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BEYOND ROE AND DOE: THE RIGHTS OF THE FATHER

Howard Sherain*

I. Introduction

On January 22, 1973, the United States Supreme Court decided *Roe v. Wade*¹ and *Doe v. Bolton*.² These two cases, establishing a woman's legal right to an abortion, have stirred much response and analysis, some in support of the decisions³ and some quite critical of them. The criticism divides between the "right to life" critics who consider those decisions incorrect on moral grounds⁴ and those who think the Court reached the correct decision but in a sloppy, over-reaching, and dangerous manner.⁵

This commentary will not add to this critical analysis of the two decisions but rather will look beyond *Roe* and *Doe* to a problem which is likely to arise in the future⁶ and is left unsolved by both cases. The problem is the extent of the biological father's rights with regard to the abortion decision. If the mother wants to obtain an abortion but the father wants the fetus to come to term, how is the dispute resolved?⁷

The attempt here is not to argue that an abortion should be allowed to take place only with the father's consent. However, just as the mother has certain legal rights with regard to the abortion decision, so too does the father. Fundamental notions of equal protection compel the conclusion that, if there is disagreement between father and mother with regard to the abortion decision, the decision of the mother should not be absolutely decisive. Secondly, fundamental notions of procedural due process compel the conclusion that if the father acts promptly, he must be afforded the opportunity to an immediate hearing before a board which would weigh the interests and burdens asserted by the father and mother.

II. *Roe* and *Doe*: The Mother's Right of Privacy

Roe v. Wade and *Doe v. Bolton* deal with the rights of the mother as against

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1 410 U.S. 113 (1973).

2 410 U.S. 179 (1973).

3 E.g., Heymann & Barzelay, *The Forest and the Trees: Roe v. Wade and Its Critics*, 53 B.U.L. REV. 765 (1973).

4 E.g., *Pastoral Message of the Administrative Committee, National Conference of Catholic Bishops*, 19 CATHOLIC LAWYER 29 (1973).

5 E.g., Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920 (1973); Tribe, *Toward a Model of Roles in the Due Process of Life and Law*, 87 HARV. L. REV. 1 (1973). See generally Note, *Abortion after Roe and Doe: A Proposed Statute*, 26 VAND. L. REV. 823, 8 U. RICHMOND L. REV. 75 (1973); 30 WASH. & LEE L. REV. 628 (1973); 10 GA. ST. B.J. 153 (1973); 2 AM. J. CRIM. L. 231 (1973).

6 This expectation is also noted in Tribe, *supra* note 5, at 40.

7 In what follows, the words "father" and "mother," rather than "potential father" and "potential mother," are used merely as shorthand. For reasons which should become clear as this commentary proceeds, "father" is preferred to the narrower and unfeeling "fertilizer." [That term was suggested by Mr. Roy Lucas in his (undated) letter to this writer. Mr. Lucas was attorney for Miss Coe in *Coe v. Gerstein*, 376 F. Supp. 695 (S.D. Fla. 1974), discussed at note 91 *infra*].

the state. The facts of neither case raised the issue of the rights of the father and *Roe's* footnote 67⁸ explicitly reserves judgment on this issue:

Neither in this opinion nor in [*Doe*], do we discuss the father's rights, if any exist in the constitutional context, in the abortion decision. No paternal right has been asserted in either of the cases, and the Texas and the Georgia statutes on their face take no cognizance of the father. We are aware that some statutes recognize the father under certain circumstances. North Carolina, for example . . . requires written permission for the abortion from the husband when the woman is a married minor, that is, when she is less than 18 years of age. . . . [I]f the woman is an unmarried minor, written permission from the parents is required. We need not now decide whether provisions of this kind are constitutional.⁹

This is not to say, however, that *Roe* offers no guidance whatsoever. The reasoning in *Roe* and *Doe* will aid in the analysis of the right of the father.

Roe and *Doe* note that a woman's right to an abortion rests on the constitutionally protected right of privacy. While *Roe* states that the right of privacy is "broad enough to encompass a woman's decision whether or not to terminate her pregnancy,"¹⁰ neither case precisely defines that right nor articulates its scope.

