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CONSENT PROVISIONS IN ABORTION STATUTES

In *Roe v. Wade* and *Doe v. Bolton* the Supreme Court of the United States declared the abortion laws of Texas and Georgia to be unconstitutional infringements upon a woman's right of personal privacy. These decisions implied that during the first trimester of a woman's pregnancy the woman and her physician are to reach the abortion decision and effectuation without any state interference. Consequently, *Roe* and *Doe* implicitly suggested that many other abortion laws in effect at that time were unconstitutional.

*Roe* and *Doe*, however, left unsettled at least one important question: can a state impose, as a prerequisite for a lawful abortion, the requirement that a woman obtain the consent of the father of her


unborn child? This question should be answered as state legislatures

5. The Court in Roe merely stated:
Neither in this opinion nor in Doe v. Bolton post, p. 179, 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. North Carolina, for example, N.C. Gen. Stat. § 14-45.1 (Supp. 1971), requires written permission for the abortion from the husband when the woman is a married minor, that is, when she is less than 18 years of age, 41 N.C.A.C. 489 (1971). We need not now decide whether provisions of this kind are constitutional.

410 U.S. at 165 n.67. "Father's rights" is an ambiguous term. It may refer to such interests as his wish that his child be raised and cared for as well as possible, his claim to any earnings of the child or his desire to receive a child's love and affection. See Marcus, Equal Protection: The Custody of the Illegitimate Child, 11 J. FAMILY L. 1 (1972). In this note, however, the right discussed is a right in the Hohfeldian sense; it is the right of the father to have the mother seek his consent before terminating the pregnancy. Thus, the right arises from the relationship of the parents although it protects the interests commonly thought to be "parental rights."

To understand why fathers' rights became an issue only recently, it is necessary to examine the history of abortion laws in the United States. Laws proscribing abortion at any time during pregnancy except when necessary to preserve the pregnant woman's life do not come to us either from ancient or common law. There seemed to be no consistent attitude taken by the ancients with respect to abortion. For a discussion of ancient and common law treatment of abortion, see L. LADER, ABORTION 75-77 (1966); Means, The Phoenix of Abortional Freedom: Is a Penumbral or Ninth-Amendment Right About to Arise from the Nineteenth-Century Legislative Ashes of a Fourteenth-Century Common-Law Liberty?, 17 N.Y.L.F. 335, 336-375 (1971) [hereinafter cited as Means I]. Neither Roman law nor Roman morality opposed abortion: the basic legal principle was that the fetus was not a human being, but *pars viscerum matris*. L. LADER, supra, at 76. Abortion per se was not punishable by criminal penalty or social stigma. For a short time, Septimius Severus (193-211 A.D.) attempted to exile wives who had abortions. This penalty, however, was rarely inflicted, probably only when the father-husband had refused his consent. *Id.* The husband, whose rule over the family as *pater familias* was absolute, imposed whatever restrictions there were. He could order his wife to seek an abortion, and he could punish his wife or divorce her if she terminated a pregnancy without his consent. *Id.* at 77. At common law, termination of a pregnancy before the fetus quickened was no crime and the issue of a husband's consent to such an act was apparently never raised. 410 U.S. at 132. Some scholars claim that at common law even abortion of a quickened fetus was no criminal offense. Means I, *supra*, at 336-52; see 410 U.S. at 155; L. LADER, supra, at 78-79.

At the time of the Roe and Doe decisions, the laws governing abortion in more than half the states were the work of nineteenth century legislators. By the end of the nineteenth century, almost every American jurisdiction had absolutely prohibited the commission or even the attempted commission of an abortion unless continuation of the pregnancy would endanger the mother's life. Means I, *supra*, at 358. Legislators claimed that these laws were needed to inhibit promiscuous sexual relations, to protect the fetus and to protect women from the danger of nineteenth century surgery. Abele v. Markle, 542 F. Supp. 800, 802 (D. Conn. 1972), *vacated as moot*, 410 U.S. 951 (1973). Again Means disputes the commonly held view and claims that the only demonstrable legislative purpose behind these strict laws was to protect pregnant women "from the danger to their lives imposed by childbirth at term." Means I, *supra*, at 358. See also Means, The Law of New York Concerning Abortion and the Status of the Fetus, 1664-1968: A Case of Cessation of Constitutionality, 14 N.Y.L.F. 411 (1968) [hereinafter cited as Means II].
The interest of a man in having his potential child born was not an interest that the states felt compelled to protect explicitly. Model Penal Code § 230.3 (Proposed Official Draft 1962) was the prototype for abortion law reform in the late sixties. By 1970 thirteen states had adopted legislation patterned after it. Abortion in these states was lawful if a licensed physician believed that "there is substantial risk that continuance of the pregnancy would gravely impair the physical or mental health of the mother or that the child would be born with grave physical or mental defect, or that the pregnancy resulted from rape, incest, or other felonious intercourse." Model Penal Code § 230.3 (2) (Proposed Official Draft 1962).


