Roe v. Wade: What Rights the Biological Father?

*By Elizabeth Hughes Georgius**

In the *Abortion Cases* handed down in January, 1973, the Supreme Court determined that a woman's decision to terminate her pregnancy is a personal matter, protected from undue state interference by her constitutional right to privacy.[1] Although this "right to privacy" is not explicit in any clause of the Constitution or its amendments, it has come to be recognized as one of those implied personal guarantees fundamental to the realization of the American democratic ideal. Privacy is deemed to be a right which emanates from and is peripheral to those expressly preserved by the Bill of Rights and an element essential to their full exercise;[2] accordingly, protections for express rights, including 14th Amendment prohibitions against state action, extend to a guarantee of privacy in the exercise of those rights.[3] The Court remains divided in its opinion of what constitutes the specific source of this fundamental right. It may be derived from the intent and purposes of the Constitution and its Bill of Rights[4] as "implicit in the concept of ordered liberty,"[5] as included within the "penumbras" of the first eight amendments,[6] as preserved to individuals by the Ninth Amendment,[7] or as protected against undue state restriction by the Fourteenth Amendment.[8]

Justice Brandeis in his dissenting opinion in *Olmstead v. United States*[9] gave early recognition to government's propensity to invade

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1. Roe v. Wade, 410 U.S. 113, 153 (1973).
2. Griswold v. Connecticut, 381 U.S. 479, 483-85 (1965).
3. *Id.* at 484.
4. Roe v. Wade, 410 U.S. 113, 152 (1973).
5. Griswold v. Connecticut, 381 U.S. 479, 500 (1965) (Harlan, J., concurring); Palko v. Connecticut, 302 U.S. 319, 325 (1937).
6. Eisenstadt v. Baird, 405 U.S. 438, 461 (1972) (White, J., concurring); Griswold v. Connecticut, 381 U.S. 479, 484-85 (1965).
7. Stanley v. Illinois, 405 U.S. 645, 651 (1972); Griswold v. Connecticut, 381 U.S. 479, 486 (1965) (Goldberg, J., concurring).
8. Stanley v. Illinois, 405 U.S. 645, 652 (1972); Pierce v. Society of Sisters, 268 U.S. 510, 534-35 (1924); Meyer v. Nebraska, 262 U.S. 390, 399 (1923).
9. 277 U.S. 438, 471-85 (1928).

individuals' privacy, and to the operation of the Bill of Rights in protecting against abuse. That personal privacy is a protected right was first clearly enunciated in *Griswold v. Connecticut*,[10] where the Court struck down as an unconstitutional invasion of privacy Connecticut's statute banning the dissemination and use of birth control information and devices. The Court has continued to clarify the extent and nature of this protected right as applied to domestic concerns in recent decisions. Thus, an implicit right to freedom from undue state interference has been extended to choice of marriage partner,[11] to procreation,[12] and to contraception.[13]

Striking down Texas' antiabortion and Georgia's regulated abortion statutes in the *Abortion Cases*, the Court held that the decision to abort belongs to the individual woman in consulation with her doctor during the first three months of pregnancy, and continues to be her decision in accordance with limited state regulations during the final six months before birth.[14] The text of the several opinions of individual justices does not suggest what participation in the decision the father is to be afforded, although by footnote the Court recognized that the prospective father may have an interest that must be considered.[15] That he has an interest in the outcome of the woman's pregnancy is not doubted. Regardless of his marital relationship to her, he is bound at law to support his child;[16] if he has or shares custody, he is responsible for the child's discipline and education[17] and shares in benefit from the child's earnings and services.[18] Under some state

10. 381 U.S. 479 (1965).

11. Loving v. Virginia, 388 U.S. 1, 12 (1967).

12. Skinner v. Oklahoma, 316 U.S. 535, 541 (1942) (dictum).

13. Eisenstadt v. Baird, 405 U.S. 438 (1972); Griswold v. Connecticut, 381 U.S. 479 (1965).

14. Roe v. Wade, 410 U.S. 113, 163 (1973).

15. *Id.* at 165 n.67.

16. Gomez v. Perez, 409 U.S. 535 (1973).

17. *E.g.*, CAL. CIV. CODE § 196 (West 1973). "The parent entitled to the custody of a child must give him support and education suitable to his circumstances. If the support and education which the father of a legitimate child is able to give is inadequate, the mother must assist him to the extent of her ability;" CAL. CIV. CODE § 196a (West Supp. 1974). "The father as well as the mother of an illegitimate child must give him support and education suitable to his circumstances . . . ." N.Y. FAM. COURT ACT § 413 (McKinney 1973). "The father of a minor child is chargeable with the support of his child, and, if possessed of sufficient means or able to earn such means, may be required to pay for his support a fair and reasonable sum according to his means, as the court may determine." DEL. ANN. CODE tit. 13, § 702 (1972 Supp.). "The legal duty to support a minor child rests solely upon the father if he is living and able to provide such support, but if the father is not living or is unable to provide such support, then the mother if she is living and able shall provide such support."

18. *E.g.*, Cal. Civ. Code § 1197 (West 1973). "The father and mother of a

statutes the father can expect support from his adult child if the father is indigent.[19] However, these are interests that depend upon the birth and survival of the child. What interests the prospective father may have in his *unborn* child, and whether they are of sufficient substantiality to require his participation in the abortion decision is the subject of this note. It is assumed that if the man has an interest in the fetus, such an interest is potentially protectable under the Fifth and Fourteenth Amendments. It is also assumed that, to the extent his interests support his participation in the decision, they are of necessity antagonistic to the woman's since his power to consent implies his power to withhold consent and so nullify her decision to abort.

The Nature of the Woman's Interests

Before attempting to identify the prospective father's interests and the rights that protect them, it is well to review what the Court identified as the woman's interests. The Court recognized that the decision to abort is a decision relating to the care and maintenance of personal health, and as such is principally of individual and private concern. The woman who elects to abort is deemed to be acting to safeguard her mental and physical health.[20]

Acknowledging the potentially grave risks of an unwanted pregnancy,[21] the Court observed that by tradition the individual's interest in preserving good health is of such a personal nature that it remains outside the domain of government regulation except when the state

legitimate unmarried minor child are equally entitled to its custody, services and earnings. If either the father or mother be dead or unable or refuse to take the custody or has abandoned his or her family, the other is entitled to its custody, services and earnings." DEL. ANN. CODE tit. 13, § 703 (1972 Supp.). "The father and mother of a minor child are equally entitled to its services and earnings, and if one of the parents is dead, or has abandoned the child, or has been deprived of its custody by court decree, the other parent shall be entitled to such services and earnings." *See also* CONN. GEN. ANN. STAT. §§ 17-43 (Supp. 1973). "Any parent whose child has been supported by the welfare commissioner for at least three years immediately preceding such child's eighteenth birthday shall not be entitled to such child's earnings or services during such child's minority." *Accord*, TEX. VERN. CIV. STAT. art. 2337 (1971).