The right of privacy is a broad concept and there are perhaps four possible ways in which it could apply to *Roe* and *Doe*. There would be a privacy protecting the intimacies of motherhood and childbearing,¹¹ a privacy needed to protect the relationship of mother and child. However, since the decisions in *Roe* and *Doe* protect the woman's decision to abort—precisely the decision not to establish the relationship of mother and child—surely that relationship cannot easily be the basis for *Roe's* privacy. A second possible interpretation is that *Roe* relies on a concept of "family-unit privacy."¹² A third possibility is a need for privacy to protect the special intimacy of the sexual relation.¹³

While different, these three possibilities have a common element: privacy occasioned not by a location but by a relationship. As Justice Brennan put it in his dissent in a recent obscenity case, if privacy extends to the doctor's office, the hospital, and the hotel room, it is not because there is something sacrosanct about these places but because, at that moment, they are the location of something particularly personal, perhaps intimate.¹⁴ A similar conclusion is reached with a different approach to the matter. The privacy in *Roe* may be based upon the sexual relation privacy of *Griswold v. Connecticut*,¹⁵ which stems from the right of associational privacy of *NAACP v. Alabama*.¹⁶ The right of privacy recognized in *NAACP* and in *Griswold* protects individuals against intrusion by the

8 410 U.S. at 165 n.67.

9 *Id.* See Tribe, *supra* note 5, at 38.

10 410 U.S. at 153.

11 *See Paris Adult Theatre I v. Slaton*, 413 U.S. 49 (1973).

12 *See, e.g., Loving v. Virginia*, 388 U.S. 12 (1967); *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944); *Pierce v. Soc'y of Sisters*, 268 U.S. 510 (1925); *Meyer v. Nebraska*, 262 U.S. 390 (1923).

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

14 *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 73 (1973) (Brennan, J., dissenting).

15 381 U.S. 479 (1965).

16 357 U.S. 449 (1958).

state; it is not a right to serve as a fence between and among individuals. *Roe* identifies its right of privacy as personal, but so was *Griswold's* and *NAACP's*; the right is personal in that it could be asserted by and is intended to protect individual persons. *Roe* does not equate personal with exclusive.

Finally, the fourth possibility is that the *Roe* right of privacy differs from the above cases and is called forth by "location";¹⁷ that is, *Roe* may stand for the right of bodily privacy. This theory would rest on the premise that a woman, or she and her doctor, have a right to decide what goes on inside her body. Simply, a woman has a right "to determine her own reproductive life."¹⁸

The first suggestion of a right of bodily privacy occurs as dictum in a nineteenth-century railroad case. The Court wrote in *Union Pacific Railway Co. v. Botsford*:

No right is held more sacred, or is more carefully guarded . . . than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law. As well said by Judge Cooley, "The right to one's person may be said to be a right of complete immunity: to be let alone."¹⁹

Does that mean that the law will not permit intrusions into or extrusions from the human body without that individual's consent? Are we dealing with—to use Judge Cooley's phrase—"a right of complete immunity"?

Cases such as *Skinner v. Oklahoma*²⁰ and *Rochin v. California*²¹ suggest that government intrusion into the body is disfavored. However, no case stands for the principle that bodily privacy somehow holds a preferred position in the area of protected privacy. The state has been upheld in its program of compulsory vaccinations in *Jacobson v. Massachusetts*,²² in its foray into eugenics in *Buck v. Bell*,²³ and in its involuntary blood-test search for criminal evidence in *Schmerber v. California*.²⁴ No right of bodily privacy was held to prevent a private hospital from performing a blood transfusion to a fetus over the strong religious objections of the mother.²⁵ The argument for an absolute right to bodily privacy has been forcefully made but has never won. The claim was made in an *amicus* brief in *Roe* and the Court responded:

17 This is the approach in, e.g., *Stanley v. Georgia*, 394 U.S. 557 (1969); *Camara v. Municipal Court*, 387 U.S. 523 (1967); and *Frank v. Maryland*, 359 U.S. 360, 374-84 (1959) (Douglas, J., dissenting).

18 PRESIDENT'S TASK FORCE REPORT ON FAMILY LAW AND POLICY 31 (1968), quoted in *Tribe, supra* note 5, at 39.

19 141 U.S. 250, 251 (1891).

20 316 U.S. 535, 544-46 (1942) (Jackson, J., concurring).

21 342 U.S. 165, 172 (1952).

22 197 U.S. 11 (1905).

23 274 U.S. 200 (1927).

