# "A TRIAL OF STRENGTH IN SCENES OF VIOLENCE": BUILDING A CASE FOR THE PRENATAL RIGHTS OF WILLING FATHERS TOWARDS CUSTODY

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ABSTRACT

*In the 1920s, family law jurisprudence saw the development of a fundamental right to direct the upbringing and education of children by parents. However, in the aftermath of Roe v. Wade, the Supreme Court began a trajectory that culminated in what would amount to a total deprivation of a father's prenatal rights despite an absence of judicial review of these matters. This evolution has created a grave injustice and a violation of the rule of law, in addition to facilitating the breakdown of family oneness in our culture. While proponents like Lynne Marie Kohm, Michael J. Higdon, Mary Totz, and Matthew R. Pahl have argued on behalf of the father using various legal approaches that invoke the Equal Protection Clause, Intentional Infliction of Emotional Distress, Conversion, and Coverture Theories, this article advocates for a reform that requires empowering states to create procedural safeguards for a willing father to obtain custody of his unborn child. These safeguards would be based on three components and work in harmony with the existing abortion jurisprudence. The three components encompass: (1) the concept of the judicial bypass provision for minors seeking an abortion to circumvent parental notification statutes; (2) the decision in Stanley v. Illinois; and, (3) the labor investment theory developed in the 70s and 80s involving the requisite paternal involvement throughout the pregnancy.*

"When I was in my 20s, I had a girlfriend who had an abortion, and the decision was entirely out of my hands. Ever since, I have dreamed about a boy at the age he would be now."[1]

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[1] Nick Loeb, *Sofia Vergara's Ex-Fiancé: Our Frozen Embryos Have a Right to Live*, N.Y. TIMES OP-ED (Apr. 29, 2015), http://www.nytimes.com/2015/04/30/opinion/sofiavergaras-ex-fiance-our-frozen-embryos-have-a-right-to-live.html?_r=0. The controversy involved an attempt by Nick Loeb to void a contract between the couple concerning the custody of two frozen embryos that could have been brought to term only by mutual consent. *See* Hilary Hanson, *Judge Allows Sofia Vergara's Ex to Sue*

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## INTRODUCTION

The Greek historian Plutarch tells a story about the birth of a boy who would have never been born had it not been for the deception of a man[2] called Lycurgus, the lawgiver of Sparta.[3] When Lycurgus was placed in the position to succeed as king of Sparta, he discovered that the former king's widow was pregnant; as a result, he decided to abdicate the throne in favor of the child.[4] However, the widow went to Lycurgus and instead offered to abort the child,[5] under the condition that he would take her as his wife once he became King.[6] While Lycurgus "loathed her morals, he raised no objection to the actual proposal."[7] He told the widow that she should keep the child for now and forego the unnecessary physical harm involved—promising that when the baby was delivered, he would dispose of it.[8] Lycurgus did not keep his promise, however. After the boy was

*for Custody of Frozen Embryos*, HUFFINGTON POST (May 25, 2015), http://www.huffingtonpost.com/2015/05/24/sofia-vergara-embryo-lawsuit-nick-loeb-custody_n_7432114.html. Once the couple split up, the contract was silent on who was to have custody of the embryos, something Nick Loeb desired, while Sofia Vergara seemingly wanted to keep the embryos frozen indefinitely. *Id.*

[2] *See* PLUTARCH, ON SPARTA 7 (Richard J.A. Talbert trans., 2005). Pythia at Delphi called him "a god rather than a man." *Id.*

[3] *Id.* at 3.

[4] *Id.* at 5.

[5] In this article, the term "child" also refers to the various gestational stages of development.

[6] PLUTARCH, *supra* note 2, at 5.

[7] *Id.*

[8] *Id.*

born, Lycurgus announced him to be the next king of Sparta.[9] This decision stirred up envy and factions arose among some of the citizens of Sparta.[10] In an attempt to avoid the unrest, and "stimulated with a thirst for knowledge,"[11] Lycurgus left the city.[12] While praised by the likes of John Adams for refusing to consent to the abortion,[13] Lycurgus did not prove exemplary in his treatment of children. Compelled by the good of the nation, Lycurgus would allow his commitment to discipline overshadow any concerns for human dignity.

When Lycurgus returned from his travels, he envisioned that the knowledge he had gained would allow him to create a new Sparta, built on a new set of constitutions.[14] Among the new beliefs was the notion of encouraging pregnant women to strive for physical fitness during their pregnancy in an effort to develop a strong seed.[15] Newborns who failed to meet the standards of health and vigor were rumored[16] to be disposed; raising them was seen as a disservice to the public interest.[17] In this obsession to develop "fine breeding," Lycurgus left no room for common notions of fidelity[18] and sought to view children as products of the commonwealth.[19] It was an odd form of selective inequality bent on serving the

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[9] *Id.*

[10] *Id.* at 6.

[11] 4 JOHN ADAMS, THE WORKS OF JOHN ADAMS: NOVANGLUS, THOUGHTS ON GOVERNMENT, DEFENSE OF THE CONSTITUTION 550 (Charles Francis Adams ed., 1851), http://oll.libertyfund.org/titles/2102.

[12] PLUTARCH, *supra* note 2, at 6.

[13] ADAMS, *supra* note 11.

[14] PLUTARCH, *supra* note 2, at 7.

[15] *Id.* at 16. Leonidas' wife Gorgo once told a foreigner that Laconian women "are the only ones who give birth to men." *Id.* at 18.

[16] Recent excavations have uncovered no bones from newborns leading some to suspect that the dumping site was merely a myth picked up by Plutarch from Sparta's enemies. *Study Finds No Evidence of Discarded Spartan Babies*,ABC (Dec. 10, 2007, 5:00 PM), http://www.abc.net.au/news/2007-12-11/study-finds-no-evidence-of-discarded-spartan-babies/983848. However, fathers in Ancient Greece had the option "to not raise the baby . . . in the case of some type of deformity, or if the family was too big, or if the mother was unmarried." Douglas Main, *450 Dead Babies Found in Athenian Well Shed Light on Ancient Greeks*, NEWSWEEK (June 10, 2015, 12:53 PM), http://www.newsweek.com/2015/06/19/discovery-dead-infants-athenian-well-sheds-light-ancient-greek-society-341681.html.

[17] PLUTARCH, *supra* note 2, at 20; *see also* PLATO, THE REPUBLIC 134 (G.M.A. Grube trans., 1992) ("but the children of inferior parents, or any child of the others that is born defective, they'll hide in a secret and unknown place, as is appropriate"). This ancient Greek method of birth control towards the "unfit" is reminiscent of practices all over the world today. *See, e.g.*, Heather Clark, *Armenian Father Refuses to Give Up Down Syndrome Son, Wife Divorces Him Over It*, CHRISTIAN NEWS (Feb. 7, 2015), http://christiannews.net/2015/02/07/armenian-father-refuses-to-give-up-down-syndrome-son-wife-divorces-him-over-it/; John M. Glionna, *South Korean Pastor Tends an Unwanted Flock*, L.A. TIMES (June 19, 2011), http://articles.latimes.com/2011/jun/19/world/la-fg-south-korea-orphans-20110620; Hilary White, *95% of Spanish Down's Syndrome Children Aborted After Prenatal Testing*, LIFESITE NEWS (July 31, 2008), https://www.lifesitenews.com/news/95-of-spanish-downs-syndrome-children-aborted-after-prenatal-testing.

[18] *See* PLUTARCH, *supra* note 2, at 19–20 (providing that the best man that could produce the best seed should have just as much right to a woman as—for example, a husband).

[19] *Id.* at 19. Aristotle believed that the child to some extent belonged to the father having been "sprung" from the father; however, the parents come to love that child only after he or she is born. *See* ARISTOTLE, NICOMACHEAN ETHICS 237 (Martin Ostwald trans., 1999); Barbara Bennett Woodhouse, *"Who Owns the Child?": Meyer and Pierce and the Child as Property*, 33 WM. & MARY L. REV. 995,

common good instead of respecting human dignity. While Sparta was a culture linked to the idea of instrumentalism—the use of law towards social reform—our contemporary form of government in many ways bears all the markings of that ancient culture.

When commenting on the disagreement between Nick Loeb and Sofia Vergara concerning Loeb's custody claim to their frozen embryos, Dr. Keith Ablow argued that fathers should be able to veto a mother's abortion.[20] In his brief article from 2011, Dr. Ablow explains his basic contention:

> I believe that in those cases in which a man can make a credible claim that he is the father of a developing child in utero, in which he could be a proper custodian of that child, and in which he is willing to take full custody of that child upon its delivery, that the pregnant woman involved should not have the option to abort and should be civilly liable, and possibly criminally liable, for psychological suffering and wrongful death should she proceed to do so.[21]

Dr. Ablow argues that the "quiet message" being sent to males by the current American abortion policy is that men have no voice and no responsibility for the pregnancy and that the life they helped create is subject only to the whim of the women whom they choose to be intimate with.[22] This article offers further support for the arguments advanced by Dr. Ablow in an effort to continue this discussion

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1043 (1992) ("[t]he notion of the child as property is at least as ancient as the Greek and Judeo Christian traditions identifying man as the procreative force"). At common law, the father had sole authority over his *legitimate* child. Lee E. Teitelbaum, *Family History and Family Law*, 1985 WIS. L. REV. 1135, 1154 (1985). This tradition continued in the United States where "[t]he patriarch's right to custody and control over his minor children was near absolute as the nineteenth century opened and was the uniform rule in American jurisdictions." Mary Becker, *Maternal Feelings: Myth, Taboo, and Child Custody*, 1 S. CAL. REV. L. & WOMEN'S STUD. 133, 168 (1992). However, there has been overlap between the U.S. common law and the principles embodied by Ancient Sparta. *See, e.g.*, Teitelbaum, *supra* at 1138–39 ("[i]n the seventeenth and eighteenth centuries, the household was an extension and reflection of the community at large"). As noted by modern historians, many common law ideas about American family law begun to change in the later parts of the nineteenth and twentieth century. *See* Bennett Woodhouse, *supra* at 1037–41 (noting the "process of transformation, from the hierarchical, patriarchal model of the family of colonial times toward a more egalitarian model"); Becker, *supra* at 168 ("[b]y the end of the nineteenth century . . . the patriarch's right was replaced by a maternal preference at divorce").