19. *E.g.*, CONN. GEN. ANN. STAT. § 17-320 (Supp. 1973). "When any person becomes poor and unable to support himself or herself and family, and has a husband or wife, and, if such person is under eighteen, a father or mother, or *if such person is under sixty-five, a child able, jointly or severally, to provide such support,* it shall be provided by them" (emphasis added). CAL. CIV. CODE § 206 (West Supp. 1974). "It is the duty of the father, the mother, and the children of any person in need who is unable to maintain himself by work, to maintain such person to the extent of their ability."

20. Roe v. Wade, 410 U.S. 113, 153 (1973).

21. *Id.*

can identify an overwhelming societal interest which justifies its interference.[22] While the discovery of antisepsis and improved gynocologic and obstetric care have markedly reduced the dangers of childbirth,[23] these risks continue to constitute a significant threat to the life and health of the expectant woman.[24] The Court recognized the immediacy of the risks she faces, and admitted certain validity to the woman's claims to the freedom to choose whether she shall undergo these hazards, whether she shall tax physical and mental health for the major part of the ensuing eighteen years in meeting the stress and distress of parenting an unwanted child, and whether, if unmarried, she shall bear the stigma of giving birth to an illegitimate child.[25]

Reviewing the status of abortion in the Western world and the development of society's attitudes toward it from earliest history, the Court observed that while abortion was not encouraged, it was not severely proscribed until the 19th century. The civil, criminal and canon laws relating to or regulating abortion were inspired by notions that a father holds a proprietary right in his offspring[26] or that the quickened fetus is a human soul.[27] The Court saw a relationship between the enactment of criminal abortion laws in 19th-century America and the high mortality rate associated with abortion, far exceeding that of natural full-term childbirth.[28] The state had sound basis for

22. Jacobson v. Massachusetts, 197 U.S. 11, 25-27 (1905).

23. In 1937 the techniques of blood transfusion and sulfa drug therapy, as well as the newly developed antibiotic therapy, were introduced into the obstetrical ward for routine use. The benefits from these advances in medical technology were most directly felt by those segments of the population which utilized the obstetrical ward—urban whites; the great number of non-white births were home deliveries, and most of these, without benefit of these new developments. Consequently, these advances are most clearly reflected in the *white* figures.

Maternal mortality, rates cited per 10,000:

Year	All Births	Whites	Non-Whites
1935	58.2	*53.1*	94.6
1936	56.8	*51.2*	97.2
1937	48.9	*43.6*	85.8
1938	43.5	*37.7*	84.9

46 *Maternal Mortality,* VITAL STATISTICS: SPECIAL REPORTS no. 17, at 438 (1940).

Projecting these rates to the standard per 100,000:

1936	568	*512*	972
1937	489	*436*	858
1938	435	*377*	849

24. Maternal mortality rate for all births in the United States in 1970, most recent year for which complete statistics are available, is 26.8 per 100,000. U.S. DEP'T OF HEALTH, EDUCATION AND WELFARE, MATERNAL MORTALITY: VITAL STATISTICS OF THE UNITED STATES (1973).

25. Roe v. Wade, 410 U.S. 113, 153 (1973).

26. *Id.* at 130.

27. *Id.* at 130-32.

28. 19 C.H. HAAGENSEN AND W. LLOYD, A HUNDRED YEARS OF MEDICINE 119-31, 285-94 (1943).

its proscription of induced abortion in its legitimate desire to protect the life and health of the pregnant woman.[29]

Today the dangers to the woman from abortion under clinically protected conditions are less than those of childbirth after full-term pregnancy,[30] although the margin of difference is reduced as the pregnancy progresses and the fetus grows.[31] Only in the final weeks of the pregnancy do the risks of induced abortion compare unfavorably with the dangers of childbirth.[32] Accordingly, insofar as the interest in maternal health is concerned, the mother's interest as well as the state's lies in terminating the pregnancy, and the earlier the better. If maternal health is the sole determinative, there can be no valid interference with the woman's decision to abort.

To the extent that the decision to abort grows out of the woman's interest in preserving her health, and to the extent that the right to privacy protecting her freedom to make personal health decisions without undue interference is one of those fundamental and essential rights guaranteed by the Constitution, regulation by the state must be carefully limited. Only where abortion interferes with the interests of others can the state intervene to determine whether those other interests in the continuation of the pregnancy outweigh the woman's interest in her health and have sufficient constitutional standing to turn the

29. Roe v. Wade, 410 U.S. 113, 148-49 (1973).

30. Maternal mortality statistics include all deaths immediately attributable to the complications of pregnancy, premature and full-term childbirth; abortion mortality statistics include all maternal deaths associable with abortion complications, with pre-existing complications attributable to "problem" pregnancies as well as septic abortions (clinical completion of "botched" attempts, presumed to be illegally undertaken abortion attempts). Statistics are for the year 1970; rates per 100,000:

	Maternal Deaths	Abortion Mortality
United States	26.8	8.2
New York City	29.0	4.8

Note: New York's antiabortion law was liberalized to take effect in July, 1970.

U.S. DEP'T OF HEALTH, EDUCATION AND WELFARE, MATERNAL MORTALITY; VITAL STATISTICS OF THE UNITED STATES (1973).

31. Abortion mortality in New York City for the two-year period immediately prior to the liberalization of New York's antiabortion law, July 1, 1968 through June 30, 1970, is reported at rates per 10,000; projected to rates per 100,000:

All Abortion	First Trimester	Second and Third Trimesters
5.2	2.2	17.5

64 PLANNED PARENTHOOD WORLD POPULATION NEWSLETTER, *Maternal Mortality* (Jan. 12, 1973).

32. "The risk of maternal death if pregnancy is allowed to go to term is far greater than that associated with early abortion. The risk to life from abortion in the third trimester is no greater than that of pregnancy and childbirth." PLANNED PARENTHOOD-WORLD POPULATION, LEGAL ABORTION IN THE UNITED STATES: FACTS AND HIGHLIGHTS (1973).

balance against her. In *Roe v. Wade* the Court found such an interest in the unborn fetus when it has reached a stage of viability, that is, that stage of development when it has the biological capacity to survive independent of the mother's womb, and sanctioned the state's intervention in the third trimester in behalf of the "potential person."[33] In weighing the present potential life against the risks to maternal health, the Court found that the state may preserve the fetus. However, where the balance must be struck between the life of the mother and the present *potential* life of the fetus, the Court refuses to allow the state to interfere with the woman's decision to abort even though that decision is made during the final trimester of pregnancy.[34] Here, the Court is providing a clue to what kinds of interests will be of sufficient weight to permit interference with the woman's decision to abort.

The Nature of the Man's Interest

While the Court recognized that the prospective father may have an interest in the fetus, it did not indicate what that interest might be, or what weight it might carry as against the woman's interests. In the contemporary medical, social, and legal context the question is a new one. Traditionally, where a novel legal issue is presented, the inquiry requires an analysis of the specific claim and the factual nexus out of which it comes. When the essential elements are clarified, legal principles applicable to the new question may be established by analogy to related or relatable phenomena for which legal principles already have been established and applied. This analysis of the question of natural father's rights will follow that plan.

