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John and Jane Doe, say, marry; Jane gets pregnant; John wants the child; Jane doesn't, and exercises her unqualified prerogative of getting it aborted; and that's that. Now take the opposite case: Jane is pregnant; John doesn't want the kid; Jane does, and refuses to abort it; they divorce; John has to support the kid he never wanted.[1]

INTRODUCTION

This article discusses one rationale behind holding fathers civilly and criminally liable for the maintenance of their infant chil-

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1. Sobran, *Of Ms. and Men*, NAT'L REV., May 24, 1974, at 579, 581. Early this year Mr. Sobran elaborated upon his reflection on the father's plight:

> Abortion as a principle threatens the structure of the family, since by reducing the fetus to the status of a tumor within the woman it denies the interest and, especially, the authority of the man who begot it. And if he has no say in whether she decides to abort, how can he be held responsible for her decision? For instance, why may not the defendant in a paternity suit argue: "Look, this sort of action made sense when the consequences of impregnation were inexorable. But law and science are now so advanced as to make them optional—and her option, not mine. She could have gotten an abortion; she chose not to; I had no say in the matter, and was not even consulted. The most she could plausibly ask would be that I go Dutch treat on the cost of terminating her pregnancy and even this doubtful. She alone decided to bear this child; she alone is responsible. Let her therefore support it by herself." And if an explicit mutual commitment to the (prospective) child is necessary to establish paternal responsibility, why may not even a married man refuse to support his wife's child? If abortion is simply and solely a feminine prerogative, it would seem difficult to hold a man responsible.

Sobran, *Abortion: Rhetoric and Cultural War*, 1 HUMAN LIFE REV. 85, 97 (1975).

Others have voiced the same concern about fairness to the father. One lawyer on the National Board of the National Organization for Women (NOW) has referred to "discrimination against a man, who after a casual sexual encounter with a woman (who often has no access to birth control) finds himself in court, being sued by the Welfare Department, and faced with eighteen years of supporting a child he didn't plan for or want. He should have no right, of course, to force the woman to have an abortion; but if he is willing to share the

dren. Contractual, tort and criminal law analogies to this rationale existed before the 1973 abortion decisions of *Roe* v. *Wade*,[2] *Doe* v. *Bolton*[3] and *Jones* v. *Smith*.[4] The article outlines several holdings of these decisions and shows how they affect the paternal liability rationale. In addition, the article illustrates how these holdings undermine the rationale in contractual, tort and criminal law analogies. Examination of the analogies shows why the elimination of paternal liability may be not only logically necessary, but also an equitable policy under certain articulated premises. The article demonstrates why the contemporary removal of paternal liability would not contradict the logic behind any liability that may have attached to fathers when abortion was originally legal prior to any abortion legislation. Finally, it contends that recognition of any abortion veto for the father is one appropriate response to the challenge to paternal liability for child support presented by abortion on maternal demand.

THE LIABILITY RATIONALE

The imposition of liability for child support upon private persons is usually considered a function of a state's *parens patriae* power. It is presumed pursuant to the exercise of this power that resident minors are state wards in whom the government has an interest.[5] Part of this state interest is to ensure that children are cared for adequately without becoming public charges. As a result, the duty to support children falls on private persons.

Placing the burden of child support upon private persons was defended by Justice Stone as necessary "in order that children might not become public charges."[6] Benjamin Cardozo agreed that the property of an absconding husband or father could be seized if the man left a "wife or child likely to become charges on the pub-

financial responsibility of an abortion and the woman refuses to have one, then he should not be forced to support the child." K. DECROW, SEXIST JUSTICE 230 (1974).

2. 410 U.S. 113 (1973).

3. 410 U.S. 179 (1973).

4. 278 So. 2d 339 (Fla. App. 1973), *cert. denied*, 415 U.S. 958 (1974).

5. *See* Geary v. Geary, 102 Neb. 511, 167 N.W. 778 (1918), *error dismissed*, 251 U.S. 535 (1919).

6. Yarborough v. Yarborough, 290 U.S. 202, 221 (1933) (Stone, J., dissenting).

lic."[7] It also has been generally regarded as sound public policy to require courts to guard the rights of minors "and take due precautions to prevent their becoming a public charge."[8] Reflecting this concern, the Supreme Court of Missouri commented: "It is essential to the welfare of the state that infants be fed, clothed, lodged, and educated; and also that the state shall not be burdened with their care."[9] But precisely why should parents, especially fathers, be the private persons so burdened?

As early as 1903 the Supreme Court held that a father's "obligation to support his children during their minority" survived even his bankruptcy.[10] It was not surprising therefore that twenty years later it could be noted that in the United States parents were by the great weight of judicial opinion under a legal duty to maintain their legitimate minor children.[11] This parental obligation did not depend upon any statutory duty of support.[12]

The ultimate source of this duty was defined in various ways. Responsibility of fathers or of both parents for infant children's upkeep has been based on "the law of nature;"[13] similar justifications have alluded to "natural law"[14] or "natural right"[15] and "natural duty"[16] or "natural obligation."[17] Child support duties also have been deemed a moral obligation.[18]

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7. Coler v. Corn Exch. Bank, 250 N.Y. 136, 139, 164 N.E. 882, 883 (1928), *aff'd* 280 U.S. 218 (1930).

8. Willits v. Willits, 76 Neb. 228, 230, 107 N.W. 379, 380 (1906).

9. State v. Thornton, 232 Mo. 298, 305, 134 S.W. 519, 521 (1911).

10. Dunbar v. Dunbar, 190 U.S. 340, 352 (1903).

11. Doughty v. Engler, 112 Kan. 583, 584, 211 P. 619, 619 (1923). *See also* Denning v. Star Pub. Co., 94 Ind. App. 300, 180 N.E. 685 (1932); Wells v. Wells, 227 N.C. 614, 44 S.E.2d 31 (1947).

12. *See* note 11 *supra*.

13. Fulton v. Fulton, 52 Ohio St. 229, 237, 39 N.E. 729, 731 (1895).

14. Denning v. Star Pub. Co., 94 Ind. App. 300, 308, 180 N.E. 685, 687 (1932).

15. Wells v. Wells, 227 N.C. 614, 620, 44 S.E.2d 31, 34 (1947).

16. Pretzinger v. Pretzinger, 45 Ohio St. 452, 458, 15 N.E. 471, 473 (1887). *See also* Spencer v. Spencer, 97 Minn. 56, 105 N.W. 483 (1906).

17. Thayer v. Thayer, 189 N.C. 502, 507, 127 S.E. 553, 555 (1925). *See also* Osborn v. Weatherford, 27 Ala. App. 258, 170 So. 95 (1936); Crain v. Mallone, 130 Ky. 125, 113 S.W. 67 (1908).

18. Osborn v. Weatherford, 27 Ala. App. 258, 260, 170 So. 95, 96 (1936); Fulton v. Fulton, 52 Ohio St. 229, 237, 39 N.E. 729, 731 (1895). *See also* State v. Thornton, 232 Mo. 298, 134 S.W. 519 (1911).

Precisely why any such moral or natural claims existed (let alone were enforceable at law) was seldom rendered explicit in judicial opinions. The obligation was "often accepted as a matter of course without the assignment of any reason."[19] Indeed, the District of Columbia Court of Appeals confessed in 1923 that although the legal burden of supporting his infant children fell upon a father, the authorities were "not agreed as to the principle upon which a father can be held liable."[20]

The Supreme Court noted that motherhood is of course a "biological relationship."[21] It is on such a rationale that both parents were held liable to their (at least legitimate) children in most instances in which courts enunciated their premises.[22] The Supreme Court of Iowa cited one source as follows: " 'The duty of parents to support, protect, and educate their offspring is founded upon *the nature of the connection* between them.' "[23] After all, the Supreme Court of Kansas observed: "A sufficient reason for holding parents to be under a legal obligation, apart from any statute, to support their legitimate child while it is too young to care for itself, is that the liability ought to attach as a part of their responsibility for having *brought it into being*."[24]

It was similarly determined: "The obligation of *progenitors* to support their offspring is universally acknowledged."[25] The Ohio Supreme Court quoted an early commentator for the contention that parents must support their offspring due " 'to the implied obligation which parents assume in entering into wedlock and *bringing*

19. Doughty v. Engler, 112 Kan. 583, 584, 211 P. 619, 619 (1923). *See also* Barrett v. Barrett, 44 Ariz. 509, 39 P.2d 621 (1934); Wells v. Wells, 227 N.C. 614, 44 S.E.2d 31 (1947).

