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Paternal Interests in the Abortion Decision: Does the Father Have a Say?

Molly Diggins†

On November 14, 1988, in Conn v Conn' the Supreme Court affirmed without opinion an Indiana Supreme Court decision rejecting a man's attempt to block his estranged wife from having an abortion. If the court had granted certiorari on that case, it would have had to reconsider the question of whether and to what extent a man has a right to influence a woman's decision to have an abortion.³ Thirteen years ago the Court decided in Planned Parenthood of Central Missouri v Danforth⁴ that a man may not exercise a unilateral veto over his wife's ability to have an abortion. The holding in Danforth, however, did not preclude a range of rights—short of a veto—that a man may assert against his wife's decision to abort. The Court's refusal to hear Conn is indicative of its reluctance to address the difficult and controversial issue of paternal rights in the abortion decision, an issue which should ultimately be settled.⁵

This comment will propose a state statute that would consider the father's interests prior to the mother procuring an abortion.

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¹ 109 SCt 391 (1988).

² In Planned Parenthood of Central Missouri v Danforth, 428 US 52, 67-72 (1976), the Court invalidated a law requiring that a woman obtain the father's consent to an abortion. Subsequent cases presenting the issue of paternal control over an abortion have usually arisen in the context of individuals seeking to block an imminent abortion and have been decided by individual Justices in their capacity to hear emergency pleas. See Doe v Smith, 108 SCt 2136 (June 15, 1988), on emergency appeal to Justice Stevens in his capacity as Circuit Justice for the Seventh Circuit; but see Lewis v Lewis, 57 USLW 3373, cert denied (Nov. 28, 1988) (dissolution of injunction prohibiting woman in pending divorce from having an abortion of child conceived between parties during pendency of divorce action, because injunction interferes with rights set forth in Roe v Wade, 410 US 113 (1973), and Danforth).

³ 428 US 52.

⁴ Id at 71.

⁵ The Court recently decided a Missouri case which addressed the constitutionality of a state statute regulating abortion. Webster v Reproductive Health Services, 57 USLW 5023 (July 3, 1989). While the case raises several constitutional questions pertaining to the issue of abortion, the Court did not explicitly reconsider Roe nor does the case address questions specifically concerning paternal interests. Webster is important for the effect it has on the present legal status of a woman's right to an abortion and does not affect the status of paternal rights to control a woman's abortion.
The comment will show that the statute would withstand constitutional scrutiny. While the holding in Danforth denies the father a unilateral veto over an abortion, that decision does not forbid a state law which balances a potential father's interests against the mother's right to an abortion. Indeed, the landmark decision in Roe actually allows state legislatures to regulate abortion in a manner similar to that of the proposed statute. In addition, the Supreme Court has identified several interests of individuals, including men, relating to the creation and ordering of a family that are protected by the right of privacy. These arguably provide a man some degree of constitutional protection for his freedom to procreate and raise a family. Finally, there are state interests in promoting marriage and protecting the procreative potential of its citizens which incidentally may safeguard a prospective father's interest in his unborn child.

I. The State of the Law Concerning a Father's Ability to Intervene in an Abortion

In 1973, the U.S. Supreme Court ruled in Roe v Wade that a woman's ability to choose to have an abortion is a "fundamental right" protected by the U.S. Constitution. While the Court did not address in Roe whether spousal consent to an abortion can constitutionally be required, it later held in Danforth that "the State may not constitutionally require the consent of the spouse . . . as a condition for abortion during the first 12 weeks of pregnancy." The Court in Danforth recognized both the "interest that a devoted and protective husband has in his wife's pregnancy" and "the importance of the marital relationship" to American society. However, it found that by requiring spousal consent to an abortion, the statute essentially "determined that the husband's interest in continuing the pregnancy of his wife always outweighs any interest on her part . . . ." The Court viewed the husband's statutorily conferred power as the equivalent of a unilateral veto, and concluded:

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6 428 US at 69-70.
7 410 US 113.
8 Id at 153-56.
9 Id at 165 n 67.
10 428 US 52.
11 Id at 69.
12 Id.
13 Id at 70 n 11.
14 Id.
We recognize, of course, that when a woman, with the approval of her physician but without the approval of her husband, decides to terminate her pregnancy, it could be said that she is acting unilaterally. The obvious fact is that when the wife and the husband disagree on this decision, the view of only one of the two marriage partners can prevail. Inasmuch as it is the woman who physically bears the child and who is the more directly and immediately affected by the pregnancy, as between the two, the balance weighs in her favor.\textsuperscript{15}

Lower courts have consistently interpreted \textit{Danforth} to invalidate any statutory provisions that effectively granted the prospective father a unilateral veto over the woman’s decision to have an abortion.\textsuperscript{16} Essentially, \textit{Danforth} has precluded state legislatures from enacting statutes which would require spousal consent before a doctor may perform the abortion procedure.\textsuperscript{17} At the same time, lower courts have reached different conclusions as to whether \textit{Danforth} precludes the assertion by the prospective father of any rights, other than that of consent, as an unconstitutional infringement upon the woman’s right to an abortion.\textsuperscript{18} Any procedure that may result in preventing a woman from having an abortion could be considered a veto. And to the extent that such a procedure can be initiated by one person it could be considered unilateral. Still, current jurisprudence permits the imposition of certain regulations on the ability of a woman to obtain an abortion.\textsuperscript{19} Where a procedure...
dure exists to allow consideration of the interests of other parties, 
the fact that one party initiates such a procedure does not render 
it a "unilateral" veto.