In the abortion decision the man's claim of interest arises out of his biological contribution to the formation of the fetus, and whatever expectancy the prospective father has in his future child which the law recognizes as real and substantial begins with that biological contribution.

The biological contribution

The prospective father's interest in the fetus *qua* fetus is probably a proprietary interest in biological matter. To the extent that cellular matter of the man is involved in formation of the embryo, the man participates in the creative process and he has an element of control in acquiescing to its occurrence. The embryo is not formed until the man's semen is separated from his body and he has lost physical con-

33. Roe v. Wade, 410 U.S. 113, 164-65 (1973).
34. *Id.* at 164-65.

trol over the material. The Court has supported a personal claim to control over one's own biology, albeit with limitation;[35] but once the biological material is separated from the individual, does he retain *any* control over its disposition?

Analogous to the release of semen may be the intentional transfer of human tissue from one individual into the body of another. Since the biological definition of "tissue" is "any group of cells specialized for a particular function,"[36] such fluids as blood and semen are familiar tissues and invite comparison. The first marginally successful blood transfusions were attempted in the late 19th century; and even though tissue transfer is of so recent origin, with the rapid development of biological and medical technology other tissue matter is now being successfully transferred from one human being to another. Today human tissue banks store blood, corneas and eyes, kidneys, bone and semen for such transfer to living human beings. Since the transfer of tissue and cellular matter from one human being to another is a fairly recent phenomenon, the law surrounding the use of such biological materials is still developing. Under current practices the person who yields up his tissue is a "donor" who gives (or whose legal representative gives in the donor's behalf) formal consent to the removal of the matter and retains no control or claim of title in it. The language of the formal consent forms signed by donors is a complete relinquishing of any control over the biological matter, and includes giving full discretion to the recipient tissue bank in the disposition of the material.[37] While the donor of blood, for example, may yield up his tissue in the name of a specific intended beneficiary, the particular matter from the donor's body becomes a fungible stored for whatever use the blood bank makes of it, including experimentation and even discard.[38] Similarly, tissue such as corneal matter removed from cadavers is stored as a fungible for use as required.[39] Just as the donor has given up control over the material, so also he owes no duty nor

35. Jacobson v. Massachusetts, 197 U.S. 11 (1905).

36. A. LOEWY AND P. SIEKERITZ, CELL STRUCTURE AND FUNCTION 10 (1963).

37. Text of consent form utilized by the Irwin Memorial Blood Bank of San Francisco: "I voluntarily donate my blood to the Irwin Memorial Blood Bank to be used as decided by the San Francisco Medical Society." Text of donor's intent form utilized by the Eye Bank of the San Diego County Medical Society: "I hereby state that it is my wish to donate to the Eye Bank of the San Diego County Medical Society *immediately* following my death both or either of my eyes for such purposes as the San Diego County Medical Society Eye Bank, in its sole discretion, deems advisable, including but not limited to transplantation of the cornea to the eye of a living person."

38. Interview with James L. Kelley, M.D. American College of Surgeons; in San Diego, California, December 20, 1973.

39. EYE BANK OF THE SAN DIEGO COUNTY MEDICAL SOCIETY, EYE BANK (1973).

makes any warrant concerning that matter to any ultimate beneficiary relating to the use of that material.

Where the tissue is sought for a specific use, as an organ of a genetically related donor of specific tissue typing, and the donation requires the hazard of major surgery on a live donor with the life-long risks to the donor associable with the loss of that organ, the donor appears to retain a claim to control insofar as the immediate use of that gift organ is concerned. While a search of the literature has not shown an instance of legal prosecution of such a claim of control, the language of the release signed by the donor[40] suggests a cause of action would lie with the kidney donor who runs a substantial risk for an identified beneficiary and discovers the organ was used instead for experimentation or for a stranger beneficiary.[41]

The sperm donor, like the blood donor, yields up his semen after having consented to the wholly discretionary use of the material by the recipient agency. Unless the insemination of the recipient is performed immediately upon collection of the sperm, the donor has no knowledge of the actual use to which his tissue is put, nor, unless he is husband to the intended beneficiary, does he know her identity.[42] Here the similarities between blood and semen donations end, for the blood transferred so anonymously to the beneficiary creates no new focus of legal or moral obligations in either the donor or the beneficiary. Yet the transferred semen can and is intended to result in the creation of a new human being, and with that child a new focus of legal responsibilities is created for which the adults associated with the child are answerable. Where the technique used is AI-H (artificial insemination utilizing the husband's semen), the question of paternity is not raised; but when the technique used is AI-D (in which the semen used is that of a donor who is not the husband of the beneficiary), the question of paternity has arisen.

The Supreme Court of California recently considered the ques-

40. Partial test of "Living Related Donor" form utilized by the transplant unit of the University of California Medical Center, San Francisco: "We ask that you sign the following statement to indicate . . . that you wish to be a kidney donor for your relative. I, ———, . . . understand that this operation involves certain risks and I also understand that the kidney may be rejected by the patient and will have to be removed."

41. On the basis of the law governing contracts made for the benefit of a third party, it appears that the intended beneficiary who suffers disability or death without that kidney by dint of its misuse would also have a cause of action as a third party beneficiary to the arrangement. *See* RESTATEMENT (SECOND) OF CONTRACTS § 135 (Tent. Drafts Nos. 1-7 Revised and Edited, 1973).

42. Interview with Marshall Taylor, M.D. Fellow, American College of Obstetricians and Gynecologists; American Fertility Society; in San Diego, California, December 20, 1973.

tion of who owed the paternal obligation of support to the minor child born as the result of its mother's impregnation by AI-D.[43] The court held the legal responsibility for support and education of the child lay in the husband, and in dictum indicated that the man whose semen impregnated the mother by AI-D has no legal claim and no legal responsibility to the child.[44] Other courts which have considered the question have reached the same conclusion: the husband who has given his consent to the AI-D insemination of his wife assumes the full liability as parent for support of the resulting child.[45]

When the question of the child's status was first raised in the lower courts, two jurisdictions labeled the AI-D child "illegitimate" despite the husband's consent to the procedure.[46] Nevertheless, in each instance the husband was held to be obligated to support the child. The California case is the most recent, and the only one to date rendered by a court of last resort. Here, the court held that the AI-D child is legitimate and that the relationship of the husband to the child is precisely that of the natural father.[47]

No record of litigation by the sperm donor claiming paternal rights in the child has been found, and due to the anonymity surrounding the procedure such a claim is not likely to arise. However, the case law assigning the paternal duty to support the child conceived by AI-D to the spouse and not to the biological father would appear to provide substantial basis for denying any parental claim in the biological father who merely provides sperm cells. Moreover, considering the practices relating to human tissue transfers in general—complete absence of any control over disposition of biological materials and the absence of any liability relating to their use—any claim of interest in the fetus arising solely from the biological fact of paternity seems quite tenuous.