[20] Tobin Grant, *Should Men Be Able to "Veto" Abortion Decisions? Why You Should Expect Most Americans to Agree*, RELIGIOUS NEWS SERV. (May 6, 2015), http://tobingrant.religionnews.com/2015/05/06/should-men-be-able-to-veto-abortion-decisions-why-many-americans-are-likely-to-answer-yes/.

[21] Dr. Keith Ablow, *Men Should Be Allowed to Veto Abortions*, FOX NEWS (July 22, 2011), http://www.foxnews.com/opinion/2011/07/22/men-should-be-allowed-to-veto-abortions/. Dr. Ablow addressed the emotional harm element by stating that "[t]he notion that there is no emotional injury done [to] men by depriving them of decision-making power as to whether the children they father are aborted is naive." *Id.; see also The New Scar on My Soul*, AM. THINKER (Mar. 4, 2012), http://www.americanthinker.com/articles/2012/03/the_new_scar_on_my_soul.html. This argument is typically discussed in the context of intentional infliction of emotional distress. *See* Jill E. Evans, *In Search of Paternal Equity: A Father's Right to Pursue a Claim of Misrepresentation of Fertility*, 36 LOY. U. CHI. L.J. 1045, 1086–89 (2005); Jeffrey D. Devonchik, *When the Father Is the Victim: A Constitutional Recourse for Fathers of Aborted Children*, 2 FLA. COSTAL L.J. 141, 141 (2000).

[22] Ablow, *supra* note 21.

on behalf of all "willing fathers" seeking custody of their unborn child who are being deprived of legal means for redressing their injuries.

Part I of this article traces the legal landscape towards the fundamental right of parenthood and the gender based inequality created in the aftermath of *Roe v. Wade*.[23] It discusses the breakdown in marital "oneness" that contributed to the alienation of the father's "prenatal rights"—a term that connotes the idea of a father's ability to prevent an abortion and obtain child custody at birth. The article will also discuss the development of the unfettered control provided to mothers in deciding to terminate a pregnancy. It also looks at the principles of the rule of law, which are central to every legal system, and argues that the American legal system has largely ignored those principles. Part II offers the components for reform, including allowing state legislators to draft legal procedures that would provide a willing father his day in court before a mother can terminate her pregnancy. The procedure should consider various aspects of the law and find a meaningful balance between the competing interests of all parties involved, i.e., the father, mother, child, and state. These various aspects should build on current abortion jurisprudence, in particular the judicial bypass provisions for minors seeking to obtain an abortion without first having to obtain parental consent; custodial rights of fathers under the U.S. Supreme Court decision in *Stanley v. Illinois*;[24] and, finally, the labor investment doctrine that considers the competing contributions from both parents, and demands that courts should not award custody of a child based merely on biological factors. This article will explore all these concepts in the effort to find a balance in the theatre of judicial reform, if only to avoid inviting one another to a "trial of strength in scenes of violence."[25]

## I. REASONS FOR THE REFORM

The shift from Ancient Sparta into the twentieth century moves conveniently through the first decision to outline the foundation for the fundamental liberty interest of parents.[26] In *Meyer v. Nebraska*, Justice McReynolds remarked on the "communal ownership"[27] in Sparta, where the children were taken from their parents and entrusted to guardians for their education and training.[28] He claimed

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

[24] Stanley v. Illinois, 405 U.S. 645 (1972).

[25] The title of this article comes from Cicero's "Oration for Milo" and connotes the idea that instead of seeking justice through violence, we should seek justice through the legal system. Marcus Tullius Cicero, *Speech in Defence of Titus Annius Milo*, *in* ORATIONS OF MARCUS TULLIUS CICERO 218 (Charles Duke Yonge trans., Colonial Press 1900).

[26] Troxel v. Granville, 530 U.S. 57, 65 (2000).

[27] Meyer v. Nebraska, 262 U.S. 390, 401 (1923). The image of a "specter of communal ownership" is likely inspired by William Dameron Guthrie and his *amicus* brief filed before the Court. Woodhouse, *supra* note 19, at 1089. For a rich, in-depth discussion on the background of *Meyer* and *Pierce*, see generally *id.* at 1086–06 (discussing the historical development and implications of *Meyer* and *Pierce*).

[28] *Meyer*, 262 U.S. at 402.

that these ancient practices could not be implemented in modern times without committing "violence to both letter and spirit of the Constitution."[29] Justice McReynolds' assessment was in some sense only half-true; despite the fundamental change in government today, we are still implementing what some would call a very similar measure. While the removal of children in Sparta began at birth, the practice in contemporary America has essentially continued except now at a different stage of a child's development—i.e., from post-conception until birth. It is at this stage where, much like the parents in Sparta, today it is the father who has lost essentially all rights to his child and remains subject to the mother's wishes. The need for reform is linked inextricably with the absence of procedural defaults available to the willing and able father. In the event that he seeks to prevent the mother from terminating the pregnancy, a willing father needs some way to bring his claim for custody of the unborn child. Before we look at the character of this necessary reform, it is important to track the roots of the father's fundamental rights to parenthood and where those same rights have been lost.

*A. Developing the Fundamental Right to Parenthood* (Meyer, Pierce, Yoder)

In *Meyer v. Nebraska*, the U.S. Supreme Court struck down a state imposed ban on teaching children any language other than English before the eighth grade.[30] This ban, according to the reasoning of the State of Nebraska, was intended to advance the "best interest of this country" by protecting children from foreign ideas and sentiments that presumably result if foreigners are allowed to educate their children in their natural tongue.[31] The Court, considering the liberty guarantees in the Fourteenth Amendment, reasoned that the right to establish a home and to bring up children at one's discretion is implied.[32] While not an absolute right, this liberty cannot be interfered with by a legislative action brought under the guise of protecting the public interest without first showing a "reasonable relation to a purpose within the competency of the state to effect."[33] The Court concluded that it was not persuaded that allowing a child to learn a foreign language is so clearly harmful as to justify a blanket prohibition.[34] The right of parents to control the education of their children as part of the "the authority of parents to make basic choices directing the upbringing of their children"[35] was reaffirmed and enriched by *Pierce v. Society of the Sisters*.[36] There, the Supreme Court echoed the ruling in

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[29] *Id.*

[30] *Id.* at 396.

[31] *Id.* at 398.

[32] *Id.* at 399.

[33] *Id.* at 400–01.

[34] *Id.* at 403. In 1968, the Supreme Court revisited this harm principle mentioned in *Ginsberg v. New York* where the Court upheld New York's criminal obscenity statute prohibiting the sale of obscene material to minors. Ginsberg v. New York, 390 U.S. 629, 631 (1968).

[35] Laurence H. Tribe, Lawrence v. Texas: *The "Fundamental Right" that Dare Not Speak Its Name*, 117 HARV. L. REV. 1893, 1934 (2004).

[36] Pierce v. Soc'y of the Sisters of the Holy Names of Jesus & Mary, 268 U.S. 510 (1925).

*Meyer* by reiterating that constitutional rights may not be abridged through legislative action without relating to a purpose within the competence of the state to control.[37] Since children are not "creature[s] of the state," parents tasked to care for them and invest in their future are also given the right to prepare them for additional obligations.[38]

Several years later, in *Wisconsin v. Yoder*, the Supreme Court would solidify these fundamental parental rights by adding that parents also enjoy a right to teach their children consistent with their moral, religious, and civic standards.[39] The Court in *Yoder* looked at Wisconsin's compulsory school-attendance law that required children under sixteen to attend a public or private school.[40] The lawsuit developed after a family refused to send their children to a public school after eighth grade based on a religious conviction that was consistent with their Amish faith.[41] The Court astutely recognized that the State's interest in compelling an extra two-years of formal high school education would have influenced, if not determined, the religious future of the children.[42] In its final holding, the Court sided with the family, finding support in history for the fundamental rights of the parents "to guide the religious future and education of their children."[43]

The authority of parents illustrated in *Meyer*, *Pierce*, and *Yoder* was certainly not an absolute one. Within the timeframe of these three cases, the Supreme Court issued decisions that gave states room for interfering with the rights of parents. For example, in *Prince v. Massachusetts*, the Supreme Court dealt with an issue involving a custodian aunt's conviction for violating Massachusetts' labor law, when she allowed the children in her care to sell copies of publications promoting the Jehovah's Witnesses religion.[44] The Court stated that neither the right to freedom of religion, nor the right of parenthood, is absolute, but instead both rights are connected with the general interest of the child and the role of the State as *parens patriae*.[45] These restrictions on parents were justified as a means of securing the best interest of the child, a doctrine noted today to be "at once the most heralded, derided and relied upon standard in family law . . . ."[46]

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37 *Id.* at 535.

38 *Id.*

39 Wisconsin v. Yoder, 406 U.S. 205, 233 (1972).

40 *Id.* at 207.

41 *Id.*

42 *Id.* at 232.

43 *Id.*

44 Prince v. Massachusetts, 321 U.S. 158, 162 (1944). According to the trial testimony, one of the children "believed it was her religious duty to perform this work" to prevent "everlasting destruction at Armageddon." *Id.* at 163.

45 *Id.* at 166. This term connotes the idea of the state as a sovereign having the capacity to provide protection to those unable to care for themselves. BLACK'S LAW DICTIONARY 1221 (9th ed. 2009). The Supreme Court reviewed the modern history of *parens patriae* in Alfred L. Snapp & Son, Inc. v. Puerto Rico, 458 U.S. 592, 600–06 (1982). The extent of allowable limitations to parental freedom went so far as to include "matters of conscience and religious conviction." *Prince*, 321 U.S. at 167.

46 Lynne Marie Kohm, *Tracing the Foundations of the Best Interests of the Child Standard in*

### *B. Breakdown in Family "Oneness"*

Despite the robust protection afforded to parents prior to 1973, the ideology that developed during the 1960s in the Supreme Court decision of *Roe v. Wade*[47] drastically changed the structure of family law. Although *Roe* did not directly address the prenatal rights of the father,[48] it opened the door for subsequent developments that materially changed a willing father's ability to prevent an abortion in instances where the mother was determined to have one.