20. Maschauer v. Downs, 289 F. 540, 542 (D.C. Cir. 1923). *See also* Worthington v. Worthington, 212 Mo. App. 216, 253 S.W. 443 (1923).

21. Glona v. American Guarantee Co., 391 U.S. 73, 75 (1968).

22. The following has been theorized relative to artificial insemination donors: "It is most likely that the donor will be held to be the legal parent in such cases inasmuch as he is, after all, the biological parent." Wadlington, *Artificial Insemination: The Dangers of a Poorly Kept Secret*, 64 Nw. U.L. Rev. 777, 792 (1970). From a different perspective, the biological relationship is also important: "Generally a husband is not liable to support a child born to his wife but not procreated by him." Note, *The Legal Status of Artificial Insemination*, 19 Drake L. Rev. 409, 430 (1970).

23. Porter v. Powell, 79 Iowa 151, 154, 44 N.W. 295, 296 (1890)(emphasis added).

24. Doughty v. Engler, 112 Kan. 583, 585, 211 P. 619, 620 (1923)(emphasis added).

25. Denning v. Star Pub. Co., 94 Ind. App. 300, 308, 180 N.E. 685, 687 (1932)(emphasis added).

children into the world.' "[26] Other judicial opinion added: "The father, who has *brought life into this world*, must make a manly effort to support it, and if he does not do so he is guilty under the law."[27]

Logically implicit in all of these passages is the voluntary nature of the father's biological relationship to his child. As the Supreme Court of Wisconsin recalled as recently as 1968: "A father's duty to support his child rests upon not only moral law but legally upon the voluntary status of parenthood which the father assumed."[28]

This biological fact of the father voluntarily bestowing life has long been asserted as a prerequisite before liability for maintenance of the child attaches to its parent.[29] In 1756 William Blackstone wrote in the first volume of his Commentaries:

> The duty of parents to provide for the maintenance of their children, is a principle of natural law; an obligation laid on them not only by nature itself, but by their own proper act, in *bringing them into the world*; for they would be in the highest manner injurious to their issue, if they only gave their children life, that they might afterwards see them perish. By begetting them, therefore, they have entered into a voluntary obligation, to endeavor, as far as in them lies, that the life which they have bestowed shall be supported and preserved. Thus the children will have a perfect right of receiving maintenance from their parents.[30]

This passage has been quoted with approval by the supreme courts of Kansas,[31] Arizona[32] and North Carolina.[33]

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26. Fulton v. Fulton, 52 Ohio St. 229, 237, 39 N.E. 729, 731 (1895)(emphasis added).
27. Hunter v. State, 10 Okla. Crim. 119, 126, 134 P. 1134, 1138 (1913)(emphasis added).
28. Niesen v. Niesen, 38 Wis. 2d 599, 602, 157 N.W.2d 660, 662 (1968).
29. However, the biological relationship test for fixing support duties might itself be irrational. Mr. Justice Harlan implied as much in a 1968 dissent. Glona v. American Guarantee Co., 391 U.S. 73, 79-80 (1968)(Harlan, J., dissenting). *See* KRAUSE, ILLEGITIMACY: LAW AND SOCIAL POLICY 69 (1971).
30. 1 W. BLACKSTONE, COMMENTARIES *447 (emphasis added). The assertion long antedates Blackstone, who apparently drew directly upon a work of the previous century. *See* 4 PUFFENDORF, LAW OF NATURE AND NATIONS, ch. 11, § 4 (1688).
31. Doughty v. Engler, 112 Kan. 583, 585, 211 P. 619, 620 (1923).
32. Barrett v. Barrett, 44 Ariz. 509, 512, 39 P.2d 621, 623 (1934).
33. Wells v. Wells, 227 N.C. 614, 618, 44 S.E.2d 31, 33 (1947).

The crucial significance of the voluntary bestowal of life by the father is highlighted by pre-1973 thinking concerning the heterologous artificial insemination donor (A.I.D.). The voluntary nature of the role of these fathers is blatant: donors generally are paid.[34] If the heterologous A.I.D. child of a married mother is considered illegitimate, the donor-father, not the mother's husband (at least when the husband is non-consenting), would be seemingly responsible for the child's support.[35] While—at least as of the early 1970's—there appear to be no cases exactly on this point,[36] it has been asserted that placing responsibility for the child's support on the donor-father would in principle be a desirable result.[37]

Such reasoning reaffirms the overriding import of the voluntary role of the father as a partner in biological creation. In the esoteric A.I.D. context more than in the everyday paternity suit, it is demonstrated that neither marriage, acknowledgement, subsidy or custody contains the critical element of paternal responsibility. The A.I.D. father is remote from any of those elements. Only his role as a voluntary and immediate biological creator exists, but this latter role suffices to encompass the pre-1973 elements of paternal support liability.

Although case discussions indicate that the voluntary assumption of a biological relationship seems the strongest argument justifying paternal responsibility for child support, this basis for the duty under Anglo-American legal tradition emphatically is not self-evident. The father of bastards has usually entered voluntarily into the biological relationship with them. Nevertheless

> [T]he common law with almost uniform consistency treated an offspring of parents not married to each other as nullius filius—the son of no one—of no father and no mother. That is to say, it closed its eyes to the fact of that relation and in legal aspect ignored its existence.[38]

34. *See* Rice, *A.I.D. — An Heir of Controversy*, 34 NOTRE DAME LAW. 510, 519 (1959).
35. Note, *The Legal Status of Artificial Insemination*, *supra* note 22, at 430.
36. Wadlington, *supra* note 22, at 792.
37. Rice, *supra* note 34, at 519.
38. Doughty v. Engler, 112 Kan. 583, 584, 211 P. 619, 619 (1923). "At early English common law, the illegitimate was a stranger to its parents, neither owing it any duty of support." Comment, *Illegitimates — Father's Duty To Support*, 28 N.C.L. REV. 119, 120-21 (1949).

Nor is this general outlook ancient history. Even in 1968 Texas and Idaho statutes made no provision for the support of illegitimate children.[39] Indeed, one view sustained by early cases in some American states and in England was that parents had no legal obligation to support even, apparently, legitimate children.[40] These circumstances all provide the *caveat* that the paternal liability question is in theory not a definitively settled matter. A fresh look at the question is appropriate as pervasive legal abortion becomes routine for the first time.

THE TRADITIONAL CONTRACTUAL PARALLEL

The pre-1973 common law obligation of a father to support his infant children was apparently to be distinguished from a contractual obligation. In *Buchanan* v. *Buchanan*,[41] the Virginia Supreme Court held that parental rights and duties could not be altered by contract.[42] Despite this holding, child support claims prior to 1973 were analogous to contractual claims.

A promise which a promisor (parent) should reasonably expect to induce action (growth) on the part of a promisee or third party (child) and which does induce such action is binding if justice can be achieved only by enforcement of the promise.[43] In the typical pre-1973 support controversy the child was in a position analogous to that of the plaintiff third party in such a contracts case.[44] Although

39. CLARK, THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES 162 n.4 (1968). "Cases abound commenting that the father has no duty to support his illegitimate children except as provided by statute, that such statutes are to be strictly construed, and that the rights and remedies they provide are exclusive." Comment, *Illegitimates — Father's Duty to Support*, *supra* note 38, at 119 (citing numerous cases). *But see* Gomez v. Perez, 409 U.S. 535 (1973), holding that discrimination between legitimate and illegitimate children under a Texas statute providing support obligations of biological fathers denied illegitimate children equal protection of the laws.