Finally, in Roe v. Wade, the Supreme Court declared that the strict Texas abortion statute violated a woman's right of personal privacy. Using the same rationale, the Court struck the Georgia abortion statute that was patterned after the Model Penal Code. The Court's model for abortion regulation came even closer to allowing "abortion-on-demand" than the most liberal state laws had. Until important state interests give compelling justification for the state's intervention (at approximately the end of the first trimester of pregnancy) the abortion decision in all its aspects is inherently and primarily a medical decision, and basic responsibility for it must rest with the doctor. 410 U.S. at 163. Thus, in the early stages of pregnancy, the decision to abort and its effectuation must be left to the medical judgment of the pregnant woman's attending physician. Id.

The evolution of statutory regulation of abortion in England parallels its evolution
begin to draft new abortion laws that are within the Court's guidelines. In considering this question, legislatures must decide whether there is a legal basis to compel or even to justify the existence of the potential father's interests in the fetus.

In a few states new abortion laws adopted since Roe and Doe require the consent of the potential father for a lawful abortion regardless of the couple's marital status. In other states a woman must obtain the potential father's consent to the abortion only if he is also her husband. If the intent of the Court was that a state treat abortion in the first trimester of pregnancy as a medical decision to be made solely by the woman and her doctor, then these consent provisions are inconsistent with that intent.

Abortion reform organizations in some states are already challeng-

in the United States. The first English criminal abortion statute, Lord Ellenborough's Act, 43 Geo. 3, c. 58 (1803), made abortion of a quick fetus a capital offense and assigned lesser sanctions for abortion of a fetus before quickening. This law was replaced by the Offences Against the Person Act of 1861, 24 & 25 Vict. c. 100, § 59, which eliminated the death penalty and the distinction between pre-quickening and post-quickening abortion. This act, in effect until the 1967 reform, did not allow abortion even when continuation of the pregnancy endangered the life of the mother. In 1938 Justice Macnaghten construed the 1861 Act to permit abortion if a doctor reasonably believed that "the probable consequence of the continuance of the pregnancy will be to make the woman a physical or mental wreck." Rex v. Bourne [1939] 1 K.B. 687, 693-94 (1938). Finally, in 1967, Parliament passed the present law, Abortion Act 1967, c. 87:

Medical termination of pregnancy

(1) Subject to the provisions of this section, a person shall not be guilty of an offence under the law relating to abortion when a pregnancy is terminated by a registered medical practitioner if two registered medical practitioners are of the opinion, formed in good faith—

(a) that the continuance of the pregnancy would involve risk to the life of the pregnant woman, or of injury to the physical or mental health of the pregnant woman or any existing children of her family, greater than if the pregnancy were terminated; or

(b) that there is a substantial risk that if the child were born it would suffer from such physical or mental abnormalities as to be seriously handicapped.

(2) In determining whether the continuance of a pregnancy would involve such risk of injury to health as is mentioned in paragraph (a) of subsection (1) of this section, account may be taken of the pregnant woman's actual or reasonably foreseeable environment. [Emphasis added.]

6. See note 5 supra.


ing the constitutionality of consent clauses. In states that lack consent clauses, those favoring protection of a father's interests have also turned to the courts to enforce these rights. While it is too early to predict the ultimate fate of consent requirements, the trend seems to be against enforcement.

I. THE POSITION OF THE PUTATIVE FATHER

When the issue of a father's right to participate in the abortion decision is discussed, the putative father must be distinguished from the husband-father. It is the latter who is more likely to have his interests protected. The law has never viewed the father of an illegitimate child in a very favorable light. At common law, during a period when the law gave women few rights or responsibilities, the mother of an illegitimate child was its legal guardian. Today many states still refuse to recognize any interest the putative father has in his child. For example, if the mother wishes to have the child adopted, the consent of the putative father is often unnecessary. Even when the putative father has asserted a claim to his child in proceedings to terminate the mother's parental rights, the court has looked on him with jaundiced eye.

