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Cultural Feminism: It Sounds Good, but Will It Work? Application to a Husband's Interest in His Wife's Abortion Decision

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CULTURAL FEMINISM: IT SOUNDS GOOD, BUT WILL IT WORK?
APPLICATION TO A HUSBAND'S INTEREST IN HIS WIFE'S
ABORTION DECISION

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I. INTRODUCTION

“Men resolve disputes in terms of who is right according to rules; women explore needs and see if both sides can be satisfied.”¹

For feminists, the right of abortion is a milestone on the road to gender equality and to transforming a patriarchal legal system into a system that incorporates the perspective of women. Feminist jurisprudence offers the perspective of women through a variety of feminist theories.² This Comment will apply one theory, cultural feminism, to an abortion rights issue—specifically, whether a husband should have input into his wife's abortion decision. Presently, under this patriarchal legal system, expectant fathers have no constitutional interest that *outweighs* women's constitutional right to an abortion.³ Thus, no legal rule secures the father any input in the woman's abortion decision. In spite of the current law, cultural feminist theory ironically would give the husband input into his wife's abortion decision in a

1. Joel F. Handler, *Dependent People, The State, and the Modern/Postmodern Search for the Dialogic Community*, 35 UCLA L. REV. 999, 1041 (1988).

2. See *infra* notes 20-31 and accompanying text for the various themes.

3. See *Planned Parenthood v. Danforth*, 428 U.S. 52 (1976) (holding that as among the competing interests between a man and a woman in an abortion rights issue, the balance must weigh in her favor because she must bear the child).

nonabusive marital relationship.⁴ While such a result arising from cultural feminism would be a welcome surprise to men, a weakness of the theory is that the opposite result occurs in an abusive marriage. Because of the two different outcomes, a uniform legal rule implementing the husband's interest is not feasible. The impracticability of cultural feminism on this particular issue impinges the credibility of the theory when it comes to utilizing cultural feminism in protecting a moral right as a legal right.

Adherents to the cultural feminist approach believe women see "a world comprised of relationships rather than of people standing alone,"⁵ and thus address the overall context when solving a problem. Conversely, the justice perspective considers primarily the individualism, autonomy, and separation of the parties.⁶ The cultural feminist perspective strives to resolve disputes in a way that maintains the connections among parties.⁷ Logic thus dictates that cultural feminists must be concerned with the continued marital relationship between the wife and husband both during and after a pregnancy.

In an effort to move away from the rights-based, or justice, approach used by traditional theorists,⁸ feminist scholars tend to avoid making either the woman's or the man's right to decide superior to the other's right. Ironically, this feminist theory justifies a father's legal interest in participating in the abortion decision in a nonabusive marriage. Within the context of an abusive marriage, however, the theory would not grant a father any protected interest because, surprisingly, the woman's individual responsibility to herself to avoid harm outweighs her obligation to communicate with her husband, thereby furthering their connection. The cultural feminist outcome in an abusive relationship separates the wife from the husband in her abortion decision-making process, a result reminiscent of the traditional jurisprudence.

Part II of this Comment briefly introduces the two basic strands of feminist jurisprudence,⁹ explains in greater detail the strand of cultural feminism, and contrasts it with traditional jurisprudence.¹⁰ Part III sets out the United States Supreme Court's reasoning in *Planned Parenthood v. Danforth*¹¹

4. This Comment is not a discussion about abortion; it does not attempt to determine whether abortion is right or wrong. This Comment is not an argument regarding whether conception creates a life or a mere mass of tissue, nor does it discuss at what stage in a pregnancy the state has, or should have, a compelling interest in the fate of that pregnancy. Instead, this Comment explores the irony that arises from the application of cultural feminist thought to a wife's abortion decision. The Comment's analysis is limited to a husband-wife situation and does not discuss situations where pregnancy arises from rape, incest, or between two unmarried people. All of these circumstances would probably lead to a different result under this perspective. See *infra* notes 122-131 and accompanying text for a discussion of domestic violence within marriage.

5. CAROL GILLIGAN, *IN A DIFFERENT VOICE* 29 (1982).

6. Suzanna Sherry, *Civic Virtue and the Feminine Voice in Constitutional Adjudication*, 72 VA. L. REV. 532, 582 (1986).

7. Kenneth L. Karst, *Woman's Constitution*, 1984 DUKE L.J. 449, 490.

8. See *infra* notes 76-80 and accompanying text for an explanation of traditional jurisprudence.

9. See *infra* notes 14-36 and accompanying text.

10. See *infra* notes 37-80 and accompanying text.

11. 428 U.S. 52 (1976). In this seminal case, the Supreme Court rejected the statutory requirement of

as an example of the hierarchy of rights, or the justice perspective.¹² Part III then uses the cultural feminist perspective to analyze the rights of men and women in an abortion decision solely within the context of a *marital* relationship. This analysis shows that a cultural feminist should allow the husband within a nonabusive marriage input in the abortion decision and suggests the legal mechanism of a counselor's authorization form to implement this decision.¹³ Part III next illustrates a weakness of the theory's practical usefulness through the context of an abusive marriage. Part IV concludes that the cultural feminism theory, when pressed by women's experience, utilizes some of the hierarchy of rights approach and does not reach a consistent result which can sustain a uniform rule. This Comment elucidates the irony that exists when a feminist confirms a man's right to participate within the abortion context, although that man's own abusive actions causes those same rights to be retracted.

II. BACKGROUND

A theory of law and adjudication which has grown out of the women's liberation movement of the 1960s has been labeled by some as feminist jurisprudence.¹⁴ By the late 1970s, this theory had become a strong and distinctively feminine voice in both law and society.¹⁵ One feminist scholar offered the following as a working definition of feminist jurisprudence: "the analysis and critique of law as a patriarchal institution."¹⁶ While sometimes ridiculed as being anti-male and "bitchy,"¹⁷ feminist legal thought differs from traditional jurisprudence by seeking to approach conflicts in a way which achieves, or at least strives for, "reconciliation rather than just adopting a win/lose posture."¹⁸ The basic premise of this theory is that the women's perspective offers unique resources because women have developed morally different than men.¹⁹

spousal consent because it would give the husband an absolute right to veto the wife's decision to obtain an abortion. See *infra* notes 83-101 and accompanying text.

12. See *infra* notes 81-99 and accompanying text.

13. See *infra* notes 102-54 and accompanying text.

14. Gary Minda, *The Jurisprudential Movements of the 1980s*, 50 OHIO ST. L.J. 599, 622 (1989).

15. *Id.*

16. FEMINIST JURISPRUDENCE 3 (Patricia Smith ed., 1993). Feminists describe law as a patriarchal institution because "[f]eminist theory recognizes that throughout history and even today, public discourse has been almost exclusively conducted by men from (quite naturally) the perspective of men." *Id.*

17. Leslie Bender, *A Lawyer's Primer on Feminist Theory and Tort*, 38 J. LEGAL EDUC. 3 (1988). "Feminism is a dirty word." *Id.* "Feminists are portrayed as bra-burners [and] men-haters" whose "sexual preferences are presumed." *Id.* In fact, Justice O'Connor eschews the word feminism. Michael E. Solimine & Susan E. Wheatley, *Rethinking Feminist Judging*, 70 IND. L.J. 891, 896 (1995). "In her view, that word carries with it a political agenda that may not be shared by all women." *Id.*

18. William N. Eskridge, Jr. & Gary Peller, *The New Public Law Movement: Moderation as a Postmodern Cultural Form*, 89 MICH. L. REV. 707, 758 (1991).