40. *See* Wells v. Wells, 227 N.C. 614, 619, 44 S.E.2d 31, 34 (1947).

41. Buchanan v. Buchanan, 170 Va. 458, 197 S.E. 426 (1938).

42. *Id.* at 459, 197 S.E. at 434.

43. RESTATEMENT (SECOND) OF CONTRACTS § 90(1) (1973).

44. The logic of this kind of third party beneficiary claim has long been appreciated:

> [I]f the relation between two contracting parties has been followed by consequences to others; if it has placed third parties in any peculiar position, or, as in the case of marriage, has even called third parties into existence, obligations arise on the part of both the contracting parties towards those third persons, the fulfillment of which, or at all events the mode of fulfillment, must be greatly affected by the continuance or disruption of the relation between the original parties to the contract.

used in a different context, this contractual analogy had been used before 1973 in an argument relative to abortion:

> If one is aware of the nature of human sexual intercourse as a potentially life-giving act of love-making, there is "an implicit promise to life made in the sexual act." Intercourse freely engaged in means that a "promise-making situation exists, realized or not." The promise made is not to the fetus as such but to the future person that is begun.[45]

The deeds of the promisors (both parents) had inevitably led the third person beneficiary (child) to the status of a helpless person in need of support.

The fact that the only "promises" of the parents in the classic child support instance were their deeds in begetting and bearing the child makes it no less analogous to a contractual promise. The fact that the promise must be implied by these deeds does not defeat the analogy because actually "all contracts are implied contracts" insofar as meanings are "found by a process of implication and inference."[46]

Since abortion was generally prohibited before 1973, the birth

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MILL, ON LIBERTY 61 (1921).

This passage from John Stuart Mill was being quoted in the marriage contract context as late as last year. *See* Fleischmann, *Marriage by Contract*, 8 FAM. L.Q. 27, 49 n.68 (1974).

45. Ramsey, *Reference Points in Deciding About Abortion*, in MORALITY OF ABORTION 60, 80 (Noonan ed. 1970), *quoting* Green, *Abortion and Promise-Keeping*, CHRISTIANITY & CRISIS, May 15, 1967. Before 1973 it was similarly supposed that the marriage contract "might be viewed as a third-party beneficiary contract by which the father prospectively confers legitimacy on all children resulting from the marriage. Other situations in which the law permits a choice as to whether to grant or withhold benefits superficially seem to support this focus on the father's consent." KRAUSE, *supra* note 29, at 78-79.

Even since *Roe* and *Doe* one sociologist has discussed in greater detail the contractual implications of abortion. Concerning purely voluntary consensual intercourse, for example, this scholar contends that

> a contractual relationship is implied, for if a child is born of that union, the male partner may be assigned the responsibilities of support of the child and/or its mother. In a just and reasonable society, rights and responsibilities occur in tandem. Has not a man who is legally liable for the consequences of his participation in sexual intercourse by mutual consent, an equal right in the determination of whether the natural consequences of that act shall be terminated by abortion?

Lincoln, *Why I Reversed My Stand On Laissez-Faire Abortion*, CHRISTIAN CENTURY, April 25, 1973, at 478.

46. 1 A. CORBIN, CONTRACTS § 18 (1963).

of a child was an outcome naturally implied in the event of impregnation. Courts thus were able to infer logically that the action of the unborn in growing to term was an outcome implied in the typical parents' mutual consent to beget and conceive.[47] By nearly universal accord, justice could be achieved only by allowing the child a maintenance claim against both parents. So pronounced was this conviction before 1973 that a mother's advance waiver of any paternity action against an A.I.D. father was believed to be of doubtful validity even though such fathers have little connection with the child.[48]

The logic of the implied contract for child support had gone even further before 1973 and attached liability to nonfathers on the basis of this reasoning.[49] Several cases held that consenting husbands who had acquiesced in their wives' successful impregnation by heterologous A.I.D. fathers were liable for child support on implied contractual grounds.[50]

THE TRADITIONAL TORT PARALLEL

The pre-1973 claim of an infant or of his third party guardian for maintenance expenses was long analogous to tort claims. Proximate cause—an essential element of any plaintiff's cause of action in tort—is the reasonable connection between the act or omission of the defendant and the damage claimed by the plaintiff.[51] In the classic tort analogy, impregnation and carrying the child to term would be deeds of a father and mother creating liability to their child-plaintiff. Since abortion was prohibited in most situations prior to 1973, the father's impregnation of the mother set into play the chain of causation substantially certain to climax in the birth of the child in need of maintenance. It is well settled in civil cases

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47. In 1974 one author commented:

> We must remember that until a few years ago, abortion was a tremendously important step involving much planning and expense, a trip to another state or to another country, consultations with clergymen and lawyers, examinations by boards of physicians. Many people shared in the decision to abort.

Adler, *Abortion — The Need To Change Jewish Law*, SH'MA: A JOURNAL OF JEWISH RESPONSIBILITY, Nov. 15, 1974, at 163, 164.

48. *See* Wadlington, *supra* note 22, at 792.

49. Note, *The Legal Status of Artificial Insemination*, 19 DRAKE L. REV. 409, 431 (1970). The reasoning is that of the Restatement of Contracts. RESTATEMENT (SECOND) OF CONTRACTS § 90 (1) (1973).

50. Anonymous v. Anonymous, 41 Misc. 2d 886, 246 N.Y.S.2d 835 (1964); Gursky v. Gursky, 39 Misc. 2d 1083, 242 N.Y.S.2d 406 (1963).

51. W. PROSSER, LAW OF TORTS § 41 (4th ed. 1971).

that if two persons act in concert each is liable for the entire result if it is tortious.[52]

THE TRADITIONAL CRIMINAL PARALLEL

Criminal liability for nonsupport of children was imposed upon parents by statute in all jurisdictions at least as early as 1936.[53] The rationale for this pre-1973 criminal liability was analogous to that of criminal liability in other contexts. "The notion long persisted" in homicide, for example, "that the way to decide all questions of proximate cause was to have the jury find the defendant guilty of homicide if death was a 'natural and probable consequence' of his act."[54] But courts turned away from this test toward instead examining "how much of the original force launched by defendant was still present and contributing to the death at the moment of its occurrence."[55] When abortion was prohibited, a father's original impregnation of the mother launched a pregnancy usually ending in childbirth. It was consistent in both life-generating and life-taking matters for the law to hold men liable for outcomes of which their deeds were the proximate cause.

THE INTERVENTION OF *Roe, Doe* AND *Jones*

Roe v. *Wade*[56] and *Doe* v. *Bolton*[57] effectively remove the prohibitions on abortion. In so doing, these cases call into question father-child relationships.

The Supreme Court held in *Roe* that an unborn child is not legally a person.[58] Although it declined to ascertain when life begins,[59] the Court did refer to cases in which property interests of unborn children were held to be contingent upon live birth or in which parents of a stillborn child maintained a wrongful death action on the basis of prenatal injuries.[60] The Court believed that these

52. *Id.* at § 52.
53. 4 VENIER, AMERICAN FAMILY LAWS 60 (1936).
54. Comment, *Causal Relation Between Defendant's Unlawful Act and the Death*, 31 MICH. L. REV. 659, 661 (1933).
55. *Id.*
56. 410 U.S. 113 (1973).
57. 410 U.S. 179 (1973).
58. 410 U.S. at 158.
59. *Id.* at 159.
60. *Id.* at 162.

cases indicate "that the fetus, at most, represents only the potentiality of life."[61] Basing its decision on a mother's right of privacy,[62] the Court held that abortion during approximately the first trimester of pregnancy is to be left to the medical judgment of the mother's physician.[63] During the next trimester, the state is allowed to regulate abortion "in ways that are reasonably related to maternal health."[64]

Mr. Justice Douglas proclaimed that "the clear message" of *Roe* and *Doe* is "that a woman is free to make the basic decision whether to bear an unwanted child."[65] However, the Court expressly reserved comment on what are "the father's rights, if any exist in the constitutional context, in the abortion decision."[66] This failure to decide the father's rights left open the way for the 1973 and 1974 decisions[67] that fathers cannot prevent mothers from having an abortion.

