CARDOZO
Benjamin N. Cardozo School of Law

Cardozo Law Review

Vol. 11
Iss. 3

Article 13

Whose Womb Is It Anyway: Are Paternal Rights Alive and Well Despite *Danforth*?

Ruth H. Axelrod
Benjamin N. Cardozo School of Law

WHOSE WOMB IS IT ANYWAY: ARE PATERNAL RIGHTS ALIVE AND WELL DESPITE *DANFORTH*?

More than sixteen years ago the United States Supreme Court ruled in *Roe v. Wade*[1] that a woman could unconditionally terminate a pregnancy during the first trimester[2] and thereby removed the abortion issue from state province. Under *Roe* this right could only be restricted to further a compelling state interest.[3] The Court held that maintaining a mother's health and safety during the second and third trimesters of pregnancy, and the potential life of a viable fetus during the third trimester were compelling state interests.[4] The Court further concluded that a woman's right to make an autonomous decision

---

[1] 410 U.S. 113 (1973).

[2] There can be no state regulation of abortion during the first trimester. It is a decision between the pregnant woman and her physician. Id. at 163.

[3] Fundamental rights are protected from state actions by the fourteenth amendment. The fourteenth amendment states: "nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1.

To support a fundamental right argument the plaintiff must first show that he has a constitutionally protected fundamental right. Griswold v. Connecticut, 381 U.S. 479 (1965). Next, the plaintiff must show that the state has placed a restriction on that right. The state then has the burden of proving not only a compelling interest in limiting the right, but also that any limitations are narrowly drawn to further that interest. Id. at 485. The Court's standard of review for state interference with a fundamental right is strict scrutiny. *Roe*, 410 U.S. at 155-56.

[4] *Roe*, 410 U.S. at 163.

Even then, the state's interest in the life and health of the mother only minimally impacts on a woman's decision; she is still able to terminate the pregnancy as long as the procedure is performed in accordance with state regulations instituted to preserve maternal health. Id. (the potential life of the fetus is not an issue until it is viable, at approximately 24-28 weeks gestation).

The Court's reliance on maternal health and fetal viability is problematic. Advancing medical technology may lead to less maternal mortality in the second trimester as well. While recognizing this possibility, potential father proponents likewise point out that advancing medical technology may also lead to even earlier (less than 24 weeks) fetal viability. See Akron v. Akron Center for Reproductive Health, 462 U.S. 416, 454-58 (1983) (O'Connor, J., dissenting) (advancing technology in both directions puts *Roe* "on a collision course with itself"). The Court refused to make a judicial determination of when viability occurs. It left the right to terminate pregnancies open to the changing capabilities of medicine, thereby leaving the decision of viability in the hands of the medical profession. *Roe*, 410 U.S. at 159; see also Colautti v. Franklin, 439 U.S. 379, 396-97 (1979) (physicians must be allowed to determine viability without state limitation). But see infra note 16 and accompanying text for a discussion of the Missouri preamble at issue in *Webster v. Reproductive Health Servs.*, 109 S. Ct. 3040 (1989).

Absolute bodily privacy has not been recognized when there is a present and known danger to the individual. No absolute right to unrestricted liberty exists when it conflicts with public health. Jacobson v. Massachusetts, 197 U.S. 11, 26 (1905) (vaccination was identified as mandatory in the presence of potential epidemics). These limitations on bodily privacy do not

regarding the invasion of her personal self was an inherent privacy interest[5]—a fundamental right afforded due process protection by the Constitution.[6]

Three years after *Roe*, the question of whether potential fathers

---

exist in the abortion context where the life and health of the woman is already protected by abortion regulations. See *Roe*, 410 U.S. at 151-52.

[5] "This right of privacy . . . is broad enough to encompass a woman's decision whether or not to terminate her pregnancy." *Roe*, 410 U.S. at 153.

In *Griswold v. Connecticut*, 381 U.S. 479 (1965), the Court first recognized a marital right to privacy in reproductive decisions arising from the Bill of Rights. Subsequently, the right to privacy was extended to include unmarried individuals in *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972) ("[i]f 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") (emphasis in original), and minors in *Carey v. Population Servs. Int'l*, 431 U.S. 678 (1977).

When the Court, in *Roe*, determined that women have a right to make a choice concerning their reproductive lives, the Court recognized the right of autonomy as an individual freedom which deserves the same protection as other fundamental rights. These fundamental rights include the right to: marry, *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (miscegenation statutes unconstitutional, denying fundamental right to marry); procreate, *Skinner v. Oklahoma*, 316 U.S. 535 (1942) (unconstitutional to sterilize prisoners); rear and educate children, *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (liberty guaranteed in the fourteenth amendment "[w]ithout doubt [includes] . . . freedom . . . to marry, establish a home and bring up children"); and sexual privacy, *Griswold*, 381 U.S. 479 (unconstitutional to prohibit sale of contraception to married couples).

If autonomy is viewed as an essential element of identity, then the pregnant woman's choice will change how she is perceived and defined. R. Goldstein, Mother-Love and Abortion 193 n.81 (1988); see Note, *Griswold* Revisited in Light of *Uplinger*: A Historical and Philosophical Exposition of Implied Autonomy Rights in the Constitution, 13 N.Y.U. Rev. L. & Soc. Change 51, 75 (1984-85).

[6] Professor Laurence Tribe defined fundamental rights as "preferred freedoms," immune from governmental interference for all but the most compelling reasons. L. Tribe, American Constitutional Law § 1-6, at 8 (1988). He dismissed the theory that these "preferred freedoms" are grounded in conventional morality, stating instead that these rights are to be protected *against* the majority—they are "rights of individuals or groups *against* the larger community." Id. § 15-3, at 1311 (emphasis in original). " '[P]ersonhood,' 'autonomy,' 'intimacy,' 'identity,' and 'dignity' " were all deemed fundamental freedoms by Tribe. Id. § 15-2, at 1304.

A contrasting view of fundamental rights is that they can be delineated by current public morals. Perry, Abortion, The Public Morals, and The Police Power: The Ethical Function of Substantive Due Process, 23 UCLA L. Rev. 689, 716-34 (1976) [hereinafter Perry, Abortion]. Professor Michael Perry saw these rights as stemming from the fourteenth amendment. In his view, the people determine, through a majority, what is valued as liberty interests. Id. at 717. Since the legislative branch shifts with the political climate, and can be affected by high pressure lobbying from special interest groups, the legislature cannot be relied upon to identify social values at any given time. Id. at 727-28. According to Perry, this leaves the Supreme Court in a more suitable position to notice "the evolution of contemporary moral culture" since it is more stable and is often the first forum to perceive emerging and changing social values. Id. at 729. Perry acknowledged the Justices' difficulty in refraining from applying their own moral perspectives. Instead, he called on them to adhere to the public mores. Id. at 730-31. On the abortion issue, Perry contended that rather than attempt to find a constitutional basis for its decision, the Court should admit it applied a conventional morality standard, which at the time supported an abortion right. Thus, the Justices acted as a "jury" to

should have abortion veto power was presented to the United States Supreme Court for the first time. In *Planned Parenthood v. Danforth*,[7] the Court acknowledged "the deep and proper concern and interest that a protective and devoted husband has in his wife's pregnancy"[8] but held that it could not delegate such rights to the potential father. It reasoned that, under *Roe*, the State had no right to interfere during the first trimester of pregnancy. The Court concluded that a potential father's interest in the fetus did not abrogate a woman's right to terminate her pregnancy.[9]

Yet, despite *Danforth*, state litigation regarding spousal consent to abortion continues to proliferate. Potential fathers continue to

---

determine the current status of social mores and ultimately arrived at the *Roe* decision. Id. at 732-33.

Utilizing this conventional morality standard, Perry asserted that *Planned Parenthood v. Danforth*, 428 U.S. 52 (1976), which struck down spousal consent, upheld society's values at the time. Perry, Substantive Due Process Revisited: Reflections On (And Beyond) Recent Cases, 71 Nw. U.L. Rev. 417, 455 (1976) [hereinafter Perry, Substantive Due Process]. Specifically, he identified "a crucial difference in conventional morality's views with respect to pre- and postviability abortions . . . , similarly the character of a father's interest in his live child is *conventionally* regarded as of a wholly different character than his interest in a previable fetus." Id. at 455 n.245 (emphasis in original) (citation omitted) (indicating that before viability, the interests of a potential father do not outweigh those of the pregnant woman).

An acceptance of Perry's theory of fundamental rights would make the abortion issue (and every fundamental rights issue) susceptible to continuous challenges, depending on public acceptance at the moment. All determinations would be temporary and ripe for challenge at any given time. See N.Y. Times, Jan. 22, 1989, at 21, col. 1 (public opinion supporting abortion rights has declined in the past five years, though the decline might be accounted for by the type of question presented in a poll).

Although fundamental rights are rights not explicitly mentioned in the Constitution, the Supreme Court's recognition of their existence seems rooted in the belief that these rights are inherent in nature, " 'implicit in the concept of ordered liberty,' " and as such are principles essential to a fair and just society. Mapp v. Ohio, 367 U.S. 643, 655 (1961) (quoting Palko v. Connecticut, 302 U.S. 319, 325 (1937)). Thus the Court's view of fundamental rights as laws of nature, appears more closely aligned to Tribe's theory of individual freedoms deserving special protection from the majority. See also Duncan v. Louisiana, 391 U.S. 145, 148 (1968) (quoting Powell v. Alabama, 287 U.S. 45, 67 (1932)) (concept of due process is drawn from " 'fundamental principles of liberty and justice which lie at the base of all our civil and political institutions' ").

[7] 428 U.S. 52 (1976). Calling it the "logical and anticipated corollary to *Roe v. Wade*," Justice Blackmun delivered an opinion which answered the questions "forecast and reserved in *Roe*." Id. at 55.

[8] Id. at 69.