Leading up to *Roe*, family law jurisprudence in the twentieth century was generally based on an egalitarian model of parenthood in matters concerning the upbringing of children. However, while the best interest of the child ostensibly remained predominant, the definition of a child became a product of judicial decision-making regarding the point in time when human life became imbued with human rights. *Roe* was simply a part of the larger tapestry of the sexual revolution that provided a legal means for avoiding parenthood.[49] In essence, *Roe* began to indoctrinate the culture with the teaching of *Eisenstadt v. Baird*, which declared that "the marital couple is not an independent entity . . . but an association of two individuals each with a separate intellectual and emotional makeup."[50] *Roe* not only ruined romance—as Professor Kohm aptly put it[51]—but also fractured the image of "oneness" in marriage held dear by the Judeo-Christian religious community.[52] A discussion on oneness and its subsequent breakdown is important in light of the after effects when fathers lost all prenatal rights.

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*American Jurisprudence*, 10 J.L. & FAM. STUD. 337, 337 (2008). The best interest of the child doctrine, while present in *Meyer*, has since been defined to exclude prenatal life. *See generally* Roe v. Wade, 410 U.S. 113 (1973); Doe v. Bolton, 410 U.S. 179 (1973). As explained by Clark Forsythe, the decision in *Bolton* (in conjunction with *Roe*) allowed for a "health exception" that rendered the right to abortion at all stages of pregnancy. CLARK D. FORSYTHE, ABUSE OF DISCRETION THE INSIDE STORY OF *ROE V. WADE* 7–8 (2013). This happened when the "Justices defined 'health' in abortion law as 'all factors—physical, emotional, psychological, familial, and the woman's age—relevant to the well-being of the patient.'" *Id.* at 8 (internal citations omitted). While some realized immediately that states could no longer prohibit abortions in the first trimester, "the full implication of the Supreme Court's decisions only became clear over time as the lower federal courts decided hundreds of cases in the following decades." *Id.* at 9.

[47] *See Roe*, 410 U.S. 113; Lynne Marie Kohm, *Roe's Effects on Family Law*, 71 WASH. & LEE L. REV. 1339, 1340 (2014). "Roe has positioned children and parents against each other, breaking down this important family relationship, while also developing an entirely new area of family law." Kohm, *supra* at 1346.

[48] *See* Planned Parenthood of Cent. Mo. v. Danforth, 428 U.S. 52 (1976).

[49] Today, abortion is primarily used for reasons of convenience (e.g., timing, money, shame) and very rarely for reasons of necessity (e.g., life of the mother). *See* Lawrence B. Finer et al., *Reasons U.S. Women Have Abortions: Quantitative and Qualitative Perspectives*, 37 PERS. SEXUAL & REPROD. HEALTH 110, 110 (2005), http://www.guttmacher.org/pubs/journals/3711005.pdf.

[50] Eisenstadt v. Baird, 405 U.S. 438, 453 (1972); *see also* Kohm, *supra* note 47, at 1367–68 (stating that "[t]he effects of Roe on marriage have worked to help turn marriage into an institution that reflects more individualism than unity of two people into a new community").

[51] Kohm, *supra* note 47, at 1378.

[52] When God had created male and female as individual beings, he joined them together in matrimony, melting the two into one. *See Genesis* 2:24. "It is unfashionable in many circles to assert that sexual intercourse makes men and women 'one flesh.' One needn't appeal to the Bible, though, to demonstrate that this fusing and repurposing of natures is literally true." Jason Morgan, *Liberalism*

The doctrine of "oneness" is referenced throughout the Bible—e.g., in Genesis 2:24, where God described the act of marriage as the joining of two individuals into "one flesh"—and renders more intelligible certain aspects of marriage that would otherwise seem repressive. If we look at the statement from First Corinthians, chapter 7, verse 7:4: "[f]or the wife does not have authority over her own body, but the husband does . . . the husband does not have authority over his own body, but the wife does," the language may suggest a possessiveness where the woman is subject to the control of her husband. However, seen in light of the oneness doctrine, this verse instead suggests a *limit* on the individual right of each spouse to "indulge one's own private, spiritual discipline and repudiate the rights of the one to whom one belongs."[53] It assumes a process in marriage, where the couple looks away from the self and entrusts to the other in confidence that the other will not exploit this surrender.[54] Unfortunately, "the autonomy fostered by abortion rights in privacy and choice to one marriage partner unilaterally create[d] a wedge in the notion of marital oneness."[55] As a result, this weakened the bonds within marriage[56] and dissipated the once held unity of two people being drawn into a single, cohesive community.[57] The theologian G.K. Chesterton wrote that, "[i]t is in the nature of love to bind itself, and the institution of marriage merely paid the average man the compliment of taking him at his word."[58] It seems society was determined to return the compliment.

The purpose of discussing the theology of oneness is important because, according to the Guttmacher Institute, half of the women surveyed gave reasons for having an abortion involving a refusal to be a single parent or ongoing problems with their partner.[59] With this breakdown of marriage, and the absence of fathers in the home, more and more women are forced to carry the burden of pregnancy on their own. Instead of mending this problem by encouraging the reformation of the family unit, society today has double-downed on its commitments to individual choice and privacy, namely in its emphasis on no fault divorce and its push for unrestricted access to abortion. After *Planned Parenthood v. Danforth*,[60] a willing

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*Can't Understand Sex*, WITHERSPOON INST. PUBLIC DISCOURSE (June 3, 2015), http://www.thepublicdiscourse.com/2015/06/14753/. That oneness represents the very purity of marriage, where husbands and wives become mutual coextensions of *each other* as opposed to the common law tradition where the wife to a significant extent "gave up everything to her husband and devoted herself exclusively to managing his household." Teitelbaum, *supra* note 19, at 1140.

53 DAVID E. GARLAND, 1 CORINTHIANS 258 (2003).

54 *Id.* at 260.

55 Kohm, *supra* note 47, at 1365.

56 *Id.* at 1365–66.

57 *Id.* at 1367–68.

58 G.K. CHESTERTON, A DEFENSE OF RASH VOWS, IN BRAVE NEW FAMILY 51 (Alvaro de Silva ed., 1990).

59 GUTTMACHER INST., INDUCED ABORTION IN THE UNITED STATES (2016), https://www.guttmacher.org/fact-sheet/induced-abortion-united-states.

60 Planned Parenthood of Cent. Mo. v. Danforth, 428 U.S. 52 (1976).

father who is present and supportive throughout the pregnancy has no legal right to prevent the abortion if the mother chooses to go forward with the procedure.

### *C. Removing Presence of a Father from Family Affairs in the Aftermath of* Roe

After *Roe*'s severance of family oneness, the Supreme Court took steps to diminish the role of a willing father by substantially reducing a father's fundamental right to the future custody of his unborn child. In *Planned Parenthood v. Danforth*,[61] the Supreme Court looked at a Missouri statute requiring spousal consent during the first twelve weeks of pregnancy if the woman was seeking an abortion.[62] The justification for the law rested on perceptions of Missouri's General Assembly that major changes in family status should be jointly made based on the institutional nature of marriage.[63] The defenders of the law argued that the legislative intent behind the statute was focused on the best interests of the people of Missouri.[64]

While offering lip service in relation to the prenatal rights of the father and the marital relationship in society,[65] the Court ultimately rejected the state's capacity to delegate to fathers a right to interfere with a woman's decision to terminate her pregnancy, especially since the state had no such authority to interfere in the first trimester after *Roe*.[66] The Court reasoned that granting this veto authority impedes "fostering mutuality and trust in a marriage,"[67] but left unresolved how the same effect can be avoided if the woman has unfettered discretion to decide whether to undergo an abortion. Attempts by the Court to seek neutrality have likewise failed when it granted the mother full, discretionary power to make prenatal decisions about her unborn child. The Court reasoned:

> 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.[68]

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[61] *Id.* This case was in a sense anticipated in *Roe* when the Court stated in a footnote that the Court has not occasioned to address the "father's rights, if any exist in the constitutional context, in the abortion decision." Roe v. Wade, 410 U.S. 113, 165 n.67 (1973).

[62] *Danforth*, 428 U.S. at 67–68 (creating exceptions to preserve the life of the mother).

[63] *Id.* at 68 (internal citations omitted).

[64] *Id.*

[65] *See id.* at 70 ("we recognize that the decision whether to undergo or to forego an abortion may have profound effects on the future of any marriage, effects that are both physical and mental, and possibly deleterious").

[66] *Id.* at 69.

[67] *Id.* at 71.

[68] *Id.*

It was *Planned Parenthood v. Casey*,[69] however, that removed all hope for a father's prenatal rights to his child by failing to overrule *Roe*, despite demands of the federal government in five other cases in the prior decade.[70] Relevant to the father, the issue in *Casey* involved a Pennsylvania statute requiring pregnant women to present signed statements to their physicians indicating that they gave notice to their spouse regarding their intention to undergo an abortion.[71] The penalty for performing an abortion without first giving the notice subjected physicians to liability.[72] Justice O'Connor, in an effort to show that these requirements create a "substantial obstacle" for the women seeking an abortion, relied heavily on the fact that millions of women in this country fall in the hands of abusive husbands.[73] She argued that in a well-functioning marriage, important intimate decisions should be discussed and decided together by the spouses.[74] However, millions of women today fall prey to abusive husbands.[75] Because of this, should these women wish to obtain an abortion, they have very good reasons to want to avoid telling their spouse about the pregnancy.[76]

While it is true that in a "well-functioning" marriage the couple does discuss the decision to bear children, the problem of course is that *Casey* removed the need to communicate by giving a mother unilateral control over her pregnancy. Given that the lack of communication is often cited as a reason for marital breakdown,[77] *Casey* contributed to this breakdown by removing the need for communication in deciding on whether to keep a child. Further considering the reasoning of Justice O'Connor, it seems that her conclusion is based solely on the interest of mothers without considering the humanity of the unborn child; or, even more practically, the deleterious effects for the father—as noted in *Danforth*—that result in the loss of a child.[78] While it is certainly true that domestic abuse referenced in *Casey* creates difficult problems, *Casey* fails to offer a fair solution in removing the

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[69] Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 844 (1992).

[70] The United States filed briefs in Akron v. Akron Ctr. for Reprod. Health, Inc., 462 U.S. 416 (1983); Thornburgh v. American College of Obstetricians & Gynecologists, 476 U.S. 747 (1986); Webster v. Reprod. Health Servs., 492 U.S. 490 (1989); Hodgson v. Minnesota, 497 U.S. 417 (1990); Rust v. Sullivan, 500 U.S. 173 (1991)—arguing that *Roe* was wrongly decided. *See* Brief for United States as Amicus Curiae Supporting Respondents at 8, *Casey*, 505 U.S. 833 (No. 91-744).