Legal personality is therefore not the product of the joint conception of a child by two parents. Conception—indeed, conception plus pregnancy until just before childbirth—produces no new person as a matter of fundamental constitutional law. Nor legally is life even necessarily the product of the joint action by two parents. Legal personality is only conferred by a baby being born of a woman who is free to make the basic decision whether to bear or abort. Absent subsequent Supreme Court recognition of a father's abortion veto equal to the mother's, the decision to convert the nonperson of pregnancy into a person—with the legal demands for support such an infant person can enforce—is exclusively the mother's.

Jones v. *Smith*,[68] a Florida Fourth District Court of Appeal opinion, is examined here because it apparently presented that

61. *Id.*
62. *Id.* at 155.
63. *Id.* at 164.
64. *Id.*
65. *Id.* at 214 (Douglas, J., concurring).
66. *Id.* at 165 n.67.
67. Coe v. Gerstein, 376 F. Supp. 695 (S.D. Fla. 1974), *cert. denied*, 94 S. Ct. 2246 (1974); Doe v. Rampton, 366 F. Supp. 189 (D. Utah 1973); Jones v. Smith, 278 So. 2d 339 (Fla. App. 1973), *cert. denied*, 415 U.S. 958 (1974); Doe v. Doe, ___ Mass. ___, 314 N.E.2d 128 (1974).
68. 278 So. 2d 339 (Fla. App. 1973), *cert. denied*, 415 U.S. 958 (1974).

court with a matter of first impression in the nation[69] relative to paternal rights of adult unwed fathers in the abortion decision. The *Jones* court cited *Roe* and *Doe* in asserting that the essential and underlying factor in its own decision was the maternal right of privacy.[70]

In *Jones* a putative father sued to restrain the mother from having an abortion. The court denied the father any legal veto over the abortion.[71] Since the justices unanimously believed it to be unquestioned that a woman has a fundamental right to decide whether or not to bear a child, they reasoned that granting a paternal veto would be inconsistent with the maternal right to privacy.[72]

The *Jones* opinion is forthright in its view of the overriding impact of the privacy claim, finding the decision to abort "one that is *purely personal to the mother* and between her and the attending physician. . . ."[73] In light of the paternal claim the opinion adds: "The right of privacy is a right that is purely *personal* to the individual asserting such right."[74]

Jones, in defining the scope of a mother's privacy, carefully detached the right of privacy relative to abortion from the joint act of conception. The court stated:

> The appellant contends that whatever right of privacy that the mother might have enjoyed, such right was "waived" by virtue of her consent to and participation in the sex act. This argument is somewhat tenuous. The right of privacy of the mother with respect to a termination of pregnancy as delineated by the decisions of the United States Supreme Court is a right separate and apart from any act of conception.[75]

To the extent that duties correlate to rights, a right separate and

69. "The novel issue, therefore, is whether an unmarried father has any legally enforceable interest in the birth of his illegitimate child." Cuneo, *What Rights for the Unwed Father?*, The Indianapolis Star, April 8, 1973.

70. 278 So. 2d at 341.

71. *Id.* at 344.

72. *Id.*

73. *Id.* at 341 (emphasis in the original).

74. *Id.* at 342 (emphasis in the original).

75. *Id.* at 342-43.

apart from any act of conception might seem to imply that the corresponding duty is also independent of conception. But after conception only the mother of the two parents has a right in procreation under *Jones*. Who of the two parents after conception, then, should suffer any duty attendant to procreation?

Reaffirming "that the decision to terminate pregnancy predicated upon the right of privacy is not vitiated by participation in the sex act,"[76] the *Jones* court refused to recognize any paternal rights relative to abortion. It saw so little merit in the paternal claim to any right in the abortion decision—even when the father suggested his own health would suffer from the abortion[77]—that the court alluded to his "right" in quotation marks, as if reluctant to concede it was a serious proposition.[78]

Another 1973 decision looking to the maternal privacy right, *Doe* v. *Rampton*,[79] declared unconstitutional a statute guaranteeing a paternal veto in the abortion decision.[80] One judge, in evaluating paternal rights, found that the maternal right of privacy is "fundamental, and lesser interests or rights themselves deemed fundamental in another context may not be allowed to interfere or impose an undue burden upon the woman's right of privacy."[81] Decisions during 1974 that looked to the maternal privacy right also negated paternal veto claims. In *Coe* v. *Gerstein*,[82] Florida's statutory requirement for spousal consent to abortion was attacked as being violative of maternal privacy. Citing *Roe* and *Doe*,[83] the court found in *Coe* that the statutory spousal consent requirement was unconstitutional.[84]

In *Doe v. Doe*,[85] the Supreme Judicial Court of Massachusetts refused to recognize the claim of an estranged husband-father that

76. *Id.* at 343.
77. *Id.* at 340.
78. *Id.* at 340, 343, 344. The paternal "right" has been written of similarly elsewhere. Uda, *Abortion Law: Roe v. Wade and the Montana Dilemma*, 35 MONT. L. REV. 103, 106 n.33 (1974).
79. 366 F. Supp. 189 (D. Utah 1973).
80. *Id.* at 199.
81. *Id.* at 203 (Anderson, J., concurring in part and dissenting in part).
82. 376 F. Supp. 695 (S.D. Fla. 1974), *cert. denied*, 94 S. Ct. 2246 (1974).
83. *Id.* at 696.
84. *Id.* at 698.
85. ___ Mass. ___, 314 N.E.2d 128 (1974).

he had a constitutional right to determine that his unborn child not be aborted.[86] The conception in *Doe v. Doe* had been jointly desired, and the wife previously had expressed sentiments against abortion.[87] Since the wife's health was good, she would have run little risk in childbirth.[88] When the wife indicated that she desired an abortion, the husband brought suit and testified that he desired to assume custody of the child, to support it and to arrange for its care, including day care by the wife's sister.[89] The court, citing *Roe* and *Doe*,[90] nevertheless found that the father had no veto over abortion enforceable by the courts.[91]

These decisions denying a paternal veto over abortion undermine the various justifications given by courts for holding fathers liable for their children's care. The father's coequal generative relationship no longer has a legal counterpart: though the potential person is half his genetically, it is yet exclusively under the mother's dominion legally as well as physically until birth. No longer can a court seriously allege that the "nature of the connection" between father and child has "brought it into being". Legally, the person—perhaps arguably the life itself—was created independently of the father's act or omission. A father is now a "progenitor" who has "brought life into this world" only in some zoological sense. His legal status relative to his unborn children is that of a helpless bystander.

The Contemporary Contractual Parallel

After the 1973 and 1974 decisions giving a woman the freedom to decide whether to have an abortion and denying the father any veto over that decision, it is no longer accurate to assert from a contract analogy that an infant-plaintiff's position is like that of a third party beneficiary to a contract affirmed between its parents. Such an analogy would be inaccurate as to any but pregnancies surrounded by extraordinary circumstances. The general rule as to third party beneficiaries provides:

86. *Id.* at ___, 314 N.E.2d at 133.
87. *Id.* at ___, 314 N.E.2d at 129.
88. *Id.* at ___, 314 N.E.2d at 130.
89. *Id.* at ___, 314 N.E.2d at 129.
90. *Id.* at ___, 314 N.E.2d at 131.
91. *Id.* at ___, 314 N.E.2d at 133.