The paternal expectancy

The birth of a child is considered an occasion for rejoicing and thanksgiving among virtually all peoples and throughout man's cultural history.[48] By custom and law the community recognizes that the parents,

43. People v. Sorenson, 68 Cal. 2d 280, 437 P.2d 495, 66 Cal. Rptr. 7 (1968).

44. *Id.* at 284, 437 P.2d at 498, 66 Cal. Rptr. at 10.

45. Anonymous v. Anonymous, 41 Misc. 2d 886, 246 N.Y.S.2d 835 (1964); Gursky v. Gursky, 39 Misc. 2d 1083, 242 N.Y.S.2d 406 (1963); Doornbos v. Doornbos, No. 54S. 14981 (Super. Ct., Cook County, Ill., Dec. 13, 1954.

46. Ill. and N.Y.; *see* cases cited note 45 *supra.*

47. People v. Sorenson, 68 Cal. 2d 280, 289, 437 P.2d 495, 501-02, 66 Cal. Rptr. 7, 13 (1968).

48. R. LOWIE, *The Family as a Social Unit* in PAPERS OF THE MICHIGAN ACADEMY OF SCIENCE, ARTS AND LETTERS (1933) [hereinafter cited as LOWIE].

and particularly the father, have acquired a valuable and tangible asset.[49] Anglo-American law has considered the unborn child in several situations; earliest cases involved questions arising under the law of property related to the inheritance and succession rights of the child. Further, under criminal law when feticide resulted from an intentional act or when abortion was illegally undertaken or committed, paternal and maternal interests were recognized in some jurisdictions. Most recently under the law of torts there have been significant developments in the parental rights in the event of wrongful death of a prematurely-born infant and the unborn fetus.

Under the law of property the rights of curtesy, inheritance, and succession are inchoate and conditional until a legal person comes into being, that is, until a child is born who survives independent of and apart from its mother's body.[50] Trust law permits the creation of a trust interest in an unborn, even an unconceived child, and traditionally, required that such a child be represented by a guardian ad litem in litigation affecting its potential interests.[51] However, in a recent trust termination case in New York the eight-month fetus *en ventre sa mere* was found not to have such legal identity that a guardian would be required to protect its contingent interests.[52] Thus, under property law the interests of both parent and child are severely limited during the period of gestation.

Violation of the criminal abortion laws resulting in destruction of the fetus and injury or death to the woman raised a cause of action in the husband against the abortionist; but his recovery was limited to the expenses of the wife's medical care and funeral, if she died, and recovery for his loss of consortium.[53] However, a factor in the husband's recovery was the culpability, if any, of his wife in the abortion. Where she actively solicited, or at least consented to the act, the case law is mixed. Most jurisdictions found the woman's consent to the abortion made her a willing participant in an illegal act; and although she was not prosecuted as a conspirator, recovery for resultant injuries or death was denied both spouses.[54] In a few jurisdictions the tort claim survived despite the woman's consent on the theory

49. *Id.*

50. RESTATEMENT OF PROPERTY § 273 (1940).

51. *See* RESTATEMENT (SECOND) OF TRUSTS §§ 112, 340 (1959).

52. *In re* Peabody, 5 N.Y.2d 541, 547, 158 N.E.2d 841, 845, 186 N.Y.S.2d 265, 270 (1959).

53. The husband's cause of action was in tort; *see* W. PROSSER, TORTS §§ 36, 125 (4th ed. 1971).

54. Nash v. Meyer, 54 Idaho 283, 31 P.2d 273 (1934); Martin v. Morris, 163 Tenn. 186, 42 S.W.2d 207 (1931). *See also* Szadiwicz v. Cantor, 257 Mass. 518, 154 N.E. 251 (1926); Miller v. Bennett, 190 Va. 162, 56 S.E.2d 217 (1949).

that consent is no defense since the act was criminal.[55] Two limitations are noteworthy: recovery was limited to the person financially responsible for the woman's expenses—her husband or her parent—and recovery did not include damages for loss of the fetus.

Under tort law the parents of the child who is injured, maimed, or killed by another's negligent action have recovered for their economic losses: medical and burial expenses and loss of the child's services and earnings.[56] However, by tradition the disappointment of the prospective parents' expectations in their child by the destruction of the fetus has not been recognized as being of legal substantiality to support a claim. Accordingly, the prospective father could not recover for his inchoate personal interests against the tortfeasor whose actions destroyed the fetus his wife carried. Similarly, the expectant mother did not have a recognizable cause of action in the loss of her unborn; her recovery was limited to the pain and suffering of the miscarriage.[57]

If the child is first live born and then dies as the result of injuries sustained, a cause of action is recognized in the child under the wrongful death statutes.[58] Since the recovery is based on the wrongful death of a once-living person, the general rule is that the newborn must survive the birth process. Once the live birth occurs, there is a valid claim even though death follows soon thereafter;[59] and although no

55. Lembo v. Donnell, 116 Maine 505, 101 A. 469 (1917). *See also* Pleak v. Cottingham, 94 Ind. App. 365, 178 N.E. 309 (1931); Milliken v. Heddesheimer, 110 Ohio St. 381, 144 N.E. 264 (1924).

56. Mace v. Jung, 210 F. Supp. 706 (D. Alas. 1962); Drabbels v. Skelley Oil Co., 155 Neb. 17, 50 N.W.2d 229 (1951); Graf v. Taggert, 43 N.J. 303, 204 A.2d 140 (1964); Endres v. Friedberg, 24 N.Y.2d 478, 248 N.E.2d 901, 301 N.Y.S.2d 65 (1969); Gay v. Thompson, 266 N.C. 394, 146 S.E.2d 425 (1966); Padillow v. Elrod, 424 P.2d 16 (Okla. 1967); Marko v. Philadelphia Transp. Co., 420 Pa. 124, 216 A.2d 502 (1966); Durrett v. Owens, 212 Tenn. 614, 371 S.W.2d 433 (1963); Lawrence v. Craven Tire Co., 210 Va. 138, 169 S.E.2d 440 (1969).

57. Endres v. Friedberg, 24 N.Y.2d 478, 486, 248 N.E.2d 901, 906, 301 N.Y.S.2d 65, 69 (1969). *See also* Norman v. Murphy, 124 Cal. App. 2d 95, 268 P.2d 178 (1954); Graf v. Taggert, 43 N.J. 303, 204 A.2d 140 (1964); Marko v. Philadelphia Transp. Co., 420 Pa. 124, 216 A.2d 502 (1966).

