CASEY RECONSIDERED:

NOTIFICATION OF AND COMMENT BY THE FATHER UPON THE MOTHER'S DECISION TO DELIVER OR ABORT THEIR FETUS

It is truly surprising that the majority finds in the United States Constitution, as it must in order to justify the result it reaches, a rule that the State must assign a greater value to a mother's decision to cut off a potential human life by abortion than to a father's decision to let it mature into a live child. Such a rule cannot be found there, nor can it be found in Roe v. Wade.[1]

INTRODUCTION

The United States Supreme Court gags and binds fathers with respect to their unborn children. Anticipatory fathers[2] are impotent bystanders, voiceless and optionless spectators to maternal decisions that will affect the most intimate sphere of their lives.[3] If

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[1]Planned Parenthood of Missouri v. Danforth, 428 U.S. 52, 93 (1975) (White, J. concurring in part and dissenting in part) (hereinafter Danforth). Roe v. Wade, 410 U.S. 113 (1973)(hereinafter Roe). See Doe v. Bolton, 410 U.S. 113 (1973) (companion case to Roe). Having begun with this quote, pro-choice readers suspect this author's perspective is pro-life. They are wrong. As will become apparent below, this paper does not advocate abolition of a woman's right to choose to abort, despite the objections of the father of her fetus. This paper does, however, point out violations of a father's constitutional rights inherent in the current regimen, and suggests ameliorative procedures which give fathers a place in the abortion decision.

In fashioning the proposal this paper commends, this writer was guided by Ralph Waldo Emerson's notation of the inscription on the gates of Busyrane: on the first gate, "Be bold;" on the second gate, "Be bold, be bold, and everymore [sic] be bold;" and on the third gate, "Be not too bold." RALPH WALDO EMERSON, PLATO, OR, THE PHILOSOPHER 481 (The Modern Library, 1940).

[2]This paper employs the term "anticipatory father" and "anticipatory mother" in preference to the more common "potential father" or "potential mother." These latter terms are substantially inadequate as descriptors. They fail to recognize the historical fact of the pregnancy in question (it is not potential, but actual). The term "potential" indicates a mere possibility of live human birth. In fact, in the large majority of cases, a healthy, live birth will occur from pregnancy if a decision to abort does not intervene. The term "potential" is also overinclusive in that all fertile human beings are "potential" mothers or fathers. Therefore, parents-to-be are therefore anticipatory, not merely potential.

[3]*See* George S. Swan, *Abortion on Maternal Demand: Paternal Support Liability Implications*, 9 VALPARAISO UNIV. L. REV. 243, 256 (Winter 1975). *See also* Marshall B. Kapp, *The Father's (Lack of) Right and Responsibilities in the Abortion Decision: An Examination of Legal-Ethical Implications*, OHIO NORTHERN UNIVERSITY L. REV. 369, 376-77 (1982).

The Eleventh Circuit has said, of a minor anticipatory father's rights in his fetus:

an anticipatory mother chooses, for good reasons or ill, to abort, the anticipatory father can say and do nothing. His fetus perishes; the State stands brooding at the aborting mother's side. Should the anticipatory mother decide to carry the child to term, regardless of the anticipatory father's knowledge or desires, the father will be saddled with financial, time, and moral commitments, some of which the State will enforce by civil or criminal sanctions.

The paramount concerns that underlie this paper can be illustrated by two hypothetical scenarios.

> A. Audrey becomes pregnant by Bart, her husband of five years. They have long planned a family, with joy and the usual trepidation. Audrey suffered childhood abuse at the hands of her alcoholic mother. Audrey begins to irrationally fear her pregnancy. She stealthily aborts their fetus. When Bart learns of Audrey's "miscarriage," Bart grows despondent and seeks psychological counseling. The partners in Bart's law firm, a family-oriented group, wonder at Bart's continued childlessness, and their concerns affect their partnership offers. Bart remains an associate. Bart learns that Audrey did not miscarry, but rather aborted. His lawyer tells Bart he has no legal recourse against Audrey.
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> B. Charlotte wants to marry Dick. Dick is reticent, and wonders, aloud on occasion, about Charlotte's emotional stability. By agreement, Charlotte takes prescribed contraceptive pills, and when they have intercourse, Dick wears a condom as well. Dick has explicitly stated that he does not feel ready to be a father, and is willing to have intercourse only on condition that the couple avoids pregnancy. Wanting to force Dick into long-term commitment, Charlotte pinpricks the tips of all of Dick's condoms and ceases taking her contraceptive pills. Charlotte conceives. Dick is forced by the prosecuting attorney of his county to pay child support. He feels obligated to nurture the child, and does so, with joy in the child, but unrelenting reluctance.[4]

> The pregnant woman is the only one who controls the abortion decision. Not even the spouse of a pregnant woman has the legal right to prevent an abortion and require the child to be carried to term. As the boyfriend of Jane, John Doe's agreement or disagreement with Jane Doe's abortion decision does not enjoy constitutional protection.

Arnold v. Board of Educ. of Escambia County Ala., 880 F.2d 305, 312 (11th Cir. 1989). *See* People in Interest of S.P.B., 651 P.2d 1213 (Colo. 1982).

[4]This author realizes that both hypotheticals paint the female abortion decision-makers in an unfavorable light. The abortion decision-maker in some feminist literature, in a manner reminiscent of Jeremy Bentham's utilitarian "felicific calculus," is portrayed as a rational mind weighing complexities in a computation of mother-and-fetus enlightened self-interest. *See* Andrea M. Sharrin, *Note: Potential Fathers and Abortion: A Woman's Womb Is Not A Man's Castle*, 55 BROOKLYN L. REV. 1359, 1400 (1990) (listing pregnancy effects possibly considered by the abortion decision-maker in her choice to abort). Laudable reasonableness may occasionally, even frequently, be the case. But often the female-choosing-abortion is not so enlightened or careful. For example, in John Smith v. Jane Doe, No. 84C01 8804 FP 185 (Ind. Cir. Ct., Juv. Div., Vigo Cty., filed April 8, 1988, *rev'd sub nom.* Doe v. Smith, 530 N.E.2d 331 (Ind. Ct. App. 1988), the unmarried anticipatory father of his girlfriend's fetus petitioned the court for a temporary restraining order to prevent the woman's planned abortion. The court found that the woman wanted an abortion because she was concerned about her appearance in a bathing suit and she did not want to "share the [anticipatory father] with the baby." In another case, a wife sought to abort due to concern about her appearance, general disaffection with life's difficulties and family disharmony (she may also have had a heart ailment). Denying the father's petition for injunction, the judge nevertheless said, "I cannot help but express my feeling that the abortion of a potential life for purely cosmetic reasons is simply intolerable in a society which claims any pretense to civilization." Steinhoff v. Steinhoff, 531 N.Y.S.2d 78, 80 (Sup. 1988).

Anticipatory mothers (as well as anticipatory fathers) can make important decisions on wholly substanceless or reprehensible bases. Freud noted: "One has, I think, to reckon with the fact that there are

Neither Bart nor Dick have any say in the decision to abort or bear his fetus. Audrey and Charlotte alone make the abortion decisions.[5] Neither anticipatory father's consent is required. Neither anticipatory father must be notified or heard on the matter. Bart is denied the companionship of his child and the fulfillment he sought in fatherhood. Dick writes checks to support a child he never desired and spends time in parental nurture he would prefer to have otherwise invested.

The Constitutional asymmetry that Bart and Dick suffer has been mandated by the United States Supreme Court. In abortion decisions, women speak and act. Men are hapless and mute. Is this fundamental asymmetry justified? Does a different regimen recommend itself, one that recognizes the anticipatory father's interests, without trammelling the anticipatory mother's rights?

THE PROBLEM IN DETAIL

A. ROE, DANFORTH, *AND* CASEY

In *Roe v. Wade*, the United States Supreme Court held that a pregnant woman has a less-than-absolute constitutional right to abort her fetus in the first six months after conception.[6] The *Roe* majority noted, however, that its ruling was limited to the role of

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present in all men destructive, and therefore anti-social and anti-cultural, tendencies, and that with a great number of people these are strong enough to determine their behaviour in human society." SIGMUND FREUD, THE FUTURE OF AN ILLUSION 6 (W.D. Robson-Scott, trans. 1953).

The hypothetical scenarios suggested indicate two instances in which the anticipatory mother acts from improper motivation, to the loss and grief of the anticipatory father. Any regime that reduces irresponsible abortion decision-making is, in this author's view, desirable.

[5]See Kapp, *supra* n. 3, at 376 ("A women [sic] who suffers an unwanted pregnancy produced by the 'vicissitudes of life' now enjoys the guaranteed option to have an abortion. On the other hand, a man who fathers a fetus through a haphazard accident of life--the unintentional impregnation of a woman--has no equivalent opportunity to have the pregnancy terminated."). This author sides with Karl Llewellyn in weighing the abortion decision: "I rebel against some of the fiercer tricks old nature plays our passions. Love and begetting--and children where there are no means to keep a child in health, alive. That is one trick that I rebel against." KARL LLEWELLYN, THE BRAMBLE BUSH 146 (1991).

[6]*Roe*, 410 U.S. at 164-65. Under Roe, in the first trimester, the state cannot intervene to overrule the decision of the woman's attending physician concerning abortion. At approximately the end of the first trimester, the health risks to the mother in continuing her pregnancy are outstripped by those associated with abortion procedures. The State may, in the second trimester, impose regulations governing abortion procedures insofar as those regulations reasonably relate to maternal health. At the beginning of the third trimester, which is said to be the time at which normal fetuses become viable, State interests wax. The State may regulate, or even forbid, abortion, except where it is necessary to preserve the life or health of the mother.

The Roe majority emphatically rejected the argument "that the woman's right is absolute and that she is entitled to terminate her pregnancy at whatever time, in whatever way, and for whatever reason she alone chooses." *Id.* at 153.

For the purposes of this paper, it is important to note that, even in Roe, considered to be the fount of abortion rights and the center of the pro-life hubbub, women are not granted an absolute right to abortion on demand. In the first trimester, the woman's decision must be confirmed by a collaborating doctor willing to perform the abortion. (Note that the language in the Court's summary of its holding lacks the words "a woman's right to choose"; in fact, woman-choosing-abortion is not mentioned at all, but only her doctor's medical opinion.) *Id.* at 164. In the second trimester, the State's interest in the mother's health adds further impediments to abortion in the form of regulations governing medical procedures. In the third trimester, state or federal governments may prohibit abortions altogether, except where concerns over maternal health and survival predominate. Though these obstacles appear formidable, in practice, they are

state and federal governments in impairing a woman's access to abortion services. The Court explicitly eschewed deciding whether a father might have constitutionally cognizable rights related to a woman's abortion decision. The Court said:

> Neither in this opinion nor in *Doe v. Bolton*, do we discuss the father's rights, if any exist in the constitutional context, in the abortion decision. No paternal right has been asserted in either of the cases, and the Texas and the Georgia statutes on their face take no cognizance of the father. We are aware that some statutes recognize the father under certain circumstances. . . . We need not now decide whether provisions of this kind are constitutional.[7]

The question of whether spousal consent could be a condition precedent to a woman's abortion was settled in *Danforth.* Referring explicitly to the *Roe* footnote cited above, the Court said, "We now hold that the State may not constitutionally require the consent of the spouse . . . as a condition for abortion during the first 12 weeks of pregnancy."[8]

Roe was reconsidered in *Planned Parenthood v. Casey.*[9] With respect to paternal rights concerning abortion decisions, *Casey* continued down the path of *Roe's* progeny, *Danforth.* In *Casey*, the anticipatory father's constitutional rights in the abortion decision withered to nothingness. The Court considered Pennsylvania's Abortion Control Act of 1982 (as amended in 1988 and 1989). That Act, in pertinent part, required, in § 3209 (entitled Spousal Notice), a married woman to give to the physician who is to perform her abortion a signed, but not notarized, statement indicating that the woman has notified her husband that she is about to undergo an abortion. The statement must contain a notice that any false statement made therein is punishable by law. Four alternative statements suffice: 1) that the woman's spouse is not the father of the child, 2) that the woman's spouse, after diligent effort, could not be located, 3) that the pregnancy is a result of spousal sexual assault which has been reported to a law enforcement agency having jurisdiction in the matter, or 4) that the woman has reason to believe that furnishing notice to her spouse is likely to result in the infliction of bodily injury upon her by her spouse or another individual.[10]

The Court struck down Pennsylvania's spousal notification statute. The Court said, "A husband has no enforceable right to require a wife to advise him before she exercises her personal choices."[11] Presciently, the Massachusetts Supreme Court, as early as 1974 in *Doe v. Doe*, said, "After the 1973 decisions [*Roe* and *Doe*], recognition of an enforceable right in the husband to prevent the abortion would raise serious constitutional questions. Although the court did not pass on the husband's right, it used language inconsistent with such a right."[12]

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not. Millions of legal post-1973 abortions confirm that women in America abort-on-demand during the first six months of their pregnancies.

[7] *Id.* at 165 n.67 (citation omitted).

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

[9] Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833 (1992) (hereinafter Casey).

[10] *Id.* at 735-36.

[11] *Id.* at 728. The High Court struck the Pennsylvania statutory notification requirement, despite citing, only two pages before, the language from Danforth, 428 U.S. at 69, noting a husband's "deep and proper concern and interest . . . in his wife's pregnancy and in the growth and development of the fetus she is carrying." The Court also touted the anticipatory father's "cognizable and substantial" interest in custody of his children, citing Stanley v. Illinois, 405 U.S. 645, 651-652 (1978).

[12] Doe v. Doe, 314 N.E.2d 128, 132 (Mass. Sup. Ct. 1974). *See generally* W.E. Shipley, *Woman's Right to Have Abortion Without Consent Of, or Against Objections of Child's Father*, 62 A.L.R.3D 337 (1975) (collecting cases which have considered whether a pregnant woman may elect to undergo an abortion without the consent of, or against the objections of, the father of the child she carries).

What are the historical antecedents to the High Court's position concerning paternal rights in the abortion decision? A brief examination follows.

B. THE HISTORICAL MAINSTREAM

1. Ancient Law[13]

In the Greek and Roman era, abortion was practiced, generally without prohibition. When abortion was prosecuted in the Greco-Roman era, a violation of the father's right in his children was the theoretical justification.[14] The Hippocratic Oath condemned abortion,[15] as part of its general program to do no physical harm in medical treatment. The Oath, however, did not carry the day in Greek and Roman culture generally.[16] For example, Plato, discussing his eugenic plan for the ideal republic, would allow citizens outside the ideal child-bearing ages to copulate as they wish. He imposes on both sub-optimal parents, mother and father alike, a duty to abort any fetus resulting from the coitus, or, if the fetus should come to term, "the parents must understand that the offspring of such a union cannot be maintained, and arrange accordingly."[17] In the Roman era generally, only fathers could exercise parental powers. The *pater* of a family had quasi-property rights in his children, which included the right to put them to death at his discretion.[18]

2. Christian Theology and Medieval Law

A deutero-Pauline biblical passage explicated the nascent church's theory of matrimony: *Ephesians* 5:21-33.[19] The Pauline School likened marriage to the theological mystery of the unity between Christ and his church, conceived to be a perfect unity with Christ as the head and absolute master of the church. Analogously, in marriage, the husband rules the marital union, but rules in that odd inverted manner characteristic of

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[13]*See generally, Roe*, 410 U.S. at 129-41 (presenting an extensive examination of the historical precedents relating to abortion, touching on the Persian Empire, ancient Greek and Roman law, the Hippocratic Oath, the Pythagorean school, Plato, Aristotle, the common law, Bracton, Coke, English statutes and cases, and American law.)