In Jones v. Smith, the Fourth District Court of Appeal of Florida considered whether a potential putative father has the right to restrain the natural mother from terminating the pregnancy that resulted from their cohabitation. The court noted that this was a matter of first impression in Florida, and, as best its research could determine, a matter of first impression in the nation.

The appellant in this case was a divorced man who had dated the

10. See notes 59 & 63 and accompanying text infra.
11. See notes 59, 63 & 73 and accompanying text infra.
15. C. FOOTE, R. LEVY & F. SANDER, CASES AND MATERIALS ON FAMILY LAW 491 (1966); H. CLARK, supra note 13, at 176. But see In re Brennan, 134 N.W.2d 126, 127 (Minn. 1965).
16. 134 N.W.2d at 127; In re Guardianship of Smith, 265 P.2d 888, 892 (Cal. 1954) (concurring opinion); id. at 893-94 (dissenting opinion).
18. Id. at 341.
appellee, a nineteen-year-old unmarried woman, for approximately six months. Appellant had expressed a desire to marry the appellee and to assume all obligations, financial and other, for the care and support of the unborn child. The woman, in her first trimester of pregnancy, did not want to marry the appellant and wished to terminate the pregnancy. The appellant sought injunctive relief to restrain the appellee from obtaining an abortion. When the Circuit Court of Orange County denied relief, he appealed.¹⁹

When this case was litigated, Florida had a consent requirement in its abortion law,²⁰ but the requirement affected only married women and minors. The court dismissed the father's contention that a distinction between "husband" (as used in the statute) and "putative father" was invalid,²¹ and said that the Florida statute gave the appellant no basis to claim that his consent was necessary.²² Thus the court saw in the wording of the statute no violation of the equal protection clause of the fourteenth amendment.

The appellant offered three other grounds to support his right to participate in the abortion decision. First, he contended that the mother waived her right of privacy when she consented to and participated in sexual intercourse.²³ The court rejected this theory and found that the mother's right of privacy with respect to termination of pregnancy is a "right separate and apart from any act of conception."²⁴ The court concluded that whatever purported waiver might have occurred because of conception, the interest of the natural father must remain subservient to the well-being of the woman.²⁵ Appellant's second contention was that appellee's decision to terminate the pregnancy showed her to be an unfit mother and constituted abandonment of the unborn child.²⁶ The court refused to conclude that a mother's decision to obtain an abortion raised the issues of unfitness or abandonment.²⁷ Finally, the appellant contended that the appellee had a contractual duty to obtain his consent before she terminated her pregnancy. This duty supposedly arose from an implied contract between the appellant and the appellee. As evidence of the contract appellant offered: (1) his agreement to support a child if appellee became pregnant; and (2)

¹⁹. Id. at 339
²⁰. FLA. STAT. § 458.22 (3) (Supp. 1972); see note 67 and accompanying text infra.
²¹. 278 So. 2d at 342 n.3.
²². Id. at 342.
²³. Id. at 342-43.
²⁴. Id.
²⁵. Id.
²⁶. Id.
²⁷. Id.
appellee's conduct in (a) engaging in sexual intercourse without contraceptive devices, and (b) promising to marry the appellant.\textsuperscript{28} The court said that because appellant could be obligated by law to support the child, there was no consideration for such a contract.\textsuperscript{29} Even if the appellant had only a moral obligation, without force of law, to undertake the child's support, this could not serve as a basis to establish a contract of "such legal and enforceable significance as to prevent a termination of pregnancy otherwise permissible."\textsuperscript{30} Finding all the appellant's contentions to be without merit, the court denied him injunctive relief.

Although the appellant in Jones presented a nearly exhaustive list of possible grounds to justify requiring the putative father's consent for an abortion, there is another possible justification. In at least one state, the court may require a putative father to pay for a therapeutic abortion.\textsuperscript{31} If this obligation were extended to cover expenses incurred for an abortion "on request," failure to ensure the man's participation in the abortion decision could violate the due process clause of the fourteenth amendment.\textsuperscript{32} A state could avoid this problem if it absorbed the expense of abortions given to women too poor to pay the costs themselves.