[71] *Casey*, 505 U.S. at 887. The statute had several exceptions including medical emergencies. *Id.*

[72] *Id.* at 888.

[73] *Id.* at 893–94.

[74] *Id.* at 892-93.

[75] *Id.* at 893.

[76] *Id.*

[77] Kohm, *supra* note 47, at 1363 ("Lack of communication is often cited as a primary source of marital breakdown and subsequent dissolution.").

[78] Planned Parenthood of Cent. Mo. v. Danforth, 428 U.S. 52, 70 (1976). Justice O'Connor denied the humanity of the fetus by presuming, in essence, that it is non-personhood: "If a husband's interest in the *potential* life of the child outweighs a wife's liberty, the State could require a married woman to notify her husband before she uses a postfertilization contraceptive." *Casey*, 505 U.S. at 898 (emphasis added).

prenatal rights of good fathers based on the theory that only one parent can prevail.[79]

While the reasoning in *Casey* is driven largely by the interest to protect women,[80] it fails to consider the interest of the willing father and his fundamental rights to the child—unless it is first assumed *de facto* that no interest and no rights exist. The Supreme Court is clear that the Constitution protects all individuals from the abuse of the government's power even if that power is employed for the benefit of a family member.[81] However, if the Constitution protects men and women alike, it is imperative to allow fathers—equally with mothers—to exercise a level of prenatal rights to their children without simply assuming away a father's respective interest in seeing his child's birth. This selective extension of rights raises concerns about violations of the rule of law and the question whether the abortion jurisprudence needs further revisions, as noted recently by the Eighth Circuit in *MKB Management Corp. v. Stenehjem*.[82]

### *D. Rule of Law Concerns*

In the aftermath of *Planned Parenthood v. Danforth*, one of the central concerns is the issue of whether the arbitrary designation of certain rights in favor of the mother violates the rule of law. According to F.A. Hayek, all rule of law systems require the law to possess three attributes: generality, certainty, and equality.[83] If we take these attributes and apply them in turn to the current legal framework involving a father's prenatal rights, we see that while the principle of certainty is met, the principles of generality and equality are violated.

First, the principle of certainty requires that those subject to the law can readily discern the rules of governance and identify how those rules apply to them.[84] In the aftermath of *Danforth* and *Casey*, a father who attempts to restrict a mother's access to an abortion will have no legal basis on which to rely. This certainty is reflected in the absence of an affirmative duty on the mother to obtain consent from the father or even provide him a notice prior to terminating her pregnancy.

Second, the principle of generality "requires that the law be set out in advance in abstract terms not aimed at any particular individual."[85] While the Court in *Roe* noted that its decision does not address the rights of the father,[86] the decisions in *Danforth* and *Casey* eliminated the rights of the father throughout the

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

[80] *Id.* at 898.

[81] *Id.*

[82] MKB Mgmt. Corp. v. Stenehjem, 795 F.3d 768, 773 (8th Cir. 2015), *cert. denied*, 136 S. Ct. 981 (2016).

[83] BRIAN Z. TAMANAHA, ON THE RULE OF LAW 66 (2004).

[84] *Id.*

[85] *Id.*

[86] Roe v. Wade, 410 U.S. 113, 165 n.67 (1973).

pregnancy and made his involvement optional. Considering this targeting of fathers, the implications of the rule of law suggest that the law does not, to borrow a phrase from Jean-Jacques Rousseau, "consider all subjects collectively."[87] While the Supreme Court may not have had this intent, the as-applied effect of the abortion jurisprudence has certainly created this outcome.

Finally, the principle of equality demands "that the laws apply to everyone without making arbitrary distinctions among people."[88] The inequality created through the reproductive rights jurisprudence essentially gives the mother a number of advantages that are simply not available to the father. For example, a mother has sole prenatal control over the life of the child without considering its best interest—assuming *a priori* that the "best interest of the child" is to exist,[89] or the need to consult the father. A mother not only has sole control to carry the child to term and demand child support,[90] but she also enjoys disproportionate control over the child's future without the approval of the father in certain areas. While this article is not concerned with considering these areas in depth, two are worth mentioning. The first is *adoption*. The law in many states allows the mother to give the child up for adoption after birth without requiring consent of the father.[91] Even if the father theoretically is interested in adopting the child and tries to obtain a notice of adoption by using the putative father registry, all that the mother needs to do is move from state to state to avoid triggering a notification.[92] The second example is

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87 TAMANAHA, *supra* note 83, at 66. "When I say that the province of the law is always general, I mean that the law considers all subjects collectively and all actions in the abstract; it does not consider any individual man or any specific action." *Id.*

88 *Id.*

89 St. Anselm's Ontological Argument relies on the idea that existence in reality is greater than existence in the understanding alone. *See The Ontological Argument*, PRINCETON UNIV., https://www.princeton.edu/~grosen/puc/phi203/ontological.html (last visited Mar. 27, 2016). But see, e.g., Peter Singer who thinks it is best to "intentionally end the lives of severely disabled infants" since they seemingly lack the capacity for a "meaningful life." *Princeton Prof: Kill Severely Disabled Infants Under Obamacare*, WND (Apr. 19, 2015, 7:43 PM), http://www.wnd.com/2015/04/princeton-prof-kill-severely-disabled-infants-under-obamacare/. This language is reminiscent of *Roe's* definition of viability, which provides: "[w]ith respect to the State's important and legitimate interest in potential life, the 'compelling' point is at viability. This is so because the fetus then presumably has the capability of meaningful life outside the mother's womb." *Roe*, 410 U.S. at 163.

90 *See* Michael J. Higdon, *Marginalized Fathers and Demonized Mothers: A Feminist Look at the Reproductive Freedom of Unmarried Men*, 66 ALA. L. REV. 507, 517 (2015); Bryn Anne Poland, *He Said, She Said: Diverging Views in the Emerging Field of Fathers' Rights*, 46 WASHBURN L.J. 163, 174 (2006) ("[b]y requiring that both parents support their children to the best of their ability, the legal system helps ease the strain on many government programs"). Note that in many states failing to pay child support is a civil offense so that the father may not be entitled to a public defender. Mary A. Totz, *What's Good for the Goose Is Good for the Gander: Toward Recognition of Men's Reproductive Rights*, 15 N. ILL. U. L. REV. 141, 143 (1994).

91 Higdon, *supra* note 90, at 526 ("unwed mothers [when placing a child up for adoption] generally are not required to identify the father . . . it remains the father's sole responsibility to protect himself"); *see also* Cecily L. Helms, *Take Notice Unwed Fathers: An Unwed Mother's Right to Privacy in Adoption Proceedings*, 20 WIS. J.L., GENDER & SOC'Y 1, 10–24 (2005) (detailing the state statutory schemes concerning adoption proceedings).

92 Higdon, *supra* note 90, at 527. "[A] mother can simply flee her state of residence and travel to another state to surrender her child for adoption. Unless the putative father actually registered in that specific state, he will not be entitled to notice of any adoptions concerning the child. Additionally, any

*abandonment*. A willing father—unaware that a child has been born—is further handicapped since the mother simply can utilize the "safe haven" provisions, which provide a legal way for her to abandon a newborn at designated locations.[93]

In addition, the right of the mother to collect child support has generated a number of troubling state court decisions—troubling not because the support is underserved, but because of the double-standard in forcing the father in these instances to step into the role of a parent. A number of incidents exist where a father was forced to pay child support despite the mother's pregnancy being a product of her wrongful conduct.[94] For example, in Wisconsin, a father appealed from a lower court's decision that awarded child support after the mother allegedly used date rape drugs to have nonconsensual intercourse with the father.[95] The Wisconsin Court of Appeals refused to remove or reduce his child support payments, focusing on the best interests of the child instead of the wrongful conduct of the mother.[96] The court went even further by stating that the issue of child support should have never been decided by the jury, and once paternity was established, the father's "right to a jury trial was extinguished."[97]

Reflecting on these and other examples of inequality, it is clear that the law is logically inconsistent. For example, if a father is willing to protect the life of the child in utero, the law ignores his rights and the best interest of the child—allowing the mother to make the decision entirely on her own to terminate the pregnancy. If the father refuses to assume the role of a parent (e.g., when the father is an absentee father), the law ignores his interest to abdicate responsibility and refers to the best interest of the child to enforce child support payments.[98] Mary Totz aptly notes this incongruity:

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ability he might have had to challenge the adoption is now permanently foreclosed." *Id.*

[93] Carol Sanger, *Infant Safe Haven Laws: Legislating in the Culture of Life*, 106 COLUM. L. REV. 753, 755 (2006). The idea behind safe-haven laws is to ensure the safety and well-being of newborns, and provide an alternative to abortion for mothers. *Id.* at 762; *see also* Jeffrey A. Parness & Therese A. Clarke Arado, *Safe Haven, Adoption and Birth Record Laws: Where Are the Daddies?*, 36 CAP. U. L. REV. 207, 207 (2007) ("demonstrate how paternity interests are unreasonably, if not unconstitutionally, foreclosed when children are abandoned by their mothers").

[94] Higdon, *supra* note 90, at 517.

[95] *In re* Derek S.H., 642 N.W.2d 645 (Wis. Ct. App. 2002).

[96] *Id.* ¶ 11.

[97] *Id.* ¶ 18. For other similar cases involving statutory rape and misappropriated sperm, see Higdon, *supra* note 90, at 518–23.

[98] Note the curious outcome created by the law today that finds a biological link to a child sufficient to trigger an obligation to pay child support assuming the man to be the father, but insufficient when the biological father is unwed yet seeks this status nevertheless. Dana Purvis, *The Origin of Parental Rights: Labor, Intent, and Fathers*, 41 FLA. ST. U. L. REV. 645, 663–64 (2014) ("[u]nwed biological fathers are . . . locked both in and out of parenthood by the law"). By creating this logical inconsistency, the state seemingly does the very thing the Supreme Court rejected in leaving the father "seriously prejudiced by reason of his status." *See* Stanley v. Illinois, 405 U.S. 645, 649 (1972). In response, the Court asks this question for further analysis: "Is a presumption that distinguishes and burdens all unwed fathers constitutionally repugnant?" *Id.* This article asks the same question when it comes to all willing fathers being distinguished based on their gender and burdened by the legal system that designates the decision to terminate the pregnancy entirely to the woman—is this constitutionally repugnant?