[14]*Roe*, 410 U.S. at 130 (citing L. EDELSTEIN, THE HIPPOCRATIC OATH 10 (1943)).

[15]"I will not give to a woman a pessary to produce abortion." *Roe*, 410 U.S. at 131 (citing A. CASTIGLIONI, A HISTORY OF MEDICINE 84 (2d Ed. 1947), E. Krumbhaar, translator and editor.)

[16]*Roe*, 410 U.S. at 130-32.

[17]PLATO, THE REPUBLIC, BOOK V 185 (The Modern Library, date of publication unknown) (B. Jowett, translator).

[18]Richard A. Gilbert, *Abortion: The Father's Right*, 42 U. OF CINCINNATI L. REV. 441, 454 n.76 (1973).

[19]Be subject to one another out of reverence for Christ. Wives, be subject to your husbands, as to the Lord. For the husband is the head of the wife as Christ is the head of the church, his body, and is himself its Savior. As the church is subject to Christ, so let wives also be subject in everything to their husbands. Husbands, love your wives, as Christ loved the church and gave himself up for her, that he might sanctify her, having cleansed her by the washing of water with the word, that he might present the church to himself in splendor, without spot or wrinkle or any such thing, that she might be holy and without blemish. Even so husbands should love their wives as their own bodies. He who loves his wife loves himself. For no man ever hates his own flesh, but nourishes and cherishes it, as Christ does the church, because we are members of his body. "For this reason a man shall leave his father and mother and be joined to his wife, and *the two shall become one.*" *This is a great mystery, and I take it to mean Christ and the church;* however, let each one of you love his wife as himself, and let the wife see that she respects her husband.

Ephesians 5:21-33 (Revised Standard Version) (emphasis added).

rulers emulating Jesus of Nazareth. He who rules best serves all. The husband is the wife's servant.[20]

After Christianity overran the Roman Empire, the task fell to baptized Emperors of the bifurcated Mediterranean state to translate Christian marriage theory into procedures acceptable to the once-Roman populace. The Roman law of marriage emphasized consent and contract; it wedded comfortably to the early Christian view.[21] Many aspects of the familial role of the Byzantine Christian husband melded neatly with the Roman *pater's* familial autocracy.[22]

The early and medieval church forbade the destruction of young life altogether, either by abortion or infanticide.[23] Sexual intercourse outside marriage was strictly enjoined, and within marriage permitted only for the purpose of procreation.[24] Violation of these standards in the early centuries of Christian hegemony was cause for expulsion from the church, but after Pope Calixtus I in the early third century, sanctions for sexual improprieties were relaxed.[25]

3. The Common Law

"At common law, the father's rights over a child were exclusive and the mother, during the father's life, had no legal parental rights, being entitled only to 'reverence and respect.'"[26] This fact derived from the underlying conception of marriage in the common law, a theory which borrowed much from the Christian/Roman law amalgam. In marriage, a wife's legal existence was subsumed by that of her husband. Under common law, "[H]usband and wife are regarded as one person, and her legal existence and authority [are] in a degree lost or suspended, during the continuance of the matrimonial union."[27] Lawrence Friedman put it succinctly, "Essentially, husband and wife were one flesh; but the man was the owner of that flesh."[28] The legal disabilities of married women under the common law extended to lack of suffrage,[29] loss of property rights, [30] and limited rights of succession by inheritance.[31] Paternalistic protection of married women, and females

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[20] *Id.* at verses 5:25-28.

[21] THE OXFORD DICTIONARY OF THE CHRISTIAN CHURCH 889 (F. L. Cross and E. A. Livingstone, eds. 1977).

[22] Note mention of paternal power in the Roman family, above at § The Problem in Detail, B. 1.

[23] KENNETH SCOTT LATOURETTE, A HISTORY OF CHRISTIANITY, Volume I, 248 (1975).

[24] *Id.* As regards sexual relations, celibacy, not faithful marriage, dominated the early and medieval church's ideal of godliness.

[25] *Id.*

[26] Shipley, *supra* n.12, at 1097.

[27] JAMES KENT, COMMENTARIES ON AMERICAN LAW, vol. II, 129 (2nd ed., 1832).

[28] LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 208 (2nd ed., 1985).

[29] *See generally* U.S. CONST. amend XIX (adopted in 1920).

[30] The husband, by marriage, acquires a right to the use of the real estate of his wife, during her life; and if they have a child born alive, then, if he survives, during his life, as tenants by curtesy. He acquires an absolute right to her chattels real, and may dispose of them. . . . He acquires an absolute property in her chattels personal in possession. . . . As to the property of the wife accruing during coverture [(marriage)] the same rule is applicable.

Friedman, *supra* n.28, at 208 (citing chief Justice Zephaniah Swift's opinion in Griswold v. Penniman, 2 Conn. 564 (1818).)

[31] Friedman, *supra* n.28, at 251 (noting the nineteenth century American tendency not to leave land or other property in fee simple to women successors, but rather to "settle" property on women by means of trust or lesser estates (e.g., life estates).)

generally, characterized the common law.[32] A fetus, under the common law, was generally regarded as a portion of the mother's body, having no separate existence for legal purposes.[33]

Criminal abortion restriction laws are a modern invention. Most emerged in the last half of the nineteenth century.[34] Such criminal restriction of abortion has, however, in the twentieth century become global. Every country now restricts pregnancy termination in some manner.[35]

C. *THE LEFT-TURN OF CONTEMPORARY LAW*

On the question of paternal rights in pregnancy and child-rearing, modern law has departed from the common law in a revolutionary manner. Where once the father was the sole familial authority, in contemporary law he is at best co-equal with the mother of his children (child-rearing within marriage) and at worst a non-participant (abortion decisions). Even where the father's familial rights have not been wholly abrogated, they are truncated (adoption, visitation, child support).

The phenomenal political clout of the women's movement[36], coupled with the advent of widespread, reliable contraception, set the stage for the modern break with the common law.[37] Some elements of this departure are commendable, born of a reasonable dissipation of disabilities no longer (if ever) justifiable: equal pay for equal work, female suffrage, women's property and inheritance laws, awareness of a cultural double-standard

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[32]*See generally* Bradwell v. State, 83 U.S. (16 Wall.) 130 (1873):

> Man is, or should be, woman's protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life. The constitution of the family organization, which is founded in the divine ordinance, as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood. The paramount destiny and mission of woman are to fulfill the noble and benign offices of wife and mother. This is the law of the Creator.

Other statutory discriminations concerned not married women alone, but women generally. See Muller v. Oregon, 208 U.S. 412 (1980) (upholding an Oregon statute limiting the working hours of women); Reed v. Reed, 404 U.S. 71 (1971) (striking an Idaho law granting a preference to men over women in the choice of appointment of estate administrators).

Outside the realm of law, the language was sometimes less chivalrous. Friedrich Nietzsche, in 1886, speaks in words coated not with sugar, but with bile:

> To go wrong on the fundamental problem of "man and woman," to deny the most abysmal antagonism between them and the necessity of an eternally hostile tension, to dream perhaps of equal rights, equal education, equal claims and obligations--that is a *typical* sign of shallowness . . . A man . . . must think about woman as *Orientals* do: he must conceive of woman as a possession, as property that can be locked, as something predestined for service and achieving her perfection in that. . . . As [woman] takes possession of new rights, aspires to become "master" and writes the "progress" of woman upon her standards and banners, the opposite development is taking place with terrible clarity: *woman is retrogressing*. . . . her first and last profession--to give birth to strong children.

FRIEDRICH NIETZSCHE, BEYOND GOOD AND EVIL 166-69 (1966)(Walter Kaufmann, trans.).

[33]Gilbert, *supra* n.18, at 446.

[34]Roe, 410 U.S. at 129.

[35]*The Practice of Modern Medicine*, 23 ENCYCLOPEDIA BRITTANICA 903, 911 (1987).

[36]The women's movement claims, curiously, minority status, despite the fact that the movement's natural constituency is a numerical majority of the United States' voting population.

[37]Advances in reproductive options and control are presenting new opportunities, riddled with complex legal and ethical issues. *See* John A. Robertson, *Procreative Liberty and the Control of Conception, Pregnancy, and Childbirth*, 69 VA. L. REV. 405 (1983).

concerning assaults upon women, and family leave laws. Other elements of the revolution are reactionary, born of political frenzies attributable to sexist hyperbole and slur-laden rhetoric: gender-based affirmative action,[38] punitive child support,[39] and the exclusion of anticipatory fathers from decisions concerning pregnancy, to mention a few.[40]

The revolutionary overthrow of the common law in the twentieth century truncated fathers' rights in their children, born and unborn. Fathers, wed or unwed, anticipatory or actual, are systematically discriminated against by current law. The State cannot require the anticipatory mother to seek the father's consent to her abortion, even where broad safeguards to abuse are put in place.[41] Nor can a statute requiring mere notification of the anticipatory father regarding a planned abortion, again with abundant safeguards, be constitutional.[42] A husband may not recover in tort for deprivation of offspring and loss of

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[38]Some, including this author, consider sexual preferences on the basis of perceived past discrimination as nothing more than retributive sexism and pallid paternalism. Even Professor MacKinnon finds that some "compensation for sex differences" enactments have been "more ideologically denigrating than materially helpful." Catharine A. MacKinnon, *Reflections on Sex Equality Under Law*, 100 YALE L.J. 1281, 1292 (1991) (referencing the $500 tax exemption for widows but not widowers upheld in Kahn v. Shevin, 416 U.S. 351 (1974), and the statute giving women naval officers longer to achieve promotion than men before the women would be discharged for lack of promotion upheld in Schlesinger v. Ballard, 419 U.S. 498 (1975).)

[39]The majority of the child support burden falls on putative fathers. *Cf.* Karen Czapanskiy, *Volunteers and Draftees: the Struggle for Parental Equality*, 38 UCLA L. REV. 1415, at 1432-33 n.59 (1991).

[40]Speaking of the women's movement writers, Catharine MacKinnon says:

> The distinctive theory forged by this collective movement is a form of action carried out through words. It is deeply of the world: raw with women's blood, ragged with women's pain, shrill with women's screams. . . . It participates in reality: the reality of a fist in the face, not the concept of a fist in the face.

MacKinnon, *supra* n.37, at 1285. Professor MacKinnon continues with other opinions, which can be epitomized as follows. The relation of the sexes is gender warfare. *Id.* at 1284-85. To be male is either to be a rapist or to support them. *Id.* at 1303. Procreation is cousin to rape. *Id.* at 1308. Pregnancy is the primary physical emblem of female negativity, as related to male domination. *Id.* at 1309 (borrowing from Andrea Dworkin). The fetus is a parasite. *Id.* at 1314. Abortion is a form of political protest. *Id.* at 1317. Abortion and pregnancy affect only females; males are non-participants. *Id.* at 1320. Andrea Sharrin describes motherhood as a "ball and chain to manipulate and deprive women of their right to participate in the workforce equally with men," and "a euphemism for compelled treatment as fetal containers." Sharrin, *supra* n.4, at 1398-99. Ruth Axelrod describes a mother as an "involuntary prisoner to pregnancy." An anticipatory father's concerns about a planned abortion are "legal interference from interested third parties." Ruth H. Axelrod, *Whose Womb Is It Anyway: Are Paternal Rights Alive and Well Despite Danforth*, 11 CARDOZO LAW REVIEW 685, 711 (1990).

In this writer's opinion, the women's movement's curious apoplexy concerning men, pregnancy, and family life rises from a jaundiced and indefensible view of society, a monomania exalting distortion over balance. The effort to "right the constitutional boat" by granting fathers enforceable rights in fetal determinations should be considered a palliative to feminist-fringe overreaching.

[41]*Danforth*, 428 U.S. at 69. Note that Danforth ruled out requirements of paternal consent only in the first twelve weeks of pregnancy, leaving open the question whether statutes requiring paternal consent in the second trimester of pregnancy might pass constitutional muster. Casey closed this door. *Casey*, 505 U.S. 833, at 898.

See Doe v. Zimmerman, 405 F. Supp 534, 537 (M.D. Penn. 1975) (striking down Pennsylvania's pre-abortion spousal consent statute); Wolfe v. Schroering, 541 F.2d 523 (6th Cir. 1976) (striking down Kentucky's pre-abortion spousal consent statute); Conn v. Conn, 525 N.E.2d 612 (Ind. App. 1 Dist. 1988); Coleman v. Coleman, 471 A.2d 1115 (Md. App. 1984); Rothenberger v. Doe, 374 A.2d 57 (N.J. 1977); Ponter v. Ponter, 342 A.2d 574 (N.J. 1975).

[42]*Id. See* Eubanks v. Brown, 604 F. Supp 141, 148 (W.D. Ky. 1984); Jane L. v. Bangerter, 809 F. Supp. 865, 876-77 (D. Utah 1992) (striking down Utah's spousal notification statute on the basis of the Casey rule).

consortium and society against the doctor who performed the wife's abortion, unless the physician would also be liable in tort to the consenting wife.[43] Where a woman has conceived after fraudulently misrepresenting her sterility or use of birth control, resulting in a pregnancy the anticipatory father does not want, the father, after the birth of his child, cannot recover in tort against the mother. But a woman may recover for a man's fraudulent misrepresentation as to sterility where the child born is either normal or abnormal. Neither result was deemed to violate the Equal Protection Clause.[44] An unmarried father has no legal right to the care, custody and control of his child. Unless the mother is proved unfit to parent, her claim is in every instance superior to that of the putative father.[45] The father, in fact, wholly lacks legal standing to challenge any decision made by the anticipatory mother concerning his fetus.[46] The child of an adulterous relationship can constitutionally be deemed the child of the marriage, even when the adulterer's paternity is not disputed. The father of the illegitimate child has no parental rights and is owed no visitation opportunities, even where he has lived with the mother and actively parented the child of their illicit union.[47]

Upon birth of an unwanted child, fathers incur child support obligations. Maternal fraud concerning her use of contraception or sterility fails to bar or offset paternal child

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[43]Herko v. Uviller, 114 N.Y.S.2d 618 (1952).