II. The Position of the Husband-Father

At common law the husband was the head of the family.\textsuperscript{33} This position entitled him to the services and earnings of his unemancipated child as long as the child was legally in his custody.\textsuperscript{34} This right gave him several causes of action if he was deprived of the child's services.\textsuperscript{35} His interest in the conception of children was recognized to the extent that its denial by his spouse could be ground for annulling the marriage.\textsuperscript{36} His interest in the child during the period of gestation, how-

\textsuperscript{28} Id.
\textsuperscript{29} Id. at 344.
\textsuperscript{30} Id.
\textsuperscript{32} See Note, supra note 31.
\textsuperscript{33} See H. CLARK, supra note 13, at 261-62.
\textsuperscript{34} Id. at 584.
\textsuperscript{35} Id. at 269-70, 278; Lippert, supra note 12, at 402.
\textsuperscript{36} One author has concluded: "[S]ince sexual intercourse and the procreation of children are fundamental to marriage, misrepresentation of intent with respect to these matters is essential fraud for which annulment may be granted." H. CLARK, supra note 13, at 111. The marriage, however, will not be annulled unless (1) there was a premarital fraudulent intent not to have children, (2) the other party to the marriage would have refused to enter the marriage if aware of that intent, and (3) the defrauded party ceases cohabitation immediately after learning of this intent. Primmer v. Primmer, 234 N.Y.S.2d
ever, was apparently unprotected.  

Few husbands have sought recovery of damages from an abortionist after abortions performed without their consent. In only three suits has the husband claimed the loss of his potential offspring as a basis for the action. In *Kausz v. Ryan,* Mrs. Kausz had returned to her mother's home and then terminated her pregnancy. Mr. Kausz charged that the defendant, Dr. Scharf, had caused the miscarriage and deprived him of his offspring. The trial court had sustained a demurrer to this claim, and the appellate court upheld this ruling. The appellate court held that Kausz could not recover for injury to his offspring "*in ventre sa mere,"* except for the loss of the child's services caused by the abortion; the father had not sought such damages. In dictum, the court suggested that the law would not allow such a claim for damages because it would be based upon very remote and speculative consequences of the abortion.

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The court in *Fowler v. Fowler,* [1952] T.L.R. 143, offered the following justification for distinguishing between the refusal by a husband to procreate and a similar refusal by a wife:

>If a man takes contraceptive measures against the will of his wife so as to prevent her having any children, without reasonable excuse for doing so, then it is easy to infer that he does it with intent to inflict misery on her. . . . But when the wife herself takes contraceptive measures . . . her conduct can often be attributed to fear of the consequences to herself without any intention of injuring him. She fears the pain and risk of childbirth. This is very unnatural and unfortunate, but it is not cruelty unless she also has an intention to inflict misery on the husband."

*Id.* at 147. By analogy, it is possible that obtaining an abortion without the husband's consent might give him grounds for divorce on a theory of cruelty. *Contra,* Matovcik v. Matovcik, *supra* at 241. In states with "no fault" divorce statutes, *see,* e.g., FLA. STAT. ch. 61 (1971), such behavior of the wife would certainly be evidence of the irretrievable breakdown of the marriage.

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40. 1 N.W. 485 (Iowa 1879).

41. *Id.* at 486.

42. *Id.* at 485.

43. *Id.* at 487.

44. *Id.*

45. *Id.*
In *Herko v. Uviller*, the plaintiff husband brought an action against his wife's uncle for deprivation of further offspring and for loss of consortium. While still living with her husband, Mrs. Herko had discovered that she was pregnant. She consulted her uncle, a physician, about terminating the pregnancy. At that time Herko told Uviller that he opposed an abortion. After the pregnancy had been terminated, Herko brought suit. The defendant moved to dismiss the complaint for failure to state a cause of action. The court granted the motion on the grounds that the consent of Herko's wife to the operation precluded him from maintaining his action.

The holdings of the preceding cases suggest that if there is any legal basis for recognizing a father's right to participate in the abortion decision, this right is derived from the marital relationship rather than the parent-child relationship. Further support for this theory comes from a recent case in which a father sought compensation from the abortionist for the loss of his unborn child. In *Touriel v. Benveniste*, the court recognized that the plaintiff husband had an interest in his unborn child distinct from his wife's interests in the child and thus was unaffected by her consent to an illegal abortion. The court found that an illegal abortion interferes with separate interests of the husband and wife in the rights, duties and privileges stemming from the marital relationship. Consequently, the defendant's intentional destruction of the parental relation of the plaintiff to his child and the deprivation of plaintiff's right to father a child was regarded as injuring an important and genuine interest.