Both state and federal courts have reached different conclu-
sions on the question of whether fathers have a right to notice of 
an impending abortion. In 1981, the Fifth Circuit in Scheinberg v Smith held constitutional a statute requiring that a married wo-
man give her husband notice of the proposed termination of preg-
nancy. The state justified the notice provision as furthering two 
interests: maintaining and promoting the marital relationship, and 
protecting a husband's interest in the procreative potential of the 
marrige. The court "weighed together" the state interests and 
balanced them against those of the mother, finally concluding that 
the Florida statute did not "run afoul of the concerns emphasized 
in Danforth. The statute requires notice, not consent . . . . The 
intrusion into a woman's ability to exercise freedom is thus much 
less here than in Danforth." Two U.S. district courts, however, have refused to limit the 
holding in Danforth solely to the right to consent and, accordingly, 
struck down statutes that recognize paternal interests. In Eu-
banks v Brown and Planned Parenthood of Rhode Island v Board 
of Medical Review, the respective courts interpreted Danforth to 
hold that the woman has "the right to unilaterally terminate her 
pregnancy," and that this right preempts any right asserted by 
the putative father. Accordingly, the courts struck down state stat-
utes requiring notification of the woman's husband prior to an 
abortion.

The differing holdings in Scheinberg, Eubanks and Planned 
Parenthood of Rhode Island concerning a prospective father's abili-
ity to assert any rights as against the woman's right to an abortion 
can be attributed to the ambiguous holding in Danforth. The court 
in Scheinberg emphasized that Danforth acknowledged paternal 
rights and did not preclude the possibility of balancing these 
interests, provided their exercise amounts to less than a unilateral

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20 See n 18.
21 659 F2d 476.
22 Id at 483.
23 Id at 486.
25 Eubanks, 604 F Supp at 148, citing Danforth, 428 US at 70-71; see also Planned 
Parenthood of RI, 598 F Supp at 638.
26 Danforth, 428 US at 69.
veto, with those of the mother.\textsuperscript{27} Scheinberg thus can be read as narrowing the \textit{Danforth} holding to a prohibition solely of a father's unilateral veto power.

The \textit{Eubanks} and \textit{Planned Parenthood of Rhode Island} decisions, by contrast, were based on the \textit{Danforth} dicta that "as between the man and the woman, the balance weighs in her favor."\textsuperscript{28} The Indiana Appellate Court in \textit{Conn} adopted the interpretation of \textit{Danforth} advanced in \textit{Eubanks} and \textit{Planned Parenthood of Rhode Island}.\textsuperscript{29} In sum, the \textit{Eubanks}, \textit{Planned Parenthood of Rhode Island} and \textit{Conn} decisions stand for the proposition that \textit{Danforth} precludes any balancing of rights, regardless of the validity of the rights asserted.\textsuperscript{30}

Despite the uncertainty at the lower court level about the reach of \textit{Danforth}, the Supreme Court has not definitively spoken on whether \textit{Danforth} precludes any consideration of the father's interests in an abortion decision. Since \textit{Danforth}, individual Justices have considered several emergency appeals by fathers seeking to influence abortion decisions, but have, for the most part, disposed of the appeals with little or no comment on the issue of paternal rights.\textsuperscript{31} In \textit{Doe v Smith},\textsuperscript{32} however, one such emergency opinion suggested that a balancing of the father's rights against those of the mother may indeed be permissible.

In \textit{Doe v Smith}, a prospective father sought to enjoin a woman from proceeding with an abortion.\textsuperscript{33} The Indiana Supreme Court affirmed the findings of the trial court judge who stated that "although the Plaintiff has expressed a legitimate and apparently sin-

\textsuperscript{27} As discussed at pp 370-79, the Court concluded in \textit{Danforth} that a requirement of spousal consent effectively amounted to a veto because the father's interest "always outweigh[ed] any interest on [the mother's] part." 428 US at 70 n 11. However, the Court has upheld restrictions which would not automatically deprive the woman the right to an abortion but rather would initiate a certain process ultimately enjoining the woman from the exercise of her right. The parental notification requirement upheld in \textit{Ashcroft}, 462 US at 476, could trigger a process through which a court would determine that the minor should not obtain an abortion, because of, for instance, immaturity. The notification requirement would not automatically deprive the minor of the right to an abortion.

\textsuperscript{28} 428 US at 71.

\textsuperscript{29} "The language and holding in \textit{Danforth} is unambiguous and unqualified. A married woman has an unconditioned right to have an abortion in the first trimester . . . . \textit{Danforth} in plain language struck down the balancing argument presented here, and even used the term 'for any reason' in holding that a husband has no right to veto the wife's decision to have an abortion." \textit{Conn v Conn}, 525 NE2d 612, 616 (Ind App 1988).

\textsuperscript{30} \textit{Conn}, 525 NE2d at 616; \textit{Eubanks}, 604 F Supp at 148; \textit{Planned Parenthood of RI}, 598 F Supp at 638.