[44]Barbara A. v. John G., 193 Cal. Rptr. 422 (1983) (woman bringing action for battery and deceit against father for fraudulent misrepresentation concerning his sterility, where the intercourse resulted in ectopic pregnancy and physical injury). The court noted that the same cause of action would be available to a similarly situated male (though it is difficult to imagine conditions under which a male could suffer ectopic pregnancy). *See* Linda D. v. Fritz C., 38 Wash. App. 288, *rev. den.* 102 Wash. 2d 1024 (1984) (dismissing father's counterclaim in the mother's suit for child support, for tortious misrepresentation by mother in use of contraception). See also Anne M. Payne, *Sexual Partner's Tort Liability to Other Partner for Fraudulent Misrepresentation Regarding Sterility or Use of Birth Control Resulting in Pregnancy*, 2 A.L.R.5th 301 (1992).

[45]Jones v. Smith, 278 So. 2d 339, 343 (Fla. App. Ct. 1973), *cert. den.* 415 U.S. 958 (1973). This result may differ if other jurisdictions.

The unmarried father may also suffer other disadvantages as compared to the unmarried mother: no right of visitation if mother opposes, must have mother's consent to legitimate the child, and diminished rights to notice or consent before putting the child up for adoption. Gilbert, *supra* n.18, at 455 n.83. A putative father's disadvantages in adoption have waned in recent case law, though unwed fathers still stand at a significant disadvantage as compared to both married fathers and mothers, married or unmarried. *See* Tonya M. Zdon, *Putative Fathers' Rights: Striking the Right Balance in Adoption Laws*, 20 WM. MITCHELL L. REV. 930 (1994). *See* Stanley v. Illinois, 405 U.S. 645 (1972) (striking Illinois statutory presumption that all unwed fathers are unsuitable and neglectful parents because they are strangers to their children, and holding the unwed father's has a right to a relationship with his child); Quilloin v. Walcott, 434 U.S. 246 (1978) (upholding Georgia law requiring only maternal consent before an illegitimate child could be placed for adoption, and holding that an unwed father who has never exercised actual or legal custody over his child, and thus has never shouldered any significant responsibility with respect to the daily supervision, education, protection, or care of the child lacks any right to veto a maternally-approved adoption); Caban v. Mohammed, 441 U.S. 380 (1979) (holding that where an unwed father has established a substantial relationship with a child and admitted paternity, the state may not treat the father differently than the mother with respect to ability to veto pending adoption of the child); and Lehr v. Robertson, 463 U.S. 248 (1983) (holding an unwed father who has mere biological relationship with his child, and no actual relationship of parental responsibility characterized by daily associations and emotional bonds cannot challenge an adoption proceeding, especially where a state notification-of-adoption registry is maintained and the father does not avail himself of the service). So, even after birth, a father's relationship with his child is not considered organic or self-evident, as is that of the child and its mother, but rather as a matter to be demonstrated (and possibly proved in a court of law). *See* Adoption of Kelsey S., 4 Cal. Rptr. 2d 615 (Cal. 1992).

[46]*Jones v. Smith*, 278 So. 2d at 344.

[47]Michael H. v. Gerald D., 491 U.S. 110 (1989). *See* Elizabeth A. Hadad, *Tradition and the Liberty Interest: Circumscribing the Rights of the Natural Father*, 56 BROOKLYN L. REV. 291 (1990).

support obligations.[48] Even the male child victim of a female statutory rapist can be charged with child support obligations for a subsequent birth to his rapist.[49] Such requirements of child support for unwanted children do not violate the father's equal protection rights.[50] Oddly, the anonymous sperm donor cannot be charged with child support obligations.[51]

Further, upon birth of an unwanted child, fathers incur moral obligations to nurture the child, to parent and love him or her, to guide the child's education and religious upbringing, to insure appropriate nutrition is given and hygiene taught and medical supervision and care are provided, and to perform his part in all other training and oversight necessary to successfully integrate the child into modern society. Some fathers, daunted by this overwhelming unsought burden, decline. In so doing, they forfeit some parental legal rights, especially as to participation in future adoption proceedings.[52] The more attenuated the father's active participation in parenting and supporting a child, the less willing is a court to hear his parental objections.[53] Abdicating fathers also incur non-legal societal wrath in the form of epithets, prejudice, and a presumption of irresponsibility. Such a father is at best a "Disneyland dad" and at worst a deflowering gigolo.[54]

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[48]Anne M. Payne, *Parent's Child Support Liability as Affected by Other Parent's Fraudulent Misrepresentation Regarding Sterility or Use of Birth Control, or Refusal to Abort Pregnancy*, 2 A.L.R.5th 337, 347 (1992).

[49]*Id.* at 349.

[50]*Id.* at 363-66.

[51]Swan, *supra* n.3, at 248.

[52]*See* discussion *supra* note 45.

[53]*See* Lehr v. Robertson, 463 U.S. 248 (1983).

[54]Sexual stereotyping is one aspect of sexual discrimination of which the women's movement has justifiably complained. The courts have agreed; sexual stereotyping is one factor the U.S. Supreme Court considers when evaluating the constitutionality of a statute or government practice. See Mississippi University for Women v. Hogan, 458 U.S. 718 (1982) (setting aside the "women-only" admissions policy of MUW, a state-funded nursing school, in that the policy perpetuated a sexual stereotype that portrayed nursing as exclusively a woman's job).

The Court's concern with sexual stereotypes must be weighed in conjunction with other language of the Court. In Michael M. v. Superior Court, 450 U.S. 464 (1981), Justice Rehnquist wrote for a plurality in considering a California statute that criminalized statutory rape for minor males, but not minor females:

> [B]ecause [equal protection] does not [require] 'things which are different in fact [to] be treated in law as though they were the same,' this Court has consistently upheld statutes where the gender classification is not invidious, but rather realistically reflects the fact that the sexes are *not similarly situated* in certain circumstances.

Id. at 469 (emphasis added). The tension between an interest in eradicating sexual stereotyping in law and granting the legal possibility of dissimilar situation on account of gender is unresolved. Surely, a father is not similarly situated as compared to the mother in relation to their pregnancy. He never bears nor delivers (but then, she never sits in the waiting room or wrings her hands in the frustration of helplessness). But, likewise, the attitude and approaches of various fathers to pregnancies are as diverse as the fathers, and no set of categories (or ugly epithets) adequately encompasses them.

Women are not alone in suffering the stigma of unfair gender stereotyping. A host of derogatory stereotypes are employed by courts and feminist writers to help minimize stripping fathers, anticipatory and actual, of their constitutional rights relative to pregnancy and parenting. The male parent is the *abandoning father*, presumed to prefer parental irresponsibility. He must prove his adequacy as a parent, unlike the mother. *See* Lehr v. Robertson, 463 U.S. 248 (1983). The father is the *deadbeat dad*, he who, by criminal and civil sanctions, gets the State off the hook for support of children and their mothers, even when the reluctant father never planned the pregnancy, supported its abortion, opposed bringing the child to term, and has resisted making payments. *See* Kapp, *supra* n.3 (citing Oregon decisions, subsequently overruled, supporting the father's right to termination of child support obligations, where the father has offered to pay for an abortion and the mother refused). *See* Meera Werth, *Spousal Notification and the Right of Privacy: Scheinberg v. Smith, 659 F.2d 476 (5th Cir. 1981)*, 59 CHI.-KENT L. REV. 1129 (1983). *See* Scheinberg

C. *THE ISSUE*

The common law approach toward women is indefensible in contemporary American society. Women should be full participants. They should vote. They should get equal pay for equal work. They should own property. They should inherit. They should perform any work of which they are capable. They should control the fate of their own bodies. Women should, in short, be free--at least as free as any American citizen. Insofar as American society is a zero-sum game, the movement of women from their former condition of legal subordination to one of legal and economic equality will come at the expense of males.

Is such a cost what underlies the abrogation of paternal rights in pregnancy decision-making? Or has contemporary law substituted for the excesses of the common law a regime similarly, though oppositely, abusive? Current law makes the anticipatory father a non-participant in procreation. Insemination is nothing, more akin to a sneeze than an act of legal consequence. Even after fetal viability, the State, but not the anticipatory father, acquires an enforceable interest in the fate of the anticipatory father's fetus.[55] Paternal desire for the child is a nullity. Paternal hope for abortion is for naught. Paternal reasoning and emotions are alien interlopers. Nevertheless, child support is demanded. Silent grief is required where abortion is chosen over paternal desire to parent. The anticipatory father is sidelined, ignored. *Roe*, *Danforth*, and *Casey* wrought this circumstance.

Is the Court right to have done so? Are a father's interests in his fetus genuinely negligible? Has the Court, in forsaking the common law perspective, righted an imbalance created by former male domination? Or has the Court over-corrected, its vision clouded by

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v. Smith, 659 F.2d 476 (5th Cir. 1981), *on remand*, Scheinberg v. Smith, 550 F. Supp. 1112 (S.D. Fla 1982) (the appellate court finding that a spousal notification statute can be constitutional if abortion results in greater than *de minimis* risk to the marriage's childbearing capacity, and the district court on remand finding no such evidence of greater than *de minimis* risk). The impregnating male is the *usurper of wombs*, bent on reproducing himself by rapaciously commandeering unsuspecting uteri. *See* Sharrin, *supra* n.4. The father-opposing-abortion is a *sperm fount*. He has reproductive "options" a woman lacks. Implicit in this view of the father is the anticipation that he will copulate with available women, regardless what faith he breaks with the fetus' anticipatory mother. The male is presumed to "sow his seed broadly." *See* Justice White's objections in Danforth, 428 U.S. 52, 93 (1975) ("A father's interest in having a child--perhaps his only child--may be unmatched by any other interest in his life.") The familial male is the *battering partner*. *See Casey*, 505 U.S. at 888-92 (adopting the district court's findings of facts concerning male spousal abuse, while simultaneously acknowledging that all research concerning abuse-effects of paternal notification statutes is limited and relies on samples too small to be representative.) Note also that the Casey Court also fails to consider the number of false reports of abuse, the large percentage of females-reporting-abuse who subsequently refuse to testify in support of prosecution of those charges, and the likely voluminous under-reporting of female-on-male physical and emotional spousal assault. Perhaps most important among the paternal slurs employed in the process of denigrating and ultimately abrogating paternal interests in pregnancy is the father conceived as the *non-nurturing outsider*. He is the parent who changes no diapers, snores when the three a.m. feeding is needed, and uniformly prefers abortions to births. Karen Czapanskiy went so far as to write (incredibly): "There is no evidence that, in general, live-in fathers perform daily caregiving for their children." Czapanskiy, *supra* n.39, at 1435.

If sexual stereotyping is gender discrimination, then courts and some feminist literature discriminate. One must question the jurisprudential bases of current paternal notification law insofar as courts have relied on such impermissible rants. Howard Sherain said of abortion jurisprudence, "This exclusivity of the mother's decision and total disregard for the claims of the father is a fundamentally sexist expression." Howard Sherain, *Beyond* Roe *and* Doe*: The Rights of the Father*, 50 NOTRE DAME LAWYER 483, 494 (1975).

[55]Though *Danforth*, 428 U.S. at 69, leaves some question about the father's rights after the first trimester, the implications of *Casey*, 505 U.S. 833 (1992), seem less ambiguous. Arguably, fathers have no rights.

a well-spoken ideology of retributive sexism? In short, was *Casey*, as it relates to paternal notification, wrongly decided?

The remainder of this paper proposes a constitutionally balanced regime for paternal pre-abortion notification, proffers arguments in support of that proposal, and entertains likely criticisms of the proposal.

Though *Casey* would seem to have slammed the constitutional door on paternal notification, that door will not stay latched. Men will force it open. "No coffins have been nailed shut; no bones have been picked clean. Unfortunately for those whom the law affects, the issue of paternal rights is alive and well, and unresolved."[56]

A PROPOSAL

The paternal notification and comment regime advocated in this paper follows.[57]

A. The anticipatory father[58] of any fetus is constitutionally entitled to notice of and opportunity to express his preferences concerning a woman's pregnancy in the first six months of that pregnancy.[59]

B. Proof of such notice and paternal comment shall consist in a written statement from the anticipatory mother that the anticipatory father has been notified and his preferences concerning the pregnancy have been understood and considered. This statement must become a permanent part of the anticipatory mother's medical records, and must antedate an abortion procedure by twenty-four hours. The statement need not be notarized. Doctor-patient privilege shall not prevent discovery of this document in any cause of action described below.[60]

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[56]Sherain, *supra* n.54, at 1033. It seems to this author none of the parties to the pregnancy decision debates are likely to make an accommodating peace any time soon. Each derides all other contestants, echoing words Plato put in Socrates' mouth, "[I]t is not easy to rid you of great prejudices in a short time." PLATO, APOLOGIA 131 (The Modern Library, date of publication unknown) (B. Jowett, translator).

[57]This proposal borrows significantly from the Pennsylvania Abortion Control Act of 1982, § 3209 (Spousal Notice), that was struck down by Casey.

[58]This proposal expands the class of anticipatory fathers for whom notification is required from husbands only (as in the Pennsylvania Abortion Control Act) to all fathers, regardless of marital status. Justice O'Connor criticized the position of Attorney General Ernest Preate, Jr., in his oral defense of Pennsylvania's position in Casey, in that the Pennsylvania statute addressed only husbands, when the State's interest lay in protecting the unborn child's life. STEPHANIE GUITTON AND PETER IRONS, MAY IT PLEASE THE COURT: ARGUMENTS ON ABORTION 192 (1995).

[59]Section A reverses the result in Casey, 505 U.S. 833 (1992). Also, the proposal affects not only decisions to abort, but also decisions to deliver.

[60]*See* FED. R. EVID. 501. Note that no branch of the government is involved, within the framework of this paper's proposal, before the event of abortion or childbirth. This structure was chosen for several reasons. First, an anticipatory mother, if she requires an abortion (even for unjustified reasons), should be able to acquire one. Pregnancy, birth, and the early childrearing years often place a disproportionate burden on mothers. The proposal attempts to accommodate the unequal burden of the early years. (It should be noted here, that as time passes, the disproportionate burden usually passes from the mother to the father, as the family's needs become less a consuming time commitment and more then need of large amounts of money. *Contra* Czapanskiy, *supra* n.39, at 1432-33 n.59. Ms. Czapanskiy seems to have confused the legal requirement of financial child support obligations equalized between father and mother with how child support is in fact allocated. In broken families, generally, fathers pay and mothers don't. Ms. Czapanskiy's own statistics show this. *Id.* at 1435.) Second, commending the decisional process to a judicial proceeding may be an exercise in futility. Gestation waits for no court. Assuming consistent judicial promptness would be folly. Last, there is the issue of injunctions. Were a woman's decision to be overruled by a court, what would the court do to enforce its judgment? Would the court

C. An anticipatory mother can substitute for the written statement of notice and consideration of paternal pregnancy concerns: 1) a statement that the anticipatory father, after diligent search, cannot be found, 2) a statement that the anticipatory father, upon notification and comment, would threaten her well-being or that of her children, or 3) a statement that the pregnancy resulted from a sexual assault by the anticipatory father which has been reported to law enforcement agency with jurisdiction over the matter. Any alternative statement must become a permanent part of the anticipatory mother's medical records, and must antedate an abortion procedure by twenty-four hours. The statement need not be notarized. An objective "reasonable person" standard shall be employed by any court evaluating the good faith of an alternative statement.[61] Doctor-patient privilege shall not prevent discovery of this document in any cause of action described below.