[9] Id. As a result, a plethora of state statutes inconsistent with *Roe* were struck down. The provisions deemed unconstitutional in *Danforth* were: spousal consent requirement in the first trimester, blanket parental consent, arbitrary limitations on available abortion procedures, and criminal and civil liability for physicians failing to take appropriate measures to promote the life of the fetus, regardless of gestational age. Id. at 58-60. This Note, however, only addresses the issue of potential father's rights. A point worth noting is that while the Supreme Court has actively supported various forms of parental consent requirements, it has not seen fit to consider the issue of spousal consent since *Danforth*. For a discussion of other invalidated abortion statutes, see infra note 17.

claim an inherent fundamental right in their partner's pregnancy—comparable to the woman's right. They seek a case-by-case determination which balances the interests of each of the potential parents. Most recently, the Court denied certiorari, without opinion, in two cases specifically raising the issue of potential father's rights in abortion.[10] In all these lawsuits the women involved were forced to endure the humiliation and stigma associated with having the personal details of their lives presented before the public. Finally, days, weeks, even months later, they were told that the men who brought them into court lacked standing to bring suit.[11]

The continuous stream of state litigation and the issuance of injunctions on behalf of potential fathers by lower courts casts doubt on whether *Danforth* truly settled the question: May a potential father veto the potential mother's right to terminate a pregnancy?[12] That potential fathers are able to bring a case even into the lowest level state court raises questions as to *Danforth*'s conclusiveness. No judiciable controversy should exist. Furthermore, a constitutional right will only be reviewed if there is state action impinging on that right.[13]

Yet, instead of settling the debate surrounding abortion, the Court, in the recent case of *Webster v. Reproductive Health Services*,[14]

---

[10] Conn v. Conn, 526 N.E.2d 958 (Ind.), cert. denied, 109 S. Ct. 391 (1988); Lewis v. Lewis, No. 88-159036-DM (Genesee Cir. Ct. (Mich.) Sept. 6, 1988) (woman who became pregnant by estranged husband during pending divorce was enjoined from having an abortion), rev'd, No. 111440 (Mich. Ct. App. Sept. 15, 1988) (order dissolving injunction but granting stay pending further appeal), appeal denied, No. 841469 (Mich. Sup. Ct. Sept. 22, 1988) (stay extended), stay denied, 109 S. Ct. 28, cert. denied, 109 S. Ct. 495 (1988).

In *Lewis*, the trial court expanded state divorce statutes concerning the custody and support of minor children to encompass the unborn. *Lewis*, No. 88-159036-DM, slip op. at 4-10. The trial judge supported his findings with pre-*Roe* Michigan law, which protected fetal rights; however, the state statutory provisions dealt only with the unborn's property interests, which are contingent upon live birth. Id. slip op. at 9-10.

The judge subsequently appointed a guardian *ad litem* for the fetus and all subsequent appeals to the Supreme Court were on behalf of both the estranged husband and the fetus. *Lewis*, No. 88-159036-DM, slip op. at 17 (Myers appointed as guardian *ad litem*), stay denied sub nom. Myers v. Lewis, 109 S. Ct. 28, cert. denied, 109 S. Ct. 494 (1988).

[11] E.g., Larrimore v. Doe, No. 3686 Equity of 1989, slip op. at 2 (C.P. Blair Co. (Pa.) Sept. 25, 1989).

Potential fathers must show a constitutionally protected fundamental right as well as state infringement of that right in order to have standing to bring these actions. See supra note 3. See also infra note 56 for a discussion of state action constituting infringement of constitutionally protected rights.

[12] The prominent issue not addressed by *Roe* was whether potential fathers have any rights in the fetus. "[W]e [do not] discuss the father's rights, if any exist in the constitutional context, in the abortion decision. . . . We are aware that some statutes recognize the father under certain circumstances. . . . We need not now decide whether provisions of this kind are constitutional." Roe v. Wade, 410 U.S. 113, 165 n.67 (1973).

[13] See infra note 56.

[14] 109 S. Ct. 3040 (1989).

further inflamed it. Specifically, the *Webster* Court authorized states to restrict or prohibit public funding for abortion services,[15] the use of public facilities, and the use of public employees.[16] As a result, *Web-*

[15] Individual states must now decide whether they will provide abortion funding. See, e.g., Kasindorf, Abortion In New York, N.Y. Mag., Sept. 18, 1989, at 32, 35 (New York is one of thirteen states which absorb the abortion costs for indigent women in response to a state constitutional requirement that equal treatment be given to the poor). Consequently, an indigent woman's constitutionally protected right may be virtually impossible to exercise, thus perpetuating the two class system. These women, already pregnant and seeking guidance from a family planning organization, may be unable to receive counseling or referral services regarding abortion. This decision, on its face, impacts on a woman's absolute right to obtain an abortion in the first trimester.

Prior to *Roe*, a two-class system existed in obtaining legal abortions. The first class consisted of women who were financially capable of traveling to a state with liberal abortion laws. The second class consisted of indigent women, often unaware or incapable of utilizing liberal abortion laws outside their own states. Id. at 35; E. Dorsey Smith, Abortion: Health Care Perspectives 5 (1982); E. Rubin, Abortion, Politics, and the Courts: *Roe v. Wade* and Its Aftermath 29 (1987).

Federal funding of abortions expanded following *Roe*, only to be limited four years later. Beal v. Doe, 432 U.S. 438 (1977); Maher v. Roe, 432 U.S. 464 (1977). Between 1975 and 1979 up to 23,000 women sought illegal abortions; even after *Roe*, indigent women were left to back-alley butchers and self-induced abortions. N. Davis, From Crime to Choice: The Transformation of Abortion in America 223 (1985). From 1940 to 1973, although the incidence of maternal deaths from criminal abortions decreased, the statistics were never as low as those from legal abortions. New Perspectives on Human Abortion 82 (T. Hilgers, D. Horan & D. Mall eds. 1981).

Subsequently, Congress passed the Hyde Amendment, restricting medicaid funding to instances of rape and incest, or risk to the woman's life. Pub. L. No. 94-439, § 209, 90 Stat. 1434 (1976). Although funding was provided to rape and incest survivors, this was conditioned on the rapid reporting of these assaults. Hyde Amendment, Pub. L. No. 96-123, § 109, 93 Stat. 926 (1979); Harris v. McRae, 448 U.S. 297 (1980); see also 42 U.S.C. § 300(a)(6) (1982) (federal funds for family planning programs may not be used if program provides abortion counseling or referral); 42 U.S.C. § 300(z)(10) (1982) (abortion referrals may only be made to pregnant adolescents upon request). The only federal funding currently permitted is where the life of the pregnant woman would be endangered by carrying a fetus to term. Pub. L. No. 101-166, § 204, 103 Stat. 1177 (1989).

Recently, a New York District Court held constitutional the Reagan administration regulations banning federal funding to family planning services. New York v. Bowen, 690 F. Supp. 1261 (S.D.N.Y.), aff'd, 863 F.2d 46 (2d Cir. 1988), cert. denied, 109 S. Ct. 3255 (1989). Contra Planned Parenthood v. Bowen, 687 F. Supp. 540 (D. Colo. 1988); Massachusetts v. Bowen, 679 F. Supp. 137 (D. Mass. 1988).

Pro-choice Senators and Representatives introduced the "Freedom of Choice Act of 1989," in response to the current challenges to *Roe*. S. 1912, 101st Cong., 1st Sess., 135 Cong. Rec. 516025-01 (1989). This Act codifies *Roe* by barring state involvement in any abortion, either previability or postviability, if necessary to preserve the woman's life or health. Id. at § 2(a)(2). The only permissible restrictions would be health and safety measures intended to protect the woman's life and health during the abortion procedure. Id. at § 2(b). In conjunction with this bill, the Reproductive Health Equity Act will be introduced in the Senate to permit federal funding for abortions. Id.

[16] The statutory provisions appealed in *Webster* were: a declaration that human life begins at conception; a requirement that specific state-dictated tests were mandated to determine viability; a ban on the use of public facilities and public employees when no public funds were expended; and a ban on public funding where abortion is encouraged or counseled. *Webster*,

ster adversely affects the indigent population and those seeking information and health care from state funded family planning centers.

Webster may open the floodgates of state court litigation on *all* questions resolved by *Roe*, *Danforth* and their progeny[17]; indeed, it

---

109 S. Ct. at 3047. The Circuit Court upheld only the statutory prohibition on using public funds for abortions when the pregnant woman's life was not at risk and declared the other provisions unconstitutional. Reproductive Health Serv. v. Webster, 851 F.2d 1071 (8th Cir. 1988), rev'd, 109 S. Ct. 3040 (1989).

The Supreme Court plurality, however, reversed the Circuit Court and upheld the constitutionality of the Missouri statute banning the use of public employees and public facilities for nontherapeutic abortions. Furthermore, the Court held that it was constitutional for Missouri to prohibit public funding for the purpose of encouraging or counseling women for nontherapeutic abortions. *Webster*, 109 S. Ct. at 3051-54.

Additionally, the Court did not rule on the statute's preamble which declared that life begins at conception. According to the Supreme Court, this statement merely emphasizes the state's value preference for childbirth and in no way regulates abortions. It is for the state to interpret and is not to be reviewed by federal courts unless the preamble is interpreted in a manner that restricts activity. Id. at 3050; see infra note 24 and accompanying text.

The statute's viability testing provision was not construed to mean that a physician is required to perform viability tests before every abortion. Rather, the Court interpreted this provision to mean that whether testing is required is subject to the physician's professional experience, skill, and judgment. Id. at 3054-56.

[17] Although *Roe* invalidated statutes that prohibit abortions, it did not address the constitutionality of state regulations that merely restrict legal abortions. In the wake of this silence, numerous state statutes were challenged.

Blanket parental consent requirements were deemed unconstitutional because they gave unconditional control over abortion to a third party. E.g., Akron v. Akron Center for Reproductive Health, 462 U.S. 416 (1983) (nonspecific municiple ordinance permitting a juvenile proceeding to determine pregnant minor's maturity was insufficient to protect the minor's right to privacy); Planned Parenthood v. Ashcroft, 462 U.S. 476 (1983) (judicial denial of abortion required a finding that minor was insufficiently mature, not emancipated, and that her best interests would not be served by an abortion); Bellotti v. Baird (II), 443 U.S. 622 (1979) (minor was not required to consult or notify parents before initiating judicial proceeding); see Note, Abortion Statutes After *Danforth*: An Examination, 15 J. Fam. L. 537, 556-58 (1977) (table of consent provisions). These cases required that a separate judicial hearing be provided for the minor who fails to obtain parental consent, to allow her to demonstrate sufficient maturity or emancipation. The hearing also allows the minor to prove that even if she is insufficiently mature or not emancipated, the abortion would be in her best interests.

Parental consent statutes continue to be challenged in the federal court system. Although promotion of parental involvement is a legitimate state interest after the minor is held to be insufficiently mature or unemancipated, it is unduly burdensome to the pregnant mature minor to require parental notification until such a determination is made. Akron Center for Reproductive Health v. Slaby, 854 F.2d 852, 863-64 (6th Cir. 1988), prob. juris. noted, Ohio v. Akron Center for Reproductive Health, 109 S. Ct. 3239 (1989). A Minnesota statute requiring notice to both parents forty-eight hours before abortion, unless the court granted the minor a waiver, was upheld by the Eighth Circuit. Hodgson v. Minnesota, 853 F.2d 1452 (8th Cir. 1988), cert. granted, 109 S. Ct. 3240 (1989).

Statutory requirements for informed consent were also successfully contested. While informed consent was constitutional, the type of information explained could not include details of the fetal anatomical and physiological characteristics at that stage of development, as well as other information provided for the exclusive purpose of discouraging abortions. Akron v. Akron Center for Reproductive Health, 462 U.S. at 444-45; see Note, supra.