19. "[T]he resources for constructing more empathetic, more creative, and in general, better theories,

The umbrella term, “feminist jurisprudence,” covers many different theories. In fact, “there is no single feminist jurisprudence, no single political theory associated with feminism.”²⁰ Many views fit within this “broad sense of jurisprudence,”²¹ including liberal, Marxist, socialist and existentialist feminism,²² post-modern feminism,²³ radical feminism,²⁴ and cultural or relational feminism.²⁵ Modern feminist theorists generally hold that women are different from men and agree that the differences are important. Feminists disagree on which of those differences are most vital.²⁶ This conflict divides feminist theory into two basic camps:²⁷ cultural²⁸ or relational feminism,²⁹ and radical feminism.³⁰ Cultural feminism theorizes that the sense of connection entails a way of learning, of moral development, a view of the world and one’s place in it which sharply contrasts with men’s.³¹ This Comment utilizes the cultural feminist approach to address the moral dilemma of a husband’s right to participate in his wife’s abortion decision.

The cultural feminist approach is likely the more familiar of the two strands and is in large part defined in Carol Gilligan’s book, *In a Different*

law, and social practices.” Martha Minow, *Justice Engendered*, 101 HARV. L. REV. 10, 62 (1987).

20. FEMINIST JURISPRUDENCE, *supra* note 16, at 483.

21. *Id.* The boundaries on the categorizations are “never as fixed as the labels make them seem.” Patricia A. Cain, *Feminism and the Limits of Equality*, 24 GA. L. REV. 803, 841 (1990). “[S]ome feminists slip in and out of the various categories.” *Id.*

22. For a helpful discussion of these positions, see FEMINIST FRAMEWORKS: ALTERNATIVE THEORETICAL ACCOUNTS OF THE RELATIONS BETWEEN WOMEN AND MEN (Alison M. Jaggar & Paula S. Rothenberg eds., 2d ed. 1978). On liberal feminism, see ZILLAH R. EISENSTEIN, *THE RADICAL FUTURE OF LIBERAL FEMINISM* (1986). On Marxist feminism, see *WOMEN AND REVOLUTION* (Lydia Sargent ed., 1981). On socialist feminism, see ALISON M. JAGGAR, *FEMINIST POLITICS AND HUMAN NATURE* (1983). On existentialism, see ROSEMARIE TONG, *FEMINIST THOUGHT* (1989).

23. See FEMINIST JURISPRUDENCE, *supra* note 16, at 6, for a general discussion of post-modern feminism.

24. See *infra* note 30; Catharine A. MacKinnon, *Feminism, Marxism, Method and the State: An Agenda for Theory*, 7 SIGNS 515 (1982).

25. See *infra* notes 32-36 and accompanying text. Cultural feminists are called so because “they tend to equate women’s liberation with the development and maintenance of a female-centered counterculture.” Minda, *supra* note 14, at 627. Relational feminists are those feminists who focus on women’s relationships. Cain, *supra* note 21, at 835 n.122.

26. Robin West, *Jurisprudence and Gender*, in FEMINIST JURISPRUDENCE, *supra* note 16, at 499.

27. *Id.* at 499-501.

28. *Id.* at 499. The cultural/relational camp thinks the important difference is that women raise children and men do not. *Id.* Two prominent cultural feminists are Robin West and Suzanna Sherry.

29. FEMINIST JURISPRUDENCE, *supra* note 16, at 7. The labels of cultural and relational feminism are synonymous with this strand of feminist theory. See Cain, *supra* note 21, at 835 n.122.

30. West, *supra* note 26, at 499. The radical camp thinks the important difference is that women are those from whom sex is taken while men are the takers. *Id.* Catharine MacKinnon and Christine Littleton are two of the dominant figures in radical feminism. See Cain, *supra* note 21, at 833. Basically, this theory claims that “gender inequality in law is not the result of irrational discrimination but rather the result of the systematic social subordination of women,” Minda, *supra* note 14, at 628, through the patriarchal system. FEMINIST JURISPRUDENCE, *supra* note 16, at 5. “For the radical feminist, the most obvious intrusions and violations experienced are the violations of the body in the institutions of heterosexual intercourse, pregnancy, and motherhood.” Jeanne L. Schroeder, *Feminism Historicized: Medieval Misogynist Stereotypes in Contemporary Feminist Jurisprudence*, 75 IOWA L. REV. 1135, 1149 (1990); see generally CATHARINE A. MACKINNON, *FEMINISM UNMODIFIED* (1987).

31. West, *supra* note 26, at 501.

Voice.³² The cultural feminist paradigm may be examined by comparing it to traditional, or mainstream, jurisprudence.³³ Cultural feminist jurisprudence and traditional jurisprudence offer different methods of interpreting problems, or different approaches to analyzing conflicts. The two modes of thought are best understood by contrasting the moral development of women with that of men.³⁴ It is important to note at the outset that the contrast between male and female perceptions is used here to highlight a distinction between two methods of interpretation, not to generalize about either sex.³⁵ This difference between men and women may influence the manner in which they approach law and think about adjudication and decision making.³⁶

A. Moral Development of the Sexes as Identified in Gilligan's In a Different Voice

The theory of gender identification for children is fundamental to an understanding of this analysis. Because women are the primary caretakers of children, a female child develops her sense of identity as continuous with her caretaker's, while a young boy's identity is distinguished from that of his mother's.³⁷ For boys, separation and individualization are critically important since separation from the mother is essential for the development of masculinity.³⁸ For girls, gender identity is found in attachment to and empathy with their mothers.³⁹ Males are thus threatened by intimacy, while females are threatened by separation.⁴⁰ For these reasons, women define themselves in a context of human relationships⁴¹ and equate integrity with responsibility and care.⁴² Men, on the other hand, "equate adulthood with autonomy and

32. *Id.* at 500; GILLIGAN, *supra* note 5. Cultural feminist theory is "one of the most prominent and widely accepted varieties of feminist and feminist legal thought." Pamela S. Karlan & Daniel R. Ortiz, *In A Diffident Voice: Relational Feminism, Abortion Rights, and the Feminist Legal Agenda*, 87 NW. U. L. REV. 858, 858 (1993).

33. Traditional jurisprudence is often called patriarchal jurisprudence or masculine jurisprudence by feminists in an effort to distance themselves from the dominant, masculine forms of jurisprudence. Minda, *supra* note 14, at 630. West describes patriarchy as "a political structure that values men more than women." West, *supra* note 26, at 494.

34. This formation of the issue does not imply that either sex represents the norm in moral development.

35. GILLIGAN, *supra* note 5, at 2. In fact, the purpose of Gilligan's book is to describe a "different voice" not by gender characterization, but by theme. The different voice is associated with women through Gilligan's empirical observations, but the association is not absolute.

36. Sherry, *supra* note 6, at 581. These two perspectives, a justice and a care perspective, "denote different ways of organizing the basic elements of moral judgment: self, others, and the relationship between them." Carol Gilligan, *Moral Orientation and Moral Development*, in *WOMEN AND MORAL THEORY* 22 (Eva F. Kittay & Diana T. Meyers eds., 1987).

37. West, *supra* note 26, at 501.

38. GILLIGAN, *supra* note 5, at 8. See *id.* at 5-23, for a thorough explanation of the gender identification theory and other psychological development theories proposed by Nancy Chodorow, Sigmund Freud, and Jean Piaget.

39. *Id.* at 8.

40. *Id.*

41. *Id.* at 17.