> In essence, when it comes to reproductive rights, men are confronted with a set of inequities and inconsistencies. As it stands today, the law places an absolute economic burden on the man, and then, figuratively speaking, slices the male's reproductive capacity by affording him unequal protection in deciding whether to bear or beget a child.[99]

Consistent with the message Dr. Ablow believes is being sent to men that their voice and involvement throughout the pregnancy is meaningless, it is fair to say that the lack of prenatal rights of fathers signifies that their contributions are only necessary at the point of conception. A father is rendered a mere instrument to advance a social policy on reproductive care consistent with only the views of the mother. The father—no longer seen as an essential ingredient for new life—becomes a mere necessity in the decisions of the mother, unable to take part in a process that he was directly responsible for beginning. He becomes an instrument coerced into watching what he believes to be the death of his offspring, unable to stop the process using legal means.[100] To reverse this inequality within the law, judicial reform is necessary and judges appointed to remain impartial and to advance justice[101] must play a critical role in bridging the divide.

## II. CHARACTER OF THE REFORM

In order to develop a meaningful reform, state legislators should draft statutes taking into consideration three legal concepts: (1) the safeguards provided for minors seeking an abortion through judicial bypass provisions without first receiving parental consent; (2) the decision in *Stanley v. Illinois* that guaranteed a hearing before a father lost his custodial rights; and, (3) the labor investment theory that involves the requisite contribution (e.g., financial, willingness to take custody after birth) that a father must make throughout the pregnancy.

States should draft statutes in accordance with the principles of judicial bypass procedures, which would provide the willing father an opportunity[102] to

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[99] Totz, *supra* note 90, at 145; *see also* Higdon, *supra* note 90, at 510 ("just as common law coverture gave men complete dominion over their wives' property, the current law puts women in almost complete control of the parental rights of a nonmarital male"); Evans, *supra* note 21, at 1056-57 ("Within the context of pregnancy, paternal rights are clearly non-existent. Neither married nor unmarried fathers have standing to enjoin or otherwise interfere in a woman's decision to carry a child to term or to terminate her pregnancy.").

[100] This invokes what F.A. Hayek once wrote on the evil of coercion and its tendency to reduce a person to a tool for the ends of another by refusing to acknowledge that person as a thinking and valuing individual. EUGENE F. MILLER, HAYEK'S THE CONSTITUTION OF LIBERTY: AN ACCOUNT OF ITS ARGUMENT 78 (2010).

[101] The judiciary must embrace the delicate balance between justice, righteousness, and impartiality, explained in the Pentateuch, when it appealed especially to the officers of the law, to "not pervert justice . . . [to] not show partiality, and . . . [to] not accept a bribe, for a bribe blinds the eyes of the wise and subverts the cause of the righteous." *Deuteronomy* 16:19; PETER C. CRAIGE, BOOK OF DEUTERONOMY 247 (2d ed. 1976). Judges must keep their gaze upon the firmness of their office for "so difficult, rare, and arduous a thing is a simple and straight eye in a judge." 9 MARTIN LUTHER, LUTHER'S WORKS: LECTURES ON DEUTERONOMY 164 (Jaroslav Pelikan ed., 1960).

[102] *See* Nguyen v. I.N.S., 533 U.S. 53, 66 (2001) (invoking the "critical importance of the

present his prenatal claims to the child before a neutral and detached magistrate prior to an abortion. During such hearings, the father would be required to demonstrate that he has maintained a meaningful relationship[103] with the unborn child throughout the pregnancy. A showing that the father in fact maintained a meaningful relationship with the unborn child would allow the judge to find the necessary custodial intent towards that child consistent with the labor investment cases discussed in Part II.D of this article. The interest of the mother and father should be viewed through the lens of meaningful review and, if the father's interest to the child exceeds that of the mother, she should be enjoined from terminating her pregnancy thus providing the father an opportunity to seek custody of his child after birth. The Supreme Court alluded to this sort of procedure in *Doe v. Smith*.[104]

Between *Danforth* and *Casey*, the Supreme Court decided in *Doe* to deny a writ of injunction that would have prevented a mother from obtaining an abortion.[105] Although the Court failed to address the merits of the argument, it seemingly approved the lower court's approach to the issue.[106] By quoting at length the Indiana Superior Court that first decided the issue, we come to see the competing interests considered by the judge:

> While the Court has carefully weighed the testimony, it is apparent that although the Plaintiff has expressed a legitimate and apparently sincere interest in the unborn fetus, his interest would not be sufficient to outweigh the Constitutionally protected right of the Defendant to abort her child. It would appear from the Danforth decision that in order to require the mother to carry a child to term against her wishes, the father must demonstrate clear and compelling reasons justifying such actions . . . In summary, 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.[107]

The Indiana Superior Court, in its approach to dealing with both parents, understood the need for a careful balance between a "clear and compelling" interest

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Government's interest in ensuring some opportunity for a tie between citizen father and foreign born child which is a reasonable substitute for the opportunity manifest between mother and child at the time of birth"). The difference between men and women in relation to the birth process is a real one, and the principle of equal protection does not forbid Congress to address the problem at hand in a manner specific to each gender. *Id.* at 73.

[103] *See id.* at 65 ("In the case of a citizen mother and a child born overseas, the opportunity for a meaningful relationship between citizen parent and child inheres in the very event of birth, an event so often critical to our constitutional and statutory understandings of citizenship. The mother knows that the child is in being and is hers and has an initial point of contact with him. There is at least an opportunity for mother and child to develop a real, meaningful relationship. The same opportunity does not result from the event of birth, as a matter of biological inevitability, in the case of the unwed father.").

[104] Doe v. Smith, 486 U.S. 1308 (1988).

[105] *Id.*

[106] *Id.* at 1310.

[107] *Id.* at 1309–10.

of the father and the rights of the mother to terminate her pregnancy.[108] The balancing of interests is necessary to ensure that equality between the father and the mother is achieved with respect to the opportunity for parenthood in instances where the pregnancy would be terminated. While this balance was largely lost after *Casey*, meaningful reform is required to restore a proper balance between the rights of the mother to seek an abortion and the prenatal rights of the father that allow him an opportunity to receive custody after birth by preventing termination of the pregnancy. To find a solution, states should look to other concepts, such as the judicial bypass provisions for minors seeking an abortion without consent of their parents, that consider not only the interest of the mother or the state, but also other competing interests, including the one touching on the role of a parent.

### *A. Judicial Bypass Provisions*

As an initial measure, state drafted judicial bypass provisions would allow a willing father to present his claims in court before a mother could obtain an abortion. Judicial bypass provisions are typically used by unemancipated minors to circumvent requirements of first receiving parental consent prior to seeking an abortion.[109] The constitutionality of bypass provisions has been consistently affirmed.[110] Beginning with *Bellotti v. Baird*, [111] the Supreme Court reasoned that states may require parental consent before a minor receives an abortion, arguing that it is in the best interest of the minor to seek the counsel of parents. However, in order to ensure that parents do not have an "absolute, and possibly arbitrary, veto" power, which was ruled impermissible in *Danforth*,[112] consent laws must include judicial bypass provisions that allow the minor to go around the notice requirement. If a minor seeks to "bypass" the parental consent requirement, she could bring a claim before a judge.[113] During this proceeding, she would need to prove that she is "mature and well informed enough" to make the decision to

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[108] *Id.*

[109] *See* Anna C. Bonny, *Parental Consent and Notification Laws in the Abortion Context: Rejecting the "Maturity" Standard in Judicial Bypass Proceedings*, 11 U.C. DAVIS J. JUV. L. & POL'Y 311, 313 (2007). Typical language in these provisions allows a "pregnant minor who wishes to have an abortion . . . [to] file an application for a court order authorizing . . . the performance of an abortion without notification to either of her parents or a managing conservator or guardian." *See generally*, TEX. FAM. CODE ANN. § 33.003 (West 2013) (including typical language in a bypass procedure); *see also* Bellotti v. Baird *(Bellotti I)*, 428 U.S. 132 (1976).

[110] Stacey Gray & Alicia Holden, *Fifteenth Annual Gender and Sexuality Law: Annual Review Article: Abortion*, 15 GEO. J. GENDER & L. 3, 10 (2014).

[111] Bellotti v. Baird (*Bellotti II*), 443 U.S. 622, 640 (1979) ("a State reasonably may determine that parental consultation often is desirable and in the best interest of the minor"); Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 895 (1992) (noting that consent laws are "based on the quite reasonable assumption that minors will benefit from consultation with their parents and that children will often not realize that their parents have their best interests at heart").

[112] *Bellotti II*, 443 U.S. at 643–44; Ohio v. Akron Ctr. for Reprod. Health, 497 U.S. 502, 511 (1990). The justification for allowing parental consent laws does not apply to adult women. *Casey*, 505 U.S. at 895.

[113] *Bellotti II*, 443 U.S. at 643.

terminate her pregnancy or that ending her pregnancy would be in her best interest.[114]

Currently, the law does not require the mother to seek the counsel of the father before terminating her pregnancy. By allowing states to pass reforms and provide willing fathers their day in court, the law would accomplish three things. First, it would provide women time to seek the benefit of counsel consistent with the prudence of parental consent laws.[115] Second, it would ensure that states could advance their constitutional interest in protecting "potential life."[116] Third, it would reaffirm the custodial rights of fathers consistent with *Stanley v. Illinois* (discussed in Part II.C).

The process of providing a hearing for minors should be applied today in matters of prenatal disputes when a mother wishes to terminate her pregnancy. This process would allow a willing father to provide clear and compelling evidence of his fitness before a neutral and detached magistrate who examines the competing claims of both parents (i.e., to seek an abortion versus to prevent the abortion) under the lens of the meaningful review framework.

### *B. Meaningful Review Framework*

On one hand, meaningful review is the level of certainty necessary to preserve fundamental fairness in a variety of government-initiated proceedings that threaten the individual involved with "a significant deprivation of liberty" or "stigma."[117] This concept is meant to safeguard the guarantees of the Due Process Clause, which protect individual rights—e.g., in this instance, the right to have children and to raise them in accordance with one's choosing—against excessive

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[114] *Id.* at 643-44. If the court is persuaded that the minor may make this decision independently, the court must authorize the abortion. *Id.* at 647. If, however, the court is not persuaded by the minor that she is mature, or that the abortion would be in her best interest, the court may decline to sanction the procedure. *Id.* at 647–48. Not surprisingly, Justice Blackmun, who wrote the majority in *Roe*, believed that the "need to commence judicial proceedings in order to obtain a legal abortion would impose a burden at least as great as, and probably greater than, that imposed on the minor child by the need to obtain the consent of a parent." *Id.* at 655 (Blackmun, J., concurring).