Record-keeping and reporting statutes were also challenged as unduly burdening the right

will probably result in a full-scale assault on the fundamental right to abortion.[18] The Court's grant of renewed state authority has already revived the question of whether a woman's right to terminate her pregnancy is an inherent right. For example, Pennsylvania became the first state to enact sweeping anti-abortion measures, the strictest in the country, less than six months after *Webster*.[19] Among the restrictions imposed is a requirement that a married woman provide her physician with a note stating that her husband was notified.[20] The likely result of these regulations is that women seeking abortions, but refusing to submit to stringent notification requirements will go to other states to obtain abortions.[21] Other states have also begun reviewing and initiating anti-abortion legislation, either by awaiting the return of their state assembly or by calling for special legislative sessions.[22] *Webster*'s far-reaching effects are ominous—the privacy interest which *Roe* protects is in imminent danger.

---

to abortion. These regulations were upheld as long as the information obtained was used for maternal health and safety. Note, supra, at 559-60.

Since the decision to abort is a private matter between a woman and her physician, methods of record-keeping and reporting which could affect the degree of privacy maintained and influence the decision for abortion were held unconstitutional. "The scope of the information required and its availability to the public belie any assertions by the Commonwealth that it is advancing any legitimate interest. . . . [The reports] while claimed not to be 'public,' are available nonetheless to the public for copying." Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. 747, 765-66 (1986). Accord Doe v. Rampton, 366 F. Supp. 189, 193 (D. Utah 1973) (striking down a state statute which provided that details of abortions were part of public record); see Note, supra, at 561-62 (table of reporting provisions).

18 Robertson, The Future of Early Abortion, A.B.A. J. 73 (Oct. 1989); see also, Larrimore v. Doe, No. 3686 Equity of 1989, slip op. at 1-2 (C.P. Blair Co. (Pa.) Sept. 25, 1989) (unsure of *Webster*'s effect on state abortion law, the state court granted a preliminary injunction in order to review *Webster*'s ramifications. The court ultimately concluded that *Danforth* controlled and dismissed the injunction).

19 Nat'l L.J., Dec. 4, 1989, at 39, col. 4.

20 Wash. Post, Nov. 18, 1989, at A3, col. 1. Other restrictions include a prohibition against abortions past twenty-four weeks, unless there will be " 'irreversible' physical damage to the woman or to save the woman's life," and a ban on " 'sex selection.' " Id. The legislation also requires a twenty-four hour waiting period before terminating a pregnancy—a measure previously held to be unconstitutionally burdensome by the Supreme Court in *Akron v. Akron Center for Reproductive Health*, 462 U.S. 416 (1983) (twenty-four hour waiting period), and *Eubanks v. Brown*, 604 F. Supp. 141 (W.D. Ky. 1984) (two-hour waiting period). The spousal notification provision, as well as the waiting period requirement are currently blocked from enforcement by a preliminary injunction issued by the Pennsylvania Eastern District Court. N.Y. Times, Jan. 12, 1990, at A18, col. 2.

21 N.Y. Times, Nov. 15, 1989, at A19, col. 5. See supra note 15.

22 Florida's special legislative session failed to pass any legislation. But this "may not be the final battle in the state's war over those rights. . . . [F]rustrated anti-abortion activists may try their luck at the polls." Nat'l L.J., Oct. 23, 1989, at 22, col. 2. In Illinois the emergency legislative session also failed to send any abortion legislation on to full assembly, though only by one vote. However, the bill will be reintroduced this year. Nat'l L.J., Dec. 4, 1989, at 39, col. 1. Louisiana is currently reviewing a sixteen year-old injunction barring the enforcement of criminal abortion laws which include hard labor for physicians who perform abortions. Id.

One of the most prominent questions unanswered by *Roe* was whether potential fathers possess any rights in the fetus. The Court's silence on spousal consent and notification gave rise to a torrent of litigation challenging state statutes with these provisions.[23] *Danforth* should have resolved the issue; however, it has not always been deemed dispositive by state trial courts. With the advent of *Webster*, the issue of potential fathers' rights will continue to be resolved by the state courts and legislatures[24]; the passage of the Pennsylvania spousal notification provision may be the first, but is unlikely to be the last.

Part I of this Note discusses the application of *Danforth* to cases brought on the state level. Part II reviews and analyzes the current course of spousal consent litigation presented to state courts. Part III explores the constitutional arguments advanced by potential fathers and examines their arguments for a balancing of opposing interests. This Note concludes that the Supreme Court has already resolved the issue of potential father's rights in favor of pregnant women.

I. *PLANNED PARENTHOOD V. DANFORTH*

The spousal consent requirement challenged in *Danforth* allowed husbands to supersede their wives' choice to abort—statutorily providing husbands with greater rights than those possessed by the state.[25] The *Danforth* statute explicitly mandated spousal consent during the first trimester of pregnancy unless the pregnant woman's life was in danger.[26] It applied to all husbands, regardless of whether they were the biological potential fathers or could be contacted for consent. Thus, the Missouri legislature effectively foreclosed a married woman's independent right to terminate her pregnancy and enabled a husband to block his wife's abortion by merely withholding his permission. Essentially, the statute provided the potential father with an unconscionable bargaining chip.[27]

---

23 Statutory requirements of spousal consent were held unduly burdensome and therefore unconstitutional by individual state courts. E.g., Doe v. Zimmerman, 405 F. Supp. 534 (M.D. Pa. 1975); Doe v. Rampton, 366 F. Supp. 189 (D. Utah 1973); Doe v. Doe, 365 Mass. 556, 314 N.E.2d 128 (1974); see Note, supra note 17.

24 Significantly, the preamble in the Missouri statute upheld in *Webster*, provides that "[t]he natural *parents* of unborn children have protectable interests in the life, health, and well-being of their unborn child." *Webster*, 109 S. Ct. at 3049 n.4 (quoting Mo. Rev. Stat. § 1.205 (1)(3) (1986)) (emphasis added). Although the Supreme Court interpreted the entire preamble merely as indicating a state preference for childbirth over abortion, this portion of the statute clearly will support a multitude of cases by potential fathers who will now claim a defined right in the fetus.

25 Planned Parenthood v. Danforth, 428 U.S. 52, 68-69 (1976).

26 Id. at 85 (Mo. Rev. Stat. 188.020 § 3(3) (1974)).

27 L. Wardle & M. Wood, A Lawyer Looks at Abortion 83 (1982). Factors which might affect the pregnant woman's decision to inform her husband include: his emotional or physical

The United States Supreme Court struck down the Missouri statute, refusing to allow a state to empower husbands with a unilateral veto "exercisable for any reason whatsoever or for no reason at all."[28] The Court first reasoned that there was no state interest in giving rights to a potential father of a previable fetus. While paternal rights have been recognized in born children, none have been recognized in even a viable fetus.[29] In fact, legal rights are not recognized in a fetus unless it is born alive,[30] making recognition of a potential father's interest in a fetus, especially a previable one, difficult. Since the state has no compelling interest in the previable fetus, it could not recognize any such interest in another party.[31] This rationale is in line with *Roe*'s trimester differentiation of compelling state interests in relation to the woman's right.[32]

Danforth's applicability to potential fathers' claims is problematic for a number of reasons. First, the *Danforth* Court construed and struck down a statutorily conferred veto power. Potential fathers contend that their rights are constitutional, based on the ninth and fourteenth amendments.[33] Consequently, they claim these rights re-

---

stability, the likelihood that he would react violently, or his strong religious or moral opposing beliefs. Id. at 81. Other reasons married women do not inform their husbands are: when the pregnancy resulted from rape, when the marital relationship is already unstable, and when they fear that their husbands would want the pregnancy to continue. Plutzer & Ryan, Notifying Husbands About Abortion, 71 Soc. & Soc. Res. 186 (Apr. 1987).

Each one of these elements alone could conceivably influence the pregnant woman to obtain an abortion without ever informing or consulting with her partner. On the other hand, if she does confer with him, these same fears might result in her seeking an abortion—even to the point of violating a court order.

28 *Danforth*, 428 U.S. at 71.

29 For example, to determine parentage for a father and child relationship, the Uniform Parentage Act states: "If an action under this section is brought before the birth of the child, all proceedings shall be stayed until after the birth, except service of process and the taking of depositions to perpetuate testimony." Unif. Parentage Act § 6(e), 9B U.L.A. 303 (1987). But see Unif. Act on Paternity § 6, 9B U.L.A. 358 (1987) (paternity action may be brought prior to the birth, but "the trial shall not, without consent of the alleged father, be held until after the birth"); Unif. Putative and Unknown Fathers Act § 2, 9B U.L.A. 17 (Supp. 1989) (putative father may bring a paternity action at any time unless his rights have already been determined or are the subject of a pending action).

30 For example, property rights of a fetus are dependent upon live birth. "Relatives of the decedent conceived before his death but born thereafter inherit as if they had been born in the lifetime of the decedent." Unif. Probate Code § 2-108, 8 U.L.A. 66 (1983).

31 *Danforth*, 428 U.S. at 52.

32 See supra notes 2 & 4 and accompanying text.

33 "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." U.S. Const. amend. IX.

"No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1.

gardless of the existence of a statute. Potential father advocates discount *Danforth* as pertaining to the constitutionality of state legislation, condemning only those statutory provisions which grant absolute obstacles to abortion. Thus, they question *Danforth*'s applicability to a constitutional argument based solely on a fundamental right.

This constitutional argument seeks to expand parental rights and the right to a family beyond born children by encompassing the fetus.[34] This fundamental right, it is argued, need not be specifically mentioned by the Constitution, just as the woman's right to privacy, affording her the right to terminate a pregnancy, is not explicitly mentioned.[35] Though the *Danforth* Court did not identify any specific fundamental right of a potential father in a fetus, it did acknowledge that husbands have a deep interest in their wives' pregnancies and the fetuses they carry.[36] Potential fathers believe that recognizing such an "interest" will unlock the door to a future Supreme Court ruling that potential fathers do, in fact, have a "fundamental" constitutional right in the fetus.

Nevertheless, recognizing a potential father's right in the fetus does not automatically mean that it will be deemed fundamental. If the interest is not compelling it will fail when examined against the woman's recognized fundamental right. Further, even if potential fathers are allotted a fundamental right in the fetus, this right can still be secondary to the woman's recognized privacy right.

The paternal interest acknowledged by the *Danforth* Court should never overcome the privacy right deemed fundamental in *Roe*. The potential father is not seeking to protect any aspect of *his* privacy; instead, he is seeking to protect an ethereal concept—a potential relationship with a fetus. Therefore, even if his right is deemed fundamental, it does not rise to a level equal to the woman's freedom from bodily intrusion. The potential father's interests do not actually exist until the fetus is born, whereas a woman's interest in her own body exists at all times. An alternative to recognizing any right of a potential father is to restrict the privacy right of a pregnant woman by limiting her freedom of choice. If the Court limits a woman's right, however, it invites an equal protection challenge since only a woman's privacy rights would be restricted.