42. *Id.* at 171.

individual achievement” and value the right to be free from the interference of others.⁴³

Gilligan took these gender identity themes and examined the way in which two eleven-year-olds, Amy and Jake, approached a moral dilemma. Gilligan’s intent was to see if children’s identities created male and female perspectives and thus, different methods of interpretation. Gilligan concluded that the female voice does lead to a different approach to moral dilemmas. This different approach is what cultural feminists use to analyze moral dilemmas.⁴⁴

In her experiment with Amy and Jake, Gilligan asked them to resolve a moral dilemma and then explored the logic of their resolutions.⁴⁵ Amy and Jake were asked whether a man named Heinz should steal a drug which he could not afford to buy in order to save his wife’s life.⁴⁶ Jake constructed the dilemma as a conflict between the values of property and life and chose the logical priority of life.⁴⁷ To justify his choice, Jake asserted that life is worth more than money; the druggist will continue to live without the money, but Heinz’s wife would die without the drug.⁴⁸ Jake described the dilemma as “sort of like a math problem with humans,” set up the equation, worked out the solution, and even rationalized that a judge would consider Heinz’s theft justified.⁴⁹ Jake exemplifies the male model of interpretation in his comment that “there can only be right and wrong in judgment.”⁵⁰

Amy’s reply was not quite so self-assured. She neither thought Heinz should steal, nor did she think his wife should die.⁵¹ She suggested there may be ways, other than stealing, to obtain the drug.⁵² Amy saw the dilemma as one of relationships that “extends over time,” and that if the wife died, a lot of people would be hurt.⁵³ Also, she noted that if Heinz stole and went to jail, the two would not be together anyway.⁵⁴ Amy considered the problem to be the druggist’s failure to respond in light of the wife’s condition.⁵⁵ Amy’s logic exemplifies the female model of interpretation, seeing a world that “coheres

43. Karst, *supra* note 7, at 483.

44. This is why Gilligan’s book best illustrates the cultural feminist perspective, although the book is not a discussion about jurisprudence.

45. The dilemma was one in a series devised by psychologist Lawrence Kohlberg, GILLIGAN, *supra* note 5, at 25, who suggested the highest forms of moral reasoning “involved appeals to abstract principles of justice”—a rights-based theory. PATRICIA S. MANN, *MICRO-POLITICS: AGENCY IN A POSTFEMINIST ERA* 106 (1994). See Karlan & Ortiz, *supra* note 32, at 862-65, for a brief synopsis of Kohlberg’s view of full human moral development.

46. GILLIGAN, *supra* note 5, at 25-26.

47. *Id.* at 26.

48. *Id.* The druggist can replace the money with an exact duplicate, but Heinz’s wife cannot be replaced because of individual uniqueness. *Id.*

49. *Id.* at 26-27.

50. *Id.* at 27.

51. *Id.* at 28.

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.*

through human connection rather than through systems of rules."⁵⁶ Both children thus saw the need for agreement between parties,⁵⁷ although each saw it accomplished in different ways. Jake addressed the dilemma "impersonally through systems of logic and law," while Amy solved the problem "personally through communication in the relationship."⁵⁸

B. Analogizing Amy's and Jake's Rationales to Cultural Feminism and Traditional Jurisprudence, Respectively

These two children exemplify different ways of thinking about conflicts and choices.⁵⁹ Amy's analysis contains the insights central to an "ethic of care" which is the basis for cultural feminism. The ethic of care sees the issue within its context of relationships. The rational connection between people gives rise to a recognition of responsibility for one another.⁶⁰ In this way, the parties involved in a moral dilemma are not portrayed as opponents in a contest of rights, but as members of a network of relationships on whose continuation the members depend.⁶¹ Gilligan phrases this network of connection as a "web of relationships" sustained by the process of communication.⁶²

Jake's judgments reflect the "logic of the justice approach"⁶³ which is the premise of the traditional or masculine perspective. A male's perspective sees a conflict between two rights as being resolved by logical deduction.⁶⁴ Jake transposed a hierarchy of power into a hierarchy of rights and resolved the conflict by casting it as an impersonal conflict of claims.⁶⁵ The male perspective uses the logic of fairness as an objective way to decide who will win a dispute.⁶⁶ Gilligan describes this as a hierarchy of rights with imagery of winning and losing.⁶⁷ In contrast, the female interpretation changes the moral problem from one of unfair domination of rights to one of unnecessary exclusion of a party.⁶⁸

Gender identification underlies the moral development of women and men.⁶⁹ Because of whom boys and girls identify with,⁷⁰ "[w]omen's moral voice is one of responsibility, duty, and care for others," while men's concept

56. *Id.* at 29.

57. Jake needed the judge to agree that stealing was right; Amy wanted the druggist to agree to an arrangement for later payment. *Id.*

58. *Id.* at 29.

59. *Id.* at 32.

60. *Id.* at 30.

61. *Id.*

62. *Id.* at 32.

63. *Id.* at 30.

64. *Id.* at 31.

65. *Id.* at 32.

66. *Id.*

67. *Id.*

68. *Id.*

69. See *supra* notes 37-44 and accompanying text.

70. See *supra* notes 37-44 and accompanying text.

of value revolves around autonomy, individuality, justice, and rights.⁷¹ Hence, two different perspectives of solving a dilemma are developed.

Gilligan's study highlights the two themes of separation and connection⁷² to conclude that "[t]he images of hierarchy and web . . . convey different ways of structuring relationships and are associated with different views of morality and self."⁷³ The ethic of care operates to identify and to respond to a need and to take care of the world by sustaining the web of connection so that no one is left out.⁷⁴ Because of this perspective, cultural feminists approach a conflict contextually and see "morality as a question of responsibilities to particular people in particular contexts."⁷⁵

In contrast, the perspective of the "ladder", the view taken by traditional jurists, tends to produce an abstract hierarchy of rights "to govern the competition of highly individuated individuals."⁷⁶ The hierarchy approach develops a morality that respects equality, rights, and freedom.⁷⁷ Justice is therefore applied through abstract, uniform rules.⁷⁸ Hence, the hierarchy or autonomous perspective resolves disputes in terms of who is right according to rules.⁷⁹ In sum, traditional jurisprudence uses an individualistic approach to resolving dilemmas. These dilemmas themselves are regarded as having autonomous interpretations. A hierarchy of rights is used to resolve conflicts, creating a win-lose situation. The cultural feminists offer a different angle of interpretation, one that considers all interests of those who are part of the web, in an effort to preserve connection after the conflict is resolved.⁸⁰

III. ANALYSIS

Examples of the cultural feminism and traditional approaches aid in the understanding of the different methods of approaching a moral dilemma. Justices on the Supreme Court utilize both approaches. For example,

71. West, *supra* note 26, at 503-05. Gender identification is the basis for a common conception of women's existential lives, underlying both radical and cultural feminism, called the "connection thesis" by Robin West. *Id.* at 499. This thesis asserts that only women, by their nature, have potential to be materially connected to other human life by virtue of their fundamental difference from men—the ability to give birth—and by the fact that women are the primary caretakers of children. *Id.* at 500. Women become connected to the infant they have carried and are ultimately more connected to other human beings. *Id.* at 503.

72. GILLIGAN, *supra* note 5, at 39.

73. *Id.* at 62. The hierarchy perspective seeks to be alone at the top and fears others will get too close. *Id.* The web perspective seeks to be at the "center of the network of connection" and fears being too far out on the edge. *Id.*

74. *Id.*

75. Karst, *supra* note 7, at 462.

76. *Id.*

77. Marijane Camilleri, *Lessons in Law from Literature: A Look at the Movement and a Peer at Her Jury*, 39 CATH. U. L. REV. 557, 594 (1990).

78. Handler, *supra* note 1, at 1041.

79. *Id.*

80. This legal decision-making "emphasizes . . . context instead of universals and abstractions; reconciliation and accommodation instead of conflict and rights; and community instead of autonomy." Eskridge & Peller, *supra* note 18, at 756.

traditional jurisprudence is utilized in *Planned Parenthood v. Danforth*⁸¹ and *Roe v. Wade*.⁸² These two cases will be distinguished from the cultural feminism approach. Finally, using cultural feminism, a procedural rule is suggested that will give a husband input in his wife's abortion decision in a non-abusive marriage. In an abusive marriage, however, the husband forfeits his right to be involved in his wife's abortion decision.