D. Anticipatory mothers must give informed consent to any abortion or birth procedure. Informed consent must include a discussion with the anticipatory mother's medical professional of her paternal notification and comment statement.[62]

E. Violation of the father's constitutional right to paternal notice and comment concerning a woman's pregnancy in the first six months of that pregnancy gives rise to one of two causes of action: a) in the event of unwanted abortion, a cause of action in tort for damages, to include both consequential (including intentional infliction of emotional distress) and punitive damages, or b) in the event of unwanted birth, a cause of action for termination of paternal parental rights and obligations. In either cause of action, the burden of proof shall be upon the woman who failed to notify and consider the anticipatory father's concerns regarding her pregnancy. Her burden of proof shall be clear and convincing.[63]

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throw the woman in jail to prevent her seeking an illegal abortion? What issues of involuntary servitude does this plan raise? If she refused a court-ordered abortion, would the court strap the anticipatory mother into stirrups and vacuum out the fetus? Courts have been reticent to order invasive surgeries, even in the criminal context. *See* Winston v. Lee, 470 U.S. 753 (1985) (refusing to authorize involuntary surgical removal of a bullet lodged in the defendant's chest, allegedly implanted by gunfire of the armed shopkeeper whom the defendant assaulted). *See* Sherain, *supra* n.54, at 489-91.

See Planned Parenthood v. Board of Medical Review, 598 F. Supp. 625 (1984) (considering a Rhode Island spousal notification statute in which the doctor, not the mother, is required to notify the husband, if possible (with long list of exceptions)).

The Massachusetts Supreme Court said:

> Except in cases involving divorce or separation, our law has not in general undertaken to resolve the many delicate questions inherent in the marriage relationship. We would not order either a husband or a wife to do what is necessary to conceive a child or to prevent conception, any more than we would order either party to do what is necessary to make the other happy. We think the same considerations prevent us from forbidding the wife to do what is necessary to bring about or to prevent birth, at least before the fetus is viable and in the absence of any danger to maternal life or health. Some things must be left to private agreement.

Doe v. Doe, 314 N.E.2d 128, 132 (Mass. Sup. Ct. 1974). *See* Armstrong v. Manzo, 380 U.S. 545 (1965).

[61]This requirement helps reduce the possibility of irrational subjectivity or self-serving rationalization on the part of the anticipatory mother. *See* discussion *supra* n.4.

[62]The informed consent provision of the Pennsylvania Abortion Control Act of 1982 was upheld by the Casey Court. *Casey*, *supra* n.9, at 881-887. No woman's consent to a procedure aborting a fetus can be informed where the process involves no consideration of the wishes of the fetus' father.

[63]Some of this provision is indebted to Kapp, *supra* n.3.

F. In states where relevant, violation of the father's constitutional right to paternal notice and comment concerning a woman's pregnancy in the first six months of that pregnancy shall constitute fault grounds for divorce.[64]

G. Any medical professional supervising an anticipatory mother's abortion or delivery, who fails, at least twenty-four hours prior to that event, to discuss with the anticipatory mother her paternal notification and comment statement, as required for the anticipatory mother's informed consent, shall be liable to the anticipatory father in tort for consequential and punitive damages, regardless whether the medical professional would be liable in tort to the mother.[65]

H. Any abortion or delivery may be performed by a woman's physician without notification of and comment from the anticipatory father in cases of medical emergency. Neither the anticipatory mother nor her physician shall be liable for an anticipatory father's damages, where emergency abortion or delivery were required. The physician shall certify in writing the nature of the medical emergency the anticipatory mother suffered, and append all relevant medical tests and analysis supportive of the claim of medical emergency. Doctor-patient privilege shall not prevent discovery of this physician certification of medical emergency in any cause of action described above.

SIX ARGUMENTS

Six arguments follow, each of which supports adoption of this proposal as the rule governing notification of and comment by anticipatory fathers prior to an anticipatory mother's abortion or delivery of their fetus

A. THE SUBSTANTIVE DUE PROCESS ARGUMENT

Anticipatory fathers have a substantive due process right to notification of and comment upon the anticipatory mother's decision to abort or deliver.

1. Substantive Due Process Generally

In substantive due process, courts stretch the commodious indeterminacy of the Due Process Clauses[66] to inject hitherto unexplicit "constitutional" rights into the body of American law.[67] Substantive due process decisions, especially those pronounced by the

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[64]See Poe v. Gerstein, 517 F.2d 78 (5th Cir. 1974), *aff'd mem. sub nom.* Gerstein v. Coe, 428 U.S. 901 (1976).

[65]Section G reverses the result in Herko v. Uviller, 114 N.Y.S.2d 618 (1952).

[66]The Fifth Amendment states, in pertinent part:

> No person shall be held to answer for a capital, or otherwise infamous crime, . . . nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law."

U.S. CONST. amend. V.

The Fourteenth Amendment states, in pertinent part: "No State shall . . . deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV, § 1.

[67]Stefanie Black characterizes the High Court's substantive due process decisions as "constitutional embroidery," and offers a most helpful overview of the Court's substantive due process decisions as they pertain to paternal rights. Stefanie Lee Black, *Competing Interests in the Fetus: A Look*

United States Supreme Court, raise questions concerning the role of courts in American society and invariably generate controversy.[68]

Rights articulated in a case or controversy receive constitutional protection, under substantive due process, if they are among those "implicit in the concept of ordered liberty"[69] and are "fundamental principles of liberty and justice which lie at the base of all of our civil and political institutions."[70]

2. The Right to Parent

Some among the various substantive due process rights "discovered" by the United States Supreme Court in the verbal paucity of the Due Process Clauses bear on the issue of paternal rights in pregnancy determinations.

In *Meyer v. Nebraska*,[71] the Court reversed the conviction of a teacher who instructed his young pupils in the German language, in violation of a post-World War I anti-German statute. Justice McReynolds asserted:

> Without doubt, [liberty] denotes not merely freedom from bodily restraint, but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, *to marry, establish a home and bring up children*, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.[72]

Into Paternal Rights After Planned Parenthood v. Casey, 28 WAKE FOREST L. REV. 987, 994 (1993). Ms. Black cites Michael Perry, who defines substantive due process as "the judicial practice of constitutionalizing values that cannot fairly be inferred from the constitutional text, the structure of government ordained by the Constitution, or historical materials clarifying otherwise vague constitutional provisions" Michael J. Perry, *Substantive Due Process Revisited: Reflections on (and Beyond) Recent Cases*, 71 Nw. U. L. REV. 417, 419 (1976).

[68]Consider dicta from Justice White's majority opinion in Bowers:

> The Court is most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution. . . . There should be, therefore, great resistance to expand the substantive reach of [the Due Process Clauses], particularly if it requires redefining the category of rights deemed to be fundamental. Otherwise, the Judiciary necessarily takes to itself further authority to govern the country without express constitutional authority.

Bowers v. Hardwick, 478 U.S. 186, 194-95 (1986).

[69]Palko v. Connecticut, 302 U.S. 319, 325 (1937) (Cardozo, J.)

[70]*Id.* at 328 (quoting Hebert v. Louisiana, 272 U.S. 312, 316 (1926).)

[71]Meyer v. Nebraska, 262 U.S. 390 (1923). *See* Zablocki v. Redhail, 434 U.S. 374 (1978).

[72]*Id.* at 399 (emphasis added). As early as Meyer, the Court emphasized the rights of the individual, not that of the family considered collectively, in a manner not uncharacteristic of American individudalism. Consider, for contrast, the language of the Irish Constitution of 1937, which found in the family the "natural primary and fundamental unit group of Society, and a moral institution possessing inalienable and imprescriptable rights, antecedent and superior to all positive law." IRISH CONST. art. 41.

In this author's view, siting some rights in collectives so fundamental as the family could work salutary changes to American constitutional law. In the topic considered in this paper, we see the odd spectacle of the State intruding to pit the procreational interests of mother and father, lover and beloved, against one another. A man and woman marry. In so doing, they forsake many rights (privacy, independent finances, considering no person's opinion but one's own, choosing a location amenable to oneself alone, and so forth), some constitutional and others supra-constitutional, for the privilege and joys of being linked. They, to some degree leave raw individuality behind in favor of the subtleties of individuality-within-and-in-relation-to-communality. Even unmarried couples, with no permanent commitments, share, in some fleeting fashion, the communality typified in healthy marriages. Only

In *Pierce v. Society of Sisters*,[73] the Court struck down an Oregon law requiring children to attend public schools. The Court, speaking again through Justice McReynolds, recognized the "liberty of parents and guardians to direct the upbringing and education of children under their control. . . . The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations."[74]

Thus, a father (and mother as well) possess a liberty interest and fundamental right to marry, establish a home, and raise their children as they see fit, free from unwarranted State intrusion. A sphere of family autonomy exists; its center lies in the heart of parents-raising-children.[75]

3. The Right to Procreate or Not Procreate

In *Skinner v. Oklahoma ex rel. Williamson*,[76] the Court struck down Oklahoma's Habitual Criminal Sterilization Act, which provided for mandatory sterilization of three-time felons whose crimes involved moral turpitude. Justice Douglas' majority opinion asserted:

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slavish adherence to individuality-with-a-vengenance would rip the fetus conceptually from its natural home in the marriage context and treat it as a football passed between parents through the course of pregnancy--that father handing off to the mother in ejaculation, who runs broken-field through pregnancy, only to lateral repeatedly to one another to get across the red zone of infancy and the toddler years. The inadequacy of this conceptual framework is manifest, and a likely source of much of the parental antipathy surrounding the pregnancy decision brouhaha. Framing pregnancy discussions among disagreeing anticipatory parents in terms of marriage and family (not individuals), parenting (not biofunctions), children (not fetuses), sacrifice (not rights), and coping (not medical technologies) might well ameliorate some of the bloodletting.

An ambitious anticipatory father might characterize his interest in his fetus as his own interest in "life in the community," owed substantive due process constitutional protection. Other areas of law show comfort with multi-personal communal entities: property law (joint tenancies and tenancy by the entirety), or business law (partnership or corporations), for example. Such an argument is unlikely to succeed, given the (puzzling) thorough-going individualism of contemporary jurisprudence in the realm of family relations. That jurisprudence has lost touch with the fact that families, conceived broadly as voluntary associations of persons seeking communal identity, are the structural cornerstone of American society.

This writer realizes that this is wishful thinking, best relegated to a footnote. One is reminded of Justice Douglas' prudential opinion, expressed in Sierra Club v. Morton, 405 U.S. 727, 741 (1972), that, in environmental challenges, trees should have standing.

[73]Pierce v. Society of Sisters, 268 U.S. 510 (1925).

[74]*Id.* at 534-35. Friedrich Nietzsche, speaking of parental education, said: "Involuntarily, parents turn children into something similar to themselves--they call that 'education.' Deep in her heart no mother doubts that the child she has borne is her property; no father contests his own right to subject it to his concepts and valuations." Nietzsche, *supra* n.32, at 107.

[75]Meera Werth argues that this intense familial privacy itself urges that no paternal notification statute is proper: "In the final analysis, spousal notification should be regarded as a private judgment. In the absence of any consensus that spousal notification is beneficial, legislation mandating such notification should not override a woman's judgment." Werth, *supra* n.54, at 1151. This argument might persuade had the State not made a woman's abortion a public matter, were the issue still a private one between anticipatory mothers and fathers alone. But in each abortion the State stands by the woman's side, trampling the anticipatory father's rights. One cannot characterize this circumstance as "private judgment."

Justice Scalia, speaking for the plurality in Michael H., *supra* n.47, argued that the lack of traditional support for the relationship between an unwed father and the child of an adulterous union within a marriage precludes the possibility of a liberty interest between the father and his child.

See Williams v. Reiner, 2 Cal. Rptr. 2d 472, 484 (Cal.App. 2 dist. 1991) (containing an extensive list of case citations supporting the proposition that parental rights are fundamentally protected).

[76]Skinner v. Oklahoma ex rel. Williamson, 316 U.S. 535 (1942) (emphasis added) (hereinafter Skinner). See Axelrod, *supra* n.40, at 702 (offering analysis of Skinner).

> We are dealing here with legislation which involves one of the basic civil rights of man. *Marriage and procreation are fundamental to the very existence and survival of the race.* [There] is no redemption for the individual whom the law touches. Any experiment which the State conducts is to his irreparable injury. He is forever deprived of a *basic liberty.*[77]

Procreation shares both the character of a liberty interest and a fundamental right, the essential criteria for substantive due process protections.

The Court, in *Griswold v. Connecticut*,[78] considered the opposite proposition. Do married adults have a right to contraceive,[79] that is, to employ doctor-prescribed drugs or devices to copulate without conception? The Court answered affirmatively. Reaffirming the *Pierce* and *Meyers* cases, Justice Douglas coined the "penumbra" language, now famous, to describe the right of privacy, which, in his view, derives from the First, Third, Fourth, Fifth, and Ninth Amendments.

> [S]pecific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance. . . . Various guarantees create zones of privacy. . . . The present case [ ] concerns a relationship lying within the zone of privacy created by several fundamental constitutional guarantees. And it concerns a law which, in forbidding the use of contraceptives rather than regulating their manufacture or sale, seeks to achieve its goals by means having a maximum destructive impact upon that relationship. Such a law cannot stand in light of the familiar principle [that] "governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms."[80]

Married persons have a right not to procreate.

The Court went on to enunciate the standard of strict scrutiny review for violations of fundamental personal liberties. The Court said, "'Where there is a significant encroachment upon personal liberty, the State may prevail only upon showing a subordinating interest which is compelling.' The law must be shown 'necessary, and not merely rationally related, to the accomplishment of a permissible state policy.'"[81]

In *Eisenstadt v. Baird*,[82] the Court expanded *Griswold* when it struck down a law banning distribution of contraceptive foam to an unmarried person. Attention diverted from the fruit and quality of a marital relationship to a focus on unmarried individuals. The Court opined:

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[77] *Id.* at 541 (emphasis added). One would be remiss if he failed to mention at this juncture Buck v. Bell, 274 U.S. 200 (1927), the rationale of which Skinner undercut. In the Bell decision, the Court upheld a Virginia statute mandating involuntary sterilization of institutionalized mental defectives. Justice Holmes wrote: "It is better for the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind. . . . Three generations of imbeciles are enough." *Id.* at 205.

[78] Griswold v. Connecticut, 318 U.S. 479 (1965).

[79] "Contraceive" is a coinage not found in WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE UNABRIDGED 494 (1986). The term unites the familiar words "contraception" and "conceive."

[80] *Id.* at 484.

[81] *Id.* at 497.