[115] Justice Stewart noted in *Danforth* that it "seems unlikely that [a minor] will obtain adequate counsel and support from the attending physician at an abortion clinic, where abortions for pregnant minors frequently take place." Planned Parenthood of Cent. Mo. v. Danforth, 428 U.S. 52, 91 (1976). A pregnant woman, regardless of age, needs the same opportunity and soundness of advice before making this decision given the rampant attempts by abortion advocates to keep her misinformed about the physical and psychological dangers of having an abortion. *See, e.g.*, Abby Johnson, *Abby Johnson: Planned Parenthood Kept Me in the Dark on My Abortion*, LIFENEWS.COM (Oct. 20, 2011, 5:10 PM), http://www.lifenews.com/2011/10/20/abby-johnson-planned-parenthood-kept-me-in-the-dark-on-my-abortion/; Lila Rose, *Misinformation and Manipulation at Planned Parenthood*, LIVEACTION.ORG, http://liveaction.org/rosaacuna/ (last visited May 20, 2015). This makes the need for a bypass hearing that much more important to protect the health of the mother.

[116] *Casey*, 505 U.S. at 876–78; *see also* Webster v. Reprod. Health Servs., 492 U.S. 490, 519 (1989) ("[W]e do not see why the State's interest in protecting potential human life should come into existence only at the point of viability, and that there should therefore be a rigid line allowing state regulation after viability but prohibiting it before viability.").

[117] Addington v. Texas, 441 U.S. 418, 425-26 (1979).

governmental interference.[118] The standard of proof required under this framework is a heightened standard (i.e., clear and convincing evidence), which attempts to provide a sufficient level of protection against lower levels of scrutiny and puts judges on notice that they are not at liberty simply to defer to one party.[119] Stated succinctly by the Supreme Court in *Santosky v. Kramer*, "[b]efore a State may sever completely and irrevocably the rights of parents in their natural child, due process requires that the State support its allegations by *at least* clear and convincing evidence."[120]

On the other hand, meaningful review advances the procedural requirements in our legal system. According to scholar Jeremy Waldon, the responsible application of the principle of equality guaranteed by the Fourteenth Amendment enables the judge "to determine the rights and responsibilities of particular persons fairly and effectively after hearing evidence and argument from both sides."[121] In our current legal system, the rights of the willing father to his unborn child throughout the pregnancy do not exist because the biological design of humans has bestowed pregnancy only on the mother. As a result, courts considering competing interests of the father will often hold them subservient to the mother's bodily autonomy.[122] Therefore, meaningful review is necessary to overcome this deference and ensure that a father's fundamental right to custody and parenthood is preserved where it would otherwise be lost during an abortion. Justice Blackmun emphasized the need for a heightened standard when dealing with fundamental rights:

> When the State initiates a parental rights termination proceeding, it seeks not merely to infringe that fundamental liberty interest, but to end it. If the State prevails, it will have worked a unique kind of deprivation . . . A parent's interest in the accuracy and justice of the decision to terminate his or her parental status is, therefore, a commanding one.[123]

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[118] *See* Washington v. Glucksberg, 521 U.S. 702, 719–20 (1997).

[119] The underlining principle behind the standard of proof is to inform the factfinder of the "degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication." *In re* Winship, 397 U.S. 358, 370 (1970) (Harlan, J., concurring). In the infamous footnote four from *United States v. Carolene Products*, "the Court created a dichotomy between *fundamental* rights, which receive meaningful protection, and *nonfundamental* rights, which do not." United States v. Carolene Products, 304 U.S. 144, 152 n.4 (1938); *A Brief History of Fake Judging*, INST. FOR JUSTICE, http://ij.org/center-for-judicial-engagement/programs/a-brief-history-of-fake-judging. While a meaningful review standard requires judges to consider both sides of the issue and judge accordingly, lower level scrutiny (i.e., rational basis review) is oftentimes considered as a euphemism for a rubber-stamp style of judging. *Id.*

[120] Santosky v. Kramer, 455 U.S. 745, 747–48 (1982).

[121] JEREMY WALDRON, N.Y. UNIV. SCHOOL OF LAW, WORKING PAPER NO. 10-73, THE RULE OF LAW AND THE IMPORTANCE OF PROCEDURE 10 (2010).

[122] *See* Planned Parenthood of Cent. Mo. v. Danforth, 428 U.S. 52, 71 (1976); Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 896 (1992); *see also* Loeb, *supra* note 1 ("These are issues that, unlike abortion, have nothing to do with the rights over one's own body, and everything to do with a parent's right to protect the life of his or her unborn child.").

[123] *Santosky*, 455 U.S. at 759 (internal quotation marks and citations omitted). The judicial bypass

In the same sense that lawyers from the Center for Reproductive Rights argue for courts to apply meaningful review to "prevent unjustified intrusion on a woman's constitutionally protected liberty,"[124] the same standard should be applied when a father is challenging *his* constitutionally protected interests in being a parent as against the mother's interest in terminating her pregnancy.

While it is true that the intended purpose of bypass provisions is to protect the interests of the minor in attaining an abortion, a bypass hearing can still serve as a useful vehicle—alongside decisions like *Stanley v. Illinois*—to ensure that willing fathers are not deprived of their fundamental rights of custody and, more broadly, of parenthood.

### *C. Father's Custodial Rights Under* Stanley v. Illinois

Bypass provisions are also needed to bring the states in line with the Supreme Court's decision of *Stanley v. Illinois*,[125] which emphasized the importance of a father's custodial rights. Since a father's prenatal rights are the first step in the process of gaining custody of his child after birth, these cases illustrate the importance that the Supreme Court has placed on depriving fathers of custody rights without some form of process. Needless to say, when a pregnancy is terminated, the father loses an opportunity to seek custody of his child.

In *Stanley*, the Court looked at the termination of paternal rights and the absence of due process under state law.[126] Under the then current law of Illinois, children whose mothers had died became wards of the state without an inquiry into the natural father's fitness for custody.[127] The plaintiff, an unwed father, brought a claim based on equal protection, arguing that the automatic termination of custody rights does not apply to married fathers and unwed mothers.[128] The State responded that unwed fathers are "presumed unfit to raise their children" and that to bring an individualized hearing to determine fitness would be unnecessary.[129] The State went even further by defining a parent to mean exclusively "the father and mother of a legitimate child . . . or the natural mother of an illegitimate child,"

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provision aims to do just that and serves to advance the argument of Justice Blackmun that "persons faced with forced dissolution of their parental rights have a more critical need for procedural protections than do those resisting state intervention into ongoing family affairs. When the State moves to destroy weakened familial bonds, it must provide the parents with fundamentally fair procedures." *Id.* at 753-54.

[124] *Supreme Court Takes on the Most Important Abortion Case in Two Decades*, FOX43 (Mar. 2, 2016), http://fox43.com/2016/03/02/supreme-court-takes-on-the-most-important-abortion-case-in-two-decades/.

[125] Stanley v. Illinois, 405 U.S. 645 (1972).

[126] *Id.*

[127] *Id.* at 646.

[128] *Id.*

[129] *Id.* at 647. Under Illinois law, the unwed father was "treated not as a parent but as a stranger to his children, and the dependency proceeding has gone forward on the presumption that he is unfit to exercise parental rights." *Id.* at 648.

thereby excluding all unwed fathers.[130] By refusing to acknowledge the rights of unwed fathers and to consider their fitness for custody purposes, the State in essence deemed fitness irrelevant for parental qualification.[131]

In response, the Supreme Court concluded—as a matter of due process—that the unwed father in the case was "entitled to a hearing on his fitness as a parent before his children were taken away."[132] By denying him this right, the Court found that the State had denied him the equal protection of the law guaranteed under the Fourteenth Amendment.[133]

The willing father, however, must take whatever available steps he can to develop a meaningful relationship with his child during the pregnancy in an effort to prove his fitness and afford himself an opportunity to seek custody after birth.

### *D. Labor Investment Theory*

In the past, a father's right to custody of a child was thought to be determined exclusively on the basis of biology (to the point of excluding the mother all together, as in the common law where the father had all presumptive rights over the child).[134] However, today the Supreme Court has moved towards a "biology plus" model, or "labor investment theory," incorporating the requirement that fathers be involved in the lives of their children.[135] This new standard harks back to the Lockean principle of labor that states, "ownership of property is created and is justified by the labor that the owner invested into the property."[136] Under this framework, the pregnant mother is undoubtedly in a unique position based on biological factors to invest more labor into the pregnancy and presumptively enjoys superior liberty interests and authority to decide the outcome of her pregnancy.[137] As E. Gary Spitko writes:

> The biological father is situated dramatically differently from the biological mother with respect to the labor necessary for the child's birth. The biological father's role in conceiving the child is constitutionally insignificant as labor. He has no role, of course, in physically carrying and

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130 *Id.* at 650.

131 *Id.*

132 *Id.* at 649.

133 *Id.*

134 *See* Woodhouse, *supra* note 19, at 1044. During the Roman period, "[m]en . . . ruled over their families like sovereigns over their subjects—or kings like fathers over their families." *Id.*; *see also* Purvis, *supra* note 98, at 651 ("in England during the tenth century, fathers . . . had a right to absolute control over their children").

135 *See generally id.* at 677 (discussing how unwed fathers need to show a genetic link and a relationship with the child for gaining constitutional parental rights). In regards to the mother, her requisite labor investment is assumed by her biology plus her bodily sacrifice in carrying the child.

136 *Id.* at 654–55. "It is this belief that leads Locke's theory to be characterized as one of moral desert: the law grants a person a property right in a thing because that person deserves it as a reward for the virtue of having created the major part of its value." *Id.* at 656.

137 *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 896 (1992) (noting the "inescapable biological fact that state regulations with respect to the child a woman is carrying will have a far greater impact on the mother's liberty than on the father's").