A. *The Facts and Opinion of Planned Parenthood v. Danforth*

In *Planned Parenthood v. Danforth*,⁸³ the plaintiffs, Planned Parenthood of Central Missouri and two doctors, challenged a 1974 Missouri statute which regulated abortions in Missouri during all stages of pregnancy.⁸⁴ Plaintiffs claimed that a section of the statute deprived them and their patients of various constitutional rights.⁸⁵ The statutory provision required "the written consent of the woman's spouse [during the first twelve weeks of the pregnancy], unless the abortion is certified by a licensed physician to be necessary in order to preserve the life of the mother."⁸⁶ The state of Missouri recognized marriage as an institution and declared that "any major change in family status is a decision to be made jointly by the marriage partners."⁸⁷ The state wrote its statute too broadly, however, giving the husband too much authority in this decision.⁸⁸

In *Danforth*, the Court saw the issue of spousal consent as the state's attempt to give the husband the unilateral ability "to prohibit the wife from terminating her pregnancy, when the state itself lacks that right."⁸⁹ In holding that section of the statute unconstitutional, the Court stated that the section places the husband's interest in continuing his wife's pregnancy above her interest in terminating it.⁹⁰ The Court looked at the dilemma objectively as an impersonal conflict of claims and decided its outcome based upon a balancing of rights.⁹¹ In fact, Justice Stewart observed: "We are called upon to choose

81. 428 U.S. 52 (1976).

82. 410 U.S. 113 (1973).

83. 428 U.S. 52. As the law stood in 1976 when *Danforth* was decided, the woman had a constitutional right to have an abortion if she chose. See *Roe*, 410 U.S. 113. That right is not debated in this comment; rather, it serves as the fundamental premise. What *Roe* did not decide was whether a woman was required to inform her husband or obtain his consent before obtaining an abortion. Therefore, this analysis proceeds from that point in the development of the law and sets aside the present rule of law governing a husband's input.

84. *Danforth*, 428 U.S. at 57.

85. *Id.* at 57-58. Those rights included the right to privacy in a physician-patient relationship and the female patient's right to determine whether to bear children. *Id.* at 57.

86. *Id.* at 58.

87. *Id.* at 68.

88. *Id.* at 71.

89. *Id.* at 70.

90. *Id.* at 70 n.11.

91. *Id.* at 71 (holding that the "balance weighs in her favor" since the woman physically bears the child and is affected by the pregnancy").

between these competing rights” of the husband and wife.⁹² The Court did not even suggest a compromise between the interests.

The *Danforth* decision illustrates the utilization of the hierarchy of rights perspective and analytical process. Likewise, in *Roe v. Wade*⁹³ the parties were set as opponents in a win-lose posture, each with their pertinent rights laid on the table. In *Roe*, the Supreme Court analytically separated the parties—the woman and the state—to determine the woman’s individual right. The *Roe* Court protected the woman’s autonomy by placing her right to privacy above the state’s right to protect the health, safety, and welfare of the public. That autonomy, however, is not absolute. In *Danforth*, while the Court placed the woman’s right to an abortion above the husband’s interest in continuing the pregnancy, it rejected the idea that the woman alone could choose to terminate her pregnancy at any time.⁹⁴

The *Danforth* Court found itself juggling three competing interests: the wife’s right to decide whether or not to have an abortion, the husband’s right to intrude into the wife’s right by analogy to the state’s protected interest,⁹⁵ and the strengthening of the institution of marriage. First, recognizing that the constitutionally protected right to privacy is not absolute, the Court allowed the state to intrude into that right at the appropriate time.⁹⁶ Second, giving the husband input into the abortion decision is another intrusion into the woman’s right, and the *Danforth* Court did not allow that intrusion. Paradoxically, the *Danforth* Court acknowledged this result could give the wife the unilateral authority to decide whether to terminate the pregnancy, authority which the Court had previously said was not allowable.⁹⁷ Finally, the *Danforth* Court recognized “the decision whether to undergo or to forego an abortion may have profound effects on the future of any marriage.”⁹⁸ The Court used traditional jurisprudence to resolve this conflict of interests through the only logical means under that theory: a balancing of rights. Ultimately, the Court set aside the

92. *Id.* at 90 (Stewart, J., concurring). Justice Stewart further stated that it was a surprise that the majority found in the Constitution “a rule that the State must assign a greater value to a mother’s decision to cut off a potential human life by abortion than to a father’s decision to let it mature into a live child.” *Id.* at 93.

93. 410 U.S. 113 (1973).

94. *Danforth*, 428 U.S. at 60. Interestingly, the Court used words that smack of cultural feminism stating the “pregnant woman cannot be isolated in her privacy.” *Id.* at 61 (quoting *Roe*, 410 U.S. at 159) (emphasis added). The Court, however, resolved the issue using a hierarchy of rights or autonomous approach. *Id.* at 71. Another example is *Einsensadt v. Baird* in which the Court stated that for the right of privacy to mean anything, “it is the right of the individual . . . to be free from unwarranted governmental intrusion” into personal matters. 405 U.S. 438, 453 (1972) (second emphasis added).

95. See Andrea M. Sharrin, Note, *Potential Fathers and Abortion: A Woman’s Womb is not a Man’s Castle*, 55 BROOK. L. REV. 1359 (1990) for constitutional rights arguments asserted by “fathers-to-be” and for state cases adjudicating the assertion of such rights.

96. *Danforth*, 428 U.S. at 60-61. Fetal viability has been deemed the appropriate time for intrusion. *Roe*, 410 U.S. at 163.

97. *Id.* at 71.

98. *Id.* at 70.

continuing-marriage interest, ignored the husband's potentially protected right to infringe upon the wife's right to privacy, and placed the unilateral power to make an abortion decision in the wife's hands.⁹⁹

The *Danforth* Court indicated in dicta that a care perspective made more sense because it considers both the parties in the web and the decision's effect upon the relationship after the moral impasse. The Court stated that "[i]t seems manifest that, ideally, the decision to terminate a pregnancy should be one concurred in by both the wife and her husband. No marriage may be viewed as harmonious or successful if the marriage partners are fundamentally divided on so important and vital an issue."¹⁰⁰ The Court also stated that the decision could not achieve the goals of fostering trust in a marriage and of strengthening the marriage "by giving the husband a veto power exercisable for any reason whatsoever or for no reason at all."¹⁰¹ These statements indicate the Court's own perception of the weakness of the justice or hierarchy approach it used.

B. A Cultural Feminism Analysis of a Husband's Moral Right in His Wife's Abortion Decision

A cultural feminist would approach the dilemma of a husband's consent to or involvement in an abortion by using an entirely different approach than that of *Danforth*. Rather than identifying the parties as opponents, the cultural feminist theory approaches the issue by identifying the connection between the parties involved in the web of this marital relationship. The goal is to recognize their competing interests and to resolve the dilemma so that the parties maintain a continuous relationship afterward. If a husband has no input in such an important decision, the marital relationship will probably be severely injured thereafter. The connections between the parties create responsibilities to care for the other. Thus, in resolving the impasse, harm is to be avoided. Communication is the tool through which the impasse is resolved.

This approach operates in a healthy relationship, as Amy assumed Heinz had with the druggist (i.e. they were not arch enemies).¹⁰² In a harmful relationship, such as an abusive marriage, Amy's approach cannot be applied; the theory must therefore resort to some weighing of interests. While a

99. See *id.* at 71. Note that the radical feminism strand would reach this same decision, probably under a dominance approach. That is, in order to avoid dominance by a man, a woman should have the complete and unadulterated ability to decide what to do with the intrusion of her body created by the fetus. The husband, who, in the radical feminist's view, perpetuated that intrusion, would have no input. Catharine MacKinnon, believing that the ground of sex discrimination or equality is sounder reasoning for granting abortion rights than the right to privacy grounding, stated that this right to privacy grants men the right to oppress women, one at a time. MACKINNON, *supra* note 30, at 102. Because men have controlled the meanings and destinies of women's bodies, MacKinnon presumably would not give a husband any input into his wife's abortion decision. *Id.* at 82.