[82] Eisenstadt v. Baird, 405 U.S. 438 (1972) (hereinafter Eisenstadt).

> It is true that in Griswold the right of privacy in question inhered in the marital relationship. Yet the marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional make-up. If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.[83]

Finally, in *Stanley v. Georgia*,[84] the Court struck down a statute criminalizing possession of obscene material in one's home. The statute violated the Court's broad concept of privacy, which it expressed as the fundamental "right to be free, except in very limited circumstances, from unwanted governmental intrusions into one's privacy."[85] *Stanley* constitutionally authorizes the third of the three sexual/reproductive schema available: sex with relationship and offspring (procreation), sex with relationship without offspring (contraception), and sex without relationship or offspring (masturbation).

Griswold, *Eisenstadt*, and *Stanley*, considered together, stand for the proposition that the State may not prohibit private sexual and reproductive choices.[86]

4. The Right of Intimate Association

In *Roberts v. United States Jaycees*,[87] the Court recognized a substantive due process right to enter into and maintain certain close personal relationships. Striking down practices of the United States Jaycees organization, which limited full voting membership to men between the ages of eighteen and thirty-five, the Court said:

> [C]hoices to enter into and maintain certain intimate human relationships must be secured against undue intrusion by the State because of the role of such relationships in safeguarding the individual freedom that is central to our constitutional scheme. In this respect, the freedom of association receives protection as a fundamental element of personal liberty.[88]

The Court defined "intimate association" by listing the attributes of "relative smallness, a high degree of selectivity in decisions to begin and maintain the affiliation, and seclusion from others in critical aspects of the relationship."[89] The Court further noted that "certain kinds of personal bonds have played a critical role in the culture and traditions of the Nation by cultivating and transmitting shared ideals and belief; they thereby foster diversity and act as critical buffers between the individual and the power of the state."[90]

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[83] *Id.* at 453.

[84] Stanley v. Georgia, 394 U.S. 557 (1969).

[85] *Id.* at 564.

[86] The glaring exception to this rule lies in Bowers v. Hardwick, 478 U.S. 186 (1986), which upheld Georgia's sodomy law forbidding any adult male from performing oral or anal intercourse with another male.

[87] Roberts v. United States Jaycees, 468 U.S. 609 (1984). This right of intimate association is further developed in Board of Directors of Rotary Intern. v. Rotary Club, 481 U.S. 537 (1987) (holding California's antidiscrimination law was violated by local Rotary clubs' exclusion of women, and that the California statute did not deny the Rotary members their right of freedom of intimate, private association or freedom of expressive association).

[88] *Id.* at 617-18.

[89] *Id.* at 620.

[90] *Id.* at 618-19.

Critically, the Court identified the purpose served by this right of intimate association. Justice Brennan, after citing *Pierce* and *Meyer*, said:

> [T]he constitutional shelter afforded such [intimate and personal] relationships reflects the realization that individuals draw much of their emotional enrichment from close ties with others. Protecting these relationships from unwarranted state interference therefore safeguards *the ability independently to define one's identity* that is central to any concept of liberty.[91]

Prior to *Roe*, *Danforth*, and *Casey*, then, an anticipatory father possessed fundamental rights to marry, make a home, procreate, contraceive, entertain his private sexual interests, make friendships and build intimate associations of his liking, and independently define his personal identity. *Roe*, *Danforth*, and *Casey* extended these substantive due process rights, which create a zone of privacy into which the government may not lightly intrude. But the extension applied only to women. *Roe*, *Danforth*, and *Casey* lopped off several of these constitutional rights as they apply to men. After *Roe*, *Danforth*, and *Casey* a woman still holds intact all that rights acknowledged in *Meyer*, *Pierce*, *Skinner*, *Griswold*, *Eisenstadt*, *Stanley*, and *Roberts*. She requires no man's consent to exercise her constitutional rights. But for a man, the fundamental story line has changed. A woman's choice now intervenes. If that woman, the anticipatory mother of his fetus, chooses against his wishes, his constitutional rights are cut off. He may long to procreate, but be frustrated. He might desperately wish to avoid fatherhood, but he will have no say in the matter. His life's desire might be to build the unique intimacy that exists between a father and his children. But if his partner is skittish, his dream will crash. He may have, from earliest childhood, longed only to head a family. The anticipatory mother can demolish that identity.

The *Casey* Court held, "A husband has no enforceable right to require a wife to advise him before she exercises her personal choices."[92] Why is this preemption a female prerogative? Why does a wife have an enforceable right to require a husband to gain her consent before he can exercise his personal choices, guaranteed to him by the United States Constitution? A woman should have no such unilateral right, just as a man ought not to possess a veto over a woman's pregnancy. Howard Sherain put it:

> [J]ust as the mother has certain legal rights with regard to the abortion decision, so too does the father. Fundamental notions of equal protection compel the conclusion that if there is disagreement between father and mother with regard to the abortion decision, the decision of the mother should not be absolutely decisive.[93]

Today, however, the anticipatory mother's word is final. The United States Supreme Court stands by her side, slaying all challengers.[94] Some would say it is not so. Some

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[91] *Id.* at 619 (emphasis added).

[92] *Casey*, 505 U.S. at 898.

[93] Sherain, *supra* n.54, at 483.

[94] Andrea Sharrin argues that the Court's defense of a woman's right to abort her fetus, over the anticipatory father's objections, does not constitute "state action." Were judicial adjudications of disputes between husbands and wives concerning contemplated abortions state action, then all legally significant private actions considered by courts would be state action for purposes of constitutional analysis. Sharrin, *supra* n.4, at 72-73.

"State action" is required before a court can find a due process (or equal protection) violation. Two approaches suffice to implicate government involvement adequately for a finding of state action. First, is the *public function approach*, which finds state action when a private enterprise is essentially performing a

would say that the anticipatory father's rights are intact, but in waiting. There is some truth to this, but there is also some falsity to it. According the the Court, a father's rights, like the mother's rights, are his own to exercise. Women have justly fought to eliminate a paternal abortion veto. But the result has been not to eliminate the veto, but merely to transfer it between genders. Cannot an anticipatory father protest with each argument women mustered to declaim the requirement of paternal consent before abortion? Does not

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public function in a sufficiently state-like manner to warrant application of constitutional restrictions on the private actor. The classic example is Marsh v. Alabama, 326 U.S. 501 (1946), where a company town prohibited a person from distributing religious literature by charging him with trespass. Second, and most pertinent to the issues surrounding pregnancy determinations, is the *nexus approach.* If sufficient points of contact between the private actor and the state are found, then imposing constitutional restraints on the private actor is warranted, or, in the alternative, requiring the state to disentangle itself from the essentially private interactions is permitted. Shelley v. Kraemer is the classic case of nexus "state action." A 1911 Missouri restrictive covenant excluded Negro and Mongolian owners, mandating property sales only to Caucasians. Blacks who had purchased homes, despite the covenants, were sued. Chief Justice Vinson said:

> It is [ ] clear that restrictions on the right of occupancy of the sort sought to be created by the private agreements in these cases could not be squared with the requirements of the 14th Amendment if imposed by state statute or local ordinance. . . . State action, as that phrase is understood for the purposes of the 14th Amendment, refers to exertions of state power in all forms. And when the effect of that action is to deny rights subject to the protection of the 14th Amendment, it is the obligation of this Court to enforce the constitutional commands. We hold that in granting judicial enforcement of the restrictive agreements in these cases, the States have denied petitioners the equal protection of the laws and that, therefore, the action of the state courts cannot stand.

Shelley v. Kraemer, 334 U.S. 1, 11, 20 (1948). Nexus "state action" has been found in contacts as ephemeral as leasing space in a government-owned building to a restauranteur, Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961), or lending textbooks to segregated schools, Norwood v. Harrison, 413 U.S. 455 (1973).

Application to the questions under consideration is not difficult. If an anticipatory father and mother dispute their "relational contract" concerning its pregnancy determinations, courts will order the anticipatory father to desist. This is state action. Any argument to the contrary must take as its task explaining the spectacle of federal marshalls ringing abortion clinics as something other than a significant participation by the power of government. "The father's inability to enjoin the abortion of his unborn child denies him the opportunity to associate with his child. Thus the 'other values' of the potential relationship between the father and child would be extinguished as well. Allowing the mother to suppress the right with the approval of the state certainly should invoke scrutiny of the highest nature." Black, *supra* n.67, at 1008.

Courts employ a double standard with reference to "state action" in abortion decision-making. Where a father intervenes to prevent abortion, any action by the court constitutes state action. See Doe v. Smith, 527 N.E.2d 177, 178 (Ind. 1988) ("The trial court found that any issuance of an injunction and the possible invocation of the court's contempt power would sufficiently constitute state action, which was proscribed by *Danforth.*"). But when courts act to vindicate the mother's right to abort, no state action is implicated in the abrogation of the anticipatory father's rights.

Considered in light of the above, the legal doctrine of *parens patriae* takes on a curious cast. *Parens patriae* is "the principle that the state must care for those who cannot take care of themselves, such as minors who lack proper care and custody from their parents." BLACK'S LAW DICTIONARY 1114 (6th ed. 1990). The doctrine has been interpreted to mean that both mother's and father's rights as a child's natural guardian are subject to (and derivative from) the state's parental powers. 59 Am. Jur. 2d *Parent and Child* §11 (1996). Juxtaposed with the state action doctrine, one faces the argument that, under *parens patriae*, parental copulation is state action, spanking is state action, child abuse is state action, and family religious instruction is state action. This, of course, is ludicrous, but it serves to point up the incompatibility of the *parens patriae* doctrine with a government founded in social contract theory. The *parens patriae* doctrine misconceives the place of government under the constitutional systems, state and federal, of the United States, and betrays its English common law regal origins. People, both logically and historically, precede the State. Governments exist by their consent. All government power derives from that consent. Parents (and non-parents) make the State. The State does not make parents.

the rationale that concluded the State has a minimal interest, relative to the anticipatory mother, in her pre-viable fetus[95] likewise exclude the state from interference with the anticipatory father's rights in that same fetus during the period before viability? Just as the State should not impose non-abortion, so too the State should not impose non-notification-and-comment.

Nevertheless, after *Roe, Danforth*, and *Casey*, when the mother chooses, the matter is ended. An anticipatory father has no recourse. "[A] right is best measured by effects in life. Absence of remedy is absence of right. Defect of remedy is defect of right."[96] The United States Supreme Court has fatally impaired an anticipatory father's rights with respect to his unborn children.

B. THE PROCEDURAL DUE PROCESS ARGUMENT

Anticipatory fathers have a procedural due process right to notification of and comment upon the anticipatory mother's decision to abort or deliver.

Procedural due process concerns the more straight-forward meaning of the Due Process Clauses. What procedures are due a person before the government can deprive her of life, liberty, or property?[97] When are those procedures due? The Court has held that where the individual has a legitimate claim of entitlement to an interest,[98] some process is due before the State can deprive the individual of that entitlement. Exactly what process that might be, and when it is due, is a matter of balancing various interests. The Court, in *Mathews v. Eldridge*,[99] held that:

> [D]ue process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.[100]

Mathews v. Eldridge, after balancing these three factors, held that pretermination evidentiary hearings are not required with respect to disability benefits.

What process, under the *Mathews v. Eldridge* factors, is due an anticipatory father before he can be deprived of the many substantive due process constitutional rights in his unborn child which might be abrogated by the anticipatory mother's decision to abort or

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[95]Roe, 410 U.S. 113 (1973).

[96]Llewellyn, *supra* n.5, at 94.

[97]The phrase "life, liberty, or property" has, in an influential article by Monaghan, *"Of 'Liberty' and 'Property'*," 62 CORNELL L. REV. 405 (1977), been broadly interpreted as a integrated concept encompassing all interests of value to a person.

Equal protection arguments are kin to substantive due process arguments. They sometimes occur in tandem, and are sometimes conflated. When the Court perceives that substantive due process arguments are out of vogue, it sometimes resorts to "stealth Lochnerizing" by making its argument under the rubric of equal protection. *See* Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1 (1972).

[98]Board of Regents v. Roth, 408 U.S. 564 (1972) (hereinafter Roth). See Perry v. Sinderman, 408 U.S. 593 (1972) (Roth's companion case, completing a consideration of the phrase "legitimate claim of entitlement.").

[99]Mathews v. Eldridge, 424 U.S. 319 (1976).

[100]*Id.* at 334.

deliver? First, the Court has acknowledged that the anticipatory father's interests in this circumstance are compelling. Even the *Casey* Court acknowledged the husband's "deep and proper concern and interest . . . in his wife's pregnancy and in the growth and development of the fetus she is carrying."[101] Second, since the anticipatory father receives no process whatsoever, the risk of erroneous deprivation and the expected value of some procedural protections for the father's interests are enormous. Finally, the fiscal and administrative burdens imposed would not be inordinate.[102] Potential burdens are lessened, under the regime proposed in this paper, in that no pre-birth or pre-abortion process is sought. Only those truly aggrieved will bring suit because their remedy consists not in a child, but rather in economic relief and severance of relationship with the offending anticipatory mother. To the injured, these remedies will be a less-than-fulfilling vindication.

Despite clear merit under the *Mathews v. Eldridge* factors, an anticipatory father in fact receives no process whatsoever in pregnancy determination disputes. The Court has simply swept the anticipatory father's constitutional rights under the pro-choice rug. Howard Sherain complained, long before *Casey*, "[I]t would be ironic to forbid suspension of the father's driver's license without a hearing, forbid discontinuance of his welfare checks without a hearing, or forbid his expulsion from college without a hearing, and yet deprive him of a son or daughter without a hearing."[103] Yet this is exactly what the *Casey* Court has done.

C. THE EQUAL PROTECTION ARGUMENT

Anticipatory fathers have an equal protection right to notification of and comment upon the anticipatory mother's decision to abort or deliver.

The Equal Protection Clause requires that no state deny to any person within its jurisdiction the equal protection of the laws.[104] Three levels of scrutiny have evolved: strict, intermediate,and rational basis. Under strict scrutiny, any state action impinging a constitutionally protected right must be necessary to achieve a compelling state interest.[105] Under intermediate review, any state action impinging a constitutionally protected right must be substantially related to an important state interest.[106] State action based on classifications involving race or ethnicity or alienage,[107] or state action that impinges upon fundamental rights, receive strict scrutiny.[108] State action based on classifications

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[101] *Casey*, 505 U.S. at 895.

[102] Given that the Court has found some procedure necessary for interests that are, by comparison, unimportant (jobs, school suspensions, educational corporal punishment, prisoner transfers to mental treatment facilities), abrogation of an anticipatory father's constitutional rights with respect to his unborn child must merit some procedural protection.

[103] Sherain, *supra* n.53, at 488.

[104] U.S. CONST. amend. XIV, § 1. Though the Equal Protection Clause applies only to the actions of state governments, the federal government is similarly bound by the Fifth Amendment. U.S. CONST. amend. V. *See* Davis v. Passman, 442 U.S. 228 (1979).