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47. The court stated:
   The allegation in the instant complaint that plaintiff's wife consulted with defendant for the purpose of aborting her pregnancy clearly implies that she participated in the commission of the act complained of and, therefore, she would be precluded from maintaining any cause of action arising out of the transaction. See Larocque v. Conheim, 42 Misc. 613, 87 N.Y.S. 625.
   Although "the invasion of the husband's interests in the marriage relation is a separate tort against him, it is conditioned upon factors which also constitute a tort against the wife. * * * Unless, therefore, the actor has become liable to the wife, he cannot be subject to liability to the husband." Restatement, Torts, Section 693, Comment d, p. 493.

Id. at 619.
49. For a discussion of this decision, see 14 STAN. L. REV. 901 (1962); 110 U. PA. L. REV. 908, 909 (1962). The abortion had been performed ten years before plaintiff brought this suit. Claiming that the statute of limitations was tolled, the defendant demurred to the complaint. To allow itself to determine if the statute barred the present action, the court sustained a demurrer requiring plaintiff to plead with more certainty. 14 STAN. L. REV. 901 (1962).
51. Id. at 907.
It is possible that administrative difficulties in compensating a man for such speculative damages account for the past reluctance of courts and legislators to protect the interests of a potential father.\textsuperscript{52} It is significant, however, that legislatures did not give protection of the potential father’s interests as a reason for endorsing strict pre-\textit{Roe} abortion laws.\textsuperscript{53} Of the states with statutes patterned after the ALI Model Abortion Act,\textsuperscript{54} only four have required the husband’s consent.\textsuperscript{55} Among the four states adopting modified abortion-on-demand statutes before \textit{Roe},\textsuperscript{56} only Washington required the husband’s consent.\textsuperscript{57} All these reform laws were passed after \textit{Touriel}, and of the eighteen states with such statutes, fourteen—including California, the state in which the \textit{Touriel} decision was rendered—rejected the reasoning of the \textit{Touriel} court.

Only recently has there been litigation challenging the constitutionality of abortion laws lacking consent provisions.\textsuperscript{58} In California there have been three such challenges.\textsuperscript{59} In each case, a husband hoped to prevent his wife from undergoing a legal abortion against his will; without opinion, each court denied the relief sought.

The 1970 New York reform statute\textsuperscript{60} also lacks a consent requirement. \textit{Byrn v. New York City Health \& Hospitals Corp.},\textsuperscript{61} in dictum, stated that a consent provision was not necessary to ensure the law’s constitutionality.\textsuperscript{62} Subsequently, in \textit{Doe v. Doe},\textsuperscript{63} a husband specifi-
cally challenged the absence of a consent provision in the New York law. The couple involved had separated before the wife discovered that she was pregnant. After the woman told her husband that she would have an abortion, he obtained a restraining order to stop her from terminating the pregnancy. Before Doe could serve the order, his wife entered a hospital and had her abortion. Doe then obtained a court order compelling his wife to show why she should not be held in contempt of court for ignoring the injunction.

In his complaint the husband presented a constitutional argument to support his claim that he had a right to participate in the abortion decision. Because of the Byrn decision, the husband conceded that a fetus under twenty-four weeks of age was not a person for purposes of the fourteenth amendment. He contended, however, that if the fetus was not a person, then it must be a thing. And, since all things are objects of property rights, his wife’s unilateral decision to abort the fetus under color of the 1970 reform statute deprived the plaintiff of property without due process of law. A major flaw in this reasoning is that not all things are objects of property rights.

Recognizing the fetus to be an object of property rights vested in the father would be tantamount to imposing slavery “on the womb and the intrauterine foetus of a free woman in violation of the thirteenth amendment.”

The husband’s alternative contention was that the matrimonial contract gave him the right to participate in the abortion decision. The court rejected both the constitutional and the contractual arguments offered by the husband and held that the wife was not in contempt.

This means that in New York a husband has no legally recognized right to participate in the abortion decision.