100. *Danforth*, 428 U.S. at 71.

101. *Id.*

102. See *supra* notes 46-48 and accompanying text.

weighing of interests is best for assessing rights in an abusive relationship, it offers a result different than that in a healthy relationship. Therefore, the cultural feminism approach does not create a sturdy foundation for justifying a uniform legal rule to implement the husband's moral right. Although the weakness hinders the legal usefulness of the theory, it is not grounds for rejecting the entire approach.

In applying the cultural feminist theory to the issue of whether the husband has a right to influence his wife's abortion decision, the web of relationships must first be identified. The web includes the doctor-female patient relationship, the husband-wife relationship, the woman-fetus relationship, and the individual-community relationship. Further, a cultural feminist also examines the circumstances surrounding and following an impasse.¹⁰³ This Comment assumes the wife becomes pregnant unexpectedly, and that the timing of the pregnancy is bad for either the husband or wife. One spouse wants to continue the pregnancy, while the other spouse does not. Whatever decision is ultimately made—whether to terminate the pregnancy or to have the child—one spouse will not be happy because his or her wishes will not materialize.¹⁰⁴ Simultaneously, the wife presumably is consulting her physician about abortion alternatives or about available abortion procedures. The doctor may advise her to take a particular action, while the husband may suggest or demand she take another. Since learning of her pregnancy, the wife has recognized that there is either life or potential life within her womb and is concerned about that relationship.¹⁰⁵ Because of the diametric opposition of the husband and wife, and possibly the doctor, this web has reached a moral impasse.¹⁰⁶

After making and implementing the decision, the husband and wife will still have a connection, perhaps as ex-spouses with or without a child or as husband and wife with or without a child.¹⁰⁷ Unless the physician errs in

103. Sherry, *supra* note 6, at 582.

104. The Court in *Danforth* realized this dilemma. "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." *Danforth*, 428 U.S. at 71.

105. How cultural feminism would treat the woman-fetus relationship is beyond the scope of this Comment. See Karlan & Ortiz, *supra* note 32, for a general discussion about how women make the personal decision whether to have an abortion.

106. Admittedly, a moral impasse is not reached if the wife does not inform her husband about the pregnancy or the abortion. Cultural feminism, however, recognizes that her responsibility to tell her husband arises by virtue of their marriage. A moral dilemma that could arise within the marriage, but not within the reach of the proposed rule, would occur if both wanted to terminate the pregnancy for different reasons. For example, they both may want an abortion because the wife does not want another child, and the husband wants a son but the fetus is a girl. Interview with Michael R. Merz, U.S. Magistrate, in Dayton, Ohio (Feb. 23, 1996).

107. Of course, the woman could have an abortion and then divorce her husband. Although at first blush it may not seem that there is a connection after a divorce, there most assuredly is. Marriage involves entanglement of finances, property, and the raising of additional children. Upon a divorce, the parties are connected minimally by virtue of their past life together and possibly through issues of custody, child-rearing, and child support.

performing the abortion, the doctor-patient relationship will also continue. The impasse will likely lead to hurt feelings, disappointment, or remorse by one, and feelings of relief, control, happiness, or questioning by the other. The goal, therefore, is to resolve this dilemma among these three parties so that their relationships will stay intact.

Because the cultural feminist prefers notions of community over notions of rights,¹⁰⁸ the third step in this analysis is to identify the communities and what may enhance them. The communities in this situation are the familial community and the social community at large. One goal is to have the husband and wife feel a part of the familial community they created; this community includes the husband and wife, the pregnancy, and the physician treating the pregnancy. The "ethic of care" seeks to avoid both the exclusion of a husband from the abortion decision and the degradation of a wife through a coerced abortion. A second and similar goal is to resolve the dispute so that both spouses form equal parts of the social community in which they operate as men and women. The "ethic of care" seeks to avoid the exclusion of men or women from the equal footing on which they are legally placed today.¹⁰⁹

A way to attain these goals is to consider the harms, both to the community and to its members, that the resolution is designed to prevent.¹¹⁰ Considered first are the possible harms to the spouses. If a wife does not inform her husband that she is pregnant and proceeds with an abortion, when he learns of it he will *feel* powerless, not a part of his wife's life, and without input into his family's growth. If he does not find out about the abortion, he does not just feel powerless, but he, in fact, is powerless regarding his family's growth in general. If she tells him she is pregnant and aborts over his objection, without even acknowledging his concerns, he will still feel powerless. Likewise, if a husband forces his wife to have an abortion or to forego one against her wishes, she will feel powerless in her family's growth and subservient to her husband.

Inevitably, in all of these situations, one spouse is deeply hurt, thereby upsetting the marital relationship. The cultural feminist's goal is not to prevent hurt feelings in a relationship, but to prevent the ostracization of a spouse from the family community. Using the traditional hierarchy of rights approach, notions of community are set aside and the wife's right to decide outweighs the

108. GILLIGAN, *supra* note 5, at 19. The "ethic of care" takes care of the world by sustaining the web of connection so that no one is left alone. *Id.* at 62; Sherry, *supra* note 6, at 582.

109. Although this point is open to debate, women are on substantially more equal footing than in prior years, and it is from this position that cultural feminism does not want women to fall.

110. For example, in another study in Gilligan's book, Claire had to decide whether to write a letter of recommendation for a friend that she did not really like. GILLIGAN, *supra* note 5, at 59. Claire wondered how she could be honest and at the same time do her friend justice. *Id.* She predicated her judgment upon the relative hurt her actions would cause to her friend and also to the people whose lives would be affected if the friend got the job. *Id.* at 60. Claire decided that writing the letter was the better solution because of her responsibility to her friend, since Claire's actions had formed the friendship which set up her friend's expectations for a recommendation. *Id.* at 59-60.

father's right to participate in the decision. As a result, the husband is placed on the outside of the pregnancy looking in, with no legal right to participate in the decision regarding the termination of the pregnancy. The cultural feminist wishes to incorporate the father in the decision process within his web of the marital relationship.

The second community concern is society as a whole. If actions such as those described above occur within marriages, the logical outgrowths will have harmful, broad societal impacts. If courts effectively bar husbands from sharing in their wives' abortion decisions, the husbands will feel like outcasts of the child-bearing and -rearing community. While men may prefer autonomy and individualization,¹¹¹ the goal of the web of relationships is to keep the connection intact and not to exclude a party. Husbands as a class will be relegated to the hospital waiting room or left unsuspecting in the living room while wives obtain abortions. The social message sent to husbands will be that they are outsiders.¹¹² Conversely, if wives are not given the ultimate power to decide the fate of their own pregnancies, they will be subverted under the dominion of their husbands.¹¹³ As occurred in the past, the unequal treatment of women within the marital relationship manifests an unequal treatment of women in society. Therefore, the goal must be to prevent a destruction of the two relationships—the marriage and the individual's place in society—by finding a middle ground.

The fourth aspect of the cultural feminist approach is to visualize the moral dilemma. Because of the awareness of the connection among people, the woman's perspective recognizes the responsibilities for others in the web.¹¹⁴ The crucial element of this analysis is to construct the dilemma "as a problem of care and responsibility in relationships rather than as one of rights and rules."¹¹⁵ The terms in which women construct social relations are "against a standard of responsibility to others, rather than against a standard of rights and autonomy from others."¹¹⁶ In this web, the doctor has a responsibility to advise his patient medically, to provide for her health, and to maintain confidentiality. The parties have a responsibility to protect themselves from personal harm, especially at the hand of another. The husband and wife have reciprocal responsibilities to care for each other by virtue of their intimate relationship.¹¹⁷

111. See *supra* note 43 and accompanying text.

112. "Endorsement sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community." *Lynch v. Donnelly*, 465 U.S. 668, 688 (1984) (O'Connor, J., concurring) (explaining from an ethic of care perspective the Establishment Clause interpretation forbidding governmental endorsement of or disapproval of religion); see Sherry, *supra* note 6, at 592-616 (discussing Justice O'Connor's feminist perspective).