\textsuperscript{31} See, for example, \textit{Lewis v Lewis}, 57 USLW 3373, cert denied (Nov. 28, 1988).

\textsuperscript{32} 108 SCt 2136 (1988) (Stevens, as Circuit Justice for the Seventh Circuit).

\textsuperscript{33} Id.
cere interest in the unborn fetus, his interest would not be suffi-
cient to outweigh the Constitutionally protected right of the
Defendant to abort her child.” In reaching this conclusion, the
trial judge weighed evidence such as the fact that “the parties are
not married, that there is no suggestion they will ever reunite, that
the Plaintiff is able to father other children and . . . has showed
substantial instability in his marital and romantic life.” The
judge also noted that “even if the Danforth decision permits the
Court to balance the interest of the father of the unborn child
against those of the mother, in this particular case the balancing
would be in the mother’s favor.”

In affirming the trial court and Indiana Supreme Court deci-
sions, Justice Stevens did not address whether the balancing done
by the trial court was, in fact, permissible under Danforth or any
other Supreme Court opinion. Rather, he stated:

Since such balancing has already been done by the trial
court, since the Indiana Supreme Court has indicated
that there is a presumption of correctness to the decision
of the trial court in a matter of this kind, and since there
is some danger that a delay in implementing [the defend-
ant’s] decision may increase the risk of physical or emo-
tional harm to [the mother], petitioner’s claim provides a
particularly weak basis for invoking the extraordinary ju-
dicial relief that is sought.

Stevens’ brief opinion in Doe falls short of endorsing the bal-
cancing by which the lower courts concluded that the father’s rights
and interests did not outweigh those of the mother. Instead, he
simply indicated that given the result yielded by the lower courts’
balancing, he could not re-examine whether the balancing process
itself was proper. The Doe opinion thus suggests that Danforth
fails to foreclose consideration and balancing of paternal interests
in addressing a father’s request to enjoin an abortion.

II. PATERNAL AND STATE INTERESTS IN THE ABORTION DECISION

Two groups of Supreme Court cases consistent with a narrow
reading of Danforth support balancing, to a limited extent, of

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34 Id at 2137.
35 Id.
36 Id (emphasis added).
37 Id.
rights in an abortion decision. *Roe v Wade,*[^38] though establishing a woman’s right to choose an abortion, to some extent qualified that right as subject to a process which balanced all “the relative weights of the respective interests involved.”[^38] Although finding that the right of privacy embedded in the Ninth and Fourteenth Amendments to the Constitution was “fundamental,” the Court noted that “a State may properly assert important interests in safeguarding health, in maintaining medical standards, and in protecting potential life.”[^40] *Roe* thus established that the woman has a constitutionally protected right to choose to have an abortion, but that a state may regulate that right beyond the first trimester as long as the regulation is pursuant to “compelling state interests.”[^41] Such interests become compelling only upon the viability of the fetus.

In *Roe,* the Court explicitly rejected the argument that “the woman’s right is absolute and that she is entitled to terminate her pregnancy at whatever time, in whatever way, and for whatever reason she alone chooses.”[^42] The Court instead held that the privacy right to choose abortion can be restricted during certain periods of the pregnancy if the state can assert an important interest in regulation.[^43] The state’s interest in protecting paternal rights was not an issue in *Roe,* yet *Roe* did not dismiss outright state interests in paternal rights.[^44] The Court emphasized that its holding was “con-
consistent with the relative weights of the respective interests involved" and "leaves the State free to place increasing restrictions on abortion . . . so long as those restrictions are tailored to the recognized state interests."

Thus, Roe failed expressly to foreclose states from limiting the abortion right in order to protect other interests, one of which is that of the father.

The Court has recognized two categories of state interests which, in the context of abortion, incidentally protect paternal interests. The first encompasses those interests that promote the exercise by individuals (including males) of certain fundamental rights: rights to the procreation, care, custody and companionship of their children and potential children. The Court has established, within the rubric of substantive due process, that both men and women have rights to procreate, create and order a family unit and be assured of the custody of their children without government interference, even when the exercise of these rights challenges traditional assumptions or customs. While the government may restrict the exercise of these rights, it must do so in a way that accounts for the particular circumstances of the individual's situation. A state may not, in protecting these fundamental rights, consider the gender of the affected individuals; in other words, given a conflict between the relative fundamental rights of the male and female parental members of a relationship, neither party's inter-

father's rights, if any exist in the constitutional context, in the abortion decision." Id (citation omitted).

5 Id at 165.

6 Several important cases challenged traditional assumptions concerning the "primary caretaker" in a marriage and traditional family structure. See, Stanley v Illinois, 405 US 645, 654-58 (1972), striking down an Illinois statute that automatically made children of unwed fathers wards of the state on the death of their mothers; Quilloin v Walcott, 434 US 246, 256 (1978), upholding law denying veto to unwed fathers who had exercised no custody or control over his children where the adoption was determined to be in the best interests of the child; Skinner v Oklahoma, 316 US 535, 541 (1942), holding that a statute providing sterilization for habitual criminals violates right to procreate as deprivation of "liberty" without due process; Santosky v Kramer, 455 US 745, 747 (1982), concluding that "[b]efore a State may sever completely and irrevocably the rights of parents in their natural child [on grounds of neglect], due process requires that the State support its allegations by at least clear and convincing evidence;" Moore v City of East Cleveland, 431 US 494 (1977), invalidating city ordinance limiting occupancy of any dwelling unit to members of the same "family," where the ordinance narrowly defined "family" as including only a "few categories of related individuals."