[105] *See* San Antonio School Dist. v. Rodriguez, 411 U.S. 1 (1973).

[106] *See* Craig v. Boren, 429 U.S. 190 (1976).

[107] Generally, classifications based on alienage are subject to strict scrutiny only when imposed by state governments. The federal government, by virtue of its constitutional powers, controls access to the United States by citizens of foreign nations, and can constitutionally distinguish among such.

[108] The only case in which the U.S. Supreme Court has upheld a statute challenged under equal protection strict scrutiny is Korematsu v. United States, 232 U.S. 214 (1944).

involving gender or illegitimacy receive intermediate scrutiny.[109] State action based on other classifications, especially when the actions concern economic or social regulations, are given deferential rational basis review. Such action must be rationally related to a permissible governmental interest.[110]

Anticipatory fathers have fundamental constitutional interests in the fate of their unborn children.[111] State action impinging those rights merits strict scrutiny review. In the alternative, in that the *Casey* regime distinguishes between those to whom it extends rights and those from whom it withholds rights on the basis of gender, state action impinging an anticipatory father's rights should receive intermediate scrutiny. What level of scrutiny does the Court employ in evaluating the abrogation of an anticipatory father's rights entailed by its pregnancy decision regime? None. Nowhere in the portion of the *Casey* decision which strikes down Pennsylvania's spousal notification statute does the Court consider the equal protection claim of anticipatory fathers. Summarily and utterly without discussion, the Court disposes of paternal rights, citing *Danforth*, "[A]s between [husband and wife], the balance weighs in her favor."[112]

1. "Balancing" in Casey

What is this "balancing" to which the *Casey* Court refers? Pages describe possible concerns pertinent to the anticipatory mother; the Court dispatches the anticipatory father's interests in a single brief citation from *Danforth.*[113] The Court's "balancing" begs criticism.

First, of what relevance is *Danforth* in this context? *Danforth* struck down a paternal abortion-consent requirement, which amounted to an anticipatory father's abortion veto. Certainly, balanced against a woman's interest in controlling her own body and future, such a veto is inappropriate, as the *Casey* Court notes with a tone of misplaced finality.[114] The *Danforth* Court itself said:

> The [spousal abortion consent] section does much more than insure that the husband participate in the decision whether his wife should have an abortion. The State, instead, has determined that the husband's interest in continuing the pregnancy of his wife always outweighs any interest on her part in terminating it irrespective of the condition of their marriage. The

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[109] *See* Clark v. Jeter, 486 U.S. 456 (1988).

[110] *See* Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432 (1985).

[111] *See* discussion *supra* The Substantive Due Process Argument.

[112] *Casey*, 505 U.S. at 896. Of the *Danforth* Court's sentiment, Robert Burt said, "The Court's apparent position that the mother always has the superior claim and interest, no matter how much the father might show that her burden in childbearing would be less than his burden in losing his child, appears to me an invidious discrimination." Black, *supra* n.67, at 1029 (citing Robert A. Burt, *The Constitution of the Family*, 1979 SUP. CT. REV. 329, 394.).

Mention should be made of Chief Justice Rehnquist's view, expressed in his dissent to Casey. The Chief Justice believes that abortion may not be appropriately considered as one among many constitutional rights, considering the drastic impact exercise of the right has on others. Abortion is *sui generis.* Memorably, he says, "To look 'at the act which is assertedly the subject of a liberty interest in isolation from its effect upon other people [is] like inquiring whether there is a liberty interest in firing a gun where the case at hand happens to involve its discharge into another person's body." *Casey*, 505 U.S. at 940.

Lower courts have in fact balanced anticipatory fathers' equal protection rights against those of the anticipatory mother. See People in Interest of S.P.B., 651 P.2d 1213, 1216 (Colo. 1982).

[113] *Casey*, 505 U.S. at 895. ("[A] husband has a 'deep and proper concern and interest . . .in his wife's pregnancy and in the growth and development of the fetus she is carrying.'")

[114] *Id.* at 896. Justice Rehnquist notes that Danforth should not control the Casey analysis. *Id.* at 972.

> State, accordingly has granted him the right to prevent unilaterally, and for whatever reason, the effectuation of his wife's and her physician's decision to terminate her pregnancy.[115]

This *Danforth* footnote is sandwiched between two passages, the first of which expresses concern about the possible deleterious effects an anticipatory mother's unilateral choice of abortion, and the second of which advocates marital harmony and mutual decision-making.[116] The rationale of *Danforth* does not support the use to which the *Casey* Court puts it. *Danforth* vindicates a woman's right to a voice in the pregnancy decision. *Casey* utilizes *Danforth* to complete the demolition of a man's correlative right to a voice in that decision. The rationale of *Danforth* supports the sort of proposal countenanced in this paper, not the result of the *Casey* Court 's shoehorning.

Second, the High Court does balance competing constitutional rights against those of the anticipatory mother in pregnancy decisions, but ignores the anticipatory father. *Roe* itself is an elaborate scales on which the state's interest in maternal health and fetal life is weighed against a woman's interest in control of her body and future. *Bellotti* balanced an unmarried minor's interests against those of her parents.[117] *Casey* again performed this comparison, with opposite results.[118] *Casey* itself extends the State's interest in fetal life to the moment of conception, thereby reducing the relative valuation of the anticipatory mother's interests.[119] Lower courts have balanced the fetus' own interests in life and health against maternal interests, finding for the fetus.[120] The *Casey* Court says:

> *What is at stake is the woman's right to make the ultimate decision, not a right to be insulated from all others in doing so. Regulations which do no more than create a structural mechanism by which the State, or the parent or guardian of a minor, may express profound respect for the life of the unborn are permitted, if they are not a substantial obstacles to the woman's exercise of the right to choose.* . . . Unless it has that effect on her right of choice, a state measure designed to persuade her to choose childbirth over abortion will be upheld if reasonably related to that goal. Regulations designed to foster the health of a woman seeking an abortion are valid if they do not constitute an undue burden.[121]

It seems every interested party has a right to speak to the pregnant woman, except that person most intimately interested--the father of her fetus. From what source springs this studied antipathy to paternal interests? An anticipatory father's rights can be listed, as this paper has done. They could be balanced against the anticipatory mother's interests, as this paper has proposed.[122] The *Casey* Court dismisses the father with a shrug of its collective

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[115]*Danforth*, 428 U.S. at 70 n.11.

[116]*Id.* at 70-71.

[117]Bellotti v. Baird, 443 U.S. 622 (1979)(also known as Bellotti II). *See* H.L. v. Matheson, 450 U.S. 398 (1981); Ohio v. Akron Center, 497 U.S. 502 (1990).

[118]*Casey*, 505 U.S. at 898.

[119]*Id.* at 876.

[120]MacKinnon, *supra* n.38, at 1309-10 n.130 (citing cases in which the fetus has been determined to be a "person" for purposes of vehicular homicide, wrongful death liability, custody by Department of Human Resources, and prosecution of the anticipatory mothers for neglect in exposing their fetuses to harmful substances).

[121]*Casey*, 505 U.S. at 877 (emphasis added).

[122]To this proposition, Andrea Sharrin, one of the more vehement among the feminist commentators commenting on this paper's topic, dissents. She says of any paternal notification scheme, "The result would be a total deprivation of the right to choose an abortion under the guise of a balancing

shoulders, arguing that the contest of parental rights in the fetus is an all-or-nothing proposition that the anticipatory mother must win.[123] This paper's proposal demonstrates that finer distinctions can supersede the all-or-nothing approach in order to recognize and protect interests of both anticipatory mother *and* father.

Third, the *Casey* Court in fact balances the anticipatory mother's and father's rights against one another--but only after birth. The Court says:

> If this case concerned a State's ability to require the mother to notify the father before taking some action with respect to a living child raised by both, therefore, it would be reasonable to conclude as a general matter that the father's interest in the welfare of the child and the mother's interest are equal.[124]

Why does the Court refuse all balancing of paternal interests during gestation? The *Casey* Court says, "The unfortunate yet persisting conditions [of male domestic abuse] will mean that in a large fraction of the cases in which [the spousal notification statute] is relevant, it will operate as a substantial obstacle to a woman's choice to undergo an abortion. It is an undue burden, and therefore invalid."[125] The Court concedes that the statute operates upon only one percent of women.[126] Therefore, the Court's "balancing" takes the following shape: the interests of less than one percent of pregnant women outweigh the paternal interests, however conceived, of all anticipatory fathers. The equity of this "balancing" is elusive.

Further, the Court, by its rule in *Casey*, tells an improbable tale of winking rights. The male possesses his panoply of substantive due process constitutional rights in his procreative future and personal identity. He ejaculates, and those rights, as they pertain to that particular aggregation of wriggling sperm, vanish into thin air, simply wink out of existence. Then, miraculously nine months later, only an instant after the birth of his son or daughter, his rights again pop up, as though from another dimension, full and potent. If, one the other hand, the anticipatory mother chose abortion, the anticipatory father's rights are obliterated.

Fourth, the method by which the United States Supreme Court has balanced countervailing interests against the anticipatory mother's interests is defective. Each competing interest is sequestered, considered separately without aggregation. The mother's interests are measured against first one, then another, then another competing right. Fetal life,[127] paternal substantive due process rights, parental rights, governmental interests, even her doctor's interest: each is considered, but the anticipatory mother's interests are never held in the scales against the cumulative weight of contrary interests. It

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test in violation of the privacy concepts of Roe and Danforth." Sharrin, *supra* n.4, at 1404. Ms. Sharrin, in the company of the Casey majority, proffers Roe and Danforth for propositions they do not support. She hyperbolizes, "Danforth did balance the interests of the potential father and found that they can never prevail." *Id.* at 1391 (citing Danforth, 428 U.S. at 71,90 (Stewart, J., concurring)).

The Fifth Circuit did just such a balancing of cumulated interests in considering a paternal notification statute, which it found could be constitutional under certain conditions.. Scheinberg v. Smith, 659 F.2d 476 (5th Cir. 1981), *on remand*, Scheinberg v. Smith, 550 F. Supp. 1112 (S.D. Fla. 1982).

See Shore, *Marital Secrets--The Emerging Issue of Abortion Spousal Notification Laws*, 3 J. LEGAL MED. 461 (1982) (contending that the U.S. Supreme Court applies strict scrutiny in considering paternal interests, and so finds no need to balance interests).

[123] *Casey*, 505 U.S. at 896.

[124] *Id.*

[125] *Id.*

[126] *Id.* at 895.

[127] According to Roe, states may still criminalize abortion after fetal viability. Roe, 410 U.S. at 164-645.

seems likely that the sum of all is greater than the weight of any one interest, and that measured against the whole, an anticipatory mother's rights might be found less considerable than at first imagined.[128]

Fifth, the *Casey* Court actually demoted the right to an abortion. *Roe* called abortion a fundamental right and subjected every state impediment affecting abortion to strict scrutiny.[129] *Casey* called abortion a protected liberty, and adopted a novel lower standard of review, undue burden.[130]

> The reclassification of this right surely gives the court more leeway in their determination of prevailing rights. In a challenge to a state regulation, courts will not scrutinize the statute strictly, but will apply a lower standard of review. In a suit for an injunction, the presumption that the mother's rights take precedence over the father's should give way to a true balancing of legitimate interests.[131]

2. Casey's *Reasoning*

The *Casey* Court refuses to weigh paternal interests, despite the fundamental rights and quasi-suspect classification involved. What rationale does the Court find so inexorable as to compel this abjectly asymmetrical approach?

a. Pregnancy Servitude

The Court adamantly rejects the common law view of woman's role in the family.[132] Basic to this revulsion is the fear that male authority will be exercised over the anticipatory mother.[133] The Court says:

> The husband's interest in the life of the child his wife is carrying does not permit the State to empower him with this troubling degree of authority over his wife. . . . A State may not give to a man the kind of dominion over his wife that parents exercise over their children.[134]

Commentators have likened a pregnancy, carried to term after an anticipatory father's entreaty, to slavery.[135] Pregnancy servitude, according to this argument, is involuntary,[136] and therefore violates the Thirteenth Amendment, which prohibits slavery and applies to the actions of individual citizens (here, anticipatory fathers), without regard to state action.[137]

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[128]Black, supra n.67, at 1021. Using the Court's methodology, one might prove, for example, that an elephant, a heavy animal indeed, weighs a great deal more than a billion rabbits, a small animal indeed.

[129]*Roe*, 410 U.S. at 152-53.

[130]*Casey*, 505 U.S. at 876.

[131]Black, supra n.67, at 1025.

[132]*Casey*, 505 U.S. at 896-97. *See* discussion *supra* at The Problem in Detail, B.3.

[133]*Id.* at 898.

[134]*Id.*

[135]Axelrod, *supra* n.40, at 703 n.81. *See* discussion *supra* n.40.

[136]This curious view of voluntariness would seem to consist in insulating the maternal decision-maker from all outside influences, especially that of the anticipatory father. It would seem to be born of an abiding conviction that male words portend evil, and female decision-makers cannot resist their siren allurements. This view, if placed in the mouth of a male speaker, would be castigated as wholly sexist.

[137]U.S. CONST. amend. XIII, § 1. *See* The Civil Rights Cases, 109 U.S. 3 (1883).

This argument would seem appropriate were the anticipatory father vested with the right to veto the anticipatory mother's choices. But the statute under consideration in *Casey* permitted no such veto, but rather empowered a fraction of anticipatory fathers[138] merely to know of their spouse's abortion intentions prior to the surgery. Neither Pennsylvania's spousal notification statute nor the proposal commended by this paper dwell in the reviled world view of the common law. Neither seeks control of wombs. In fact, paternal notification statutes seek quite the opposite: parity. At present, an anticipatory father has no say whatsoever in pregnancy decisions. The anticipatory mother, not he, possesses the veto. Anticipatory fathers plead with the Court that the State may not give to a woman the kind of dominion over her husband that parents exercise over their children. Fathers ask for a voice.

b. Domestic Violence

The *Casey* Court makes a great deal of the plague of violence that besets many American homes. It cites at length findings of the District Court concerning male-on-female violence, then proceeds to confirm those findings with an American Medical Association summary of recent domestic violence research. The Court notes that it is likely that the incidence of male-on-female violence is markedly underreported. The Court also dwells on psychological aspects of domestic abuse.[139]

Some men terrorize their women with violence, both threatened and actual. Undoubtedly, the incidence of such assault is greater than that reported to government officials. The entire matter is an American embarrassment and tragedy.

Nevertheless, questions must be asked of the Court's reasoning, and the use to which it puts the fact that some families are locked in a cycle of interpersonal violence.