113. See generally *Planned Parenthood v. Casey*, 112 S. Ct. 2791 (1992) (addressing the old common law understanding of women in society).

114. GILLIGAN, *supra* note 5, at 30.

115. *Id.* at 73.

116. *Id.* at 73; West, *supra* note 26, at 502.

117. Margaret C. Hobday, Note, *A Constitutional Response to the Realities of Intimate Violence*:

The institution of marriage creates their mutual responsibilities to nurture, provide for, and protect each other, and not inflict physical or psychological harm upon the other. The caring responsibility is evidenced in society's punishing of domestic violence and abuse. The wife has a moral responsibility to her husband to inform him of a pregnancy that they created together. A wife should also hear her husband's concerns out of respect for their marriage. The husband has the reciprocal responsibility to his wife to hear her concerns about an unexpected pregnancy and also to respect her privacy and confidentiality with her doctor. These responsibilities help weave and maintain the web of relationships which connect the parties involved.

Similar to the way in which Amy declared that the druggist failed by refusing to provide the drug in response to Heinz's wife's condition,¹¹⁸ it is helpful to identify who is failing to uphold his or her responsibility in the abortion context. The wife is at fault by refusing to inform her husband of the pregnancy or by failing to consider his ideas on the matter. Similarly, it is the husband's failure to not empathize with the wife's emotional, physical, or professional dilemmas. When one spouse demands that the other abide by his or her wishes, that spouse has failed to uphold his or her responsibility to nurture a considerate marriage.

The process by which cultural feminism sustains the web of relationships and, in this instance, gives the husband input into the abortion decision, is communication.¹¹⁹ As Amy's logic illustrated when she said that Heinz and the druggist should have talked about a way to supply the drug to Heinz's wife,¹²⁰ communication in the abortion dilemma will avoid positioning the parties as opponents.¹²¹ While one person's original desire will be realized ultimately, the goal is to reach that outcome without a hierarchy of values or without an individualistic approach utilizing objective rules and rights. Having first found an intimate relationship between the parties, then considered the circumstances surrounding an impasse, weighed the impact on the two types of communities, and finally considered the responsibilities within the web, cultural feminism would decide that the husband should have an input into his wife's abortion decision.

Cultural feminist theory would resolve the impasse through communication among the parties. The wife informs the husband of the pregnancy; the doctor explains the possibilities to both parties. Further, the wife must listen to and consider her husband's thoughts on the matter, and the husband must

Minnesota's Domestic Homicide Statute, 78 MINN. L. REV. 1285, 1296 n.57 (1994).

118. GILLIGAN, *supra* note 5, at 29.

119. *Id.* at 30-31.

120. *Id.* at 29. Amy thought if they talked long enough they could reach some agreement so Heinz would not have to steal. *Id.*

121. If the druggist staunchly refused to oblige Heinz's request, Claire, another member of Gilligan's study, decided, using the cultural feminist theory, that Heinz should steal because of the inseparable bond between the husband and wife. *Id.* at 57.

consider her concerns. In this way, the husband is not an outcast of the familial community, and the wife is not relegated to a subordinate position in the marriage. Most importantly, this approach to the marital relationship has the probability of maintaining the marital relationship or at least not causing it to be deteriorated. This approach neither views the issue objectively nor separates the husband and wife as opponents. Thus, cultural feminism would grant a husband a moral right in the wife's abortion decision. The above analysis, however, assumes the existence of a nonabusive relationship—where neither spouse is threatened by either physical harm or verbal abuse from the other spouse. Because the abusive marriage exists in a different context, the analysis logically reaches a different result.

C. Cultural Feminism Analysis Within the Context of an Abusive Marriage

In an abusive marriage, when analyzing the husband's moral right to participate in the abortion decision, the context changes from one where both spouses are upholding their responsibilities to protect the other, to one where one spouse inflicts harm upon the other.¹²² Issues of responsibility are very important in the cultural feminist approach.¹²³ The husband has a responsibility to avoid putting his wife in danger. Any violence between members of the family is also a breach of the trust that accompanies that type of relationship.¹²⁴ For instance, a husband who beats his wife abandons his responsibility to her as imposed by the marital institution and applicable criminal laws. Merely telling the husband of a pregnancy is "frequently a flashpoint for battering and violence within the family."¹²⁵ Thus, domestic violence as a result of informing the husband about a pregnancy is a very real concern, even if it may occur in only a small percentage of marriages.

Another responsibility within the web of relationships is for a person to be true to herself and to respond to her own feelings.¹²⁶ The wife has a responsibility to herself to focus on her personal well being in addition to focusing on her relationship to others.¹²⁷ Thus, with his violence, the husband fails his responsibility to his family, and the wife must protect herself from his abuse.

The cultural feminist analyzes this dilemma with the same factors used to analyze nonabusive marriages. Some wives are caught in a dilemma.

122. The line that must be crossed for a marriage to go from nonabusive to abusive cannot be drawn clearly because of the subtlety of abuse, or because the abused will not admit that abuse is occurring. For purposes of this analysis, the line is drawn at objective abuse such as verbal abuse and physical violence.

123. See GILLIGAN, *supra* note 5, at 126.

124. Hobday, *supra* note 117, at 1297.

125. *Planned Parenthood v. Casey*, 112 S. Ct. 2791, 2826-27 (quoting the district court's findings of fact regarding the efficacy of the state abortion law at issue).

126. See GILLIGAN, *supra* note 5, at 125-26 for a discussion of moral nihilism.

127. See *id.* at 125.

Although the wife has become pregnant by her husband, she is afraid to tell him that she is pregnant since he would hurt her because of it. Thus, a wife caught in such circumstances often faces an abortion decision. If the husband wants the child and the wife does not, his violence or threat of violence will overcome her will to seek an abortion. Thus, he frustrates her protected right to have an abortion. The impact of this upon the familial community is that the wife's will is subverted by her husband's will. The harm sought to be avoided is injury to the wife because of her husband's violent outbursts. More importance is placed on the individual's right to protect herself from harm.¹²⁸ Rather than giving the husband's interest in the abortion decision the same weight as the wife's, this approach lessens the husband's interest because of his refusal to care about his wife's physical or emotional well-being. The wife's interest in protecting herself is given priority.¹²⁹ Thus, cultural feminism would not give the husband a right to know or have input in her decision-making in order to protect her from spousal violence.

Saying that a wife's responsibility to protect herself is more important than her responsibility to her husband, whether to inform him of the pregnancy or to hear his perspective on the situations, is a weighing of interests. Such a method is utilized by the hierarchy of rights approach. Traditional jurisprudence, with its emphasis on autonomy, separates the wife from her husband in the abortion decision. The two interests are balanced against each other, and the wife's outweighs her husband's. The shift in the focus on responsibilities from the web's to the wife's individual responsibility does not seek to protect the web relationship. Thus, cultural feminism engages in the justice perspective to justify protecting the wife from domestic violence. The theory as Amy described it¹³⁰ can be applied in nonabusive marriages, but not in abusive marriages. Cultural feminist theory reaches different results in abusive and nonabusive marriages by borrowing a weighing of interest approaches. Thus, the goals of communication and enhancing the community are thwarted by preempting the husband's moral right with the wife's moral right. Therefore, "[w]hen pressed by women's experience[s], webs give way to hierarchies and the ethic of care unravels to resemble the logic of justice."¹³¹

The foregoing is an example of feminist jurisprudence's interpretation and resolution of a moral dilemma. The goal of feminist jurisprudence is to implement a woman's perspective, such as cultural feminism, into the

128. See MANN, *supra* note 45, at 106, stating that Gilligan concluded that mature ethical thinking can be understood in terms of individual responsibility and care. When a woman is considering whether to have an abortion, she must try to balance out care for herself and for others. *Id.* at 106-07. By extension, when deciding whether to require the wife to inform her husband of the pregnancy, this theory must balance that obligation with the potential for harm.