In Coe v. Gerstein, the plaintiffs brought a class action challenging the constitutionality of the Florida statute regulating therapeutic abortions. Among the prerequisites for a legal abortion in Florida was the

64. N.Y. Daily News, Mar. 18, 1972, at 5, col. 1 (final ed.).
65. Id. at col. 5.
66. §29 N.Y.S.2d at 735-36.
67. Brief for NARAL, supra note 59, at 3.
68. Id.
69. Id. at 5; cf. United States v. Willow River Power Co., 324 U.S. 499 (1945).
70. Brief for NARAL, supra note 59, at 6.
71. Id. at 7.
72. 72 C 386-72 (Nassau County Sup. Ct., May 24, 1972).
74. FLA. STAT. § 458.22 (Supp. 1972).
consent of the husband, if he had not abandoned his wife.75 One of the five plaintiffs in Coe was a married woman in her first trimester of pregnancy. She had been unable to obtain her husband’s consent for a therapeutic abortion, which her doctor had certified to be necessary to preserve her health. Plaintiffs challenged the statute as an impermissible interference by the state with “a woman’s right of privacy as that right encompasses the decision to terminate a pregnancy.”76

The court acknowledged that a husband’s interest in the fetus was qualitatively different from the interest of his wife.77 The court also recognized that the father’s interest in seeing his procreation carried full term “is, perhaps, at least equal to that of the mother.”78 The father’s interest, however, might reasonably be related either to protection of maternal health or to protection of the life of his potential offspring.79 The court nevertheless held the statute unconstitutional because neither of these concerns had been held to justify state intervention in Roe v. Wade. The state could not delegate to husbands a right that the state itself did not possess.80 If the state had been able to show that the consent provision was designed to protect third party interests attaching at the moment of conception and distinct from concern for either the mother’s health or the potential child’s life, then the court would not have felt bound by the Roe v. Wade decision.81

While the court endorsed participation by a husband in the abortion decision, it stressed that a man could not expect the state to grant him the power to regulate in an area in which the state itself lacked such power.82 The court did not believe that new legislation could be drafted to cure the flaw in the Florida statute.83

Proponents of the right to fatherhood contend that it is a fundamental principle of democratic society that one who will be affected by the decisions of others should participate in the making of these decisions.84 Consequently, because it is "within his human rights to father a child,"85 a husband should not be deprived of a voice in his wife’s decision to seek an abortion.86 They claim that if the law is to

77. Id. at 5.
78. Id.
79. Id.
80. Id. at 6-7.
81. Id. at 6.
82. Id. at 6.
83. Id. at n.6.
85. Id.
86. Id.
continue to support family solidarity, it is questionable whether a wife should be able to dispose legally of any unborn child of her marriage without the knowledge, advice and consent of the father, her husband. But one who will be affected by the decision of others cannot always participate in the making of those decisions. For example, the unilateral decision of one spouse to end a marriage can serve in some states as grounds for divorce.

In New York, the fetus, if born after its father dies, can share in the father’s intestate estate. It is feared that an abortion law that contains no consent requirement gives the wife the right to inherit the husband’s entire estate by preventing offspring. Thus she could deprive her husband of the opportunity to transfer his “name and properties to ‘flesh of his flesh’: another inalienable right.”

A. Right To Procreate

The law should protect a man’s right to procreate only if it is in the public interest to do so. Because the basic structure of society is the family, the state has a compelling interest to ensure that each family unit has maximum stability; the institution of marriage is the principal tool used by the state to control family formation and dissolution. Recognition of a right to natural fatherhood outside the institution of marriage would eliminate a major incentive for a man to wed before he begins a family.

B. Marriage Contract Theory

The marriage contract theory espoused in support of consent provisions may not comport with public policy. It is extremely doubtful that

89. N.Y. Est., Powers & Trusts Law § 4-1.1 (McKinney 1967). It is also possible that an afterborn child would share if his father died testate under N.Y. Est., Powers & Trusts Law § 5-3.2 (McKinney 1967).
91. Id.
92. For example, one court has concluded: [M]arriage is a civil or social institution, publici juris, being the foundation of the family, and the origin of domestic relations of the utmost importance to civilization and social progress; hence the state is deeply concerned in its maintenance in purity and integrity. In re Moorehead’s Estate, 137 A. 802, 806 (Pa. 1927); accord. Primmer v. Primmer, 234 N.Y.S.2d 795, 798 (Sup. Ct. 1962); J. EEKELAAR, FAMILY SECURITY AND FAMILY BREAKDOWN 15 (1971). “Marriage is a great institution. No family should be without it.” THE WIT AND WISDOM OF MAE WEST 85 (J. Weintraub ed. 1967).
enforcing such a contract right could contribute to family stability and happiness. A psychiatrist, H. Rosen, has described three situations in which the husband refused to consent to the performance of a therapeutic abortion upon his wife. In the first case it was necessary to have the woman involuntarily committed to a psychiatric hospital until the child's birth. Two days after she returned to her family, the woman killed her four children and herself. In the second case, one hospital had discharged the wife because her husband refused to give written consent for the abortion. She entered another hospital in the same city, claimed to be unmarried, and obtained her therapeutic abortion. The woman in the last case carried her child to term and started divorce proceedings immediately after the birth.