First, how exactly does male-on-female domestic violence bear on the issue of Pennsylvania's spousal notification statute. The Court says, "The limited research that has been conducted with respect to notifying one's husband about an abortion, although involving samples too small to be representative, also supports the District Court's findings of fact."[140] So which is it? Is the research limited, and its samples too small to be representative? If so, then the research does not scientifically support the District Court's findings of fact because it is anecdotal and statistically insignificant. If, on the other hand, the research supports the findings of fact, as the Court asserts, then its samples cannot be too small to be representative. One must suspect that the Court's admission of research limitations is the more accurate assertion. Were it not so, why mention it? So, the Court admits that there is no scientific research to support its holding on spousal notification. The Court gives the impression of an adjudicator reaching for a preferred result.

The Court speculates that some women who must notify their spouses, under the Pennsylvania regime, will suffer domestic violence as a result. This may be so. But speculation about what might happen to a tiny minority of women hardly warrants wholesale abrogation of constitutional rights of (potentially) nearly half of the American public. Ernest Preate, Jr., Attorney General of Pennsylvania, said during oral argument of *Casey* before the United State Supreme Court:

> Now, petitioners have produced some testimony and made some argument, essentially through one expert, about battered wives. But the testimony was that some unknown number were rendered so helpless by their battering husbands that they were incapable of checking off a line on the form, the

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[138]The Pennsylvania Abortion Control Act paternal notification statute extended only to husbands, and said nothing of the unmarried anticipatory father.

[139]*Casey*, 505 U.S. at 891.

[140]*Id.* at 892.

spousal-notice form. We can agree that these women are indeed cruelly burdened, but they're not burdened by the statute, and that's the compelling point. They're not burdened by the statute, but by circumstance, and the tragic circumstance, of their lives. We're looking at the statute to see if the statute imposes the obstacle.[141]

Second, in pages of discussion on domestic violence, filled with statistics, not a single word or number is devoted to female-on-male violence. Some females assault and terrorize their males. Domestic violence is a broad street. Anybody can travel there. At some point, every class of persons seems to: fathers, mothers, children, grandparents, uncles, cousins. The shame of American domestic violence belongs to women as well as men. It is a national, not gender-linked, disgrace.

Third, the Court makes much of likely underreporting of the incidence of male-on-female domestic violence. Had it considered female-on-male violence, the extreme likelihood that such violence is yet more woefully underreported might have become part of the *Casey* deliberation. Such contemplations might have delivered the Court of its polemical rhetoric, and made possible a genuine balancing of the constitutional interests at issue.

Fourth, the Court includes psychological abuse among its catalogue of domestic horrors. Had it considered female-on-male violence, one of the possibilities it would have been forced to consider is that women may be more likely to be verbally abusive than their male counterparts. It is a truism that where men throw punches, women hurl insults. Whether facts bear out the proverb would depend on a thorough, balanced program of research, one not captive to any particular political agenda. The Court lacked such data in *Casey*.

Fifth, a woman's pregnancy decision itself might be a form of abuse. Surely, some women have aborted fetuses to spite and frustrate their partner's wishes. Undoubtedly, some women carry their fetuses to term savoring the fact that the father will be saddled with permanent financial obligations at which he bristles. The maternal pregnancy decision can itself be domestic abuse.

Casey's use of domestic violence facts, anecdotes, and statistics lacks objectivity and fails to support the proposition for which the Court cites them.[142]

c. The Slippery Slope

The *Casey* Court seems persuaded by a parade of horribles. It notes that paternal notification of anticipatory mother's pregnancy decisions might lead to required notification of use of post-fertilization contraceptives. Then reports of behavior risky to the fetus, such as drinking or smoking, might be required, followed by the specter of spousal notification prior to use of contraceptives or surgery affecting her reproductive capabilities. All this could slide into a spousal consent regime.[143]

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[141]Guitton, *supra* n.58, at 192.

[142]The Court also argued that embarrassment to women might follow upon notification of anticipatory fathers by "disclosure of the abortion to family and friends." *Casey*, 505 U.S. at 898. One must consider whether those family and friends themselves might not have a constitutional right to notification and comment concerning the anticipatory mother's pregnancy decisions. Far from being oppressive voices, they are parents and grandparents, intimates and loved ones, the very people who can comment profitably at the decisional juncture any anticipatory mother faces. Incomprehensibly, the Casey Court's intent seems to be to isolate anticipatory mothers from their social support systems at just the time when they require the most from those persons. This question of wider notification is beyond the scope of this paper, and will not be further developed. But it is a matter that deserves some consideration.

[143]*Casey*, 505 U.S. at 898.

Without doubt, many unhappy developments could follow upon virtually any decision the Court might make either for or against paternal notification. But should speculative hand-wringing about eventualities not properly before the Court be determinative of the question at hand?

3. Not Similarly Situated

The famous article of Tussman & tenBroek says of equal protection classifications, "A reasonable classification is one which includes all persons who are similarly situated with respect to the purpose of the [law]."[144]

Are the anticipatory mother and father "similarly situated" with respect to their fetus? The obvious first answer is no. The mother carries the fetus within her body. She is linked to it, not just emotionally, historically, and genetically, like the father, but also physically.[145] But that obvious first answer is less patent if one chooses a higher level of generality. There the anticipatory mother and father share an identical relation to the fetus. Each is its anticipatory parent, waiting out the gestational period with its frustrations and challenges, different hurdles for each parent, but occasioned by the same developing entity *in utero.*

Choosing a higher level of generality, in which the contested right is considered part of a more actively defended right, is common in the Court's precedents. In *Michael H.*, Justice Brennan defended the right of an unwed father, which considered narrowly received no protection whatsoever. He argued that the unmarried father's right was defensible when considered under the more general right to fatherhood.[146] In *Eisenstadt*, the right of unmarried couples to use contraception was protected under the penumbra of the right to privacy.[147] In *Roe*, the right to choose abortion was protected under the rubric of the right to privacy.[148]

Which framework is chosen will be determined by the impetus of the Court to uphold the right under examination, or to dispose of it. The *Casey* Court's predisposition is clear.

4. Conclusion

The *Casey* Court failed to consider the equal protection interests of the anticipatory father with respect to the anticipatory mother's pregnancy decision. The Court did so without considering at length the father's rights or balancing those interests fairly. The Court relied on suspect data, and employed them in a suspect manner. The Court creates an impression of a rush to affirm *Roe*, not to reconsider it. Insofar as *Casey* pertains to paternal notification, the Court erred. Justice Powell has said, "The guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color."[149] His words have no less force with respect to gender.

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[144]Tussman & tenBroek, *The Equal Protection of the Laws*, 37 CALIF. L. REV. 341 (1949).

[145]In *Michael M., supra* n.54, at 469, Justice Rehnquist wrote for a plurality in considering a California statute that criminalized statutory rape for minor males, but not minor females:

> [B]ecause [equal protection] does not [require] 'things which are different in fact [to] be treated in law as though they were the same,' this Court has consistently upheld statutes where the gender classification is not invidious, but rather realistically reflects the fact that the sexes are *not similarly situated* in certain circumstances.

[146]Michael H. v. Gerald D., 491 U.S. 110 (1989) (Brennan, J., dissenting).

[147]Eisenstadt, 405 U.S. 438 (1972).

[148]Roe, 410 U.S. 113 (1973).

[149]Regents of University of Cal. v. Bakke, 438 U.S. 265, 289 (1978).

D. THE PROPERTY ARGUMENT

Anticipatory fathers have a property right to notification of and comment upon the anticipatory mother's decision to abort or deliver.

1. Tangible Property Rights in Ejaculated Sperm

Does a man have a property right in his sperm? The question lies at the gray edge of contemporary legal and medical deliberations.[150] Does one "own" one's genetic code? Does one own one's organs? Can one clone oneself, and use the resulting entity for spare parts? The answers to all these questions are presently indeterminate and hotly debated.

Private property is "the right of a person . . .to use a thing and to exclude others from interfering for a time long enough to extract from the thing the benefits it is capable of affording."[151] One use of sperm is procreation; another is sexual pleasure without procreation. Does the father retain a property interest in sperm ejaculated during coitus? If so, what is the relation of that interest to the woman's property interest in her ovum, with which the sperm might be integrated? Is the father's interest in the sperm-cell-destined-for-fertilization itself, or in the genetic code that individual sperm contains? What becomes the status of the millions of sperm destined to perish in the vagina, uterus, and fallopian tubes, swimming toward the ovum? Do the haploid genetic codes of sperm and ovum retain their nature as parental property once conjoined during fertilization into the diploid code of the fetus? One writer analyzes in this manner:

> Obviously, the mother has a claim for possession. Is her ownership exclusive and absolute? It would appear that the father can assert a claim of ownership equal with that of the mother's, especially where the father is also the husband of the mother. After all, the fetus is technically the combination of the female egg with the male sperm, and each contributor is in a position to claim the fetus as personal property.[152]

Regardless of the property status of the fetus and its building blocks, sperm and ovum, it is settled law that the parents have no property interest in their children after parturition.[153]

What is to be made of the alternative situation? Suppose a woman knows her partner desires sexual intercourse for sexual pleasure only and refuses to participate for procreative purposes. If the woman uses her partner's sperm to become pregnant, is she guilty of conversion? What becomes of the male's property interest in his sperm when those sex cells are seized for a purpose of which he disapproves?

A California court has considered a man's property interests in sperm. In the *Hecht* case,[154] Mr. Kane, a father of two children, divorced his wife, and lived with Ms. Hecht for five years. Just before Mr. Kane committed suicide, he deposited fifteen vials of sperm in a cryobank. The vials were to be released to his executor, ostensibly his lover, Ms. Hecht, after his death. Ms. Hecht wanted to use the sperm to impregnate herself. But the father's children sought to have the vials destroyed. The trial court ordered the sperm to be

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[150]See Robertson, *supra* n.37.

[151]ROGER A. CUNNINGHAM *ET AL.*, THE LAW OF PROPERTY iii (2nd ed. 1993).

[152]Swan, *supra* n.3, at 260 (citing Orloski, *Legal Questions and Legislative Alternatives*, AMERICA, Aug. 10, 1974, at 50-51, cols. 2-3).

[153]59 Am. Jur. 2d *Parent and Child* §10 (1996). The Thirteenth Amendment to the U.S. Constitution would also seem to preclude any such possibility.

[154]Hecht v. Superior Court, 16 Cal. App. 4th 836 (Cal. App. 1993).

discarded, but the appellate court found abuse of discretion in that ruling. The appellate court held that Mr. Kane had a quasi-property interest in his sperm. Frozen sperm falls in an interim category, not property but not a human person either, which is due special respect because of its potential for human life. A decedent has an interest, in the nature of ownership, to the extent that he had decision-making authority as to the sperm under public policy. This interest is sufficient to constitute "property" under California probate law.

If a man is found to have any sort of property interest in his sperm, what is the status of that sperm once injected into the uterus of a woman? What relationship is created between the copulating man and woman with reference to the man's living sperm?

a. A Gift of Sperm

The sperm might be considered a gift. If considered a gift, one must determine the nature of the donative interest conferred. Is this some status analogous to fee simple, relieving the female of all obligations for the care and use of the sperm with respect to its former owner, the male? Or is the interest a defeasible fee simple or some other conditional sort of ownership interest vested in the woman? The problem with any such sort of concept is the impossibility of reverter, of return of the sperm to the control of the male, upon the condition's occurrence. Were the interest determined to be some sort of conditional interest, what conditions might be placed upon the woman's "use" of the man's sperm? Might those interests include the requirement that, if pregnancy should result, the anticipatory mother will notify and consider the donor's opinion concerning the fate of the pregnancy?

b. A Bailment of Sperm

The woman's control of a man's sperm might be construed as a bailment.[155] The woman, then, would owe the coital male an implied contractual duty to preserve and protect his sperm in relation to the purpose for which it was delivered, or redeliver it to him. Under a bailment theory, problems determining the "purpose of delivery" are certain to arise. And the "redelivery" concept remains technically problematical.

c. Concurrent Ownership of Sperm

The sperm might, upon ejaculation into the woman's reproductive tract, be subject to a concurrent form of ownership. Any such property interest--whether tenancy in common, joint tenancy, tenancy by the entirety,[156] community property, or even partnership or corporate interests--would vest continuing property interests in both anticipatory mother and father, especially where pregnancy resulted from copulation. The mother would be precluded, under a concurrent ownership theory, from "ousting" the cotenant in possession,[157] that is, the anticipatory father. "Ousting" would exist, in the pregnancy decision, where the anticipatory father made a demand for birth or abortion, but the anticipatory mother refused to allow the anticipatory father any part in the decision.

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[155]A bailment is:

> A delivery of . . . personal property, by one person (bailor) to another (bailee), in trust for the execution of a special object upon . . . such goods, beneficial either to the bailor or bailee or both, and upon a contract, express or implied, to perform the trust and carry out such object, and thereupon either to redeliver the goods to the bailor or otherwise dispose of the same in conformity with the purpose of the trust.

BLACK'S LAW DICTIONARY 141 (6th ed. 1990).

[156]Tenancy by the entirety would be appropriate only where the man and woman were husband and wife.

[157]Cunningham, *supra* n.151, at 211.

2. Intangible Property Rights in Ejaculated Sperm

Ejaculated sperm can be considered property, not only in the gross physical sense, but also in the reputational sense. Virility has, for good or ill, long been a lauded value in many cultures. And one proof of virility has been siring offspring. An anticipatory mother seeking to abort their fetus must contend with the anticipatory father's intangible property interest in his reputation for virility in the community of which he is part.

3. Abortion as Chattel Abandonment[158]

If an anticipatory father retains any property interest in his sperm or its post-fertilization fetal form, then what legal concepts might apply to the anticipatory mother's decision to abort? The anticipatory mother's decision to abort might be considered an abandonment of chattels, a chattel in which the anticipatory father has a continuing interest. Her former property interests would devolve upon the father first, but perhaps also upon any other person willing to undertake possession. "Abandonment of chattels is well recognized; they may become unowned, available for new ownership by whoever will take them into possession with intent to own."[159]

4. Conclusion

Unless one denies all male property interests in sperm, or considers sperm ejaculated during copulation to be a gift in fee simple, anticipatory fathers retain some sort of property interest, prior to birth of their child, in their sperm. Under any theory addressed above, an anticipatory mother who contemplates abortion, would, at a minimum, be required to consult with the sperm's donor, bailor, or concurrent owner, before wasting[160] the anticipatory father's interest in his sperm or fetus.

E. THE CONTRACT ARGUMENT

Some anticipatory fathers have a contractual right to notification of and comment upon the anticipatory mother's decision to abort or deliver.

Parties to an implied contract manifest their agreement to the terms of the contract by conduct, not words.[161]

> [A] contract implied in fact arises under circumstances which, according to the ordinary course of dealing and common understanding of men, show a mutual intention to contract. . . . A contract is implied in fact where the intention is not manifested by direct or explicit words between the parties,

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[158] A Florida court has considered and rejected this argument. The U.S. Supreme Court denied certiorari. Jones v. Smith, 278 So. 2d 339, 342-43 (Florida App. 1973), *cert. den.* 415 U.S. 958.