129. Gilligan would call this process self-assertion on the wife's part. Karlan & Ortiz, *supra* note 32, at 889-90.

130. GILLIGAN, *supra* note 5.

131. Donald P. Judges, *Taking Care Seriously: Relational Feminism, Sexual Difference, and Abortion*, 73 N.C. L. REV. 1323, 1344 n.76 (1995) (quoting Karlan, *supra* note 32, at 890).

adjudication process. Thus, assuming case law became amenable to upholding such a moral right, a legal mechanism must be put in place to effectuate the right. While some, perhaps most, spouses would discuss the abortion decision on their own initiative, a legal rule which adopts cultural feminist rationale is needed to guide parties and to protect their legal right. By examining the practical aspect of the theory, the weakness of the contextual approach becomes apparent. While the husband should communicate with his wife about the unexpected pregnancy, he should not be able unilaterally to take her constitutional right away from her through demands, threats, or through manipulation. A good rule should ensure communication while maintaining the wife's constitutional right to make the best decision.

D. Implementing the Moral Right in a Legal Mechanism: Mandatory Counseling

In order to strengthen the presentation of a woman's perspective in legal reasoning, this cultural feminist analysis suggests a legal rule to facilitate the result. Since cultural feminism would generally grant a husband a moral right to input in his wife's abortion decision, a legal rule should effectuate and protect that right. The overall goal is to open the communication lines between the wife and husband. This goal would be achieved through various subparts of the legal rule. The wife must be compelled to tell her husband that she is pregnant.¹³² At the same time, the husband must be kept from dominating his wife and from forcing her to do his will against her own. Additionally, the rule cannot require excessive time as the pregnancy progresses; one spouse cannot foil the abortion by moving too slowly to abide by the rule. Violations of the rule must be dealt with so that parties are encouraged to abide by the rule. Because one purpose of the rule is to keep the relationship intact, the rule should not result in a judicial determination of the final abortion decision. Litigation is a point where the parties have postured themselves as opponents, not as part of a web. Further, because a concomitant purpose of the rule is to preserve the wife's constitutional right, the husband must not ultimately have the final say.

Mandatory counseling of the husband and wife before an abortion decision will satisfy these goals and be acceptable under the tenets of cultural feminism. Analogous to a woman's abortion consent form which is currently required, a counselor's consultation form would be required before an abortion could be performed.¹³³ The mandatory counseling would be structured to include at least one joint session and a final session with the wife only. A

132. To the wife, it may seem easier not to tell her husband of the pregnancy if she already knows she wants to have an abortion.

133. A possible exception may arise if there is no disagreement between the husband and wife. If both parties desire the abortion, the counselor's consultation form could be replaced by a spousal notification form that is sworn to and signed by the wife and husband.

counselor would sign a form stating that the counselor had spoken with both the husband and wife and could verify that they each had heard the other's position, and that the wife made the final decision. The counselor would act as an objective mediator; the parties would not have to be in agreement with each other or with the counselor upon the completion of the counseling. The goal of this process is to guarantee a fair setting in which the two parties can relay their opinions and concerns under the direction of an uninvolved third party, with a view toward preserving the marital relationship. With the requirement of a counselor's signature, the wife will be induced to inform her husband of the pregnancy so she can begin the process toward her abortion.

At minimum, one meeting must take place between the husband and wife, followed by one meeting with the wife in which the counselor can be assured that the wife's decision is freely made and is not the result of coercion.¹³⁴ The counselor would be unable to veto the wife's final decision by denying the consultation form. Such a denial would give the counselor unilateral authority to thwart a woman's right to an abortion; the Supreme Court has rejected such actions.¹³⁵ The counselor's role is to be a mediator, not one who conveys the right to an abortion. If the counselor suspects that the wife is consenting to an abortion against her sincere desire, the counselor can discuss that concern with the wife and come to an agreement on whether the counselor should sign the form. Therefore, at the wife's behest, the counselor could refuse to sign the form, thereby removing the availability of an abortion and ultimately giving the wife reinforcement to make her informed decision.

Incorporating a third party into this communication process installs a safeguard against one party's coercion of the other. Admittedly, the husband may threaten his wife when they are outside of the counselor's presence. The final individual session with the wife would allow the counselor to examine the wife's reasoning, especially if her position has changed since counseling began. The final session allows the counselor to be reasonably certain that the wife has considered both her husband's and her own concerns and is acting upon her own volition, not under duress. This final session seeks to protect the wife's ultimate right to choose from being unilaterally denied by her husband. This process acknowledges and fosters the institution of marriage by giving voice to the parties who joined in the creation of the fetus.

One important aspect of the proposed rule is timing. Counseling must be arranged as soon as the woman decides she may want an abortion. To encourage the husband's involvement, violation of the rule will deny him the opportunity to have input. If the husband does not attend the counseling or hinders the scheduling of counseling, he is, in essence, waiving his rights of

134. The parties cannot sign a form at home stating that they have discussed a possible abortion because this process puts the power in the husband's hands to strong arm the wife to do his will.

135. See *supra* notes 83-92 and accompanying text regarding *Danforth*.

involvement. If he is not reasonably cooperative,¹³⁶ he should lose his right to participate in the decision. This result does not frustrate the cultural feminism approach; the right is given, but because time is of the essence, the husband cannot ignore his granted right and expect it to be available indefinitely. This rule will not allow one spouse to forbid the abortion by his or her actions. Additionally, the counseling should not occur on the same day an abortion is scheduled because, at this point, the counseling is merely the ticket in the clinic door.¹³⁷

Two major hindrances to judicial acceptance of this proposed rule are the "undue burden" standard mentioned in *Maher v. Roe*,¹³⁸ specifically adopted in *Casey*,¹³⁹ and the lack of prior case law that recognizes the father's legal right to stop the woman from having an abortion. The undue burden standard holds that if a "state regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus," the statute is invalid.¹⁴⁰ Any regulation imposed to further the state's valid interest in potential life must inform the woman's choice, not hinder it.¹⁴¹ A profound respect for the life of the unborn is constitutional so long as it does not substantially obstruct the woman's exercise of her right to choose.¹⁴²

The purpose of the proposed mandatory counseling regulation is to inform the woman of the desires of her husband, which may have the effect of forbidding her choice if he threatens her. However, his influence should merely be a factor she considers in making her free choice. Again, the reason for the final session with the wife is to determine that she is making the ultimate decision. The counseling does not aim to change her mind but simply to afford a voice to the father.

The argument that counseling informs the woman's choice without hindering it would probably be rejected by a court, especially since the *Casey* court struck down a spousal notification regulation, a lesser burden upon the

136. Examples of noncooperation are refusing to agree to or commit to a date for the counseling, refusing to attend joint sessions, or canceling the sessions against the desire of the wife.

137. The cost of counseling should be incorporated with the cost of abortion and paid by the same source that pays for the abortion. Some of the mechanics of the mandatory counseling rule can be fairly resolved. The counselor must be experienced in counseling. To prevent a "stacked deck" against one spouse, the counselor must be a neutral third person who is agreeable to both parties. The counselor may be a marriage counselor or affiliated with a crisis pregnancy center, an establishment such as Planned Parenthood, or a state agency. The goal, however, is not to persuade the parties to share the viewpoint of the counselor.

138. 432 U.S. 464 (1977).