7 It is important to note that, in the cases cited in note 46, the Court either applied the rights equally to both sexes—Skinner, 316 US at 535, Santosky, 455 US at 745, Moore, 431 US at 494 or sought to eradicate a formerly unequal application of those rights—Stanley, 405 US at 645 and Quilloin, 434 US at 246. Nowhere does the Court automatically skew a fundamental right in favor of one sex to the detriment of the other.
There is a second group of interests that provide support for the recognition of paternal rights in the abortion decision through the legitimate protection of other state interests. Thus, paternal rights receive incidental protection under the umbrella of "compelling state interests" which may serve to justify legislative restrictions on a woman's right to an abortion. The Court has enumerated interests which a state may "properly assert" against the woman's right of privacy; these include: safeguarding health, maintaining medical standards and protecting potential life. In the context of abortion, the principal interests which a state might deem compelling and which incidentally protect paternal rights are the interests in promoting marriage and protecting the individual's procreative potential.

Lower courts disagree over whether a state may properly assert interests in marriage and family as justifications for limiting a woman's access to an abortion. On the one hand, the court in Scheinberg found that the state's interest in maintaining and promoting the marital relationship and protecting a husband's procreative potential "justify the burden on a woman's abortion decision" imposed by any degree of state interference. The court relied on three Supreme Court cases which stated that the creation and protection of marriage and family are "primarily . . . matters of state concern." On the other hand, other courts have not found such interests "sufficiently compelling to override a fundamental right."

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48 Indeed, several of these decisions call for a neutral weighing to allow for additional consideration of the interests of a third party, such as the child. See, for example, Caban v Mohammed, 441 US 380, 393 (1979) (law allowing the adoption of an illegitimate child without the natural father's consent violates due process where even those fathers who have "established a substantial relationship with the[ir] child and ha[d] admitted [their] patern[ity]" have no opportunity to present their interests).

49 Roe, 410 US at 155 ("fundamental" right may only be limited by a "compelling state interest").

50 Id at 154. As noted earlier, the Court explicitly did not address the issue of weighing paternal rights in an abortion decision. Roe, 410 US at 165 n 67.

51 659 F2d at 483.

52 Id, citing Sosna v Iowa, 419 US 393 (1975); Labine v Vincent, 401 US 532 (1971); Estin v Estin, 334 US 541 (1948).

53 Planned Parenthood of RI, 598 F Supp at 638. See also, Eubanks, 604 F Supp at 146-48, and Poe v Gerstein, 517 F2d 787, 796-97 (5th Cir 1975) (holding both parental and spousal consent requirements unconstitutional).
A. Paternal Rights Guaranteed by the Constitution

In Roe, the Court founded the woman's right to an abortion upon a concept of privacy that embodied certain fundamental rights relating to marriage, procreation and family ordering. While the Constitution does not explicitly mention any right of privacy, the Court reasoned that the notion of privacy emanated from the Ninth and Fourteenth Amendments. The Court additionally has concluded that "one aspect of the 'liberty' protected by the Due Process Clause of the Fourteenth Amendment is 'a right of personal privacy, or a guarantee of certain areas or zones of privacy.'" While the "outer limits" of that protection have not as yet been drawn, the Court has made it clear that "only personal rights that can be deemed 'fundamental' or 'implicit in the concept of ordered liberty' are included in this guarantee of personal privacy." Activities most often considered within the zone of privacy are "matters relating to marriage, procreation, contraception, family relationships, and child rearing and education." The Court has demonstrated a reluctance to extend constitutional "privacy" protection beyond these categories. Rather, it has confined protection to liberties "'deeply rooted in this Nation's history and tradition,'" such as those involving traditional family relationships, heterosexual marriage, or procreation. Moreover, the Court has characterized as "fundamental" several rights of males who, by virtue of their involvement in "family relationships, marriage, or procreation," are entitled to due process and equal protection safeguards.

The right of privacy shields the right to procreate and the right to keep custody of one's own children from government interference absent a showing that "compelling interests" justify the state intrusion. The Court has labelled procreation as "one of the

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54 410 US at 152-53.
55 Id at 152.
57 Roe, 410 US at 152 (citation omitted).
59 See Bowers v Hardwick, 106 SCt 2841, 2844 (1986), where the Court upheld the application of a Georgia statute criminalizing sodomy against homosexuals reasoning that the Constitution does not confer a fundamental right upon homosexuals to engage in sodomy.
60 Id at 2844.
61 Procreation is a right fundamental to the liberties afforded every man and woman by the Constitution. "Marriage and procreation are fundamental to the very existence and survival of the race." Skinner, 316 US at 541.
62 Id at 541; Stanley, 405 US at 651.
basic civil rights of man.”63 Roe, citing Skinner, made clear that regardless of whether the right to procreate is itself constitutionally protected, procreation falls within the protection afforded the right of privacy.64 While allowing a woman to choose to have an abortion without considering the interests of the prospective father does not permanently prevent him from exercising the right to procreate as would, for example, mandatory sterilization at issue in Skinner, it does implicate his interest in procreation. It could be argued, therefore, that the state’s failure to take a paternal interest into account infringes a male’s right to procreate.