58. RESTATEMENT (SECOND) OF TORTS § 869(2) (Council Draft No. 27, 1970). *See* Todd v. Sandidge Constr. Co., 341 F.2d 75 (4th Cir. 1964); Prates v. Sears, Roebuck & Co., 19 Conn. Supp. 487, 118 A.2d 633 (1955); Amann v. Faidy, 415 Ill. 422, 114 N.E.2d 412 (1953)Verkennes v. Corniea, 229 Minn. 365, 38 N.W.2d 838 (1949); Steggall v. Morris, 363 Mo. 1224, 258 S.W.2d 577 (1953); Jasinsky v. Potts, 153 Ohio St. 529, 92 N.E.2d 809 (1950); Johnson v. Charleston & W. Carolina R'y, 234 S.C. 448, 108 S.E.2d 777 (1959); Kwaterski v. State Farm Mut. Ins. Co., 34 Wis. 2d 14, 148 N.W.2d 107 (1967).

59. Torrigan v. Watertown News Co., 352 Mass. 446, 225 N.E.2d 926 (1967); Verkennes v. Corniea, 229 Minn. 365, 38 N.W.2d 838 (1949); Peterson v. Nationwide Mut. Ins. Co., 175 Ohio St. 551, 197 N.E.2d 194 (1964).

minimal survival time has been clearly indicated, the newborn in these cases survived for a matter of several hours[60] or days.[61]

Recent developments in the law have extended the elements of recovery so that some courts have come to recognize that certain intangible interests have a recoverable value under their wrongful death statutes: filial loyalty, affection, companionship, and parental pride. Furthermore, under the broadly worded statutes in a limited number of jurisdictions, the question was asked, what recoverable interests has the prospective father in the fetus. In a few of these jurisdictions the courts have permitted recovery by the parents for their disappointed *expectations* when the death is that of an *unborn in utero.*[62] In these cases the fetus was fully formed and viable; in allowing recovery the courts pointed out that the fetus had reached such maturity that, had the tort not occurred and had natural birth taken place prematurely, the child could probably have survived. The courts accepted the medical rule of thumb that the fetus must complete the sixth month of development in order to have a reasonable chance of survival.[63] Thus, under the language of the South Carolina statute the parents of an eight-month stillborn fetus were granted relief,[64] but the parents of a six-month stillborn fetus were denied.[65] However, in a relatively early Georgia case not followed by any other jurisdiction nor repeated in Georgia, the parents of a "quickened" child won reversal of demurrer where the stillborn fetus was in the fifth month of development.[66]

No case has been found where either parent has recovered for the wrongful death of a fetus which was neither viable nor quick, and in those cases where a claim was based on the wrongful death of a not yet viable fetus, recovery has invariably been denied. Thus, under some wrongful death statutes the paternal interest in the unborn fetus does have legal substantiality once the fetus reaches a stage of viability; but where the fetus is too immature to survive independently of the mother, no paternal claim is recognized.

In every report of litigation and recovery under these statutes the prospective father was married to the expectant mother; but the tort

60. Peterson v. Nationwide Mut. Ins. Co., 175 Ohio St. 551, 197 N.E.2d 194 (1964).

61. Prates v. Sears, Roebuck & Co., 19 Conn. Supp. 487, 118 A.2d 633 (1955); Torrigan v. Watertown News Co., 352 Mass. 446, 225 N.E.2d 926 (1967).

62. Todd v. Sandidge Constr. Co., 341 F.2d 75 (4th Cir. 1964); Kwaterski v. State Farm Mut. Ins. Co., 34 Wis. 2d 14, 148 N.W.2d 107 (1967).

63. Porter v. Lassiter, 91 Ga. App. 712, 87 S.E.2d 100 (1955); Rainy v. Horn, 221 Miss. 269, 72 So. 2d 434 (1954).

64. Todd v. Sandidge Constr. Co., 341 F.2d 75 (4th Cir. 1964).

65. West v. McCoy, 233 S.C. 369, 105 S.E.2d 88 (1958).

66. Porter v. Lassiter, 91 Ga. App. 712, 87 S.E.2d 100 (1955).

claim made by the prospective father not married to the expectant mother could probably not be denied so long as he is able to show that he has lost the qualifying compensable paternal expectancy. This conclusion is based on three recent Supreme Court decisions in which the Court determined that under the dictates of the equal protection and due process clauses of the Fourteenth Amendment the legitimacy of the parents' liaison *per se* cannot properly be considered as determining the legal interests of parent and child.[67] The Court is acknowledging that the parents' marital status does not of itself determine whether a family unit exists. Where circumstances give rise to the expectations of family life, the Court has extended the protection of law, striking down local laws and practices which defined a special class as "illegitimate" and which on the basis of that classification discriminated unequally against parents and children.

Under the Fourteenth Amendment the states are barred from making any law which would deny equal protection of its laws to persons within its jurisdiction.[68] In enacting a law that identifies a group of persons and singles that group out for special treatment, the state has created a classification subject to review under this amendment. If, on the basis of that classification, the effect of the law is to limit the group's free exercise of constitutionally guaranteed rights, that class as well as the law are "suspect."[69] In *Korematsu v. United States*[70] the Court first defined as "suspect" any law which has this effect of curtailing the civil rights of an individual or group, and subsequent decisions have established that before such a law can be sustained as valid it is subject to the "most rigid scrutiny"[71] of the reviewing court; in order to support such unequal treatment the state is required to sustain a "very heavy burden of justification."[72] The showing of a merely rational connection between the proposed class of persons and a valid public purpose is insufficient to justify discriminatory invasion of the civil rights of a class;[73] there must be some "overrid-

67. *See* Levy v. Louisiana, 391 U.S. 68, 72 (1968); Glona v. American Guarantee & Liab. Ins. Co., 391 U.S. 73, 75 (1968). *See also* Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164 (1972).

68. U.S. CONST. amend. XIV, § 1. "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of its laws."

69. Loving v. Virginia, 388 U.S. 1, 11 (1967).

70. 323 U.S. 214, 216 (1944).

71. *Id.*; Skinner v. Oklahoma, 316 U.S. 535, 541 (1942).

72. Loving v. Virginia, 388 U.S. 1, 9 (1967).

73. Shapiro v. Thompson, 394 U.S. 618 (1969); Carrington v. Rash, 380 U.S.

ing statutory purpose,"[74] some "compelling governmental interest,"[75] some "pressing public necessity"[76] which cannot be satisfied by some alternative means which does not make such unequal and burdensome distinctions.[77]

In the companion cases of *Levy v. Louisiana*[78] and *Glona v. American Guarantee and Liability Insurance Co.*[79] the Court held the classification of "illegitimate" to be one of those which "has no rational basis,"[80] creating an "invidious" distinction invalid under the Fourteenth Amendment.[81] In *Levy* a workman's compensation claim was filed by the illegitimate children of a woman who died as the result of an accident on the job; in *Glona* the mother of an illegitimate child sued the insurance company from whom she had purchased a life insurance policy for specific performance when the covered child was killed in an accident. Both defendants refused payment on the theory that the illegitimacy of the children barred recovery. The Court found the defendants to be in error and the classification "illegitimate" to be violative of the Fourteenth Amendment under these circumstances.[82] The classification would deny children born out of wedlock and their parents the protection of state laws equal to that extended to "legitimate" children and their parents, and in neither instance could the defendant show a compelling state interest in denying recovery on account of the circumstances of the child's birth.[83]

In *Stanley v. Illinois*[84] the Court refused to find such a compelling state interest supportive of a discriminatory state practice based on a child's legitimate birth,[85] and removed one more of the legal disabilities imposed by tradition where children are born outside the marital relationship. The Court declared the rights of the natural father to the custody of his children and to due process when that custody may be granted to a nonparent to be independent of his marital relationship with the mother of his children.[86] When the mother of

89 (1965); McLaughlin v. Florida, 379 U.S. 184 (1964). *Cf.* Reed v. Reed, 404 U.S. 71 (1971).