139. *Planned Parenthood v. Casey*, 112 S. Ct. 2791 (1992). The constitutional right to an abortion protects the woman from "unduly burdensome interference with her freedom to decide whether to terminate her pregnancy." *Maher*, 432 U.S. at 473-74. The Supreme Court adopted the undue burden standard as the appropriate means of reconciling the state's interest with the woman's constitutionally protected liberty. *Casey*, 112 S. Ct. at 2820.

140. *Casey*, 112 S. Ct. 2820.

141. *Id.*

142. *Id.* at 2821. Through this standard, the Court is trying to protect "the woman's right to make the ultimate decision." *Id.*

wife than spousal consent, as in *Danforth*. In *Casey*, the Pennsylvania statute required a married woman to sign a statement that she had notified her husband that she was going to have an abortion.¹⁴³ The Court found this to be a substantial obstacle upon consideration of domestic violence within marriages.¹⁴⁴ Although the vast majority of women consult their husbands regarding an abortion decision,¹⁴⁵ the Court gave substantial weight to the possibility of domestic violence spurred by spousal notification.¹⁴⁶ A woman is "likely to be deterred from procuring an abortion" if she fears that her husband would respond to notification by harming her or her children.¹⁴⁷ Therefore the notification requirement would operate as a "substantial obstacle" to the wife's choice to obtain an abortion, and it was held to be an undue burden.¹⁴⁸

Previous case law, to the extent it holds spousal notification requirements unconstitutional, would have to be overruled. Additionally, the Court would have to recognize a substantial or weighty constitutional interest of the father to legally secure the moral right for him to have an input in the abortion decision. Potential fathers have asserted two constitutional interests: (1) an interest in the fetus "via the right to procreation which is derived from the right to privacy" and (2) an interest in the "'custody, care, and nurture' of the potential child."¹⁴⁹ To the extent that securing any right of the father in his spouse's abortion decision requires overruling previous case law, it would be difficult to accomplish.

The requirement for a counselor's consultation form could be waived for women subject to abuse. An exception would prevent inciting physical or psychological harm to a wife and her children from her abusive husband. To effectuate this exception, a confidential form signed by the wife stating her domestic violence situation would be required in lieu of a counselor's consultation form. The exception form would remain a part of the doctor's medical records. The information on the form will not be revealed without the

143. *Id.* at 2826.

144. *Id.* at 2830.

145. *Id.* at 2826.

146. *Id.* at 2829.

147. *Id.*; see Judges, *supra* note 131, at 1455-56 for a discussion of how this decision "reflects a caring responsiveness to the plight of battered women."

148. *Casey*, 112 S. Ct. at 2830. The Court confirmed its decision that the statute was invalid because of the Court's prior rejection of the common-law understanding of a woman's role within the family. *Id.* at 2831. At common law, a married woman had no legal existence apart from her husband, who was her representative in society. *Id.* at 2830-31. The Court feared that allowing the notification provision would perpetuate a view of marriage similar to the common law understanding and stated that "[a] husband has no enforceable right to require a wife to advise him before she exercises her personal choices." *Id.* at 2831. The language of the opinion sounds like a traditional jurisprudence analysis of the hierarchy of rights rather than radical feminism's equal protection grounds. The Court weighs the rights in conjunction with their effects, depending upon the placement of the husband's rights above the wife's rights and vice versa. *Id.* The goal was to award the woman the authority for autonomous decision making.

149. Sharrin, *supra* note 95, at 1392 (discussing the cases and interests pursued on behalf of the father's interest in forbidding the woman to abort the fetus).

authorization of the woman. This exception is not fair to those wives whose husbands do not beat them and would open the door to fraud. Moreover, some women are not strong enough to admit to themselves that they are abused and cannot be expected to admit to a clinic that they are abused.

Cultural feminism has been criticized as perpetuating female stereotypes¹⁵⁰ and of contributing to the silencing of women's voices.¹⁵¹ Radical feminist Andrea Dworkin declares that the cultural feminist theory amounts to collaboration with patriarchy because the care perspective is bad faith and stigmatizes women.¹⁵² In fact, a cultural feminist strives to achieve equality not by buying into the male world on male terms but by transforming the world into the women's image of it.¹⁵³ Cultural feminism seeks to recognize the differences between men and women and not allow those differences to be used as justification for oppressing either one. The mandatory counseling rule is not a spousal authorization to proceed with the abortion and does not place the husband's interest in the fetus above the woman's right to choose.¹⁵⁴ Rather, the legal rule seeks to maintain the marital relationship after the decision regarding an abortion is made. The web should remain intact once this moral impasse is surmounted.

IV. CONCLUSION

The reader is encouraged to ponder the viewpoint presented by the cultural feminist strand of feminist jurisprudence. While criticized as being manipulable to frustrate its own goal,¹⁵⁵ the rationale is one of care, context, and connection. Irony arises in the fact that a strand of feminist jurisprudence would grant a husband additional rights in a decision on abortion.

In the marital relationship, the spouses have reciprocal responsibilities to take care of each other and respect the other's feelings and concerns. In an effort to prevent excluding a party from the relationship, the cultural feminist perspective seeks to resolve a moral dilemma in such a way that sustains the connection of the parties after the impasse is resolved. In the context of a marriage, the husband and wife will be connected either by a continuing marriage or by a divorce—connected by children or by virtue of their life together. Cultural feminism utilizes communication as the avenue to effectuate

150. Joan C. Williams, *Deconstructing Gender*, in *FEMINIST JURISPRUDENCE*, *supra* note 16, at 538 (explaining EEOC v. Sears, 628 F. Supp. 1264 (N.D. Ill. 1986), *aff'd* 839 F.2d 302 (7th Cir. 1988), and how the court used the cultural feminist approach to justify a discriminatory effect).

151. Judges, *supra* note 131, at 1340.

152. ANDREA DWORKIN, *INTERCOURSE* (1987).

153. See Williams, *supra* note 150, at 537.

154. Nonetheless, minimal restrictions upon the woman's ability to obtain an abortion will pass the undue burden standard. In light of *Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416 (1983), this counseling rule would most likely be held to be a substantial burden and the most plausible way it would be acceptable is for the Supreme Court to reform its standard. However, a critique of the standard is beyond the scope of this Comment.

155. Karlan & Ortiz, *supra* note 32.

the theory's ethic of care, to protect the web of relationships. This theory is fully realized in a nonabusive marriage where the spouses generally adhere to their responsibilities. Thus, the husband is granted a moral right to have input in his wife's abortion decision.

In an abusive marriage, however, the same principles are analyzed within a different context and the theory places more weight on the wife's interest than the husband's. Because the wife has a weightier responsibility to protect herself from abuse, the husband's interest in participating in the abortion decision, by virtue of their relationship, is not protected. The weighing process is a method used by traditional jurisprudence, a method criticized by cultural feminism. The effect is to deny the husband a moral right to participate in the wife's decision-making process regarding the abortion. Thus, the same theory reaches two different results in different marital contexts.

While the analysis reaches the logical results under cultural feminism, implementation of the results is impractical. The impracticality is a hindrance to cultural feminists' utilization of the theory for justification of legal rules. In an effort to further the consideration of using cultural feminism, a legal rule has been suggested to implement the jurisprudential approach. Mandatory counseling would incorporate the numerous concerns. It would allow a husband to have input into his wife's abortion decision under the guidance of an impartial third party while not removing the wife's authority to make the final decision. Because of the woman's authority to make the final decision, some may skeptically perceive that counseling still does not give the husband any input into his wife's abortion decision. However, this proposed rule grants more legal rights to the husband than does current traditional jurisprudence. An exception for domestic violence situations is made because the cultural feminist would not grant the husband a moral right. Because an abusive husband violates his marital responsibilities to his wife, he is denied the opportunity for legal input into his wife's decision. The cultural feminist approach offers a perspective on the abortion decision-making process that incorporates the web of relationships. Ironically, granting a husband abortion rights seems to contradict the political stance of feminists, but a husband's abuse of his wife denies all husbands those rights.

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