The right of privacy also encompasses rights inherent in the parent/child relationship. In Santosky v Kramer,65 the Court stated that natural parents have a “fundamental liberty interest . . . in the care, custody, and management of their child,” which a state may not dissolve absent a showing of parental unfitness.66 This interest, moreover, can be invoked by either the father or the mother. In Quillioin v Walcott,67 the Court recognized that a mother may not unilaterally consent to the adoption of a child, but limited the father’s ability to consent to circumstances in which he has exercised custody or control over his child.68

We have recognized on numerous occasions that the relationship between parent and child is constitutionally protected. “It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder.” And it is now firmly established that “freedom of personal choice in matters of . . . family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment.”69

Rights inherent in the parent/child relationship are also protected under the Equal Protection Clause, and the Court has explicitly held that men have as much entitlement to these rights as women do. In Stanley v Illinois70 the Court struck down a law pro-

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63 Id.
64 410 US at 152.
66 Id.
68 Id at 256.
69 Id at 255 (ellipsis in original) (citations omitted).
70 405 US 645 (1972).
viding for the automatic separation of an unwed father from his children upon the death of their mother, regardless of his fitness.\textsuperscript{71} The Court reasoned that despite a severed relationship between the parents, a father's rights to custody of his children remain as important as those of the mother,\textsuperscript{72} and that a state may not discriminate on the basis of sex by making it relatively easier to terminate the father's rights.\textsuperscript{73}

It is thus established that a father has constitutionally protected rights in the procreation, custody, and companionship of his children. Absent a compelling interest, the state may not exercise a role in decision making within the family unit. The decision in \textit{Roe} has no effect on this proposition. \textit{Roe} simply allowed a woman, in consultation with her physician, to make a decision to terminate a pregnancy within the first trimester unless compelling interests justified state interference with that decision.

There is, moreover, no principle in the Court's jurisprudence on parental rights that suggests parental rights of women are entitled to greater protection than those of men. State restrictions on rights to procreate, to care for, or to exercise custody over children are subject to the same scrutiny whether those restrictions affect men or women. Accordingly, no legislature should disregard the due process protection awarded to both paternal and maternal rights, or honor one over the other, absent a fair evaluation and balancing of those rights in light of surrounding circumstances.

B. Compelling State Interests

Because paternal rights enjoy the same constitutional status as maternal rights, they deserve equivalent Fourteenth Amendment protection. A woman's decision to obtain an abortion implicates interests of both the state and the prospective father. There are two principal interests a state might seek to protect from such infringement, and by so doing, would incidentally protect the interests of the prospective father: the promotion of marriage and the protection of the procreative potential of its members.

1. \textit{The State's Interest in Marriage}

\textit{Roe} makes clear that decisions concerning marriage and family relationships fall within the same "zone of privacy" as a woman's decision to have an abortion.\textsuperscript{74} As a result, a state may not inter-
fere with these decisions absent a compelling interest. The Court explained in Stanley:

The rights to conceive and to raise one's children have been deemed "essential," "basic civil rights of man," and "[r]ights far more precious . . . than property rights . . . . It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for the obligations the state can neither supply nor hinder." The integrity of the family unit has found protection in the Due Process Clause of the Fourteenth Amendment, and the Ninth Amendment.

Marriage serves as the central organizational component for the family unit and society: "Marriage . . . [has] more to do with the morals and civilization of a people than any other institution . . . ." Because the institutions of marriage and the family occupy and shape the contours of our society, the state may regulate where "such regulation . . . furthers or maintains the integrity of these institutions," and, despite the interest in protecting privacy within the institutions, when a state views the unrestrained right of a woman to choose an abortion as a threat to marriage, it should be permitted to regulate that right in the interest of preserving the institution.

How would the right of a woman to an abortion threaten the institution of marriage? In Griswold v Connecticut, the Supreme Court considered harmony between and unity of the parties as central to the institution's success: "Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is . . . a harmony in living . . . a bilateral loy-

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personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution . . . . [T]he right has some extension to activities relating to marriage; procreation; contraception; family relationships; and child rearing and education." (citations omitted).

75 Id at 155.
76 405 US at 651 (citations omitted).
77 Maynard v Hill, 125 US 190, 205 (1888) (state has power to regulate method by which one becomes married).
78 Scheinberg, 659 F2d at 483, citing Poe, 517 F2d at 787. The Supreme Court has written: "[T]he power to make rules to establish, protect, and strengthen family life . . . is committed by the Constitution of the United States and the people of [a state] to the legislature of that state." Labine v Vincent, 401 US at 538 (holding that a statutory intestate succession scheme was within the State's power to establish rules for the protection and strengthening of family life).
79 381 US 479 (1965).
A woman’s unilateral right to make an abortion decision, by threatening the “harmony in living” and “bilateral loyalty,” undermines the institution of marriage. Essentially, the right to a unilateral decision by the female would remove the need for communication concerning what many, males and females alike, consider an important aspect of marriage: procreating and raising children. Moreover, the male in such a marriage relationship could perceive himself as a partner with less than equal rights in procreation and, as a result, may lose the incentive to undertake a commitment in which his rights are not on par with those of his female partner.