24 384 U.S. 757 (1966).

25 *Raleigh Fitkin-Paul Morgan Memorial Hosp. v. Anderson*, 42 N.J. 421, 201 A.2d 537, *cert. denied*, 377 U.S. 985 (1964). See also *Application of President & Directors of Georgetown College*, 331 F.2d 1000 (D.C. Cir. 1964); *John F. Kennedy Hosp. v. Heston*, 58 N.J. 576, 279 A.2d 670 (1971); *State v. Perricone*, 37 N.J. 463, 181 A.2d 751, *cert. denied*, 371 U.S. 890 (1962); *Hoener v. Bertinato*, 67 N.J. Super. 517, 171 A.2d 140 (1961); *In re Estate of Brooks*, 32 Ill. 2d 361, 205 N.E.2d 435 (1965); See *Minors and Contraception*, 216 J.A.M.A. 2059 (1971).

The privacy right involved, therefore, cannot be said to be absolute. In fact, it is not clear to us that the claim asserted by some *amici* that one has an unlimited right to do with one's body as one pleases bears a close relationship to the right of privacy previously articulated in the Court's decisions. The Court has refused to recognize an unlimited right of this kind in the past . . . this right is not unqualified . . .²⁶

Thus, a right of bodily privacy is only relative. Since the matter involves a woman's fundamental right to her bodily privacy, the woman's decision with regard to that matter must prevail, unless there is a compelling concern out-balancing her interests.²⁷ *Roe* seems to suggest that an initial presumption must be made in the woman's favor; but it is not an irrebuttable presumption.²⁸ The father may also have interests and thus must be given a chance to rebut.

This commentary will propose that, while the law's refusal to sanction the mother's decision to abort may, in some circumstances, be a denial of her constitutionally protected rights, the granting of the sanction may be a denial of the father's constitutionally protected rights. *Roe's* reference to the qualified right of the woman and its explicit reservation in footnote 67 leaves open the inquiry as to the father's rights.

III. *Stanley v. Illinois*: The Disestablishment of the Sexual Stereotype

Two recent emphases in the law have been the increased development of a right of privacy and an expanded recognition of women's rights. Two other recent emphases have been the principle that substantial benefits cannot be taken away without a hearing and the broad effort to end sexual discrimination. While *Roe* ties together the first two trends, *Stanley v. Illinois*²⁹ joins the second two.

Before *Stanley*, the father had no legal rights.³⁰ Breaking with centuries of traditional civil and common law,³¹ *Stanley* held that it was unconstitutional to disregard the claims and interests of the father in his attempt to retain custody of his illegitimate child. If he promptly steps forward and acknowledges paternity,³² *Stanley* guarantees him a hearing and, through that hearing, the possibility of retaining custody of the child against the attempt of the state to take custody. Moreover, *Stanley* not only recognizes rights of the father but establishes them as

²⁶ 410 U.S. at 154.

²⁷ *Id.* at 155-56. See also Heymann & Barzelay, *supra* note 3, at 768 n.21; 41 *FORD. L. REV.* 703, 712 (1973).

²⁸ The "bad flavor" of "irrebuttable presumptions" is indicated in *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632 (1974); *Vlandis v. Kline*, 412 U.S. 441 (1973); *Carrington v. Rash*, 380 U.S. 89 (1965).

²⁹ 405 U.S. 645 (1972).

³⁰ Comment, *Protecting the Putative Father's Rights After Stanley v. Illinois: Problems in Implementation*, 13 *J. FAM. L.* 115 (1973); see generally Means, *The Law of New York Concerning Abortion and the Status of the Foetus, 1664-1968: A Case of Cessation of Constitutionality*, 14 *N.Y.L.F.* 411 (1968).

³¹ Actually, a few courageous state courts had begun the change some years prior to *Stanley*. See *In re Mark T.*, 8 *Mich. App.* 122, 154 *N.W.2d* 27 (1967); *In re Brennan*, 270 *Minn.* 455, 134 *N.W.2d* 126 (1965); *In re Zink*, 264 *Minn.* 500, 119 *N.W.2d* 731 (1963); *In re Aronson*, 263 *Wis.* 604, 58 *N.W.2d* 553 (1953).