[159] *Id.* at 465. *Cf.* Wynn v. Scott, 449 F. Supp. 1302 (N.D. Ill. 1978) (striking, on procedural due process grounds, an Illinois statute which provided for automatic termination of mother's and father's parental rights and duties where a live child is born as a result of an attempted abortion procedure).

[160] "Wasting" is used here in its technical property law sense: "An abuse or destructive use of property by one in rightful possession" or, in analogy to waste of real estate, "Action . . . by a possessor of land causing unreasonable injury to the holders of other estates in the same land." BLACK'S LAW DICTIONARY 1589 (6th ed. 1990).

[161] JOHN D. CALAMARI AND JOSEPH M. PERILLO, THE LAW OF CONTRACTS 19 (3d Ed. 1987).

but is to be gathered by implication or proper deduction from the conduct of the parties, language used or things done by them, or other pertinent circumstances attending the transaction."[162]

Acceptance by silence will be implied where the offeree (here, the woman) takes offered services with a reasonable opportunity to reject them and with a reason to believe that they are offered with expectation of compensation. As to the expectation of compensation, if services were rendered gratuitously, no "acceptance by silence" argument will stand.[163]

An anticipatory father might argue that the woman's agreement to share intercourse implied a contract with him, one term of which is a promise to notify and consider his desires in any pregnancy decision. The consensual nature of the coitus indicates a reasonable opportunity to reject services.[164] The expectation of compensation is mutual sexual gratification and satiety, or, alternatively, the live birth of a child. Such an anticipatory father's claim will be bolstered where there is explicit discussion between coital partners of the purpose of the intercourse. Conversation indicating a purpose of mere sexual gratification will support the anticipatory father's claim that their implied contract did not extend to eighteen years of child support.[165] Conversation indicating a procreative purpose will augment the anticipatory father's claim that an abortion breaches his contractual rights.

Critics of this contract theory will, with some justification, point to the uncertainty of the terms of the implied contract. Further, the fact that most people in the throes of erotic encounters do not conceive themselves to be acting contractually weakens any claim of offer or acceptance. Also, especially with reference to husbands and wives or live-in lovers, the doctrine of acceptance by silence requires inquiry whether the services involved were rendered within the family relationship. "If services are rendered within the family relationship there is a presumption that they were rendered without expectation of compensation."[166]

Fathers have sought judicial recognition of an implied contract, stemming from consent to intercourse, that the anticipatory mother will consider the anticipatory father's interests in her pregnancy decisions. In *Jones v. Smith*, a Florida appeals court rejected this argument. The court found lack of consideration, in that an anticipatory father promised to do no more in light of the contract than he was legally obligated to do apart from any contract.[167]

A second contract argument made by some fathers is that a woman's consent to intercourse constitutes a waiver of the woman's constitutional right to privacy. This waiver undercuts the rationale upon which the *Roe* Court premised its creation of a fundamental right to female autonomy in pregnancy decisions. This argument was also considered by the Florida appeals court in *Jones v. Smith*, and rejected.[168]

Though the tide runs against him, an anticipatory father in appropriate circumstances might successfully defend an implied contractual duty for the anticipatory mother to notify and consider his wishes in making her pregnancy decision.

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[162]*Id.* at 89.

[163]*Id.* at 86.

[164]Any coercive elements in the intercourse (duress, undue influence, misrepresentation, mistake, or unconscionability) would likely void the implied contract, or render it voidable or reformable. *Id.* at 336.

[165]Swan, *supra* n.3, at 258. *See* Kapp, *supra* n.3, at 369.

[166]Calamari, *supra.* n.161, at 86.

[167]Jones v. Smith, 278 So. 2d at 343-44. The court said the argument was "patently without merit." *But see* Swan, *supra* n.3, at 249 *et seq.*.

[168]*Id.* at 342-43.

F. THE TORT ARGUMENT

Anticipatory fathers have a right to damages in tort when their constitutional right to notification of and comment upon the anticipatory mother's decision to abort or deliver is violated.

Tort law concerns the amorphous territory of socially unreasonable conduct. A tort by negligent action consists in four elements:

> 1. A duty, or obligation, recognized by the law, requiring the person to conform to a certain standard of conduct, for the protection of others against unreasonable risks.
> 2. A failure on the person's part to conform to the standard required: a breach of the duty. . . .
> 3. A reasonably close causal connection between the conduct and resulting injury. This is what is commonly known as "legal cause," or "proximate cause," and which includes the notion of cause in fact.
> 4. Actual loss or damage resulting to the interests of another.[169]

Courts have recognized that a father may sue for the negligently inflicted injury or death of his fetus.[170] The anticipatory father has a relational interest in the child (the parent-child relationship), as well as an interest in defending the fetus' own interest in its life.[171] These interests may be defended in a wrongful death suit. Tort law has also recognized a cause of action for wrongful birth, life, or pregnancy.[172] These suits concern a tortfeasor whose act or omission results in the birth of an unwanted child.

The issue, for the purposes of this paper, is singular. Can these causes of action against negligent third parties be extended to an anticipatory mother's pregnancy decisions? Does an anticipatory mother have a duty to avoid negligence with respect to an anticipatory father's interests in their fetus? Can an anticipatory father bring a wrongful death or wrongful birth suit against his fetus' mother on the basis of her decision to abort or deliver their fetus?

The spectacle of a father suing the mother of his child or aborted fetus in open court is distasteful. No one, in a reasonable world, would wish to open the door to such nastiness. But where the United States Supreme Court has slammed the door on anticipatory fathers' rights, unpleasant strategies may be the only ones available.

In *Webster v. Reproductive Health Services*,[173] the Court held that a state legislative declaration that life begins at conception can be constitutional, provided it imposes no substantive restrictions on abortion.[174] The state statutory preamble at issue in *Webster* included the statement that "unborn children have protectable interests in life,

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[169]W. PAGE KEETON *ET AL.*, THE LAW OF TORTS 164-65 (4th ed., 1984).

[170]Black, *supra* n.67, at 1013 (citing Stidam v. Ashmore, 167 N.E.2d 106 (Ohio Ct. App. 1959). *See* Kelson v. Springfield, 767 F.2d 651 (9th Cir. 1985) (holding that parents may recover for wrongful loss of companionship of their son who committed suicide).

[171]Black, *supra* n.67, at 1013.

[172]Keeton, *supra* n.169, at 370.

[173]Webster v. Reproductive Health Services, 492 U.S. 490 (1989). *But see* Stephen K. v. Roni L., 105 Cal. App. 3d 640 (1980); Moorman v. Walker, 54 Wash. App.461, *rev. den.* 113 Wash. 2d 1012 (1989) (barring suit where mother misrepresented to father that she was unable to conceive, followed by a live birth).

[174]*Id.* at 505-06.

health, and well-being."[175] Though there was a strong four-member dissent in *Webster*, and the membership of the Court has shifted since 1989, *Webster* provides some evidence that the High Court might uphold a concept of fetal personhood, provided it is not used to impede abortion access.

If a fetus is a for-tort-purposes-person, then an anticipatory father might successfully claim the anticipatory mother acted negligently in failing to notify and consider his concerns prior to abortion or delivery, provided this claim was not a pretext to obstruct her decision to abort.[176]

How might an anticipatory father argue in his suit for tortious abortion or tortious birth against the anticipatory mother?

1. Tortious Birth

In a suit for tortious birth, the father could claim that rights and responsibilities are correlative concepts in the law. Where the mother alone chooses to bear a child, that is, where the anticipatory father would have recommended and offered to pay for abortion, but the anticipatory mother failed to appropriately notify him and consider his concerns, a father should be relieved of parental rights and obligations.[177] The father could point out that the anticipatory mother had the "last clear chance" to avoid injury to the father's rights,[178] and that, once apprised of the danger of childbirth, she, having neglected to notify the anticipatory father, assumed the risk of supporting the child alone.[179] The father might argue that the mother could have mitigated the child support "damages" by aborting the fetus, as he would have desired.[180] The father could insist he has no duty to support the child, person who did not exist at the time of the coitus. The duty to support lies with the mother alone, in that her failure to notify him relieved him from future duties. His causation of the need for child support is too attenuated to stand legally.[181] At best, in birth, a father's actions might be consider one cause leading to costs of delivery. A father might also claim that he bears no responsibility for supporting a child, where he was never notified or heard, because by the mother's negligence, responsibility for child support shifts to the mother alone. Where a person is "free to assume that someone else will do it or will be fully responsible in case he does not," that person incurs no duty to act.[182]

An unfortunate ancillary effect of any such litigation as that described above is the prospect of a parent publicly claiming the child's existence has damaged them financially and emotionally, and that the child's other parent did so either intentionally or negligently. Such proclamations might injure children emotionally, and loss of financial support might deprive them of the necessities of life.[183] It must be said, however, that this damage is not

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[175] *Id.* at 504-05.

[176] One tort (or contract) remedy is injunction. Note that in the proposal commended by this paper, the anticipatory father's remedies under the torts created do not include injunction. No anticipatory father would be able to enjoin the anticipatory mother's planned abortion or delivery. The Webster dissenters expressed great concern about the likelihood that the Court's holding would chill access to abortion. *Id.* at 537-38.

[177] Swan, *supra* n.3, at 254-55.

[178] See Keeton, *supra* n.169, at 462 *et seq.* (§ 66)

[179] *Id.* at 490-92.

[180] At least one court has rejected such an argument as contrary to public policy. C.A.M. v. R.A.W, 568 A.2d 556 (1990).

[181] Swan, *supra* n.3, at 263.

[182] Keeton, *supra.* n.169, at 203-04.

[183] *See* Moorman v. Walker, 54 Wn. App. 461, *rev. den.* 113 Wash. 2d 1012 (1989).

due to the father's desire to be absolved of responsibilities for the child, but rather due to the mother's failure to safeguard the father's constitutional rights.[184]

2. Tortious Abortion

In a suit for tortious abortion, the father's injuries, as well as those suffered by the aborted fetus, would lie at the feet of the mother who failed to notify and consider the anticipatory father's concerns. Where the mother alone chooses to abort, that is, where the anticipatory father would have recommended birth and parented the child, an anticipatory mother should compensate for the father's injuries: emotional, reputational, financial. What was said above applies. The mother had the last clear chance; she failed to mitigate. Responsibility shifts to her, since the father was not apprised. She proximately caused the father's injuries. The anticipatory mother is liable in tort.

CONCLUSION: HARD CASES MAKE BAD LAW

Roe, *Danforth*, and *Casey* strip anticipatory fathers of constitutional rights pertaining to their unborn children. Under substantive due process, a male has a right to build a family, procreate, not procreate, raise his children, build a relationship with those children, and fashion a personal identity to his own liking. These rights, under *Casey*, vanish for a gestational hiatus upon ejaculation. Under due process, an anticipatory father is due some sort of procedure and explanation if the government disavows his fishing license. But if the anticipatory mother of his fetus chooses, without a word to him, and with federal marshals at her side, to abort or deliver, no one hears the anticipatory father's complaint. Solely on the basis of gender, and in violation of rights the High Court deems fundamental, the State denies to anticipatory fathers their right to fatherhood or peaceful childlessness. Fathers' rights are not balanced against those of mothers. They are just ignored. This is not equal protection. The anticipatory father's property rights in his sperm are overlooked. Implied contracts are voided without a judicial word. The anticipatory father is denied tort damages. In short, the *Casey* regime leaves the anticipatory father a mere cipher; his rights, a nullity.

The result of *Casey* is not typical of the Court's great decisions, but rather of those the Court wears in red-faced ignominy. One is reminded of *Dred Scott*,[185] and *Plessy*,[186] where people were told their rights did not matter. *Casey* delivered this same message to anticipatory fathers.

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[184]Other criticisms of these tort suits come to mind. First, some will argue as well that these new causes of action in tort will exacerbate court congestion and administrative expenses in the area of family law, a case load already choking many courts. This writer responds that no one promised protecting constitutional rights would be cheap or easy. Second, some might argue that this paper's proposal imposes further administrative difficulties on doctors, and might expose some hospitals and medical facilities to yet greater tort liability. The administrative burdens imposed on doctors are, in this writer's view, minimal. As to hospital liability, no hospital which diligently avoids violation of the constitutional rights of fathers and anticipatory fathers will incur additional liability. All others are on their own. Third, releasing putative fathers from child support obligations when they are unconscionably trapped into them will strain the public fisc. In response, this author notes that the public, through its courts, has abrogated fathers' rights, and when that negation increases the state's burden to support public wards, justice is served.

[185]Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1857) (striking down the Missouri Compromise of 1820, a congressional law that set apart portions of American territory as slavery-free zones.)

[186]Plessy v. Ferguson, 163 U.S. 537 (1896) (upholding "separate but equal" accommodations for "white and colored" railroad passengers).

Courts have disagreed with the *Casey* view. "We are deeply conscious of the husband's interest in the abortion decision, at least while the parties are living together in harmony. Surely that interest is legitimate. Surely, if the family life is to prosper, he should participate with his wife in the decision."[187] The *Casey* approach is far from self-evident. A federal district court said:

> We recognize that the interest of the husband in the embryo or fetus carried by his wife, especially if he is the father, is qualitatively different from the interest which the mother may have in her health and the interest of the viable fetus in its potential life. The interest which a husband has in seeing his procreation carried full term is, perhaps, at least equal to that of the mother. The biological bifurcation of the sexes, which dictates that the female alone carry the procreation of the two sexes, should not necessarily foreclose the active participation of the male in decisions relating to whether their mutual procreation should be aborted or allowed to prosper. It may be that the husband's interest in this mutual procreation attaches at the moment of conception.[188]

The Court could impartially balance the anticipatory father's and mother's interests. This paper, for example, proposes one equitable resolution. But the *Casey* Court chose not to do so.

"Civil liberty, the great end of all human society and government, is that state in which each individual has the power to pursue his own happiness according to his own view of his interest, and the dictates of his conscience, unrestrained, except by equal, just, and impartial laws."[189] To the anticipatory father, stripped of his voice and aspirations, there is nothing equal, just, and impartial about the *Casey* regime. It is simple discrimination, graven by the heavy hand of the State.

Casey confirms the legal proverb, "Hard cases make bad law." The saying is "used to indicate judicial decisions which, to meet a case of hardship to a party, are not entirely consonant with the true principle of the law."[190] Anticipatory mothers got what they wanted. But anticipatory fathers got trampled in the stampede.

Casey was wrongly decided. Anticipatory fathers should be notified and their comments considered by anticipatory mothers before they make commitments to deliver or abort their fetuses.

To ask less is simply wrong.

Brad A. Lancaster

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[187]Doe v. Doe, 314 N.E.2d at 133.

[188]Coe v. Gerstein, 376 F. Supp. 695, 697-98 (S.D. Fla. 1973) (striking down Florida's spousal and parental consent requirement on constitutional (Roe and Doe) grounds), *appeal dismissed*, 417 U.S. 958.

[189]The Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 111 (1873) (citing Blackstone, 1 Sharswood, 127, n.8).

[190]BLACK'S LAW DICTIONARY 717 (6th ed. 1990).