74. McLaughlin v. Florida, 379 U.S. 184, 192 (1964).

75. Shapiro v. Thompson, 394 U.S. 618, 634 (1969).

76. Korematsu v. United States, 323 U.S. 214, 216 (1944).

77. Carrington v. Rash, 380 U.S. 89, 96 (1965).

78. 391 U.S. 68 (1968).

79. 391 U.S. 73 (1968).

80. *Id.* at 75.

81. Levy v. Louisiana, 391 U.S. 68, 72 (1968). *See also* Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164 (1972).

82. Levy v. Louisiana, 391 U.S. 68, 72 (1968).

83. Glona v. American Guarantee & Liab. Ins. Co., 391 U.S. 73, 75-76 (1968).

84. 405 U.S. 645 (1972).

85. *Id.* at 649.

86. *Id.* at 656-58.

Stanley's three illegitimate children died, the state granted custody to nonparents without Stanley's being notified of the proceedings and without his consent to the arrangement. Acting under the equal protection clause, the Court struck down Illinois' statutory distinction between married and unmarried fathers by declaring unconstitutional the presumption that unwed fathers are unfit to raise their children and by affirming to unwed fathers the same procedural protections afforded married fathers.[87] Where the state proposes to place the child in the custody of a nonparent, the natural father, be he married or unmarried to the mother of his child, must be shown to be an unfit parent in a formal hearing of which he has notice; and, no presumption of his unfitness as a parent can arise out of the illegitimacy of the child's birth.[88]

On the basis of the holdings in these three cases and the supportive facts of *Stanley*, it appears that the tort claim by unmarried prospective fathers for the wrongful death of a viable fetus should be successful where that father can show a sufficiently continuing relationship with the expectant mother, giving rise to a "family unit" which could support his claim of paternal expectations frustrated.

On March 4, 1974, the Supreme Court denied review of the recent Florida case, *Jones v. Smith*,[89] in which the district court held that the unmarried prospective father has no right to prevent the mother from terminating her pregnancy. The district court declared that the decision to abort is a personal one, to be made by the mother and her attending physician. While the Court is not formally accepting or rejecting the lower court's decision in declining to review it, the Court allows the decision to stand and appears to be giving at least tacit approval to the outcome. Whether the holdings in *Stanley*, *Glona*, and *Levy* are applicable to the abortion issue awaits consideration.[90] If the principle applies, the claim of right by the prospective father who is husband to the expectant mother can be afforded no greater consideration than that of the unwed father.

Paternal expectations in marriage

When the prospective father is husband to the woman, he has a special relationship to her that is recognized, encouraged, and protected

87. *Id.* at 658.

88. *Id.* at 657.

89. 278 So. 2d 339 (Fla. 1973), *cert. denied*, 42 U.S.L.W. 3501 (U.S. Mar. 4, 1974).

90. Appeals have been filed for review in two Florida cases challenging the constitutionality of the state's requirement of written "spousal or parental consent" to abortion. In both cases the lower courts declared the requirement an unconstitutional limitation on the wife's privacy. Gerstein v. Coe, *appeal docketed*, No. 73-1157, 42

by law. Anthropologists consider marriage to be among those basic and virtually universal social institutions common to the social systems of the most unsophisticated and the most technically advanced peoples.[91] Its primary purpose is the identifying and protecting of the young;[92] it is essential to avoiding the universally acknowledged tabu of incest,[93] to observing religious requirements of clan and community,[94] and to preserving and protecting property interests including sexual access to the female.[95] Since generations of societal experience have shown the desirability of procreation and nurture of children within a family unit, it is not surprising that American law confirms this preference by extending to it certain benefits.

Marriage customs and laws of twentieth-century America reflect these general social values, encouraging marriage through laws which sustain it, assigning substantial importance to the procreation and nurture of children within marriage and surrounding the procreative process with special protections. While the marriage "contract" does not impose a duty of begetting or bearing children,[96] procreation is an expectation of marriage and is legally protected.[97] Not surprisingly the statutes and case law of the many jurisdictions in this area of the law are remarkably similar. Thus, a marriage is voidable if either spouse is impotent[98] or if the woman is pregnant by another man at the time of marriage and knowingly conceals the fact.[99] Insisting on

U.S.L.W. 3441 (U.S. Jan. 28, 1974); Poe v. Gerstein, *appeal docketed*, No. 73-1283, 42 U.S.L.W. 3501 (U.S. Feb. 20, 1974).

91. TAYLOR, *Society* in ANTHROPOLOGY (1881); F. BOAS, GENERAL ANTHROPOLOGY (1938); A. KROEBER, ANTHROPOLOGY: RACE, LANGUAGE, CULTURE, PSYCHOLOGY, PREHISTORY (1948); R. RADCLIFFE-BROWN, STRUCTURE AND FUNCTION IN PRIMITIVE SOCIETY (1952).

92. LOWIE, *supra* note 48.

93. R. LOWIE, SOCIAL ORGANIZATION (1934).

94. LOWIE, *supra* note 48.

95. E. DURKHEIM, PRIMITIVE CLASSIFICATION (1965).

96. Lapides v. Lapides, 254 N.Y. 73, 80, 171 N.E. 911, 913 (1930).

97. In order to reduce the likelihood of producing defective children, several states have imposed sometimes severe restrictions on the marriage of epileptics, imbiciles, the feeble-minded or the insane where the woman is under the age of forty-five; similarly, marriage is restricted where one of the parties is infected with venereal disease in a contagious stage. *See* CAL. CIV. CODE § 4201 (West Supp. 1974); DEL. ANN. CODE tit. 13 § 101 (1972 Supp.); BURNS IND. STAT. ANN. § 44-104; KAN. ANN. STAT. § 23-120 (Supp. 1973); NEB. REV. STAT. §§ 42-102, 103 (1968); VA. CODE ANN. § 20-46 (Supp. 1973); WASH. REV. CODE § 26-04.010 (1973).

98. Marriage is voidable for impotency in thirty-two states; those not recognizing this as ground include California, Connecticut, Delaware, Hawaii, Idaho, Iowa, Kansas, Louisiana, Montana, New Jersey, New York, North Dakota, South Dakota, South Carolina, Texas, Vermont, West Virginia and Wisconsin. COUNCIL ON MARRIAGE RELATIONS, GROUNDS FOR DIVORCE 91 (1973).