> A third party who is not a promisee and who gave no consideration has an enforceable right by reason of a contract made by two others (1) if he is a creditor of the promisee or of some other person and the contract calls for a performance by the promisor in satisfaction of the obligation; or (2) if the promised performance will be of pecuniary benefit to him and the contract is so expressed as to give the promisor reason to know that such benefit is contemplated by the promisee as one of the motivating causes of his making the contract.[92]

The infant is not a creditor of his father. Neither is it true that the procreation and nurture of children is often expressly contemplated by one sexual partner[93] as a motivating cause of consent to intercourse.[94] In the absence of express contemplation of the third party benefit, the claim of an infant as third party beneficiary should collapse. As Corbin explains, "Of course, the defendant should not be compelled to render a performance that he did not promise to render—to pay a bill that he did not promise to pay."[95]

After 1973, express contemplation of child support seems necessary to make the child a third party beneficiary to the parental "contract" to create and support an infant. An implied contract can no longer be found when fathers beget children because post-1973 pregnancy is simply an occasion for the unilateral decision of the woman whether or not to bear the child. Since this decision is unilateral, the responsibility logically must be unilateral in a contract

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92. 4 A. CORBIN, CONTRACTS § 776 (1963).

93. Procreation and nurture of children is seldom expressly contemplated by sex partners:

> Indeed many pregnancies can without great difficulty be assimilated to the hard case, for how often do persons undertake an act of sexual intercourse consciously intending that a child be the fruit of that act? Many pregnancies are unspecified by particular intent, are unplanned, are in this sense involuntary.

J. NOONAN, HOW TO ARGUE ABOUT ABORTION 6 (1974).

It has been held that even a mother's later failure to abort cannot be considered a necessary indication of prior intent to conceive. Gilbert v. General Elec. Co., 375 F. Supp. 367, 375 n.6 (E.D. Va. 1974).

94. In adultery, for example, the biological father makes no promise to pay the support bill: "Adultery is committed *solely* for sexual gratification and is completed by an act of physical intercourse." Smith, *Artificial Insemination — No Longer a Quagmire*, 3 FAM. L.Q. 1, 4 (1969)(emphasis added).

95. 4 A. CORBIN, CONTRACTS § 776 (1963).

analogy because it is the decision—at least implied—to consent upon which contractual duties are founded.

United States Senator Birch Bayh appears to have anticipated this logical conclusion during a September 12, 1974, hearing of the Subcommittee on Constitutional Amendments of the Senate Judiciary Committee. An exchange between the Senator and a proponent of abortion, Pamela Lowry, was described as follows:

> Bayh mentioned a "strong legal precedent that all of us human beings, who are in command of our mental capacities, have to be responsible for our own actions."
>
> As part of her response, Ms. Lowry said, "I think it would be too facile to say someone who willingly participates in sexual intercourse willingly accepted the pregnancy."
>
> The senator retorted, "You are going to get yourself in some hot water because if that is true of the mother, then is it not also true of the father, and where do you impose a responsibility of the father to care for the children? I don't think you want to get yourself in a position where you suggest two adults who participated in a sexual activity don't bear responsibility for that very human, wholesome activity."[96]

Even where an implied contract is deemed to exist between the two parents in a pregnancy, good policy in contract law would find the post-1973 father liable only for his share of the expense of the immediate result of the impregnation, *i.e.*, the expense of the pregnancy itself or of an abortion. To hold the father liable for twenty years of costs after childbirth is to impose a liability for which his remote conduct is not the proximate cause by contract standards.

Causation requirements in contract law are designed to promote two goals. The first is the social policy of minimizing future damages; and the second is the social policy of discouraging self-help. Corbin sets out these goals as follows:

Not only must a causal relation be shown to exist between

96. Hartle, *Pro-abortionists testify before Bayh committee*, NAT'L RIGHT TO LIFE NEWS, Nov., 1974, at 12, col. 3.

> the defendant's conduct and the harm for which damages are sought, but it must also be shown that the defendant's relation to the harm was sufficiently near in space and time that compelling him to make reparation will, according to prevailing opinion, tend appreciably to prevent similar harms in the future and to prevent aggrieved persons from attempting to take "justice" into their own hands.[97]

The first goal of contract causation requirements—relating liability to prevention of future similar harm—is a goal under which the modern father should be relieved of liability for child support. If infants are free to sue fathers as well as mothers for maintenance, society's pregnant mothers will be more financially free to create future "harms" (the "harm" meaning the maintenance need of children). If, conversely, infants are allowed only to sue mothers for maintenance, society's future mothers will be discouraged from producing infants in need of support. They instead will be encouraged to exercise their constitutional abortion right. This assuredly will reduce similar "harms" in the future.

The second goal of contract causation requirements—relating liability to the prevention of self-help—is also a goal under which the modern father should be relieved of liability for child support. If fathers are no longer liable for child support, mothers still remain vulnerable to a child's maintenance claim. Since the infant-plaintiff's entire claim is still collectible from its mother, the infant has no self-help incentive at all.

In *Jones*, the unwed father suggested the existence of an implied contract between the parents manifested by the father's agreement to support the child if the mother conceived and by the woman's consent to intercourse and her representations that she would marry the father.[98] The opinion firmly denies the existence of this alleged contract. Even if the father undertook to provide for his child, such provision "does not serve as a basis upon which to establish a 'contractual agreement' of such legal and enforceable significance as to prevent a termination of pregnancy otherwise permissible."[99]

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97. 5 A. CORBIN, CONTRACTS § 997 (1963).
98. 278 So. 2d at 343.
99. *Id.* at 344. It is interesting that an obvious legal framework in which an implied

Contract law reasoning has also been used to suggest that a father may have a property interest in the fetus that cannot be defeated unilaterally by the mother. Viewing the decisions legalizing abortion as reducing the fetus to a chattel, one attorney stated:

> . . .The question becomes, therefore: Who owns the chattel?
>
> Obviously, the mother has a claim for possession. Is her ownership exclusive and absolute? It would appear that the father can assert a claim of ownership equal with that of the mother's, especially where the father is also the husband of the mother. After all, the fetus is technically the combination of the female egg with the male sperm, and each contributor is in a position to claim the fetus as personal property. Where the contributors are married, the argument is further strengthened by noting that the birth of children was contemplated within the scope of the marriage contract, and the parties thereby waived any right to assert exclusive possession of fetal life conceived during marriage.[100]

But this suggestion may have been already outdated when first proffered. An argument that a fetus is owned jointly by a father and his wife and so cannot be disposed of by one owner without the consent of the other was rejected by an Illinois court when a husband sought to enjoin his wife from having an abortion.[101]

The Contemporary Tort Parallel

Besides undermining the contract analogy for holding fathers liable for the support of their infant children, the abortion decisions

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bilateral contract between parents to provide for their children as third party beneficiaries can be found in the Canon Law. Canon 1013 provides: "The primary object of marriage is the procreation and education of offspring; . . .". S. Woywood, The New Canon Law 205 (1918).

There is sharp contrast between the premises of the Canon Law and of the Supreme Court relative to domestic relations. This contrast emphasizes the untenability of implied contractual obligations upon fathers for child support. The Supreme Court is unlikely to define either sexual relations or the marriage contract using the axioms of the Canon Law, which axioms would embrace the implied obligation.

100. Orloski, *Legal Questions and Legislative Alternatives*, America, Aug. 10, 1974, at 50, 51, cols. 2-3.

101. Pound v. Pound (Ill. Cir. Jan. 31, 1974), in 42 U.S.L.W. 2456 (Mar. 5, 1974).

of 1973 and 1974 also undermine the use of the tort analogy as a basis for imposing paternal liability for child support. A defendant in a tort case would not be held liable to a plaintiff if the defendant were a bystander analogous to the post-1973 father. In relation to negligence, for example, a valid defense is that of shifting responsibility. According to this defense, "the defendant may not be required to take any precautions for the plaintiff's safety, because he is free to assume that someone else will do it or will be fully responsible in case he does not."[102] Since a woman has nearly absolute freedom as to abortion, the father-defendant would not in a tort analogy be liable for the child-plaintiff's care because he is free to assume that the mother will care for it or will be fully responsible for its maintenance. A father's freedom to expect the exercise of such responsibility by the mother arises because the creation of the person-plaintiff and its liabilities is an intimate, months-long process in which the father is denied even a veto.