³² For varying state interpretations of this element of *Stanley*, see Comment, *supra* note 30, at 132-34.

fundamental rights.³³ The same precedents relied upon to articulate the fundamental character of the right in *Roe* are followed in *Stanley*.³⁴

Because it is a fundamental right, it cannot be summarily and stereotypically disposed of by the state. It may be, the Court reasoned, that the Illinois image of illegitimate fathers as unconcerned and uncaring towards their children is usually correct; it may also be that Mr. Stanley fits that model and should, therefore, have his children placed in other hands.³⁵ Yet, it may also be that he is an exception; and, since the issue concerned a fundamental right, the Court found Illinois' assumption to be unconstitutional. Mr. Stanley had to be provided the opportunity to show that he does not fit the stereotype, is a "fit" parent, and ought to be allowed to keep his children.

The *Stanley* decision was not novel in this emphasis. It is the requirement of Title VII of the 1964 Civil Rights Act with regard to hiring. It was required in *Reed v. Reed*³⁶ in selecting an administrator for an estate. Its omission was the error in the Cleveland Board of Education's maternity leave policy³⁷ and in the Air Force's distribution of benefits on the basis of sex.³⁸ The emphasis of *Stanley*, then, is no legal aberration; it is a logical step.³⁹ This commentary attempts to point the way to the next logical step: If it is unconstitutional to prefer, automatically and without a hearing, the state's claim to custody over the father's claim, the same fundamental right principle may mean that it is unconstitutional to prefer, automatically and without a hearing, the mother's claim to custody over the father's claim. If the Constitution compels us to reject the legitimacy stereotype⁴⁰ in favor of individual determinations in the one case, on what grounds can it be argued that it does not compel us to reject the sexual stereotype and require individual determinations in the other case?

The memorandum decisions in the wake of *Stanley* support this conclusion. In *Vanderlaan v. Vanderlaan*,⁴¹ both the mother and the father sought custody of the illegitimate child. The Illinois court summarily ruled for the mother. Despite the fact that *Stanley* only dealt with the father's right against the claims of the state while *Vanderlaan* dealt with his right against the claims of the mother, the Supreme Court explicitly vacated *Vanderlaan* on the basis of *Stanley*.⁴² *State ex rel. Lewis v. Lutheran Social Services*⁴³ also presented a mother-father dispute over custody of an illegitimate child. In deciding this case for the mother, the Wisconsin Supreme Court stated that "the mother . . . is the natural guardian

33 *Stanley v. Illinois*, 405 U.S. 645, 651 (1972).

34 *Id.*

35 *Id.* at 647, 654.

36 404 U.S. 71 (1971).

37 *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632 (1974).

38 *Frontiero v. Richardson*, 411 U.S. 677 (1973).

39 Perhaps the first step was taken in Justice Stone's concurring opinion in *Skinner v. Oklahoma*, 316 U.S. 535, 544 (1942):

[T]he real question we have to consider is . . . whether the wholesale condemnation of a class to such an invasion of personal liberty, without opportunity to any individual to show that his is not the type of case which would justify resort to it, satisfies the demands of due process.

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

41 126 Ill. App. 2d 410, 262 N.E.2d 717 (1970).

42 405 U.S. 1051 (1972).

43 47 Wis. 2d 420, 178 N.W.2d 56 (1970).

of her illegitimate child and, therefore, has a legal right to its custody, care and control, superior to that of the father"⁴⁴ This decision was vacated explicitly on the basis of *Stanley*.⁴⁵

The Court has treated *Stanley* as affecting the sexual as well as the illegitimacy stereotype. There is as much evidence showing the limitations of the one as there is of the other. Just as it is unfair to assume that the child is better off under the supervision of the state than under the supervision of the father, so it is unfair to assume that the child is better off under the supervision of the mother than under the father. Assumptions simply have no place here.

It would be unjust for the law not to recognize the burdens placed upon a mother who is refused a legal abortion. The initial, but rebuttable, presumption in favor of the mother's claims suggested in the first part of this commentary attempts to insure full cognizance of her burdens. But, by the same token, it would be ironic to forbid suspension of the father's driver's license without a hearing,⁴⁶ forbid discontinuance of his welfare checks without a hearing,⁴⁷ or forbid his expulsion from college without a hearing,⁴⁸ and yet deprive him of a son or daughter without a hearing.