99. States voiding marriage where the wife concealed her premarital pregnancy

the practice of birth control against the wishes of the marriage partner and without justifying health reasons has been found to be desertion and grounds for divorce in several jurisdictions.[100] Until recent reforms were adopted the principal ground for divorce was adultery.[101] At common law the strong proscriptions against adultery were founded on the fear of introducing spurious offspring into the family unit, adulterating the issue of the husband and turning the inheritance away from the father's own blood to a stranger unqualified to share.[102]

Under the Internal Revenue Code of 1954 the married head of household may elect to file a joint return with his wife and thereby realize what is usually a reduction of his tax liability.[103]

Even though the current trend in domestic law is to erase the legal distinctions between issue of marital and extramarital liaisons, the Court in a recent 5-4 decision chose to preserve the distinction made in Louisiana's law of intestate succession which has the effect of granting an economic advantage to children who are born in marriage. Despite its earlier decisions in *Levy* and *Glona* the Court held in *Labine v. Vincent*[104] that there was no violation of the equal protection clause in Louisiana's preserving the classification "illegitimate" where by statute it barred any intestate claim made by the illegitimate child who was never legitimated or adopted by his deceased father. In denying the illegitimate child an equal share with his legitimate half-siblings, the Court found that the state was "properly regulating property rights incident to family life" and "making a valid legislative choice" which lies "within the power of the State."[105] On the strength of this decision the intestacy laws barring the father from taking from or through his illegitimate child would also remain intact.[106]

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by another man include Alabama, Arizona, Georgia, Kentucky, Mississippi, Missouri, New Mexico, North Carolina, Oklahoma, Tennessee, Virginia, Wyoming. COUNCIL ON MARRIAGE RELATIONS, GROUNDS FOR DIVORCE 91 (1973).

100. Jones v. Jones, 186 Md. 312, 46 A.2d 617 (1946); Brown v. Brown, 78 N.H. 337, 100 A. 604 (1917); Kreyling v. Kreyling, 20 N.J. Misc. 52, 23 A.2d 800 (1942); Baker v. Baker, 99 Ore. 213, 195 P. 347 (1921); Hathaway v. Hathaway, 71 S.D. 310, 24 N.W.2d 33 (1946).

101. Adultery is named as ground for divorce in all states excepting California and Iowa.

102. *See* McAlister v. McAlister, 71 Tex. 695, 697, 10 S.W. 294, 295 (1888). For a general discussion of ecclesiastic and common law origins see Bashford v. Wells, 78 Kan. 295, 96 P. 663 (1908); State v. Bigelow, 88 Vt. 464, 92 A. 978 (1915).

103. INTERNAL REVENUE CODE OF 1954, §§ 1(a), 6013.

104. 401 U.S. 532 (1971).

105. *Id.* at 536-37.

106. *E.g.*, N.Y. ESTATES, POWERS AND TRUSTS LAW § 4-1.2 (McKinney 1973): (a) For the purposes of this article . . . [a]n illegitimate child is the legitimate child of his father so that he and his issue inherit from his father if a court of competent jurisdiction has, during the lifetime of the father, made an order of filiation declaring

In sustaining the special tax allowance for married persons and preserving Louisiana's succession laws, the Court appears to be affirming legislative determinations that procreation within wedlock should be encouraged, and authorizing a kind of benign discrimination in behalf of families created within marriage. Whether the state's apparently valid encouragement can or should be extended to granting the husband a kind of "domestic veto power" over the wife's decision to abort by authorizing a benign discrimination in the husband's behalf has yet to be considered.

Benign Discrimination and the Fourteenth Amendment

Were the state in an abortion statute to separate out the husband from all other prospective fathers as a member of a special class due favored treatment, that is, allowed consensual participation in his wife's decision to abort, it would thereby be granting an unequal right to a limited class of persons. What is the constitutionality of such discrimination favoring, not restricting, a special class? Since this is the reverse of treatment proscribed by the equal protection clause of the Fourteenth Amendment, does the amendment apply?

Recently the Court analyzed a provision of the federal Voting Rights Act of 1965[107] as just such a discriminatory grant of special favoring treatment to a limited group of persons.[108] Under § (4)(e) of the act Spanish-speaking citizens who had completed the sixth grade in an accredited school in Puerto Rico were guaranteed the right to vote, regardless of New York law making the right to register and vote conditional upon English literacy. Since the federal act did not curtail a civil right, but rather extended it, the Court began with a presumption of the statute's constitutionality and applied a "permissive standard" in testing its validity.[109] This permissive standard requires only that the law not be arbitrary and that a "reasonable relation" exist between the effect of the law and its declared purpose.[110] "[The] principle that calls for the closest scrutiny of distinctions in laws *denying* fundamental rights . . . is inapplicable."[111]

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paternity in a proceeding instituted during to pregnancy of the mother or within two years from the birth of the child. (b) If an illegitimate child dies, his surviving spouse, issue, mother, maternal kindred and father inherit and are entitled to letters of administration as if the deceased were legitimate, *provided that the father may inherit or claim such letters only if an order of filiation has been made in accordance with the provisions of* [*paragraph (a)*] (emphasis added). *See also* LA. CIV. CODE §§ 1486, 1488 (1952).

107. 42 U.S.C. § 1973b(e) (1970).

108. Katzenbach v. Morgan, 384 U.S. 641 (1966).

109. *Id.* at 657.

110. *Id.* at 650-52.

111. *Id.* at 657.

Just what rights can be so extended in a benign discrimination to special classes of persons is not yet clear; but it is not unreasonable to suggest that they will include "penumbral" rights which have been found to be of a fundamental nature.[112] Under *Griswold* and *Wade* the right to privacy in decisions concerning procreation and abortion is fundamental, and so could properly be extended to that special class —married prospective fathers—by benign discrimination.[113]

Where benign discrimination is not merely an extension of special favoring treatment to one class but has the simultaneous effect of imposing disabling restrictions on persons identifiably a part of a derivative class created by that benign discrimination, the original issue of equal protection re-emerges. Accepted for review in the Court's current term is a case from the state of Washington which turned on the constitutionality of such benign discrimination.[114] The law school of the state university had identified in ethnic and racial minorities a special class of persons that had suffered restricting discrimination in the historical past. As a result these minorities had been effectively barred from access to a legal education, and as a consequence denied participation in the legal profession.

As a state agency the university argued its responsibility as a public agency to take affirmative action to find and apply a corrective measure. The state's supreme court agreed that the preferred admissions of the members of these groups was the appropriate corrective, even though the effect of the state action was detrimental to persons not members of the favored class; but for the discriminatory admissions policy, they would have gained a seat in the law school.[115] The state court found that, in accommodating the need to open the doors of its law school to these minorities, the state had a "compelling interest" which would justify the restriction the university's actions put on those excluded.[116] The Court could have decided whether the action of the university as an arm of the state has created a derivative class; if so, whether that class, white males, has been deprived of any right guaranteed by the Fourteenth Amendment; and if so, whether there is the requisite compelling state interest with no viable alternative justifying such discrimination.