A study of Swedish children born after their mothers had been refused abortions revealed that in comparison with the control group, the unwanted children were more often arrested for antisocial or criminal behavior and required more psychiatric care. The girls in this group married early and had children early, possibly perpetuating a vicious cycle. In an unrelated study, another psychiatrist, G. Caplan, reported that while he was treating several emotionally disturbed children in Israel, he learned that their mothers had felt a strong desire to abort the particular child in treatment, and some of these mothers had made many attempts to do so. The relationship of the mothers with the siblings of Caplan's patients ranged from adequate to good, but each woman was inexplicably damaging and cruel to the unwanted child. There are also data that suggest links between unwantedness and both child abuse and development of schizophrenia in children.
Even if the marriage contract could provide the basis for asserting the father's right to participate in the abortion decision, it is unlikely that the courts would compel the wife to give specific performance of this contractual duty. Because the Bill of Rights protects the right of marital privacy and because the matrimonial contract is a personal service contract, courts are unlikely to grant injunctive relief.

C. The Woman's Interests

A man's interest in continuing his bloodline must be weighed against his wife's interests. Courts recognizing that the father may have a compelling interest in the birth of his offspring also admit that his interests are not the same as those of his wife. Recent legal recognition of the woman's separate interests in deciding whether to obtain an abortion, together with recently passed equal rights statutes and the pending equal rights amendment, suggest that the rights of women in the American legal system are undergoing a profound change. For a woman, the decision to carry and to bear a child places extraordinary limitations upon her newly emerging rights. These limitations include: (1) the curtailment (and often the end) of educational and employment opportunities; (2) the profound physical changes upon her body; and (3) the danger to her health. If the woman is already under stress from the burdens of household and job responsibilities, an unwanted pregnancy is likely to cause the woman and her family additional anxiety and mental distress.

There may also be constitutional grounds for denying legal protection to the father's interests. In Coe, the basis for the court's action was a woman's right of personal privacy. Another possible basis is that compelling a woman to bear unwanted children "perpetuates the inferior status that the Nineteenth Amendment was to eradicate." If a husband's religion forbids abortion and his wife is not opposed to

105. H. CLARK, supra note 13, at 261; Brief for NARAL, supra note 59, at 7.
abortion, a statute requiring the husband’s consent may unduly infringe upon the woman’s first amendment rights by forcing her to obey the tenets of her husband’s religion.\textsuperscript{113}

\textit{D. Practical Considerations}

From a more practical point of view, would a man really want to live for seven or eight months with a woman whom he has compelled to remain pregnant against her will? As a matter of public policy, should a state adopt laws that give husbands (and even putative fathers) the power to compel their partners to be pregnant? If a couple disagrees on the fundamental issue of whether to carry the child to term, this suggests that there may already be something drastically wrong with the relationship.\textsuperscript{114} It is difficult to believe that a woman, knowing her husband to be unalterably opposed, would seek an abortion unless she believed that the pregnancy posed an even greater threat to their relationship. In a happy, stable marriage the decision to terminate a pregnancy is and should be shared by the husband and wife. Psychiatrists, however, seem to feel that if the wishes of the husband and wife conflict, the wife’s wishes should prevail.\textsuperscript{115} Otherwise “unwanted and unplanned pregnancies, [with] their aftermath of unloved and neglected children [will continue] to create substantial suffering in this country.”\textsuperscript{116} Psychiatrists note that there appears to be no direct relationship between a woman’s physical capacity to conceive and her mental capacity to satisfy the physical and psychological needs of an infant.\textsuperscript{117} Few men are in a position to remain at home and care for their infant children;\textsuperscript{118} this burden usually falls upon the mother. If she is unable or unwilling to care for her child, assumption of this obligation must fall elsewhere.