Unilateral control over the abortion decision can operate to destabilize the institution. The Court in Danforth noted, with respect to the male partner’s power of an abortion veto:

No marriage may be viewed as harmonious or successful if the marriage partners are fundamentally divided on so important and vital an issue. But it is difficult to believe that the goal of fostering mutuality and trust in a marriage, and of strengthening the marital relationship and the marriage institution, will be achieved by giving the husband a veto power exercisable for any reason whatsoever or for no reason at all.

This rationale applies with equal force when the word “wife” is substituted for “husband.” It would make little sense for the Court, or for any state, to fear problems posed to the institution of marriage by male domination of the procreative process but not by female domination of the same process.

While the Court has on numerous occasions recognized the interest of the states in maintaining and protecting the traditional marriage unit, it has not ignored the changes taking place within the marriage/family unit and American society. The advent of no-fault divorce, legalized contraception, and child custody rights for

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80 Id at 486.
81 Id.
82 "Since the woman, by repeatedly having abortions, prevents a man from procreating offspring within the marriage relationship, an infringement of his fundamental right to a family. . .has arguably occurred." Poe, 517 F 2d at 796 (citation omitted).
83 It may be argued that state intervention in such relationships would be futile where communication on an important aspect of the relationship has already failed. However, legislation forcing recognition of the respective procreative rights of partners within a relationship clears the way for communication and compels both parties to consider the ramifications of the exercise of their rights prior to entering the relationship.
84 428 US at 71.
unwed fathers, signal a "basic shift in the way society and the courts view the family." The constitutional right of privacy has been interpreted as "not a family right, but an individual right." For example, the holding in *Eisenstadt v Baird,* which extended to single people the right to use contraceptives, "suggest[s] that a married couple is not a separate legal entity, but rather a coupling of two independent and unique individuals." Under this view, "when the law transfers moral decisions, it transfers them to individuals rather than to families, thus sustaining the image of the family as a collection of discrete individuals."

The Court's decisions concerning the rights of unwed parents, married or unmarried, in an adoption proceeding are consistent with the notion of the family as a collection of individuals. All parents have a constitutional right to a hearing on their fitness as parents before the state may remove their children from their custody. Even where only one parent is empowered to decide the custody of the children, some judicial evaluation of the particular facts of the case and the interests of the parties is necessary. Where the male parent, even if unmarried, has demonstrated the responsibility and interest inherent in the parental role he is entitled to notice and to a hearing to present his interests. Anything less unconstitutionally "discriminate[s] against unwed fathers . . . when their identity is known and they have manifested a significant parental interest in the child." These cases "[suggest] that unwed fathers who claim competency and who desire to care for their children are entitled to notice and a hearing prior to the termination of their parental rights."

This principle can be extended to cases in which a father

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86 Id at 636.
87 405 US 438 (1972).
91 *Quilloin v Walcott,* 434 US 246, 254-56 (1978) (law requiring only consent of unwed mother for adoption satisfies Due Process Clause where it included a "best interests of the child" test permitting consideration of the peculiar facts of each case).
93 Id at 394.
wishes to assert those same or similar rights when the child is yet unborn. The Supreme Court was reluctant to truncate any paternal rights in an adoption proceeding absent a parental fitness hearing, even though such a hearing may infringe the mother’s fundamental right to consent to an adoption or determine the custody of her child. It seems to follow that the Court should allow the same right to the father of a child prior to an abortion procedure.

_Doe v Smith_ suggests the propriety of a “parental fitness” test in an abortion context because the opinion emphasizes the importance of surrounding circumstances to the balancing of the parents’ respective rights. In _Doe_, the trial court judge, affirmed by both the Indiana Supreme Court and, on emergency appeal, by Justice Stevens, weighed evidence such as the fact that “the parties are not married, that there is no suggestion they will ever reunite, that the Plaintiff is able to father other children and . . . has showed substantial instability in his marital and romantic life” to conclude that “in this particular case the balancing would be in the mother’s favor.”

The balancing tests in _Quilloin, Caban_ and _Doe_ show that in assessing the father’s commitment to the family, the question is not necessarily whether the father remains within the traditional institution of marriage in order to show his commitment to family, but whether he has assumed certain duties and commitments nor-

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**See, for example, _Stanley_, 401 US at 645.

** One might argue here that cases such as _Quilloin_ and _Caban_ remain distinct from the abortion context for the simple reason that in the former cases and elsewhere in family law, the rights to companionship arise only because the child already exists. However, the abortion dispute does not center around the definition of when life begins. _Roe_ specifically avoided the question; rather, the Court indicated that, regardless of when life begins, the mother’s interests in privacy remain strong enough during the first trimester to prevail over any countervailing interests. _Roe_, 410 US at 163-64; see also Justice White dissenting: The Court for the most part sustains this position: During the period prior to the time the fetus becomes viable, the Constitution of the United States values the convenience, whim, or caprice of the putative mother more than the life or potential life of the fetus; the Constitution, therefore, guarantees the right to an abortion as against any state laws or policy seeking to protect the fetus from an abortion not prompted by more compelling reasons of the mother.

Id at 195. As a result, a state might, by statute, constitutionally define the point at which life begins, and establish that a father has a certain protectable interest in the life from that point. But see _Webster v Reproductive Health Service_, 57 USLW 5023 (July 3, 1989), which raised but did not answer the question whether legislative findings in the preamble to the state abortion bill that “the life of each human being begins at conception” and that “unborn children have protectable interests in life, health, and well being” are facially unconstitutional.