> giving birth to the child. He does not qualify, therefore, for automatic constitutional protection under the labor-with-consent theory of constitutional parental rights.[138]

Given this fact, the father would need to overcome this investment of labor factor by being involved throughout the pregnancy. While normally applied after birth, the principles in the labor investment theory can be applied during the pregnancy as well to allow for custodial rights. A brief discussion of cases concerning the fathers' custody rights, which were decided between 1972 and 1983, will illustrate application of this theory built on *Stanley*.[139]

### 1. *Quilloin v. Walcott* (1978)

In *Quilloin v. Walcott*,[140] the Supreme Court addressed the constitutionality of Georgia's adoption law that denied an unwed father the ability to block the adoption of his illegitimate child. Without legitimizing the child, the mother had exclusive rights to exercise parental prerogatives.[141] In order for the father to prevent the adoption, he was provided a full hearing where he offered evidence "on any matter he thought [was] relevant."[142] However, the father was provided this opportunity only after receiving notice of the adoption.[143] After the hearing, the trial court decided that it was in the best interest of the child to allow the adoption to move forward.[144] As for the labor investment theory, the Court looked to the father's failure to legitimize the child in the many years prior to the adoption proceedings.[145]

In a subtle fashion, the Court introduced the labor investment concept as a legitimate way of framing a relationship by essentially implying neglect because the father failed to "exercise[] actual or legal custody over his child, and thus never shoulder[ed] any significant responsibility with respect to the daily supervision, education, protection, or care of [that] child."[146] The level of commitment to the child was a major factor in preventing the father from opposing the adoption.[147] This is important since that level of commitment was connected to the father's total loss of rights to the child that accompanies a finalized adoption process.[148]

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138 Purvis, *supra* note 98, at 661.

139 *See* Higdon, *supra* note 90, at 516, 524.

140 Quilloin v. Walcott, 434 U.S. 246, 247 (1978).

141 *Id.* at 249.

142 *Id.* at 253.

143 *Id.* at 249.

144 *Id.* at 251.

145 *Id.* at 256.

146 *Id.*

147 *Id.*

148 *See, e.g.*, *id.* at 249; Caban v. Mohamed, 441 U.S. 380, 384–85, 387 (1979).

### 2. *Caban v. Mohammed* (1979)

One year later in *Caban v. Mohammed*, the Supreme Court dealt with another challenge to an adoption by the natural mother and the stepfather without the natural father's consent.[149] The law in question provided that if a child was born out of wedlock, consent to an adoption would be required only from the mother, even if the father's relationship with his child was substantial (as it was in this case).[150] Considering the constitutionality of the law, the Court determined that a gender-based distinction must be related to advancing an important government interest in order to survive an Equal Protection challenge.[151] The distinction in this case was argued to rest on the difference between maternal and paternal relations, and the claim that natural mothers bear a closer relationship with the child.[152] The Court, however, rejected this generalized claim concerning parent-child relations and affirmed that a father may develop a relationship with the child "fully comparable to that of the mother."[153]

Further, the Court implied that in a case where the father would never come forward and take on the role of rearing his child, the Equal Protection Clause would allow the state to withhold the right to veto an adoption.[154] In practice, the state's underlying understanding of the presumptive parental status still tended to discriminate against unwed fathers even when the father's identity was known and even if he demonstrated a substantial paternal interest in the child.[155] What the law suggested was that unwed fathers were "invariably less qualified and entitled than mothers to exercise a concerned judgment as to the fate of their children."[156] The law would have tended to exclude loving fathers from participating in the adoption decision and allowed the mother arbitrarily to cut off the father's paternal rights.[157]

In the end, the Court struck down the law, which was based on a gender-based distinction between the biological parents, for lack of substantial relationship with the state's goal of promoting adoption of illegitimate children.[158] The *Caban* Court was clear that in matters of adoption, courts should not bypass an unwed

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149 *Caban*, 441 U.S. at 382.

150 *Id.* at 385–86. Consent would not be required in instances where the parent had abandoned that child or has been shown to be incompetent in caring for the child. *Id.* at 385.

151 *Id.* at 388. The Court develops the government interest standard by also looking at invidious discrimination to invalidate a state statute on the basis of equal protection. Parham v. Hughes, 441 U.S. 347, 351–52 (1979). The *Parham* Court reasoned that "[t]he threshold question, therefore, is whether the Georgia statute is invidiously discriminatory. If it is not, it is entitled to a presumption of validity and will be upheld 'unless the varying treatment of different groups or persons is so unrelated to the achievement of any combination of legitimate purposes that we can only conclude that the legislature's actions were irrational.'" *Id.* at 351–52 (internal citations omitted).

152 *Caban*, 441 U.S. at 388.

153 *Id.* at 389.

154 *Id.* at 392.

155 *Id.* at 394.

156 *Id.*

157 *Id.*

158 *Id.* at 393.

father—especially when the biological father has developed a relationship with his child that is comparable to the relationship between the mother and the child.[159] While at some stages the parent-child relationship may favor the mother,[160] there is nothing in the opinion to suggest that a father cannot elevate his own involvement to that of the mother by developing a relationship with the child and assisting the mother throughout the pregnancy.

### 3. *Lehr v. Robertson* (1983)

In *Lehr v. Robertson*, the Supreme Court made final refinements to the labor investment theory that would in effect bolster a father's claim to the custody of his unborn child.[161] In *Lehr*, the issue was whether the state had sufficiently protected an unmarried father's relationship with his child with whom he had minimal contact.[162] Largely due to the father's own failure, he did not receive advanced notice of the adoption proceeding.[163] In its opinion, the Court, by looking to *Meyer*, *Pierce*, and *Prince*, reiterated that the parent-child relationship is constitutionally protected.[164] If a state seeks to terminate this relationship, it must first provide a procedure that meets the standards required under the Due Process Clause[165]—for example, the requirements in *Stanley*, *Quilloin*, and *Caban* of holding a hearing to determine the father's fitness before depriving him of custody.[166]

Relying on *Stanley*, *Quilloin*, and *Caban*, the Court in *Lehr* made two important points regarding the labor investment theory as it relates to the Due Process Clause. First, the Court noted that due process is violated if a father's custodial relationship is destroyed without providing him "any opportunity to present evidence regarding his fitness as a parent."[167]

Second, the Court looked to the dissenting members in *Caban* to outline the "clear distinction between a mere biological relationship and an actual relationship of parental responsibility."[168] Looking to the language from Justice Stewart, the Court determined that the rights of parents are not developed merely through a biological connection.[169] However, a relationship between a father and his natural child *can* acquire constitutional protection in instances were an actual relationship exists.[170] While the biological link provides only an opportunity for the father to

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[159] *See id.* at 389.
[160] *Id.* at 388.
[161] Lehr v. Robertson, 463 U.S. 248 (1983).
[162] *Id.* at 249–50.
[163] *Id.* at 250.
[164] *Id.* at 258.
[165] *Id.* (quoting Santosky v. Kramer, 455 U.S. 745, 752 (1982)).
[166] *Id.* at 259.
[167] *Id.*
[168] *Id.* at 259–60.
[169] *Id.* at 260 (quoting Caban v. Mohamed, 441 U.S. 380, 397 (1979) (Stewart, J., dissenting)).
[170] *See id.* at 260 n.16.

*develop* a relationship with his child, substantial protection under the Due Process Clause attaches when a father demonstrates he has in fact *developed* a relationship with the child—i.e., he can demonstrate a full commitment to the responsibilities of parenthood.[171] The presence of a substantial relationship between the father and the child is thus a relevant criterion "in evaluating . . . the rights of the [father] and the best interests of the child."[172]

As a final note, the Court also looked to the Equal Protection Clause and held that states may accord the two parents different levels of legal rights.[173] In order to do this, however, there must be evidence that one parent established a level of custodial relationship with the child, while the other parent did not (for example, the other parent abandoned the child).[174]

The principles above—holding a hearing and allowing a father to present evidence of his fitness and involvement with the child in an effort to avoid losing custody—establish a constitutional framework for applying the labor investment theory to judicial bypass procedures for willing fathers involved at the prenatal stage, and *potentially* allowing fathers to prevent the mother from terminating her pregnancy. In order to prevail, a father would have to develop a meaningful relationship with his unborn child by investing time and money[175] throughout the pregnancy.[176] The evidence of such involvement and establishing the beginning of custodial relationship would be needed to rebut the presumption in favor of the mother by virtue of her having to carry the child. Since the mother does not intend to keep the child, the father can prove that his own parental interest meets the constitutional standard required to protect his parent-child relationship, which

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[171] *Id.* at 261; *see also Caban*, 441 U.S. at 389 n.7 ("[i]n rejecting an unmarried father's constitutional claim in *Quilloin v. Walcott*, we emphasized the importance of the appellant's failure to act as a father toward his children" (internal citations omitted)); *Lehr*, 463 U.S. at 262 ("If he grasps that opportunity and accepts some measure of responsibility for the child's future, he may enjoy the blessings of the parent-child relationship and make uniquely valuable contributions to the child's development."); Nguyen v. I.N.S., 533 U.S. 53, 67 (2001) ("Congress has not taken that path but has instead chosen . . . to ensure in the case of father and child the opportunity for a relationship to develop, an opportunity which the event of birth itself provides for the mother and child. It should be unobjectionable for Congress to require some evidence of a minimal opportunity for the development of a relationship with the child in terms the male can fulfill.").

[172] *Lehr*, 463 U.S. at 266–67.

[173] *Id.* at 268.

[174] *Id.* at 267–68.

[175] Assessing value for the labor of carrying a child can be difficult, but research involving surrogacy contracts has provided helpful statistics. *See, e.g.*, Vanessa S. Browne-Barbour, *Bartering for Babies: Are Preconception Agreements in the Best Interest of Children?*, 26 WHITTIER L. REV. 429, 437–38 (2004); *Agency Fees & Surrogate Mother Costs*, FERTILITY SOURCE COS., https://www.fertilitysourcecompanies.com/surrogacy/looking-for-surrogate-costs-and-financing/ (last visited Mar. 27, 2016). Concerns involving insurance coverage, government aid, and family leave will also need to be debated. These concerns would allow individual states to provide funding consistent with their interest in unborn life. Family planning clinics will also play a key role in ensuring that mothers are provided an alternative to abortion when the father is committed to parenting the child.