Language in *Danforth* supports the argument that potential fa-

---

[34] Petition for a Writ of Certiorari to the Indiana Supreme Court at 16, Conn v. Conn, 109 S. Ct. 391 (1988) (No. 88-347) [hereinafter *Conn* Petition for Cert.].

[35] See supra note 6 for a discussion of fundamental rights.

[36] *Danforth*, 428 U.S. at 69.

thers lack any right in the fetus.[37] The Court determined that the weight of the scale must tip in favor of the woman's right to terminate the pregnancy "[i]nasmuch as it is the woman who physically bears the child and who is the more directly and immediately affected by the pregnancy."[38] By removing any third-party control over abortion, the *Danforth* Court supported a woman's decision to terminate a pregnancy as an individual right—a right free from both government and third-party interference. Therefore, in addition to holding unconstitutional any state statutory provision permitting spousal interference with the abortion decision, the *Danforth* Court also concluded that a woman's right to terminate her pregnancy outweighs any other party's interests.

If, as this Note concludes, the *Danforth* Court did balance the interests of the husband and wife without acknowledging a fundamental paternal right in the unborn, then this issue should be deemed resolved. But, not only do potential fathers contend otherwise, they have also sought and received, at least at the lower court level, a case-by-case review whenever there is conflict over the decision to abort.[39] On the other hand, if there was no balancing in *Danforth*, as proponents of potential fathers' rights claim, then it is time for the Court to settle this issue.

II. JUDICIAL REVIEW IN THE LOWER COURTS

The past year has seen a resurgence of cases in the area of potential father's rights.[40] Current challenges to the woman's freedom of choice do not involve state statutes. Rather, they seek to establish the potential father's fundamental constitutional right in the fetus, and they look to the lower state courts to balance the interests of the parties and decide each matter on a case-by-case review.[41]

In Indiana alone, three actions were instituted by husbands seeking to enjoin their wives from obtaining legal abortions.[42] In each

---

[37] In his concurring opinion, Justice Stewart explicitly stated that the Court was forced to decide between competing rights of the husband and wife, and that the wife's rights were stronger. Id. at 90. Six Justices agreed that the requirement of spousal consent was unconstitutional (Brennan, Stewart, Marshall, Blackmun, Powell, and Stevens; dissenting were Chief Justice Burger and Justices White and Rehnquist).

[38] Id. at 71.

[39] *Conn* Petition for Cert., supra note 34, at 12.

[40] In the past, an unmarried man was denied any standing to seek an injunction, *Jones v. Smith*, 278 So. 2d 339 (Fla. Dist. Ct. App.), cert. denied, 415 U.S. 958 (1973); and an injunction was denied a husband acting on behalf of the fetus, *Coleman v. Coleman*, 57 Md. App. 755, 471 A.2d 1115, cert. denied, 298 Md. 353, 469 A.2d 1274 (1984).

[41] *Conn* Petition for Cert., supra note 34, at 12.

[42] Conn v. Conn, 526 N.E.2d 958 (Ind.), cert. denied, 109 S. Ct. 391 (1988); Doe v. Smith,

case, the trial court issued either a preliminary injunction or a temporary restraining order, barring the abortion until appellate review.[43] Ultimately, the requests for judicial intervention were denied. In addition to the three Indiana cases, Minnesota, New York, Pennsylvania, South Dakota and New Jersey trial courts have recently litigated the same issue.[44] In a recent Michigan suit by a husband who claimed that his rights deserved greater weight because his estranged wife's desire for an abortion was based solely on social reasons, the case was appealed all the way up to the Supreme Court which refused to grant a stay.[45]

One difficulty with allowing these cases to be determined by individual states is the lack of uniformity among the decisions.[46] A similar situation developed when *Griswold v. Connecticut*[47] opened the door for federal and state litigation challenging abortion statutes.[48] Statutes restricting or prohibiting abortion were valid in some states and invalid in others. This inconsistency created uncertainty in the law, compelling the Supreme Court to directly address the abortion issue. This situation again exists. Private actions challenging a woman's freedom of choice have become pervasive in state courts.

Trial courts have issued temporary restraining orders and pre-

---

527 N.E.2d 177 (Ind. 1988), cert. denied, 109 S. Ct. 3246 (1989); *In re* Unborn Child H., No. 84CO1-8804-JP-185 (Vigo Cir. Ct. (Ind.) Apr. 8, 1988), rev'd sub nom. Doe v. Smith, No. 84AO1-8804-CV-0012 (Ind. Ct. App. Oct. 24, 1988).

43 See infra note 71, discussing the rationale for these decisions. The husband in *Conn* filed a petition for a writ of certiorari to the United States Supreme Court. *Conn*, 526 N.E.2d 958. The wife had the abortion following the Indiana Supreme Court ruling in her favor. Wall St. J., Aug. 23, 1988, at 29, col. 3. Although the case was effectively resolved, a petition for a writ of certiorari was based on the premise of "capable of repetition, yet evading review," for which pregnancy is the "classic justification." Roe v. Wade, 410 U.S. 113, 125 (1973).

44 Anderson v. Anderson, No. 88-21320 (6th Dist. (Minn.) July 8, 1988); Steinhoff v. Steinhoff, 140 Misc. 2d 397, 531 N.Y.S.2d 78 (Sup. Ct. 1988); Larrimore v. Doe, No. 3686 Equity of 1989 (C.P. Blair Co. (Pa.) Sept. 25, 1989) (the same county court judge that granted the injunction lifted it one week later, ruling that the man lacked standing to bring the suit); Bergan v. Bergan, No. 89-10003 (3d Jud. Cir. Ct., Kingsbury Co. (S.D.) Feb. 10, 1989); Hackensack Record, Nov. 16, 1989, at B1, col. 2.

45 Petition for a Writ of Certiorari to the Michigan Court of Appeals at 7-10, 13-15, 20a, Myers v. Lewis, 109 S. Ct. 494 (1988) (No. 88-555) (physician determined that abortion was not medically indicated) [hereinafter *Myers* Petition for Cert.]. Contra Respondent's Brief in Opposition at 11-14, 19a, Myers v. Lewis, 109 S. Ct. 494 (1988) (No. 88-555) (physician, asserting that abortion was a social decision, was not respondent's attending doctor). For discussion of the *Myers* and *Lewis* cases, see supra note 10.

46 "Fundamental rights, unlike liquor regulations or traffic laws, should not vary from state to state." Kukoutchos, A No-Win Proposal on Abortion Rights, N.Y. Times, July 25, 1985, at A23, col. 1.

47 381 U.S. 479 (1965).

48 Numerous suits were brought challenging state abortion statutes based on the right to privacy identified in *Griswold*. E. Rubin, supra note 15, at 48. See supra note 5.

liminary injunctions to potential fathers[49] only to be overturned on appeal.[50] The lower courts support a father's fundamental right in his unborn fetus based upon the ninth amendment and the due process clause of the fourteenth amendment.[51] Yet, each court which granted a temporary restraining order created its own standard for evaluating acceptable reasons for terminating a pregnancy.[52] Thus far, on a case-by-case basis, the state appellate courts have interpreted *Danforth* as denying a potential father's fundamental interest, deeming it dispositive on this issue.[53]

Abuse of the judicial process is a second problem which can arise as a result of action by potential fathers. In South Dakota an estranged husband obtained a temporary restraining order *ex parte* by withholding material facts from the state court judge.[54] As a result, sanctions were levied against the attorney and the estranged husband.[55]

A third concern once an injunction[56] has been issued is if and how such an order can be enforced. The only guaranteed method of

---

49 E.g., Conn v. Conn, No. 73CO1-8806-DR-127 (Shelby Cir. Ct. (Ind.) June 27, 1988), rev'd, 525 N.E.2d 612 (Ind. Ct. App.), aff'd, 526 N.E.2d 958 (Ind.), cert. denied, 109 S. Ct. 391 (1988); *In re* Unborn Child H., No. 84CO1-8804-JP-185 (Vigo Cir. Ct. (Ind.) Apr. 8, 1988), rev'd sub nom. Doe v. Smith, No. 84AO1-8804-CV-0012 (Ind. Ct. App. Oct. 24, 1988); Anderson v. Anderson, No. 88-21320, slip op. at 2 (6th Dist. (Minn.) July 8, 1988); Larrimore v. Doe, No. 3686 Equity of 1989, slip op. at 2 (C.P. Blair Co. (Pa.) Sept. 25, 1989); Bergan v. Bergan, No. 89-1003, slip op. at 3, 6 (3d Jud. Cir. Ct. (S.D.) Feb. 10, 1989).

50 E.g., Conn v. Conn, 525 N.E.2d 612 (Ind. Ct. App.), aff'd, 526 N.E.2d 958 (Ind.), cert. denied, 109 S. Ct. 391 (1988); *In re* Unborn Child H., No. 84CO1-8804-JP-185 (Vigo Cir. Ct. (Ind.) Apr. 8, 1988), rev'd sub nom. Doe v. Smith, No. 84AO1-8804-CV-00112 (Ind. Ct. App. Oct. 24, 1988); Anderson v. Anderson, No. 88-21320, slip op. at 2 (6th Dist. (Minn.) July 8, 1988); Larrimore v. Doe, No. 3686 Equity of 1989, slip op. at 9-10 (C.P. Blair Co. (Pa.) Sept. 25, 1989); Bergan v. Bergan, No. 89-1003, slip op. at 3 (3d Jud. Cir. Ct. (S.D.) Feb. 10, 1989).

51 U.S. Const. amend. IX; U.S. Const. amend. XIV, § 1; supra note 33. See cases cited supra note 49.

52 See infra note 71.

53 Conn v. Conn, 526 N.E.2d 958 (Ind.), aff'g, 525 N.E.2d 612 (Ind. Ct. App.), cert. denied, 109 S. Ct. 391 (1988); Doe v. Smith, 527 N.E.2d 177, 178 (Ind. 1988), cert. denied, 109 S. Ct. 3246 (1989).

54 The court was not made aware that: the plaintiff previously stated he would suppport his wife's decision to end the pregnancy; the wife's whereabouts were known; and there was no prenuptial agreement between the parties—contrary to what the court was led to believe. Bergan v. Bergan, No. 89-1003, slip op. at 7 (3d Jud. Cir. Ct. Kingsbury Co. (S.D.) Feb. 10, 1989). The court concluded that if these facts had been reported, a temporary restraining order would not have been issued. Id.

55 Id. slip op. at 10-11. The plaintiff was required to pay attorney's fees and costs to the defendants (wife, physician, and medical facility), and the plaintiff's attorney paid the defendant wife $1000 as a sanction.

56 In seeking to enjoin a pregnant woman from terminating her pregnancy, potential fathers claim an inherent fundamental right. See supra text accompanying notes 33-36. As a result, potential fathers must convince the court not only that their right exists, but also that it

enforcing a judicial injunction against terminating a pregnancy is to

---

is being infringed upon by the state, thus necessitating strict review and ultimately a balancing of the interests between the potential mother and potential father.