** 108 SCt 2136, 2137 (1986).

** Id.
mally associated with, but not necessarily confined to, the institution of marriage and the traditional family unit. More and more, parents share the duties associated with marriage/family relationships in lieu of delegating them to the traditional roles of “mother” and “father.” In recognition of this, the courts in Quilloin and Doe measured the degree to which the man showed his commitment to child-rearing and the family, whether through the assumption of traditional or non-traditional duties of a father. The balancing processes used by these courts suggest that the rights of a father to the custody of his children and to children fathered by him but not yet born increase concomitantly with the increase in his assumption of duties in childrearing and “family” commitments.

2. The State’s Interest in Procreation

A state may protect rights associated with, but not actually confined to, the traditional family unit, if the individual claiming such rights exercises the duties associated with the family. The traditional family “unit” nevertheless continues today to play an important social role and, accordingly, the state should strive to preserve the traditional “unit,” that is a marriage with procreative potential. The Supreme Court emphasized in Skinner v Oklahoma that “[m]arriage and procreation are fundamental to the very existence and survival of the race” and elevated the right to procreate and the right to offspring to “fundamental” rights. A state, in its efforts to protect these fundamental rights, could accord the right to procreate special protection within the context of a marriage. As long as the viability of marriage remains a prerequisite for the success of the family unit, procreation, often an important component of marriage, also merits the state’s protection.

A state abortion regulation which provides that, in certain circumstances, a father has the right to protect his own procreative potential, may promote and support the institution of marriage. A male will more willingly enter a marriage commitment knowing that, once there, his fundamental right to procreate will be recognized. In addition, both males and females will regard marriage as an institution whose procreative potential must be respected and considered in the decision to marry. Finally, if both parties are assured protection of their respective interests in procreation, they

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98 316 US at 541 (1942).
100 Id.
101 Poe, 517 F2d at 797 (suggesting state could protect man’s procreative rights by making unconsented abortion ground for divorce).
will be more willing to assume related marital duties.\footnote{Of course, regulation of abortion should not absolutely create a right for a male to procreate with a particular female or, more generally, an absolute right to procreate (for example, the state would have no right to force a woman to bear a child for a man who cannot find a wife). Nor can it be ignored that a husband/male partner may also thwart procreative potential within the relationship simply by practicing celibacy.}

It should be noted that the Court in \textit{Danforth} raised the legitimate concern that a pregnancy imposes certain burdens on the parties that cannot be seen as equal.\footnote{"Inasmuch as it is the woman who physically bears the child and who is the more directly and immediately affected by the pregnancy, as between the two, the balance weighs in her favor." 428 US at 71.} As discussed earlier, some courts have interpreted this language to mean that under \textit{no} circumstances may a male assert any right to the unborn offspring.\footnote{See \textit{Planned Parenthood of RI}, 598 F Supp at 642 and \textit{Eubanks}, 604 F Supp at 148.}

But a more reasonable reading views \textit{Danforth} as recognizing the greater burden borne by the woman by thus placing the burden on the male to show his "worthiness" to receive state protection of his interest. The standard employed by the trial court in \textit{Doe v Smith} and by the Supreme Court in \textit{Quilloin} and \textit{Caban} is consistent with this reading. In both the adoption and abortion contexts the courts considered: the history of the relationship between the mother and the father, the ability of the father to form stable relationships,\footnote{\textit{Doe}, 108 SCt at 2137.} whether the father had any other children and, if so, whether he had accepted any significant responsibility in their support and upbringing.\footnote{\textit{Caban}, 441 US at 393.} The rationales in \textit{Quilloin} and \textit{Doe} incorporate a similar analysis: Because the mother physically bears the child and has traditionally assumed its nurture and care, the choice in either the abortion or adoption situation remains with the mother unless the father can convince the court of a substantial interest in the child. Such a process of balancing both respects the weight of the burden on the mother and the interest of a genuinely concerned father.

\section*{IV. Paternal Interests and the Proposed Statute}

Both the Constitution and strong state interests compel at the least a consideration of the rights and interests of a father before a mother may exercise her right to choose to have an abortion. \textit{Roe} gave the states limited license to regulate abortion in light of their own "compelling interests."\footnote{410 US at 153-55.} A constitutionally sound and inter-
est-sensitive state statute might provide a procedure for notice and a hearing at which a prospective father could assert any interests he has as a prospective parent. The prospective father is first assured that he will receive notice that the prospective mother intends to have an abortion. The statute provides that a judge must then expeditiously hold a hearing and weigh the interests of both parties. He may enjoin a woman from obtaining an abortion only if the father's interests substantially outweigh both the mother's interests in obtaining the abortion and the additional burden she would bear from having to carry the child to term. The procedure bears some similarity to other procedures that the court has enforced in the contexts of adoption and parental consent to abortion.