This outcome is a striking one, but Prosser suggests a somewhat parallel example in his discussion of proximate cause. Prosser explains that when a defendant-created danger is passed on by a third party, responsibility would shift from the defendant "if the third party were notified of the danger in advance, and then elected to proceed."[103] This is the situation with post-1973 mothers and fathers. A legally competent mother is certainly notified of her pregnancy no later than the second trimester. She also usually understands the danger of incurring liability to the child for support upon childbirth. If she elects to proceed anyway, the fact that a defendant-father's deed played an initial physical role in the process is of no legal effect because responsibility has shifted from him.

The factors weighed in deciding whether responsibility shifts[104] all aid the argument against imposing liability for child support upon fathers via the tort analogy. These factors include the reliability and competence of the party relied upon and her understanding of the situation. Few women would be unable to comprehend their pregnancies. Fewer still would be unable to understand and respond to their pregnancies during a period extending over six months.

102. W. PROSSER, LAW OF TORTS § 33 (4th ed. 1971).
103. *Id.* at § 44.
104. *Id.* at § 33.

After a woman becomes cognizant of her pregnancy, only a calculated decision for childbirth explains any rejection (on whatever grounds) of abortion.

Other relevant shifting responsibility factors include the seriousness of the danger and number of persons likely to be affected. No exceptions to the shifting of responsibility from father to mother in the abortion analogy arise from consideration of these factors.[105] Another factor weighed is the length of time elapsed, which is some six months for the abortion decision. Factors finally important for shifting responsibility are the likelihood that "proper care" will not be used and the ease with which the original defendant himself may take precautions. Both of these factors also indicate that a shift of responsibility is appropriate in the abortion context. The likelihood that proper care will not be used is a possibility only if the typical woman deliberately refrains for months from deciding to abort. As to the ease with which the original defendant himself may take precautions, it has been seen that once the mother is impregnated the father is practically helpless to take precautions.

The time element for the tort doctrine of shifting responsibility was clarified by the Oklahoma Supreme Court in 1958. In *Greenwood v. Lyler & Buckner, Inc.*,[106] a dangerous highway condition caused by a contractor's original negligence but tolerated by the state highway department resulted in third-party injury seven months after acceptance of the completed work.[107] The court held that the contractor was not liable since responsibility had shifted to the highway department.[108]

The policy need to protect the lives of the entire road-using public from a contractor's particular act of negligence clearly outweighs the policy need to protect a solitary infant's claim for sup-

105. Prosser warns of extreme dangers or special relations in which the shifting of responsibility is barred as a policy matter. But, all the examples he cites involve extreme social dangers, such as inflammable stove polish, inflammable beauty shop combs, gasoline in kerosene cans or highly dangerous rented autos. *Id.* at § 44.

106. Greenwood v. Lyler & Buckner, Inc., 329 P.2d 1063 (Okla. 1958). *See also* Goar v. Village of Stephen, 157 Minn. 228, 196 N.W. 171 (1923). Distinguishable is Murphy v. Barlow Realty Co., 206 Minn. 527, 289 N.W. 563 (1939), because the second party in *Murphy* could not reasonably have been expected to prevent liability to a third.

107. 329 P.2d at 1064.

108. *Id.* at 1067.

port against a father's particular act of "negligence." In both instances a second party would reasonably be expected to guard against the potential claims of third parties. Moreover, a six or seven month failure on the part of the second party to guard against such liability to third parties exists in both instances. Responsibility shifted in the contractor case. As a result, responsibility must also shift in a consistent abortion analogy.

Also important in the tort analogy is the concept of duty. It is useful to state every proximate cause question in the following form: Was defendant under a duty to protect the plaintiff against this harm?[109] As a defense against liability for prenatal injuries, it was traditional for defendants to claim that no duty could be owed to a nonexistent person—the unborn.[110] While this defense collapsed between 1946 and 1967[111] because prenatal existence became legally recognized, it is apt in the child support analogy.

At the time of impregnation a father has no present duty toward the postnatal person. Such a person does not yet exist at conception. Since the "tort" upon which support is demanded—the grant of postnatal life to the child—is exactly that grant over which a father has no control after 1973, a paternal duty to support the child does not arise after conception either. A man cannot equitably have a duty to act where he is conclusively denied freedom to act. Without a duty, there can be no proximate cause of the harm and so no tort liability.

The tort doctrine of the last clear chance is also instructive in the abortion analogy. When there is injury to a third-party plaintiff, a co-defendant who had the last clear chance to avoid the harm may be required to indemnify the other co-defendant.[112] In the abortion analogy, the child as third-party plaintiff might arguably sue both parents as co-defendants in an action for support. The mother, as the co-defendant having the last clear chance, ought to be required to indemnify the father.

109. W. PROSSER, LAW OF TORTS § 42 (4th ed. 1971).

110. *Id.* at § 55.

111. *Id.*

112. Colorado & Southern R. Co. v. Western Light & Power Co., 73 Colo. 107, 214 P. 30 (1923); Nashua Iron & Steel Co. v. Worcester & N. R. Co., 62 N.H. 159 (1882); Knippenberg v. Lord & Taylor, 193 App. Div. 753, 184 N.Y.S. 785 (1920). *See also* Cuneo, *supra* note 69. But, dictum to the contrary exists. *See* W. PROSSER, LAW OF TORTS § 66 (4th ed. 1971).

THE CONTEMPORARY CRIMINAL PARALLEL

As with the contract and tort analogies, the criminal law analogy now also cannot serve as a basis for holding fathers liable for child support. A criminal defendant would not be held liable if that defendant were a bystander analogous to the post-1973 father. Even assuming that the physical cause-and-effect of impregnation makes the father's original act one cause among others resulting in the child, the father cannot be held liable in a criminal analogy for more than limited consequences of his act.

If criminal defendant A's felonious assault gives B a serious wound, B's negligence will not release A from liability should B die from the wound, even if B would have recovered but for B's own neglect.[113] But if A's felonious assault causes only a minor wound, the result is different. While the law will follow the consequences of A's acts through even B's failure to secure treatment, "the limits of liability are rather quickly reached."[114] The microscopic reality of fertilization parallels the minor wound. As a result, childbirth creating decades of maintenance liabilities is palpably beyond any "quickly reached" bound of the legal consequences of the father's act of impregnation. The mother's failure to abort during the long period of pregnancy makes the childbirth result not proximate to but remote from the father's role.

The hypothetical criminal case is not distinguishable because in it victim B herself fails to secure treatment, while in a nonsupport suit the infant "victim" is innocent of such failure. The infant after 1973 loses nothing in his innocence. As the party protecting the infant's right, the state retains the enforceable claim for the entire amount necessary for the child's support. The prosecution after 1973 simply has one parental defendant solely liable for the entire support obligation, rather than two parent potential defendants liable for the same amount.

If the ultimate outcome (childbirth) is beyond the father's control and is instead permanently in the hands of an independent party, a father's role, according to the criminal analogy, is no more

113. Comment, *Causal Relation Between Defendant's Unlawful Act and the Death*, *supra* note 54, at 678-79.

114. *Id.* at 678.

than that of one condition precedent to the ultimate liability for child support. His part is that of a necessary but not sufficient cause, like that of the maternal grandfather: "Had there been no grandfather, there would have been no grandson. But birth is not derived from the grandfather."[115] Indeed, after 1973 birth is, in effect, derived exclusively from the mother.