A pregnant woman's exercise of the right to terminate her pregnancy does not, by itself, constitute a state action against the potential father's right. To succeed, potential fathers must prove a requisite degree of state involvement in the woman's private action. A nexus must exist between the private conduct and the state to such an extent as to make the action fairly attributable to the state. Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974). Private conduct which is extensively regulated by the state also does not constitute state action. Id. at 350; see also Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 171 (1972) (private club's refusal to serve black guest, although licensed by the state liquor control board, does not constitute state action). Mere regulation of abortion, therefore, would not constitute state action.

Potential fathers may argue that the pregnant woman utilized state resources. For instance, seeking a publicly funded abortion, utilizing the services of public employees, or having the procedure performed at a public facility may be government involvement sufficient to constitute state infringement burdening the potential father's right. E.g., Webster v. Reproductive Health Servs., 109 S. Ct. 3040 (1989). Nevertheless, an abortion performed by a private physician at a private clinic could not be a state action.

Justice Stevens denied an injunction in one Indiana case, stating: "I have serious doubts concerning the availability of a federal remedy for this claim in view of the fact that Jane Smith's decision to obtain an abortion can be carried out without any action on the part of the State." Doe v. Smith, 108 S. Ct. 2136, 2137 (Stevens, Circuit Justice 1988).

If a court accepts the argument that a man has a fundamental right in a fetus, finds state action, and balances the interests of the potential mother and father, the pregnant woman must then contend that her rights are more compelling and therefore outweigh those of the potential father. See infra text and accompanying notes 64-71 for discussion of competing interests. Should the potential father succeed in obtaining an injunction, the potential mother may then claim that judicial enforcement of his rights is an unconstitutional infringement of her rights under the fourteenth amendment.

Judicial enforcement of private actions which themselves would violate a constitutionally protected right, has been held to be an unconstitutional state action. See Shelley v. Kraemer, 334 U.S. 1 (1948) (restrictive covenant, which by itself did not violate the fourteenth amendment, would constitute state action if judicially enforced). But see Weschler, Toward Neutral Principles of Constitutional Law, 73 Harv. L. Rev. 1, 29-31 (1959) (criticizing and restricting *Shelley* to its facts). Mere enforcement of state judicial orders may also constitute state action. Lewis v. Lewis, No. 88-159036-DM (Genesee Cir. Ct. (Mich.) Sept. 6, 1988) (trial court acknowledged that issuance of injunction would constitute state action; nevertheless, a preliminary order was granted and a guardian *ad litem* appointed for the fetus), rev'd, No. 111440 (Mich. Ct. App. Sept. 15, 1988) (order dissolving injunction and granting stay of order), appeal denied, No. 841469 (Mich. Sup. Ct. Sept. 22, 1988) (stay extended), stay denied, 109 S. Ct. 28, cert. denied, 109 S. Ct. 495 (1988); see also Palmore v. Sidoti, 466 U.S. 429, 432 & n.1 (1984) (court action in determining custody was state action; granting custody to father on basis of interracial remarriage of mother was unconstitutional); New York Times Co. v. Sullivan, 376 U.S. 254, 265 (1964) (judgment of damages for defamation awarded by state court constituted state action).

> The impetus for the challenged activity need not originate with the state. State action may be found if the state simply enforces the activity which originates privately. . . . A nexus must exist, however, between the governmental involvement and the particular activity being challenged . . . .
>
> It is difficult to imagine how the present case does not involve state action. . . .
>
> The court enforced a contempt proceeding that was initiated privately.

In Re Marriage of Stariha, 509 N.E.2d 1117, 1122 (Ind. Ct. App. 1987) (private lawsuit for child support resulting in incarceration for contempt involved state action).

confine the pregnant woman for the duration of her pregnancy.[57]

Once the abortion is performed, the only available remedies are to impose a fine or a prison sentence. In imposing a penalty, the court may consider the willfulness of the behavior, "the seriousness of the consequences . . . and the importance of deterring such acts in the future."[58] While choosing to violate an injunction is willful behavior, and the consequence of such action is to permanently deprive her partner of a parental relationship with that fetus, the deterrent effect of such penalties is doubtful. A woman adamant about not carrying a pregnancy to term is unlikely to be dissuaded from seeking an abortion and facing the consequences; she may view the violation of the order as the more worthwhile alternative.

Nonetheless, most state courts that issued injunctions did not consider the enforceability of these orders. For example, an Indiana trial court made no mention of a penalty in the event that the pregnant woman failed to adhere to the restraining order it had issued.[59] Enforcement was based solely on the belief that the pregnant woman would obey the court's ruling which ordered her to produce the court order to "any physician, abortion clinic, abortion facility, or pregnancy counseling organization, or any employee thereof, which she might consult regarding her unborn child or the termination of her pregnancy."[60] The court neglected to consider the possibility that this woman might not produce the court order, which is apparently what happened.[61] In another case, a New Jersey trial court did assess enforceability, concluding that there is "no possible way, from a practical viewpoint, of enforcing such an injunction even if the law arguably justified the injunctive relief sought."[62] Further, it is conceivable that rather than deterring women from violating future court orders, the fear of judicial intervention may prevent women from informing their

---

57 Rothenberger v. Doe, 149 N.J. Super. 478, 482, 374 A.2d 57, 59 (Ch. Div. 1977). Absent such confinement, if she disobeys the injunction, she will be subject to contempt proceedings. Id.; see also Walker v. City of Birmingham, 388 U.S. 307 (1967) (black ministers denied permit for peaceful demonstration against racial discrimination, violated injunction, and were subject to criminal contempt charges regardless of the constitutionality of the underlying injunction); United States v. United Mine Workers, 330 U.S. 258 (1947) (injunction issued during national emergency to prevent miners strike upheld, and violation of injunction held punishable as criminal contempt).

58 United States v. United Mine Workers, 330 U.S. 258, 303 (1947).

59 *In re* Unborn Child H., No. 84CO1-8804-JP-185 (Vigo Cir. Ct. (Ind.) Apr. 8, 1988) rev'd sub nom. Doe v. Smith, No 84 A01-8804-CV0012 (Ind. Ct. App. Oct. 24, 1988).

60 Id. slip op. at 4.

61 *In re* Unborn Child H., No. 84CO1-8804-JP-185, rev'd sub nom. Doe v. Smith, No. 84AO1-8804-CV-00112, slip op. at 2 & n.1 (Ind. Ct. App. Oct. 24, 1988) (no contempt determination made).

62 Rothenberger v. Doe, 149 N.J. Super 478, 482, 374 A.2d 57, 59 (Ch. Div. 1977).

partners of the pregnancy altogether.[63]

When each court is free to identify and balance different factors, inconsistency is inevitable. As a result, the courts provide neither side with a secure and reliable standard.

III. PRINCIPLES JEOPARDIZED BY A BALANCING TEST

In balancing the constitutional interests of the potential father with those of the potential mother, courts have attempted to ascertain which party would be more significantly harmed: the father, if the abortion is allowed to proceed, or the mother, if she is prevented from terminating the pregnancy. Proponents of potential fathers' rights argue that their rights are inherent—so basic and natural, that they are "fundamental," existing within the "zone of privacy."[64] Basing their arguments on these inherent rights, potential fathers claim an interest in the unborn.[65]

Potential fathers also assert a federally recognized right to procreate,[66] as well as a parental interest in their children[67] and in preserving familial and marital integrity.[68] Further, they claim that a

---

[63] In *Conn v. Conn*, the dissent dismissed this possibility, stating it is a social issue—not a legal one. Conn v. Conn, 526 N.E.2d 958, 962 (Ind.) (Pivarnik, J., dissenting), cert. denied, 109 S. Ct. 391 (1988). Unfortunately, the court's refusal to confront this issue does not lessen its probability. In addressing the possibility of the pregnant woman withholding this information, the dissent reasoned that the result would "polarize the parties and place them in opposite camps, in conflict with each other." Id. Yet, it is highly questionable whether any court action brought by a husband would bring a couple closer together than would withholding the fact of the pregnancy by the wife. In this sense the court is correct in identifying communication between the partners as a social issue. As a social issue, it is an improper subject for judicial interference. It is better left to the privacy of the home. See infra text accompanying notes 105-118, discussing marital integrity.

[64] The general notion of privacy as inherent within the Constitution, existed long before *Griswold v. Connecticut*, 381 U.S. 479 (1965). Justice Brandeis found that "[t]he makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. . . . They conferred, as against the Government, the right to be let alone . . . ." Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J. dissenting).

[65] See supra notes 29-30 and accompanying text.

[66] Procreation was held to be a fundamental right in *Skinner v. Oklahoma*, 316 U.S. 535 (1942) (statute, which provided for the sterilization of persons convicted of a felony involving moral turpitude two or more times, was held unconstitutional under the equal protection clause of the fourteenth amendment). See infra notes 72-79 and accompanying text.

[67] See infra notes 100-104 and accompanying text. Wisconsin v. Yoder, 406 U.S. 205, 215, 220 (1972) (parental interests in child rearing may not be subordinated to a state interest in education when it conflicts with religious (Amish) beliefs of the parents).

"It is cardinal with us that the custody, care and nurture of the child reside first in the parents . . . . And it is in recognition of this that these decisions have respected the private realm of family life which the state cannot enter." Prince v. Massachusetts, 321 U.S. 158, 166 (1944).

[68] See infra notes 98-118 and accompanying text. The state interest in preserving the family unit is manifested by the high burden of proof the state must meet to terminate parental

fundamental inequality exists when a woman may unilaterally terminate her pregnancy without the potential father's knowledge or consent,[69] even though the father or the State would remain financially responsible for a child that she unilaterally decided to carry to term.[70] Assuming these arguments are valid, the father's right directly competes with the woman's right to terminate her pregnancy.

Balancing the parties' interests in a case-by-case basis involves weighing the reasons why a woman wants an abortion against the husband's right to participate in the woman's decision-making process. The critical factors to be weighed in evaluating a woman's decision to have an abortion are: (1) whether it is a medical decision made in conjunction with her doctor; (2) whether physical and mental harm may result from the pregnancy; and (3) whether loss of economic opportunities may result which might have been available to the woman if she were not pregnant.[71]

---

rights. Parental interest in the care, custody, and companionship of a child can only be severed in the presence of "clear and convincing evidence" that the parents are so unfit that severance is in the child's best interests. Santosky v. Kramer, 455 U.S. 745, 769 (1982).

The state interest in marital integrity is evidenced by its regulation of entry into a marriage contract and its regulation of dissolution procedures. Maynard v. Hill, 125 U.S. 190, 205-06 (1888); see also L. Tribe, supra note 6, § 15-20, at 1415 (the state cannot create burdens on the individual's ability to marry or divorce).

[69] Planned Parenthood v. Danforth, 428 U.S. 52, 71 (1976).