The greatest benefit of the statute lies in the way it works to limit the role of the judiciary in the process without neglecting any interest which should be involved in the decision. First, the initial simple requirement of notice would respect the fact that the mother has the burden of bearing the child physically. Only when the father actually responds to such notice will the mother's right to abortion in any way threatened. Secondly, the hearing requirement should have a "weeding effect" on the number of fathers who wish to exercise their rights. The burden of collecting evidence and presenting it to a judge in order to meet the set of criteria established by the legislature may deter many fathers whose real interest is not, in fact, the child but perhaps simply frustrating the rights of the mother.

Additionally, the proposed statute limits the burden on the judiciary by requiring that the initial balancing procedure be performed at a hearing rather than at a full-fledged trial. Such a hearing would allow all relevant evidence to be presented and weighed by a judge without clogging court dockets. While some fathers may appeal the result of the hearing, the process may further deter frivolous suits and support only the appeals of fathers who have legitimate interests and concerns in the fetus. As a practical matter, however, appeals from a decision against the father are likely to be few. A father who fails to get a court order halting the abortion at an initial hearing has effectively lost, as the abortion will take

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108 See Appendix p 398 for one example of such a statute.
place.\textsuperscript{110}

The statute does not provide specific criteria which would guide the judge presiding over a hearing regarding the validity of the father's interests. Although such criteria should be tailored to the interests of the particular state, they might include those advanced by the trial judge in \textit{Doe v Smith}: whether the father has other children to whom he has shown some devotion and responsibility, and whether he has displayed some stability in his marriage or other relationships.

\textbf{Conclusion}

The Supreme Court, by refusing to hear \textit{Conn}, declined to resolve the troubling and complex issue of whether a father may assert certain paternal rights against the mother's right to an abortion. While the extent of the physical and emotional burden imposed upon a woman who carries a child to term must be recognized, it appears constitutionally manageable for a legislature to enforce the rights of the male without unduly infringing on any right of the woman. The Due Process and Equal Protection Clauses accord the same protection to a male's right to father and raise children as to the female's right to have an abortion. In addition, states have strong interests in maintaining marriage and family relationships—interests which incidentally protect many paternal rights. States, therefore, should be allowed to weigh paternal rights as part of a fair balancing procedure. Many fathers have increasingly assumed the responsibilities and duties of childrearing; accordingly, if a father demonstrates a substantial interest in the fetus, his rights, both those protected by the Constitution and

\textsuperscript{110} The very fact that a father's assertion of his rights may be preempted by the mother's decision to have an abortion within the first trimester perhaps points to the need for state regulation of abortion during that critical time. If the \textit{Roe} prohibition of first trimester regulation remains good law, any rights or interests a father might hold seem illusory. While the father must wait until the second trimester, at least, to exercise his rights, a mother may block his exercise of those rights simply by invoking her unfettered right to abortion during the first trimester. But such a result seems contrary to notions of equality or fairness. As Justice O'Connor has pointed out, state interests are no less compelling before viability than after. Dissenting in \textit{City of Akron}, O'Connor, joined by Justices White and Rehnquist, wrote: "potential life is no less potential in the first weeks of pregnancy than it is at viability or afterward. [The] choice of viability at the point at which the state interest in potential life becomes compelling is no less arbitrary than choosing any point before viability or any point afterward." 462 US at 461. Similarly, paternal interests cannot be ignored until the arbitrary point of "viability" at which time they suddenly assume significance. Rather, if the rights exist, they must receive due consideration at any point of the woman's pregnancy.
those guarded by the state, gain in significance. Such rights and interests cannot simply be discarded, absent a fair evaluation of the circumstances, in favor of a woman’s unilateral right to an abortion.

*Roe* established that a right to abortion is premised upon a balancing of all relevant interests. Although the Court has left open the question whether paternal rights are relevant and thus may be balanced against a woman’s right to an abortion, parental rights’ jurisprudence and policy seem to compel, in certain circumstances, consideration of paternal interests.
I. Any woman seeking to procure an abortion must first provide the father with written notice of the impending procedure. The woman must use reasonable means of ascertaining the whereabouts of the father, if such information is not readily attainable. The notice must include:

(1) Information concerning the date, location, and choice of physician for the proposed procedure;
(2) A date for a hearing, no sooner than 2½ weeks and no later than 6 weeks after such notice is sent, at which a father may have the opportunity to challenge the woman’s decision to have the abortion.

II. If a father, after receiving notice, neither appears at the scheduled hearing nor in any other way responds to the notice, he forfeits any opportunity to assert his rights in the woman’s decision to procure the abortion. If he appears at the scheduled hearing or at one rescheduled for matters of convenience, the hearing should:

(1) be attended by the woman, her physician, and the father of the fetus and presided over by a qualified, state-appointed judge;
(2) allow the father the opportunity to present evidence, at his own discretion, of a genuine interest in the fetus and its well-being. If, upon a review of all the evidence presented, the judge finds that the father’s interests substantially outweigh both the interests of the mother in procuring the abortion and the additional burden of bearing the child, the judge must enjoin the woman from procuring the abortion. If the judge finds that the father’s interests do not substantially outweigh those of the mother, the judge must grant the mother permission to proceed with the abortion and must provide her with written evidence of the permission.

III. Prior to performing an abortion, a physician must require from the mother either:

(1) A copy of the notice sent to the father, informing him of the proposed procedure and his opportunity to exercise his rights but to which he has failed to respond within the specified time period, or
(2) the written permission of the judge having presided at the hearing and having determined that the mother’s interests outweigh those of the father.