As a mere condition precedent like the maternal grandfather, the father is also similar to the vendor of a gun used in a homicide. Such a vendor—even one selling in violation of a statute—is not held liable for the homicide to which he contributed by supplying the gun.[116] Arguing from the criminal law analogy, neither should the father be held liable for the consequences of the pregnancy.

NONLIABILITY AS EQUITABLE POLICY

If removal of the civil and criminal liability of fathers to maintain their infants seems as if it is an unsound policy, the harshness of that liability should be weighed against the liability's root. If birth is the direct cause giving legal personality to an infant, pregnancy is the indirect cause. And what produces the pregnancy itself? As Mr. Justice Douglas suggested in concurring in *Roe*, unwanted pregnancies are produced by the "vicissitudes of life."[117] These vicissitudes produce the pregnancy resulting in personality-granting childbirth.

The foundation of the liability for child support incumbent upon parents after birth is therefore a haphazard accident of life, *e.g.*, the casual, happenstance impregnation of the mother by the father. To saddle a man with twenty years of expensive, exhausting child support liability[118] on the basis of a casual vicissitude of life seems to shock the conscience. This especially is so if the alternate target for exclusive liability—the mother—embraces childbirth not as a happenstance vicissitude, but as a calculated outcome freely chosen over her guaranteed option to have an abortion.

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115. Ryu, *Causation in Criminal Law*, 106 U. PA. L. REV. 773, 789 (1958).

116. Comment, *Causal Relation Between Defendant's Unlawful Act and the Death*, *supra* note 54, at 669.

117. Roe v. Wade, 410 U.S. 113, 215 (1973)(Douglas, J., concurring).

118. In 1973 one attorney estimated that it cost $125,000 to raise a child and send it to college. Goodman, *Doe and Roe: Where Do We Go From Here?*, 1 WOMEN'S RIGHTS L. REP. 20, 36 (1973).

This conclusion does not rely too heavily upon one isolated phrase of a single justice writing in the modern and liberal timeframe of 1973. Unwanted pregnancies long have been appraised with words similar to those of Justice Douglas. In 1906 the Supreme Court of Nebraska, for instance, held that a father was liable to support children born of a marriage voided due to the husband's age.[119] The court's language is instructive: "There would be neither reason nor justice in a rule that would visit the consequence of a *mutual indiscretion* exclusively upon the wife."[120] To say that children that parents do not want to support were born of a mutual indiscretion is to find them produced by the all too human mistakes of daily living.

Twenty years of child support liability for the chance happening of a pregnancy seems to be a severe judgment for modern courts to impose upon the 1975 father. As the Nebraska Supreme Court discerned, the children to whom the 1906 father was liable were born of an indiscretion that was mutual. But the child of 1975 is not born as a result of a mutual decision. Rather, today's child is born if and only if his mother coolly elects his birth during a protracted period in which she has the power of unilateral decision. As the child of 1906 deserved support by the father whose role in a mutual indiscretion produced the child, so perhaps the child of 1975 should be supported solely by the mother whose solitary decision produced him.

It cannot be argued today that the already pregnant woman does not actually "decide" to bear the child when childbirth in fact results from pregnancy. Similarly, it cannot be said that once impregnated the modern woman is helplessly swept toward childbirth.[121] "To bear" is as genuinely a decision as is "to abort."[122] This

119. Willits v. Willits, 76 Neb. 228, 231, 107 N.W. 379, 380-81 (1906).

120. *Id.* at 231, 107 N.W. at 380 (emphasis added).

121. The sweep has been seen as, if anything, in the opposite direction:

> Now that abortion is a commonplace, a readily available option, the decision rests with the woman alone. In fact, it has become necessary to remind ourselves that abortion *is* a decision and not an inevitability, and to generate some normative guidelines for how abortion is to be used.

Adler, *supra* note 47, at 164 (emphasis in original).

122. The childbirth option is commonly seen as hinging on maternal decision: "Choosing to bear a child is a hard and immense decision. Even the legitimate and long-desired child

has been enunciated repeatedly in judicial opinions. For example, Mr. Justice Douglas discussed the woman's "basic decision whether *to bear* an unwanted child."[123] The Supreme Court has alluded to "a woman's decision whether or *not* to terminate her pregnancy."[124] These same words have been quoted by the Supreme Judicial Court of Massachusetts.[125] As one federal district judge correctly added: "From conception until the end of the first trimester of pregnancy, the decision whether or *not* to procure an abortion, and the effectuation of that decision, rests with the pregnant woman and her physician."[126]

THE PRE-LEGISLATION COMPARISON

The arguable freedom of post-1973 fathers from any maintenance duty of child support is not defeated by the fact that in the period before 1821 when no American states had abortion laws regulating the first trimester of pregnancy[127] fathers still may have been liable for the maintenance of their children. The change in the law's conclusion necessarily follows from the factual premises which the Supreme Court found had changed by 1973.

The Court discovered three reasons that had been advanced to explain the enactment of nineteenth century abortion laws: Victorian sexual mores, maternal health and protection of prenatal life.[128] The Victorian mores explanation was dismissed out of hand by the Court.[129] Giving protection of prenatal life far less attention as a legislative rationale than maternal health,[130] the Court dismissed the protection of prenatal life as a legal consideration during the first two trimesters of pregnancy. Maternal health appears to be the rationale that the Court found underlying most abortion statutes.

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is not carried and borne easily by its mother." Barcus, *Thinking Straight About Abortion*, CHRISTIANITY TODAY, Jan. 17, 1975, at 8, 9.

123. Roe v. Wade, 410 U.S. 113, 214 (1973)(Douglas, J., concurring) (emphasis added).
124. *Id.* at 153 (emphasis added).
125. Doe v. Doe, ___ Mass. ___, ___, 314 N.E.2d 128, 133 (1974).
126. Doe v. Rampton, 366 F. Supp. 189, 192 (D. Utah 1973)(emphasis added).
127. *See* Roe v. Wade, 410 U.S. 113, 138-40 (1973).
128. *Id.* at 147-50.
129. *Id.* at 148.
130. *Id.* at 148-52.

In *Doe* the Court explained:

> that a century ago medical knowledge was not so advanced as it is today, that the techniques of antisepsis were not known, and that any abortion procedure was dangerous for the woman. To restrict the legality of the abortion to the situation where it was deemed necessary, in medical judgment, for the preservation of the woman's life was only a natural conclusion in the exercise of the legislative judgment of that time.[131]

The same considerations were raised in *Roe*:

> When most criminal abortion laws were first enacted, the procedure was a hazardous one for the woman. . . . Abortion mortality was high. Even after 1900, and perhaps until as late as the development of antibiotics in the 1940's, standard modern techniques such as dilation and curettage were not nearly so safe as they are today.[132]

It is little wonder that the Court added: "The few state courts called upon to interpret their laws in the late 19th and early 20th centuries did focus on the State's interest in protecting the woman's health rather than in preserving the embryo and fetus."[133]

The eighteenth and nineteenth century father, having triggered the pregnancy, could therefore not ever reasonably expect the intervention of the mother to cut short the chain of causation ending in childbirth. Any such intervention would have been a hazardous procedure for the woman inasmuch as abortion mortality was high and any abortion procedure was dangerous. The mother was locked into the pregnancy for health reasons as genuinely as if abortion had been prohibited by statute.

By 1973 the Court found an exactly converse situation. It disclosed "that abortion in early pregnancy, that is, prior to the end of first trimester, although not without its risk, is now relatively safe. Mortality rates for women undergoing early abortions, where the procedure is legal, appear to be as low or lower than the rates

131. 410 U.S. at 190.
132. 410 U.S. at 148-49.
133. *Id.* at 151.

for normal childbirth."[134] The Court reiterated: ". . . until the end of the first trimester mortality in abortion is less than mortality in normal childbirth."[135]

Today abortion is therefore a "medical procedure"[136] which, when compared to the alternative of childbirth, may be a positively healthy experience. A mother is no longer locked into pregnancy, but is free under the criminal law to act as she chooses, reasonably or unreasonably. However, as with other options, the abortion option carries with it responsibility for one's choice. If a woman exercises her freedom to make a legal choice regarding abortion, she cannot easily demand a helpless bystander to share her resultant liability for child support. If she alone is to wield the right to choose between childbirth and abortion, perhaps she alone must account for the liabilities accompanying her choice.