[70] Fathers who desire that the mother have an abortion are not relieved of their financial obligations to support the child. See generally Kapp, The Father's (Lack of) Rights and Responsibilities in the Abortion Decision: An Examination of Legal-Ethical Implications, 9 Ohio N.U.L. Rev. 369, 374-82 (1982) (most states require support of minor children on the basis of moral justifications and voluntary assumption of parenthood); *In re* S.P.B., 651 P.2d 1213 (Colo. 1982) (offer to pay for abortion did not alleviate father's child support obligation). But see Kapp, supra, at 376 (since fatherhood is no longer necessarily voluntary, his assumption of support duties should no longer be presumed).

Women seeking public assistance are also entitled to child support from the state. Prior to obtaining AFDC (Aid to Families with Dependent Children) benefits, a guardian parent entitled to child support from the absentee parent must meet the requirements of the federal regulations. See 45 C.F.R. § 232.12(a)(1)-(4) (1988); see also 45 C.F.R. § 302.33 (1988) (women not receiving welfare benefits may still apply for support services at a small fee).

[71] Conn v. Conn, No. 73CO1-8806-DR-127 (Shelby Cir. Ct. (Ind.) June 27, 1988), rev'd, 525 N.E.2d 612 (Ind. Ct. App.), aff'd, 526 N.E.2d 958 (Ind.), cert. denied, 109 S. Ct. 391 (1988). In another case, "the court reached the extraordinary conclusion that it would not be 'distressful' for Jane Doe if she were compelled to give birth, and thereby remain unemployed, uneducated and dependent." Brief Amicus Curiae in Support of Appellant's Appeal from the Vigo Circuit Court, Juvenile Division at 16, Doe v. Smith, No. 84AO1-8804-CV-00112 (Ind. Ct. App. Oct. 24, 1988).

Within the first trimester, the mother's reasons for terminating the pregnancy should be irrelevant, for there is no compelling state interest during these twelve weeks. See supra note 2. Nevertheless, lower courts have scrutinized these reasons, and have issued restraining orders to women forbidding abortion in their first trimester. *Conn*, 525 N.E.2d at 613 (a woman six weeks pregnant was enjoined by the trial court from obtaining an abortion); Brief for the Appellee Father at 2, Doe v. Smith, No. 84AO1-8804-CV-112 (pregnancy was approximately

A. *Procreation*

Potential fathers assert a constitutionally protected right to procreate. In *Skinner v. Oklahoma*,[72] the Supreme Court first recognized procreation as an inherent freedom that could not be interfered with in the absence of a compelling state reason.[73] This recognition of reproductive autonomy protected the individual from governmental control.[74] In light of *Griswold v. Connecticut*[75] and *Eisenstadt v. Baird*,[76] "the meaning of *Skinner* is that *whether one person's body shall be the source of another life must be left to that person and that person alone to decide*."[77] Thus, the Court in *Skinner* identified individual autonomy as the source of reproductive rights thirty years before *Roe*.[78]

But *Skinner* did not guarantee the *opportunity* to procreate, and giving women the right to choose to abort does not prevent men from exercising their procreative right.[79] Exercise of the man's procreative right depends on the woman's willingness to bear the child. Otherwise, allowing a husband to assert his fundamental right to procreate would completely negate, his wife's recognized right to terminate her

---

10 weeks gestation at the time of the appeal to the Indiana Supreme Court) (Ind. Ct. App. Oct. 24, 1988); *Myers* Petition for Cert., supra note 45, at 3 (injunction issued in seven to eight week old pregnancy).

The Indiana court in *In re* Unborn Child H. found no evidence that the pregnancy and birth of a child would cause the woman a distressful life or future; no indication that continued pregnancy would effect future employment, since the woman did not plan to continue her education or seek work; and no evidence that the emotional or physical health of the woman would be affected. The court derisively noted that the woman's reasons for wishing to terminate the pregnancy were that she desired to look good in a bathing suit, that she did not wish to be pregnant in the summertime, and that she did not wish to share the father with the baby. *In re* Unborn Child H., No. 84-CO1-8804-JP-185, slip op. at 2 (Vigo Cir. Ct. (Ind.) Apr. 8, 1988), rev'd sub nom. Doe v. Smith, No. 84AO1-8804-CV-112 (Ind. Ct. App. Oct. 24, 1988). When weighed against the fathers interests, the court held "[she was] an extremely inmature [sic] young woman which lessens the weight and nature of her privacy interest." Id. slip op. at 3. Finally, the court observed that "she is a very pleasant young lady, slender in statute [sic], healthy, and well able to carry a baby to delivery without an undue burden." Id. slip op. at 2. The court reached this conclusion without the benefit of expert medical or psychological testimony, even though the most inexperienced physicians would more than hesitate before pronouncing, *on mere observation*, that a woman could deliver a child without difficulty.

72 316 U.S. 535 (1942).

73 Id. at 541-42.

74 Id. at 541; see L. Tribe, supra note 6, § 15-10, at 1339.

75 381 U.S. 479 (1965).

76 405 U.S. 438 (1972).

77 L. Tribe, supra note 6, § 15-10, at 1340 (emphasis in original).

78 Id. § 15-10, at 1352. For a discussion of autonomy, see supra note 5 and accompanying text.

79 See Comment, Surrogate Motherhood: Boon or Baby-Selling, The Unresolved Questions, 71 Marq. L. Rev. 115, 118, 125 (1987).

pregnancy. She would then lose autonomy over her body and be subjected to involuntary servitude, all at the whim of her husband.

1. Involuntary Servitude

A pregnant woman becomes a prisoner of her body, a "slave" to the changes that transform her during pregnancy. She is forced to comply with a standard of care necessary for the health and well-being of the fetus, but possibly detrimental to her own psychological, emotional, and, sometimes even physical health.[80] An unwanted, court-enforced pregnancy is tantamount to "involuntary servitude" and as such, is expressly prohibited by the thirteenth amendment.[81]

Ultimately, the effects of allowing forced servitude are far-reaching. Husbands might be able to force their wives to conceive and bear children, to consent to birth control and sterilization, to dictate their wives' behaviors during pregnancy, to select the type of medical care,

---

[80] Drug therapy, prescribed by a physician for the pregnant woman, for *any* medical condition, no matter how minor, can be harmful to the fetus—especially in the first trimester. Preventing the pregnant woman from receiving this treatment could have adverse effects on her health. Obstetrics and Gynecology 496 (D. Danforth 4th ed. 1982). Maternal heart disease is the fourth leading cause of maternal death, although only a small percentage of pregnant women have this complication. Id. at 507. If forced to continue a pregnancy in the presence of adverse physical conditions, the pregnant woman's health can be permanently compromised.

[81] Involuntary servitude was prohibited by the thirteenth amendment in 1865. Originally intended to abolish slavery, it provides: "§ 1. Neither slavery nor involuntary servitude, except as a punishment for crime . . . shall exist within the United States . . . . § 2. Congress shall have power to enforce this article by appropriate legislation." U.S. Const. amend. XIII, §§ 1, 2.

Unlike the fourteenth amendment, the thirteenth is not restricted to governmental actions—it also applies to private conduct. The Civil Rights Cases, 109 U.S. 3 (1883). Justice Harlan, dissenting, recognized that the thirteenth amendment abolished all incidents of slavery and servitude, but also maintained that the fourteenth amendment was not limited to proscribing state actions. 109 U.S. at 45 (Harlan, J., dissenting). Congress has the power to determine what constitutes slavery and servitude. Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968). Congressional power to pass any necessary legislation to enforce the constitutional ban on involuntary servitude rationally gives Congress the right to determine "the badges and the incidents" of slavery. Id. at 440. The term "servitude" includes *all* types of involuntary slavery. Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1873).

"Seizing control of a woman's body and life and compelling her to undergo the pain and danger of nine months of unwanted pregnancy followed by childbirth for the sole benefit of a man who would like to have a child constitutes the type of forced personal service prohibited . . . ." Brief of Appellant at 10, Doe v. Smith, No. 84 AO1-8804-CV-00112 (Ind. Ct. App. Oct. 24, 1988); see also L. Tribe, supra note 6, § 15-10, at 1340 (there is no situation comparable to the forced service endured by a pregnant woman compelled to bear a child).

The thirteenth amendment sought to wipe out "[c]ompulsory service of the slave for the benefit of the master, [and] restraint of his movements except by the master's will." *The Civil Rights Cases*, 109 U.S. at 22. Although this amendment is usually applied to race discrimination, when the word "man" is substituted for "master," and "woman" for "slave," the analogy to the traditional slavery paradigm becomes apparent.

and to choose the type of childbirth.[82]

Further, the physical and psychological burdens of pregnancy are unlike any other burdens our laws would seek to inflict upon unwilling persons, and they often continue after childbirth.[83] If individuals cannot be compelled to donate life-saving organs to relatives,[84]

---

82 Court action circumscribing the behavior of pregnant women, for the protection of the fetus, has become more common. Pregnant women's drug use has led to numerous instances of judicial involvement during the pregnancy. Nat'l L.J., Oct. 16, 1989, at 1, col. 3; Crime & Pregnancy, A.B.A. J. 14 (Aug. 1989); Fetal Abuse, A.B.A. J. 38 (Aug. 1989). For example, this past year, a pregnant cocaine addict was arrested for theft and pled guilty, receiving a sentence extending past her expected date of delivery. United States v. Vaughan, No. F 2172-88B (D.C. Sup. Ct. Crim Div. 1988). The judge, desiring to protect the fetus, tried to ensure that the pregnant woman would not have access to drugs by sentencing her to a longer term than usual for similar offenders. Id. slip op. at 6.

Women have been brought to court for failing to undertake adequate prenatal care, thus placing their fetuses at risk. Nat'l L.J., Oct. 3, 1988, at 25, col. 1. In Massachusetts Family Court, a woman, sued by her husband, was ordered to undergo a minor surgical procedure to remedy an incompetent cervix, while pregnant with a previable fetus. On appeal, the judgment was vacated following a finding that no case law supported a judicial order of surgical intervention during a previable pregnancy. Taft v. Taft, 388 Mass. 331, 446 N.E.2d 395 (1983). Similarly, a father was allowed to bring suit based on a theory of "prenatal negligence," where the child was affected by medication ingested by his wife during her pregnancy. Grodin v. Grodin, 102 Mich. App. 396, 301 N.W.2d 869 (1981). The parental immunity doctrine invoked by the mother would not preclude the tort suit if the mother's conduct during her pregnancy was unreasonable. Id. at 871.

83 Some of the problems facing a woman after childbirth are: psychological harm, not only from an unwanted child, but from the unwanted pregnancy; distress, not only to the mother, but to others around her; and the stigma of unwed motherhood. Roe v. Wade, 410 U.S. 113, 153 (1973); Regan, Rewriting *Roe v. Wade*, 77 Mich. L. Rev. 1569, 1579-83 (1979) (discussion of common maladies associated with pregnancy, childbirth, and an extended postpartum period); Robertson, supra note 18, at 75. These problems are ignored by many lower courts. For instance, one court merely made a blanket statement that there is no evidence demonstrating potential adverse effects to the woman if she is to carry the pregnancy to term. *In re* Unborn Child H., No. 84-CO1-8804-JP-185, slip op. at 2 (Vigo Cir. Ct. (Ind.) Apr. 8, 1988), rev'd sub nom. Doe v. Smith, No. 84AO1-8804-CV-00112 (Ind. Ct. App. Oct. 24, 1988).