Public policy and the constitutional rights of women may dictate that any requirement of a husband’s consent be declared invalid. But even if consent provisions are stricken as unconstitutional infringements upon the rights of women, legal reforms will not immediately change firmly held attitudes and prejudices. Psychiatrists believe that the usual reason a woman seeks abortion is that she does not want a child.\textsuperscript{119} Many people refuse to accept this belief because it destroys

\begin{itemize}
\item \textsuperscript{113} Duin, supra note 37, at 48.
\item \textsuperscript{114} D. Callahan, supra note 84, at 440.
\item \textsuperscript{115} Rosen, supra note 93, at 464; Hardin, supra note 97, at 2. See generally Beck, supra note 97, at 7-11.
\item \textsuperscript{116} Sloane, supra note 110, at 5.
\item \textsuperscript{117} Beck, supra note 97, at 11.
\item \textsuperscript{118} Parade, Sept. 30, 1973, at 20.
\item \textsuperscript{119} Rossi, Abortion Laws and Their Victims, TRANSACTION, July-Oct., 1966, at 7.
\end{itemize}
the image of women as nurturing, loving creatures who welcome the opportunity to produce a new member of the human race. But the most ardent opposition to abortion controls has come from women. These women believe that the abortion decision is one to be made by each woman without the concurrence of either other members of her family or physicians because each woman has the right to limit her own reproduction.

The abolition of all explicit consent requirements in state abortion statutes may not eliminate the difficulties a woman must overcome to obtain an abortion. In New York, hospitals still require the written consent of the husband if they learn that the woman seeking the abortion is married. Before the abortion will be scheduled, she must obtain that consent although she may no longer live with her husband.

120. Id.


122. One commentator suggests:

Proposals for "reform" are based on the notion that abortion must be regulated, meted out to deserving women under an elaborate set of rules designed to provide "safeguards against abuse." . . . [N]ew bills make it quite clear that a woman's own decision is meaningless without the "right" reasons, the concurrence of her family, and the approval of a bunch of strange medical men. Repeal is based on the quaint idea of justice: that abortion is a woman's right and that no one can veto her decision and compel her to bear a child against her will. All the excellent supporting reasons—improved health, lower birth and death rates, freer medical practice, the separation of church and state, happier families, sexual privacy, lower welfare expenditures—are only embroidery on the basic fabric: woman's right to limit her own reproduction.

Cisler, supra note 121, at 276.

123. Since 1967, England has had a moderate abortion law with no consent provision. See note 5 supra. Mr. St. John-Stevas (Chelmsford, C.) had sought inclusion of the requirement that the husband's written consent be given before his wife's pregnancy could be legally terminated. Claiming that such a requirement could make an abortion impossible, Mr. Steel (Roxburgh, L.), sponsor of the 1967 Act in the House of Commons, resisted the insertion. The Commons Standing Committee on the Medical Termination of Pregnancy Bill rejected the consent provision by a sizeable majority. The Times (London), Mar. 17, 1967, at 3, col. 5. Nonetheless, the medical societies urge each general practitioner to obtain the consent of his patient's spouse before agreeing to terminate the pregnancy. Dudley-Brown, The Duties of the General Practitioner Under the Abortion Act, in The Abortion Act 1967—Proceedings of a Symposium Held by the Medical Protection Society in Collaboration with the Royal College of General Practitioners 3 (1969). This policy of encouraging the husband's participation in the abortion decision has inhibited women seeking abortions in some parts of England. Lennox, Problems of the Abortion Act in General Practice, in The Abortion Act 1967—Proceedings of a Symposium Held by the Medical Protection Society in Collaboration with the Royal College of General Practitioners 18 (1969). See also, Simms, The Abortion Act—One Year Later, 9 B.J. CRIM. 282 (1969).

124. Duin, supra note 37, at 47-48; Means II, supra note 5, at 433-34; Comment, The
and although he may not be the father of the fetus. The risk of malpractice suits filed by disgruntled husbands with the attendant harmful publicity will probably make physicians unwilling to perform any abortion without the husband's consent. The New York experience suggests that doctors' attitudes will not be swayed by legislative repeal of consent provisions or by judicial decisions that the loss of a child through an abortion performed with the wife's consent does not give rise to a valid cause of action.

Despite any legislative or court action, it is unlikely that in most marriages the decision to seek abortion will ever become a unilateral one. Physicians likely will continue to require a husband's consent before they will agree to perform an abortion upon a woman who they know is married. But the woman determined to obtain an abortion without her husband's consent will be able to do so, just as she can do now, by denying that she is married.

K.B. Levitz


125. Duin, supra note 37, at 47-48; Means II, supra note 5, at 433-34.

126. Means II, supra note 5, at 433-34.

127. See note 95 and accompanying text supra.