THE POLICY POTENTIAL OF A PATERNAL VETO

Legalized abortion independent of a paternal veto hints at awkward theoretical difficulties in the area of paternal support liability. It is also difficult to find any equity in the law's policy of consigning men to decades of constant financial accountability consequent to an outcome — childbirth — over which the law denies these same men a voice. For these reasons it is certain that many fathers will attempt to avoid supporting their children in the future. The feminist movement, a lobby generally endorsing abortion on demand,[137]

134. *Id.* at 149.

135. *Id.* at 163. In *Doe*, the Court described abortion as a "surgical procedure." 410 U.S. at 199. In *Roe*, Mr. Justice Douglas endorsed it for women as, if done early, "safer healthwise than childbirth itself." 410 U.S. at 216 (Douglas, J., concurring). The Court took judicial notice of various scientific and medical data in making such pronouncements. However, Chief Justice Burger explained that the Court did not exceed "the scope of judicial notice accepted in other contexts." 410 U.S. at 208 (Burger, C.J., concurring).

136. 410 U.S. at 220 (Douglas, J., concurring).

137. *See* D. CALLAHAN, ABORTION: LAW, CHOICE & MORALITY 462 (1970). But, feminist law professor Grace Olivarez has warned:

> Perhaps in our eagerness for equality, we have, in fact contributed to the existing irresponsible attitude some men have toward their relationship to women and their offspring. Legalized abortion will free those men from worrying about whether they should bear some responsibility for the consequences of sexual experience.

THE COMMISSION ON POPULATION GROWTH AND THE AMERICAN FUTURE, POPULATION AND THE AMERICAN FUTURE 292 (1972)(separate statement).

Also of note is feminist Patricia Goltz's testimony before the Subcommittee on Constitutional Amendments of the Senate Judiciary Committee on August 21, 1974:

draws attention to the failure of many fathers already to bear the child support burden.[138] The nonliability argument drawing upon the combined logic of *Roe*, *Doe* and *Jones* will certainly be invoked by fathers in attempts to further avoid supporting their children.

Nor can it be concluded that the argument of paternal nonliability is too foreign to our culture and our law to be taken seriously. Only two decades ago observers might have thought similarly as to abortion itself.[139] Today one attorney's 1958 summary of American religious thinking on abortion sounds antique: "All religious faiths condemn illegal abortion, which is abortion performed when not necessary to save the life or health of the mother."[140] A similar dramatic change in thinking and in the law may also occur with regard to paternal liability for child support.

If legalized abortion is to remain part of American law, an obvious and perhaps practically necessary corollary might be ultimate recognition by both legislatures and courts of a paternal veto power over the abortion decision.[141] As indicated previously, the Supreme Court expressly reserved comment in *Roe* on the father's rights. Were parents to share equally the abortion-childbirth deci-

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> [Those favoring abortion] deny that there is any implied agreement on the part of the woman to supply life-support systems to a child who otherwise would not live, but many of them get violently angry if it is suggested that the father has not given an implied agreement by his intercourse, to support the mother financially, even though anybody or any group could substitute. In other words, the father, whose role is not unique and irreplaceable, is to be held responsible for his actions, but the mother, whose role *is* irreplaceable, is *not* to be held responsible for hers.

Hartle, *Pro-abortionists testify before Bayh committee*, NAT'L RIGHT TO LIFE NEWS, Nov. 1974, at 12, col. 3 (emphasis in original).

138. *See* Tillmon, *Welfare Is a Women's Issue*, Ms., Spring, 1972, at 111. *See also* Cowley, *Paying Their Dues*, NEWSWEEK, Feb. 24, 1975, at 55.

139. In 1963, even those favoring abortion had such views:

> In October, 1963, Glanville Williams, the spiritual father of abortion-on-demand, put the proposition to the Abortion Law Reform Association that abortion be made a matter between woman and physician up to the end of the third month. His proposal was voted down by the then most organized advocates of abortion.

Noonan, *The Right to Life: Raw Judicial Power*, NAT'L REV., Mar. 2, 1973, at 260, 261.

140. BLANSHARD, AMERICAN FREEDOM AND CATHOLIC POWER 143 (2d rev. 1958).

141. A veto power was claimed unsuccessfully by the husband-father in Doe v. Doe, ___ Mass. ___, 314 N.E.2d 128 (1974). He relied on the concurring opinion of Mr. Justice Goldberg in Griswold v. Connecticut, 381 U.S. 479, 493 (1965).

Last year the Supreme Court denied review of *Jones* and *Coe*. Jones v. Smith, 278 So. 2d 339 (Fla. App. 1973), *cert. denied*, 415 U.S. 958 (1974); Coe v. Gerstein, 376 F. Supp. 695 (S.D. Fla. 1974), *cert. denied*, 94 S. Ct. 2246 (1974).

sion just as they share equally in procreation, equal support liability would be both plausible and palatable. The case for the paternal veto over the abortion decision is therefore a strong one.

It has been suggested that a paternal say in the abortion decision would lead to "ludicrous" circumstances,[142] as where a father might sue to compel abortion. This particular pitfall need not be feared insofar as sexual equality would underlie any paternal veto right.[143] Since pregnancy is a chain of causation jointly launched, a joint decision should be required to sever it legally. As a result, mothers would remain free of a father's suit to compel abortion just as fathers would be free of a unilateral maternal power of life-and-death over a father's offspring.

Further support for finding a paternal veto over the abortion decision can be found in recent Supreme Court cases broadening the rights of even unwed fathers over their children. Expanded rights have been recognized in care and custody,[144] adoption[145] and custody cases.[146] This expansion of paternal rights in the postnatal child would mutually reenforce recognition of paternal rights in the prenatal child.

CONCLUSION

One rationale behind holding fathers civilly and criminally liable for the maintenance of their infant children is that fathers assume voluntarily a role as a partner in creation of children. Contrac-

142. Jones v. Smith, 278 So. 2d 339, 344 (Fla. App. 1973), *cert. denied*, 415 U.S. 958 (1974). *But see* D. CALLAHAN, *supra* note 137, at 466.

143. One opponent of the paternal veto concedes:

> At the least, there is an injustice in giving males no rights prior to birth but then imposing upon them a full range of obligations after birth. If the obligations toward a child are mutual after birth, why should there not be a corresponding parity of rights prior to birth? I have not seen a satisfactory answer to that question. Moreover, if — to accept the feminist premise — women have been forced to carry through unwanted pregnancies because of male domination, the sexist shoe is put on the other foot if all rights involved in having a child are ceded exclusively to women. One injustice is corrected at the expense of creating another, and sexism is still triumphant.

Callahan, *Abortion: Some Ethical Issues*, in ABORTION, SOCIETY AND THE LAW 89, 98 (Walbert & Butler eds. 1973).

144. Stanley v. Illinois, 405 U.S. 645 (1972).

145. Rothstein v. Lutheran Social Serv. of Wis., 405 U.S. 1051 (1972).

146. Vanderlaan v. Vanderlaan, 405 U.S. 1051 (1972).

tual, tort and criminal law analogies to this rationale existed before the *Roe*, *Doe* and *Jones* decisions. However, the holdings in these cases undermine the rationale for paternal support liability in the contractual, tort and criminal law analogies. As a result, the elimination of paternal liability for child support may be not only logically necessary, but also an equitable policy. Removal of this liability because of legalized abortion would not contradict the logic behind any liability that may have attached to fathers when abortion was originally legal prior to any abortion legislation. But, as an alternative to this drastic change in child support obligation, recognition of a paternal veto over the abortion decision may be one answer for legislatures and courts.