Other potential problems include adverse emotional, psychological, and mental impact on the child, as he grows up and learns that not only was he the cause of great suffering by his mother and father, but also that he was unwanted, and if not for a "court ordered" pregnancy, he would not exist. Few studies are available regarding the effect on children of women who were denied abortions. A Swedish study which followed 120 children for thirty-five years concluded that these children were socially and psychologically handicapped. R. Goldstein, supra note 5, at 172-73 n.54. These conclusions, however, have been questioned, and the disabilities affecting these children were attributed to the social circumstances into which they were born. E. Dorsey Smith, supra note 15, at 151. Arguably, a family enmeshed in conflict over the very birth of the child is likely to continue to be unstable and should not be recognized as a cohesive family unit. Additionally, when the parents are unmarried, the child will face the stigma of illegitimacy. These children could be prone to child abuse and poor maternal-child bonding. See Note, Rebutting the Marital Presumption: A Developed Relationship Test, 88 Colum. L. Rev. 369, 377 & n.63 (1988). These potentially harmful consequences to the child may undermine the state's interest in the family relationship.

84 E.g., McFall v. Shimp, 10 Pa. D. & C.3d 90 (1978) (cousin of leukemia victim refused to donate bone marrow).

can we compel a woman to donate her entire body for nine months? The right to procreate has been held to be—and should be—a right of choice; a right to be free from state interference: nothing more, but nothing less.[85]

Proponents of potential fathers' rights acknowledge that the right to procreate merely means the right not to have the state prevent the individual's ability to have a natural child.[86] It does not guarantee a man the right to have a specific child. His right can only exist if his partner is *willing* to bear their child. He should not be able to destroy the woman's equally protected fundamental right not to procreate.[87]

2. Surrogacy

Surrogacy arrangements are analogous to a forced pregnancy in that a woman's body incubates a child she does not want to raise. However, there are two significant differences between surrogacy contracts and involuntary servitude. First, surrogate mothers are paid.[88] Second, surrogate mothers are willing to bear the child. Courts have ruled that such contracts are unenforceable as against public policy, although surrogacy involves a consenting partner.[89] Yet, if it is against public policy for a woman to willingly use her body as an

---

85 Hennessey, On the Rise: Men Make Claims in Abortion Suits, 9 Conscience 3, 5 (July/Aug. 1988) (freedom recognized in *Skinner* prohibited irreversible compulsory procreation and compulsory sterilization).

86 *Conn* Petition for Cert., supra note 34, at 16 (citing *In re* Baby M, 109 N.J. 396, 448, 537 A.2d 1227, 1253 (1988)).

87 "The Constitution confers upon no individual the right to demand action by the State which results in the denial of equal protection of the laws to other individuals." Shelley v. Kraemer, 334 U.S. 1, 22 (1948).

88 Following a surrogacy contract dispute in 1981, Michigan proscribed compensation for surrogate mothers. Comment, Baby-Sitting Consideration: Surrogate Mother's Right to "Rent Her Womb" For a Fee, 18 Gonz. L. Rev. 539, 547 (1982/1983); see P. Singer & D. Wells, Making Babies: The New Science & Ethics of Conception 105 (1985) (most states do not yet have legislation regarding surrogacy arrangements).

89 *In re* Baby M, 109 N.J. 396, 435-36, 537 A.2d 1227, 1247 (1988). The New Jersey Supreme Court held that the exchange of money conflicted with state laws prohibiting the sale of babies for adoption. Id. at 423, 537 A.2d at 1240; see also Syrkowski v. Appleyard, 122 Mich. App. 506, 333 N.W.2d 90 (1983) (no public policy determination, but court held that the paternity act did not include surrogacy contracts), rev'd, 420 Mich. 367, 362 N.W.2d 211 (1985); *In re* Adoption of Baby Girl L.J., 132 Misc. 2d 972, 505 N.Y.S.2d 813 (Sur. Ct. 1986) (court acknowledged public policy against black market babies, but upheld the surrogacy custody arrangement as in the child's best interests); Comment, supra note 79, at 135-37 (surrogacy as baby-selling); cf. Doe v. Kelley, 106 Mich. App. 169, 307 N.W.2d 438 (1981), cert. denied, 459 U.S. 1183 (1983) (privacy right did not encompass surrogacy contracts; state interference was not prohibited). Contra Surrogate Parenting Assocs., Inc. v. Armstrong, 704 S.W.2d 209, 211 (Ky. 1986) (surrogacy arrangement made prior to conception did not constitute baby selling—which connotes financial inducement to part with living child). The contract was also against public policy since it decided before birth who would have custody, therefore not evaluating parental fitness. *Baby M*, 109 N.J. at 426, 537 A.2d at 1242.

incubator, then no court should be able to force her to do so against her will.

Custody is another problem common to both forced pregnancy and surrogacy contracts. Under current law, a mother forced to bear a child she would have chosen to abort would continue to have parental rights unless she either voluntarily surrenders her claim,[90] or she is found unfit by "clear and convincing evidence."[91] In either case, courts have not made such determinations before the child's birth.[92] Therefore, even though a potential father seeks sole custody, there is no guarantee that it will be granted. The child becomes the mother's responsibility if the father does not accept, or is denied, custody.

Thus, a woman forced to endure an unwanted pregnancy is ultimately placed in the position of deciding whether to relinquish the child. One may assume that a mother so coerced would have no reservations about giving her child up for adoption should the father be denied custody.[93] However, this assumption is not necessarily valid, as evidenced by the pain of surrogate mothers unable to relinquish infants they once believed they did not want.[94] Relinquishing one's

---

[90] Although, in the *Baby M* case, Mrs. Whitehead voluntarily agreed to sever any claim she may have to the child, the court refused to recognize this portion of the surrogacy contract as valid with regard to custody, citing the contract's offensiveness to public policy and its contravention of existing adoption statutes. *Baby M*, 109 N.J. at 429-34, 537 A.2d at 1243-46.

Adoption consistently involves termination of the natural parent's rights. In *Baby M*, these adoption statutes which were reviewed by the court to determine the legality of the custody arrangement were incorporated in the surrogacy agreement. The voluntary surrender of a child must be to an "approved agency." N.J. Stat. Ann. §§ 9:2-14, 9:2-16 (West 1988). Consent in private adoptions could be revoked since the adoption does not comply with state statutes. *Baby M*, 109 N.J. at 434, 537 A.2d at 1246; see also Sees v. Baber, 74 N.J. 201, 216, 377 A.2d 628, 636 (1977) ("knowing, voluntary and deliberat[e]" surrender of child for private adoption does not constitute abandonment). New York allows revocation up to thirty days after surrender. N.Y. Soc. Serv. Law § 384 (McKinney 1989); see also Surrogate Parenting Assocs. Inc. v. Armstrong, 704 S.W.2d 209, 212-13 (Ky. 1986) (decision to terminate parental rights prior to statutorily required five-day minimum following birth fails against statute; surrogate mother was given statutory opportunity to reconsider surrendering child, regardless of the surrogacy contract); P. Singer and D. Wells, supra note 88, at 107-09 (generally the surrogate mother desiring custody is favored by the public).

[91] See Santosky v. Kramer, 455 U.S. 745, 769 (1982) (strict standard of proof was required for termination of parental rights).

[92] *Baby M*, 109 N.J. at 434, 537 A.2d at 1246 (a parent cannot be deemed unfit until she is given the opportunity to parent); see also Unwed Father v. Unwed Mother, 177 Ind. App. 237, 379 N.E.2d 467, 470 (1978) (statutory provision required that consent to surrender child can only be made *after* birth). But see Comment, supra note 88, at 560-61 (child's best interests were served by placing her with her natural father since she had been "carefully planned, anxiously awaited, and desperately wanted").

[93] It is interesting to note that this argument is not asserted in other situations where the pregnancy was unwanted such as wrongful birth litigation as a means to mitigate damages. R. Goldstein, supra note 5, at 192 n.74.

[94] *Baby M*, 109 N.J. 396, 537 A.2d 1227.

offspring carries with it travails of its own.[95] Both guilt and social pressure cause women to choose to raise their children.[96] Regardless of whether a mother decides to relinquish or retain custody, a judicial decision forces her to unwillingly carry a pregnancy to term and therefore face the painful custody conflict.

There is no reasonable rationale for ordering a woman to act as incubator when it has been deemed unconscionable in surrogacy arrangements.[97] Marriage alone cannot justify such a result. To do so would be to reinstitute the common-law concept of the wife as property of her spouse.

B. *Family Integrity*

Failure by a husband and wife to reach an amicable decision as to whether to continue a pregnancy necessitates judicial intervention. Maintenance of the family unit is a societal goal traditionally recognized by the courts.[98] Proponents for potential fathers cite constitutional protection of the family unit as a primary source of their rights.[99]

1. Parental Rights of Fathers

Potential fathers have asserted the parental rights of care, custody, and companionship[100]—rights which traditionally have only been recognized after the fetus is born. Courts have held that parents must establish an ongoing relationship of love and care with their child in order to gain these parental rights.[101] Once a parental relationship exists, termination of parental rights occurs only if there is "clear and convincing evidence" that it would be in the child's best

---

95 See supra text accompanying notes 90-94.

96 R. Goldstein, supra note 5, at 194 n.85; Regan, supra note 83, at 1589, 1590 n.27. The conflicting emotions experienced by some women who surrender their child for adoption can have a more severe impact than the emotional repercussions on women who abort a pregnancy; many women who terminate a pregnancy experience a feeling of "great relief." R. Goldstein, supra note 5, at 213 n.125.

97 Representative Hyde, noted drafter of the Hyde amendment and a foe of the right to abortion (see discussion of Hyde Amendment, supra note 15) has equated surrogacy contracts to slavery and has noted that it is like paying women for their service as a "breeder." N.Y. Times, Feb. 2, 1989, at A23, col. 5 (AP, early ed.) ("[S]urrogacy arrangements attack the essential human dignity of every person"). Id. (Reuters, late ed.).

98 See supra note 68.

99 *Conn* Petition for Cert., supra note 34, at 20.