The same questions are raised relative to the unwillingly pregnant wife, for if her husband is extended the right to participate in her abortion decision, he is being extended the right to intrude on

112. Griswold v. Connecticut, 381 U.S. 479, 484-85 (1965).

113. Roe v. Wade, 410 U.S. 113, 159 (1973); Griswold v. Connecticut, 381 U.S. 479, 485-86 (1965).

114. DeFunis v. Odegaard, 82 Wash. 2d 11, 507 P.2d 1169 (1973), *cert. granted,* No. 73-235, 42 U.S.L.W. 3306 (U.S. Nov. 19, 1973).

115. *Id.* at 22, 507 P.2d at 1184.

116. *Id.* at 25, 507 P.2d at 1187.

her personal right to privacy. Benign discrimination in his behalf is restrictive and disabling discrimination against the woman who is married. Where the unmarried woman is free to make her decision in accordance with medical advice and, when applicable, state requirements, the married woman would be denied that freedom. Granting the husband power to consent or withhold consent, the state would be forcing upon the married woman the hazards of pregnancy and childbirth she could otherwise avoid.

Summarizing the interests

Where there is conflict between personal and proprietary interests which are protectable under the Constitution, and where any resolution of that conflict is based on a classification of the persons whose interests are in conflict, a valid claim for equal protection under the Fourteenth Amendment arises; and, the interests to be affected by unequal treatment must be weighed and balanced.[117]

Here the proposed classifications are "expectant parent, husband" and "expectant parent, wife." Both are persons of standing under the law, and both may claim the support of the state in protecting their individual and fundamental rights. The prospective father claims a right to equal participation in the abortion decision, while the wife would preserve that decision to herself. Where the husband seeks to protect his personal and proprietary interests in a future child by seeking the power of consent to the destruction of the fetus, the wife seeks to protect her personal interest in her present mental and physical health by keeping safe her right to privacy. The husband desires an extension of his rights by the state's benign discrimination in his behalf as a member of the special class, "expectant parent, husband," and seeks a measure of participation in his wife's decision to abort. The wife requires equal protection with that extended by the *Abortion Cases* to all other unwillingly pregnant women, ensuring her full liberty under the law to chose abortion.

The husband's claim for discriminatory treatment grows out of the contractual relationship he shares with his wife, and is measurable by the benefits that accrue to him by dint of his parenthood. Defined principally by tort law, and to a lesser extent by the law of property, they include tangibles such as the value of services and earnings of the future child as well as the intangibles of companionship, parental pride, and filial affection.

Recognizing any compensable legal interest in the parents of the stillborn fetus is of recent development in the law of torts, and has depended upon judicial construction of the local wrongful death statutes. It is arguable that such applications of the statutes depend upon

117. Shapiro v. Thompson, 394 U.S. 618, 634-38 (1969).

a presumption that a *child* capable of *present* life actually exists even though yet *en ventre sa mere*, and so, do not truly represent an acknowledgement of parental interests in a *fetus*. However, assuming for the sake of argument that these cases do represent a recognition of substantial interest in fetal existence, the value of the father's potential loss as a result of the destruction of the fetus is the value of his expectancy; under the liberalized tort law of those jurisdictions, that value is measured in terms of the material benefits accruing to him by his parenthood. Neither his personal life nor liberty is threatened, although the disappointment or sorrow at the loss of his future child may amount to a threat to his mental health. His interests are principally economic, prospective, and contingent, and their realization is largely dependent upon the live birth of the child.

The wife's claim for protection equal to that extended to all other unwillingly pregnant women is based on her personal right to privacy in matters relating to the protection of her physical and mental health. A personal and not a property right, it is far more precious than mere property rights, and escapes meaningful economic measure. As one of those fundamental rights so "essential to ordered liberty," her personal privacy cannot be invaded unless a superior interest is thereby served. The value of her loss if denied exclusive control of the abortion decision is the value of her physical and mental health, and potentially, her life. Her interests are personal, immediate, and real.

From initial appearances, the state's interest in encouraging the rearing of children within a familial unit bound together by marriage lends support to the husband's claim for special treatment. However, making a special grant of consensual power to him would have an effect that is immediately and directly contrary to now well-established policy in all jurisdictions across the nation; despite a century's progress in removing long traditional disabilities, such a special grant of power would place married women under a new disability not shared by other women. In the light of the contemporary movement to remove the extra-legal social disabilities all women are subject to, creating such a new legal disability binding married women could only be a retrograde step.

A statute regulating abortion and granting consensual powers to the prospective father, to be in accord with the requirements of *Roe v. Wade*,[118] would probably have to limit interference by the prospective father to the final trimester of pregnancy; his interests are relatively remote prior to the sixth month of fetal development. On the other hand, protection of the woman's physical and mental health by avoiding the hazards of full-term pregnancy and birth of the unwanted

118. Roe v. Wade, 410 U.S. 113, 164-65 (1973).

child is most effectively and safely accomplished prior to the conclusion of the second trimester.[119] In view of the practices surrounding the donation of tissue for human transfer and the applications of the wrongful death statutes under tort law, even in the most liberal of jurisdictions, such a limitation of consent to the third trimester is well justified.

Striking the balance

Such a statute extending participatory consent to the prospective father would serve the purpose of preserving his present expectations in the contingent benefits of family life; however, it would deprive the woman of her right to act privately in protecting and preserving her health. Furthermore, such a statutory provision would grant the man powers equal to, yet independent of and potentially contrary to the state's power in determining the legality of abortion in the final trimester.

Where the effects of a statutory classification of persons are economic or proprietary, the standard for application of the equal protection clause is significantly different from that where the effects are in deprivation of personal civil liberties.[120] Constitutional decisions distinguish clearly between them, and during the last thirty years the Court has consistently supported class distinctions whose effects are economic if the distinctions drawn are not patently unreasonable.[121] But where the class distinctions impose a restriction on the exercise of fundamental civil liberties, the Court has just as consistently declared the class "suspect" and required an affirmative showing of a "compelling state interest" served by the discriminatory treatment and justifying that restriction.[122] Where the classification cannot meet that stringent test, it is declared unconstitutional as in violation of the Fourteenth Amendment.

As between the man's economic and the woman's personal interests, the weight of constitutional considerations appears to fall on her side of the scale. In enacting regulatory legislation relating to the man's participation in the abortion decison, the state legislatures will need to recognize that the heavier burden lies with the woman denied private and independent choice, and that the higher constitutional purpose is served by protecting her personal and immediate interests over the husband's largely contingent ones.

119. See statistics cited in note 31, *supra.*

120. Levy v. Louisiana, 391 U.S. 68, 71 (1968).

121. United States v. Carolene Products Co., 304 U.S. 144, 152 (1938).

122. Stanley v. Illinois, 405 U.S. 645 (1972); Levy v. Louisiana, 391 U.S. 68 (1968); Loving v. Virginia, 388 U.S. 1 (1967); McLaughlin v. Florida, 379 U.S. 184 (1964).