[176] The Supreme Court would later address some of the relevant factors that "may give the natural parent a stake in the relationship with the child rising to the level of a liberty interest." Hodgson v. Minnesota, 497 U.S. 417, 436 (1990). Among those factors is an assumption of personal, financial, or custodial responsibility. *Id.*

would otherwise be destroyed if the mother terminated her pregnancy. Coupling these concerns with the Equal Protection Clause, the mother would destroy the presumption by seeking an abortion and thus showing that she intends to abandon the pregnancy.[177] In this instance, states would have an opportunity to confer different rights on the two parents: the right to seek an abortion for the mother versus the right of the willing father to prevent that procedure.

*Stanley*, *Quilloin*, and *Caban* are useful illustrations of unconstitutional deprivations of parental rights. Once the adoption is complete, a father loses all rights to his child and without a hearing has no way of preventing the ultimate outcome. The difference in the abortion related claims is that the law presumes a loss of parental rights throughout the pregnancy. Similar to the existing laws struck down in *Lehr v. Robertson*, the father has no meaningful opportunity to prove his fitness before his parental rights to the child are terminated.

### *E. Brief Response to Objections*

Abortion advocates, of course, could argue that the unborn child has not matured to the stage of development where constitutional rights attach (to either the child or the father) and that the legal precedent asserted in this article does not work at the prenatal stages. Justice O'Connor noted this much in *Casey* when she dismissed the parental interest of the husband in his child prior to birth due to the impact a pregnancy has on a woman.[178] This article addresses Justice O'Connor's argument and attempts to change the judicial attitude towards parental rights of the father to the unborn child.

Many books and articles have been written in defense of life[179] and the Supreme Court itself has been pondering the question of when life begins—yet allowing the mother to decide.[180] This approach has produced inconsistent results.

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[177] It is interesting to note that "Hegel argued that property is alienable because one may cease to 'put [one's] will into it' and therefore 'may abandon' it 'or yield it to the will of another.'" Craig A. Stern, *The Coherence of Natural Inalienable Rights*, 76 UMKC L. REV. 939, 958 (2008) (internal citations omitted). Other scholars have used the "child as property" approach to argue in favor of a father's prenatal rights. *See* Matthew R. Pahl, *It Takes Two, Baby: Fathers, the Tort of Conversion, and Its Application to the Abortion of Pre-Viability Fetuses*, 24 WHITTIER L. REV. 221, 221–22 (2002) (arguing that a fetus is more like property and that "the tort of conversion should be available to a father who has had his property destroyed . . . as the result of an abortion").

[178] *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 895–98 (1992).

[179] For more recent publications defending the pro-life position, see, e.g., FRANCIS J. BECKWITH, DEFENDING LIFE (2007); ROBERT P. GEORGE, EMBRYO 27-56 (1st ed. 2008); SCOTT KLUSENDORF, THE CASE FOR LIFE (2009). A good reason exists to believe that *Roe* was based on a false understanding of abortion history. *See* FORSYTHE, *supra* note 46, at 103–11; JOSEPH W. DELLAPENNA, DISPELLING THE MYTHS OF ABORTION HISTORY (2006).

[180] *See* Ohio v. Akron Ctr. for Reprod. Health, 497 U.S. 502, 520 (1990) ("[the woman's] decision will embrace her own destiny and personal dignity, and the origins of the other human life that lie within the embryo"). Defining the question of "when life begins" is paramount and too readily avoided. For example, when minority leader, Nancy Pelosi, responded to the question of when a baby acquires human rights, she said that the answer should not have an impact on a woman's right to choose. Kathleen Parker, *Pope Pelosi at the Gate*, NAT'L REVIEW (Aug. 27, 2008, 12:00 AM), http://www.nationalreview.com/article/225441/pope-pelosi-gate-kathleen-parker. More recently, the President of Planned

A mother can invoke the protection of federal law for her unborn child, carrying the penalties customarily assigned to homicide crimes, while at the same time she can terminate her pregnancy without any legal consequences. For example, the Unborn Victims of Violence Act provides that punishment for an offense against the unborn child is to be the same as if the offense occurred against the pregnant woman, regardless if the perpetrator knew of the pregnancy.[181] When the perpetrator intentionally kills or attempts to kill a fetus, the statute prescribes a penalty that would be available for "intentionally killing or attempting to kill a human being."[182] However, the same punishment does not apply to a pregnant woman who decides to undergo an abortion, although, in essence, abortion accomplishes the same offense as is punishable under the Unborn Victims of Violence Act.[183]

Arguably, Justice Scalia provided the best answer to the critics in his *Akron* dissent when he said that the humanity of the child could be deduced neither from the Constitution nor from the longstanding tradition of our society without volunteering a judicial answer to this non-justiciable question of when life begins.[184] Courts should defer to medical science that has shown that a distinct new life is in fact created at the point of conception.[185] This new life possesses unique features that develop over time and, maybe most importantly, it possesses a unique human DNA distinct from its parents.[186] Determining humanity of the unborn at any other point is really a philosophical claim, not a scientific one.[187] During the entire gestational process, there is no intervening event, other than the point of conception, which better explains when a child becomes a unique human

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Parenthood, Cecile Richard, claimed that the question of "when life begins" is not part of the conversation. Andrew Johnson, *Planned Parenthood President: When Life Begins Not 'Really Relevant' in Abortion*, NAT'L REVIEW (Feb. 28, 2015, 10:55 AM), http://www.nationalreview.com/corner/372236/planned-parenthood-president-when-life-begins-not-really-relevant-abortion-debate.

181 18 U.S.C. § 1841(a)(2)(B) (2012); Jennifer Henricks, *What to Expect when You're Expecting: Fetal Protection Laws that Strip Away the Constitutional Rights of Pregnant Women*, 35 B.C.J.L. & SOC. JUST. 117, 152 n.73 (2015).

182 18 U.S.C. § 1841(a)(2)(C) (2012).

183 18 U.S.C. § 1841(c)(1) (2012). For a list of fetal homicide laws per state, see *Fetal Homicide Laws*, NCSL, http://www.ncsl.org/research/health/fetal-homicide-state-laws.aspx (last visited Mar. 28, 2016). For a review of the various federal laws that extend protection to the fetus, see Henricks, *supra* note 181, at 121–31.

184 *Akron*, 497 U.S. at 520 (Scalia, J., dissenting).

185 Interestingly, researchers from Northwestern University have shown that a "stunning explosion of zinc fireworks occurs when a human egg is activated by a sperm enzyme." Maria Paul, *Radiant Zinc Fireworks Reveal Quality of Human Egg*, NORTHWESTERN (Apr. 26, 2016), http://www.northwestern.edu/newscenter/stories/2016/04/radiant-zinc-fireworks-reveal-quality-of-human-egg.html.

186 Dianne N. Irving, *When Do Human Beings Begin? "Scientific" Myths and Scientific Facts*, 19 INT'L J. SOC. & SOC. POL'Y 22, 28 (1999); Sarah Terzo, *Life Beings at Conception, Science Teaches*, LIVE ACTION NEWS (Jan. 13, 2013, 3:25 AM), http://liveactionnews.org/life-begins-at-conception-science-teaches/; *Life Begins at Fertilization with the Embryo's Conception*, PRINCETON UNIV., https://www.princeton.edu/~prolife/articles/embryoquotes2.html (last visited Mar. 27, 2016); *see also* GEORGE, *supra* note 179, at 27–56.

187 Irving, *supra* note 186, at 22.

being.[188] If the science supports, or at the very least does not contradict the contention that humanity begins at the earliest stages of pregnancy, then the law should follow suit in adopting that basis as the point when constitutional rights attach.[189]

## CONCLUSION

In resolving the difficult issue of lack of prenatal rights of willing fathers towards custody, we are wise to look to the example of Milo,[190] and to invite critics to trials of strength within the legal systems to avoid the violent tendencies of our lesser angels in taking "justice" into our own hands.[191] We must do so to reform the legal system in this country that has failed in its administration of justice with regard to the willing father, largely eliminating his involvement as a parent and providing the mother unfettered control over the life and death of *their* child.

State legislators should be allowed to correct this imbalance by enacting laws providing a willing father procedural rights akin to the judicial bypass hearings and in accordance with the reasoning in *Stanley v. Illinois*, which decided that a father is entitled to a hearing on his fitness as a parent before his children were taken away. Providing a willing father a hearing—before a neutral and detached magistrate—that could potentially prevent the mother from seeking an abortion, accomplishes three things. First, it would fulfill the requirements under the various adoption cases discussed in this article, which prohibit the state from terminating the child-parent relationship without first providing a hearing to determine parental fitness. Second, the law establishing such procedure would create a balance by requiring the father to take active steps to build a relationship with his unborn child in an effort to gain sufficient constitutional protection to interfere with the mother's choice to terminate her pregnancy. Third, a hearing will help balance the unequal treatment of fathers that began when *Danforth* and *Casey* struck down laws requiring the consent of fathers before a mother could terminate her pregnancy. This framework would also address the rule of law concerns as understood by F.A. Hayek, and the inequalities surrounding the mother's ability to not only terminate her pregnancy, but also give the child up for adoption, or abandon the child,

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[188] *See* GEORGE, *supra* note 179, at 50 ("[n]one of the changes that occur to the embryo after fertilization, for as long as he or she survives, generates a new direction of growth"—except in the case of twins); Peter Kreeft, *Human Personhood Begins at Conception*, PETER KREEFT http://www.peterkreeft.com/topics-more/personhood.htm (last visited Mar. 27, 2016); *see also* Rich Cromwell, *What Nick Loeb's New Action Against Sophia Vergara Means*, FEDERALIST (May 26, 2015), http://thefederalist.com/2015/05/26/what-nick-loebs-new-action-against-sophia-vergara-means/ ("From the moment of conception, it is life. There isn't some magical moment in which the spark flies in from the ether and animates a previously inanimate, yet growing, mass.").

[189] Note that as science advances, courts have granted extended rights to the fetus independent of its mother. Henricks, *supra* note 181, at 123.

[190] Cicero, *supra* note 25.

[191] For example, the 2015 shooting at Planned Parenthood in Colorado. Matt Vasilogambros, *What the Planned Parenthood Shooter Wanted*, ATLANTIC (Apr. 12, 2016), http://www.theatlantic.com/national/archive/2016/04/planned-parenthood-shooter/477825/.

without legally being required to give the father advanced notice. In creating this framework, the legal system will strive to preserve the vital and intangible fibers that connect a father and his child, "woven throughout the fabric of our society, providing it with strength, beauty, and flexibility."[192]

[192] Lehr v. Robertson, 463 U.S. 248, 256 (1983).