100 Id. at 18.

101 Lehr v. Robertson, 463 U.S. 248 (1983) (since biological father had never established a relationship with his child, his denial of custody was not a violation of the equal protection clause).

interests.[102]

Since parental rights are not recognized in biological fathers in the absence of an ongoing relationship with the child,[103] cases involving potential fathers are easily distinguishable. There is no relationship to protect because the child does not yet exist. On the other hand, a parental relationship can never develop if the abortion is allowed. When balancing these competing interests, a man's interest in a potential relationship cannot outweigh a woman's fundamental right to be free from a court-enforced pregnancy.[104]

2. Marital Rights

Potential fathers' rights advocates contend that a case-by-case balancing test is necessary to preserve the marital relationship. Thus, to effectuate the claims of potential fathers, judicial interference in marriages is necessary.[105] Traditionally, however, courts have been

---

102 Santosky v. Kramer, 455 U.S. 745 (1982).

103 Compare *Lehr*, 463 U.S. 248 and Quilloin v. Walcott, 434 U.S. 246, 255-56 (1978) (no parental rights in unwed father who never sought relationship with child) with Stanley v. Illinois, 405 U.S. 645 (1972) (parental rights inhere in unwed fathers who establish relationships with illegitimate children).

104 See supra text accompanying notes 64-71.

105 If rights are granted to husbands, then unwed potential fathers may have the same rights. Traditionally, an unmarried relationship was viewed as lacking commitment and reliability, thus not warranting the same protection as legal marriage. Hafen, The Constitutional Status of Marriage, Kinship, & Sexual Privacy—Balancing the Individual and Social Interests, 81 Mich. L. Rev. 463, 486-89, 496-97 (1983). As a result, unwed fathers have been granted fewer rights. But in the year before *Roe* the Supreme Court recognized parental rights of the unwed father.

In *Stanley v. Illinois*, 405 U.S. 645 (1972), the Court held that a father does have parental rights in his illegitimate children when he has lived with and supported them. The irrebuttable presumption that unwed fathers are incompetent to have custody of their children was held unconstitutional. Id. at 654-57. See Robertson, Procreative Liberty and the Control of Conception, Pregnancy, and Childbirth, 69 Va. L. Rev. 405, 416 & n.33. (1983) (litigation persists seeking to determine the rights of illegitimate biological fathers).

If fathers' parental rights are deemed fundamental, then strict scrutiny should apply in all instances—regardless of whether he is wed. To do otherwise would lead to a constitutional attack on equal protection grounds, with a favorable result likely for unwed potential fathers. Note, Abortion: The Father's Rights, 42 U. Cinn. L. Rev. 441, 450-52 (1973).

In cases concerning the parental rights of unwed biological fathers in living children resulting from a liaison with a married woman, courts have refused to recognize any parental rights of the biological father. Note, supra note 83, at 376-77 & n.59. The parental interest recognized in illegitimate children, as in *Stanley v. Illinois*, does not pertain to a child born to a man who cohabitated with a married woman during the time of conception (absent proof of impotence or sterility of the husband). Public policy favors legitimization of children, but when the woman is married, there is an irrebuttable presumption that her husband is the father. E.g., Michael H. v. Gerald D., 191 Cal. App. 3d 995, 236 Cal. Rptr. 810 (1987), aff'd, 109 S. Ct. 2333 (1989); *In Re* J.S.V., 402 Mass. 571, 524 N.E.2d 826 (1988); Purificati v.

reluctant to interfere with existing marriages.[106] It has long been recognized that judicial intervention cannot promote marital relationships, but instead places husbands and wives in adversarial positions. In marriages based on mutuality and trust, the abortion decision is normally resolved in the privacy of the home.[107] When litigation ensues, it is questionable whether the marriage is salvageable. To have reached the point where one partner is seeking to make a unilateral decision indicates there is an erosion in the marital relationship.

> No marriage may be viewed as harmonious or successful if the marriage partners are so 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, and of strengthening the marital relationship and the marital institution, will be achieved by giving to the husband a veto power exercisable for any reason whatsoever or for no reason at all.[108]

Further, the Court's scrutiny of reasons to abort threatens a woman's right to maintain anonymity. This is evidenced by the public availability of these court cases and media exposure. Maintaining anonymity is totally dependent upon the court allowing the use of pseudonyms.[109] Without this use of pseudonyms, intimate details of the marriage or relationship would be publicly disclosed, adding the emotional burden of living in a glass house.[110] Rather than risk hu-

---

Paricos, 545 N.Y.S. 837 (2d Dep't 1989). If the biological father is not given any rights in a born child, it is difficult to justify granting him rights when the fetus is in utero.

Unanswered is what the effect will be on unmarried couples. Is the right to procreate equally as strong when there is no legal union of the parties? While the Court has held that unwed individuals have the same right to privacy as married couples, see supra note 5, is the right to procreate outside a marriage contract also a fundamental right? If it is, then one consequence would be to give the same rights to unwed potential fathers. New Jersey, however, held that "where there is no marital relation involved, the natural father has even less equity in compelling the mother to suffer an unwanted pregnancy." Rothenberger v. Doe, 149 N.J. Super. 478, 481, 374 A.2d 57, 59 (Ch. Div. 1977) (right of procreation asserted by potential father is not as strong as if he were spouse).

106 Hafen, supra note 105, at 488 n.110 (judicial intervention instigated potential marital disharmony).

107 Cf. Note, Protecting the Life of the Unborn Child, 103 Law Q. Rev. 340, 344 (1987) (requiring consent or notification of the potential father is more likely to increase the pressure on the pregnant woman, thus coercing her decision, rather than promoting the couple's relationship).

108 Planned Parenthood v. Danforth, 428 U.S. 52, 71 (1976).

109 Although Fed. R. Civ. P. 10(a) provides that "[i]n the complaint the title of the action shall include the names of all the parties," the federal courts do have discretion. Fed. R. Civ. P. 26(c) states: "Upon motion by a party . . . the court . . . may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense."

110 "Few decisions are more personal and intimate, more properly private, or more basic to individual dignity and autonomy . . . ." Thornburgh v. American College of Obstetricians and

miliation, stigmatization, and public hostility,[111] a pregnant woman may even acquiesce to the potential father's wishes. This effectively subjects her to officially sanctioned blackmail.[112] Fundamental rights have no meaning if individuals are too intimidated to enforce them.

Potential fathers also contend that a husband possesses an interest in his marriage's procreative potential.[113] "In the case of a married woman, the pregnancy may represent her husband's great hope for and interest in posterity. Indeed, procreation goes to the very heart of the marriage relationship."[114] Potential fathers argue that the pregnant woman's decision not only affects this pregnancy, but also affects the future childbearing potential of the marriage.[115]

In essence, husbands seek to designate their wives' fertility as a marital right, deserving of special protection. This argument relies on the antiquated notion that a woman is the property of her husband. While each individual may possess a fundamental right to procreate, no court has extended this concept to the marital relationship.[116]

Recently, Dr. C. Everett Koop, former Surgeon General of the United States, said that identifiable physical problems which *could* result from abortions, may not solely be the effect of an abortion; they

---

Gynecologists, 476 U.S. 747, 772 (1986); see Brief of Appellant at 18-22, Doe v. Smith, No. 84 AO1-8804-CV-00112 (Ind. Ct. App. Oct. 24, 1988).

111 The South Dakota state court determined that an estranged husband's lawsuit was an abuse of the judicial system warranting sanctions against him and his attorney. Bergan v. Bergan, No. 89-1003 (3d Jud. Cir. Ct. Kingsbury Co. (S.D.) Feb. 10, 1989). The court concluded that the

> ciucumstances [sic] [of this case] generated a great deal of state-wide publicity. It caused [the wife] to become physically ill, and subjected her to great embarrassment and unnecessary harassment. It may well mean an end to her current employment. It may well mean she will have to leave her current home.

Id. slip op. at 9. See also NAACP v. Alabama, 357 U.S. 449, 462 (1958) (effects of revealing the identity of members have included, "economic reprisal[s], loss of employment, threat of physical coercion, and other manifestations of public hostility").

112 NAACP v. Alabama, 357 U.S. at 462 (requiring disclosure of membership lists will discourage the exercise of the constitutionally protected right of freedom of association).

113 Scheinberg v. Smith, 659 F.2d 476, 487 (5th Cir. 1981).

114 L. Wardle & M. Wood, supra note 27, at 78.

115 *Scheinberg*, 659 F.2d 476.

The Fifth Circuit held that a husband's interest in the procreative potential of his marriage can be compelling only if the abortion procedure presents a greater than *de minimis* risk. Id. The Florida District Court, on remand, found as fact, that "induced abortion does not lead to reduced fertility." 550 F. Supp. 1114, 1121 (S.D. Fla. 1982). The court neglected to ascertain, however, whether the number of abortions performed upon a woman would have an adverse effect on her fertility. Even accepting that a greater number of abortions can pose increasingly greater risks to a woman's fertility, her ability to terminate a pregnancy should not be affected as long as she is provided with informed consent. Since only a *de minimis* risk was recognized by the court, it held that the husband's interest was insufficiently compelling.

116 See supra notes 72-79 and accompanying text.

can occur in women who have never had abortions.[117] To claim adverse effects on fertility as a compelling reason for state interference neglects to recognize both the Supreme Court's and the medical community's acknowledgement that abortions, early in pregnancy, are safer than childbirth. Moreover, states are empowered to regulate abortions to ensure that they conform to statutes promulgated to preserve life and health.[118] Even if fertility is viewed as an aspect of health, it is debatable whether only this aspect should be singled out.

CONCLUSION

The heated debate which arose after *Roe v. Wade* continues in light of *Webster v. Reproductive Health Services*, causing derisive zealotry among the forces on both sides of the abortion barricades. *Webster* has been interpreted as an invitation for states to challenge the scope of *Roe* by enacting restrictive anti-abortion legislation, thus perpetuating litigation. Among such legislation will probably be a notification or consent provision similar to the one previously deemed unconstitutional in *Planned Parenthood v. Danforth*.

Nine months as an involuntary prisoner to pregnancy is a significant event which should not be subordinated to the interest of a potential father in a dispute with his pregnant partner. The pregnancy burden is substantial and unlike any other which can be imposed on an individual. It's imposition should not be justified based on a case-by-case evaluation. The decision to continue with a pregnancy should only be made by the woman and decided in the context of her own life, without the legal interference of interested third parties.

Ruth H. Axelrod

---

[117] N.Y. Times, Jan. 10, 1989, at A19, col. 1. Studies and statistics currently available are ambiguous and do not support the conclusion that elective abortions adversely affect either the emotional or physical health of women. N.Y. Times, Mar. 17, 1989, at A12, col. 5. But see Duquin, Abortion Aftermath, 9 Childbirth Educator 29 (Fall 1989) (describing Post-Abortion Syndrome as a delayed traumatic stress disorder).

The effects of elective abortions on future pregnancies are uncertain; there are conflicting reports on the consequences. Williams Obstetrics 612 (J. Pritchard & P. MacDonald 16th ed. 1980). But it is possible that complications could arise, such as an incompetent cervix. Id. Nevertheless, often the reasons for spontaneous abortions are maternal or fetal factors unrelated to prior elective abortions. These factors include fetal anomalies (including chromosomal abnormalities), maternal age, and general health. Modern Trends in Infertility and Conception Control 273 (E. Wallach & R. Kempers eds. 1985).

[118] Roe v. Wade, 410 U.S. 113, 163 (1973).