The scope of neither *Roe* nor *Stanley* has been properly assessed by lower courts or secondary literature. *Roe* may well impose fewer restrictions upon the rights of the father than it has been taken to suggest, and *Stanley* may say more about the rights of the father than has been recognized. There is no equivalent in *Stanley* to *Roe*'s footnote 67, explicitly limiting its decision and reserving the question of the consonance of the right established in that case with the rights of the cocreator of the child. In a word, *Stanley* established and *Roe* did not disestablish a right of the father.

IV. Due Process: Notice and Hearing for the Prospective Father

Roe v. Wade led one writer to make the following observation:

[G]ranting a man the power to force someone to carry and care for his child despite her unwillingness to use her body and life for that purpose would raise the spectre of the legally enforced physical and psychological domination of one group in society by another. A woman in contemporary America who is coerced into submitting herself, at the insistence of man empowered by law to control her choice, to the pains and anxieties of carrying, delivering and nurturing a child she did not wish to conceive and does not want to bear and raise, is entitled to believe that more than a play on words has come to link her forced labor with the concept of involuntary servitude⁴⁹

⁴⁴ *Id.* at 422, 178 N.W.2d at 57.

⁴⁵ *Rothstein v. Lutheran Social Services*, 405 U.S. 1051 (1972).

⁴⁶ *Bell v. Burson*, 402 U.S. 535 (1971).

⁴⁷ *Dandridge v. Williams*, 397 U.S. 471 (1970). In fact, the Court split, holding by a vote of 6-3 that the hearing was not essential.

⁴⁸ *Dixon v. State Bd. of Educ.*, 294 F.2d 150 (5th Cir. 1961).

⁴⁹ Tribe, *supra* note 5, at 40. Similarly:

Requiring the father's signature on the consent form would allow too many possibilities for the woman to be ripped off We feel that forcing a woman to remain pregnant against her will is a form of involuntary servitude; and therefore not to be condoned under any circumstances

Letter to the author from Chris Cunningham, Member, NOW Right to Choose Coalition, Aug. 7, 1974.

Nothing in *Roe* or in *Stanley* nor anything else in the law shows any error in that statement.⁵⁰ However, admitting all this, argument here simply calls for a balancing hearing.

Admittedly, there may well be a number of legitimate objections to the proposed hearing requirement. First, there is the procedural problem of time. The human gestation period is approximately 280 days. It is only during the first 90, as the Court recognized in *Roe*, that an abortion is a very minor operation. During the second trimester, the danger of the operation substantially increases; an abortion performed in the third trimester is a major and potentially dangerous procedure. In other words, the abortion decision must be made quickly; it cannot tolerate the delay normally accompanying full judicial procedures.

Second, there is the problem of enforcement. If a hearing board were to rule for the father and if, nevertheless, the mother were to terminate the pregnancy illegally, a remedy or punishment would have to be fashioned. Fine and imprisonment may or may not be appropriate. And if nothing can realistically be done, does this not mean that the law would be better advised to avoid any involvement in the matter?

Finally, there is the major substantive objection: what interests are to be balanced by the hearing board and how are they to be balanced? More specifically, what claim of the father could possibly be found to outweigh the burdens on the unwilling mother?⁵¹

A closer look at each of these objections will be helpful. First, as to the problem of time, despite the commonly held belief in the inevitability of interminable legal delay, the fact is that the law can move remarkably quickly when it needs to.⁵² Furthermore, there are already indications that the law recognizes that this area would be one requiring quick action.⁵³ A time-consuming series of court cases—with its attendant selection of jurors, arguments of attorneys, cross-examinations, etc.—is neither desirable nor necessary. The need is for an immediate hearing. Usually the woman is able to recognize pregnancy within the first 30 days following conception.⁵⁴ That leaves approximately two months remaining in the first trimester for the notification of the father, and the decision of the hearing board.

50 A number of state statutes exhibit such male "domination." See, e.g., COLO. REV. STAT. ANN. § 40-2-50(4)(a)(i) (Cum. Supp. 1967); FLA. STAT. ANN. § 458.22 (Supp. 1974); N.C. GEN. STAT. § 14-45.1 (Cum. Supp. 1961). The North Carolina provisions were repealed in 1973. The Colorado law was allowed to stand in *People v. Norton*, 507 P.2d 862 (Colo. 1973), which struck down other parts of the Colorado Code dealing with abortion. The Florida rules were held unconstitutional in *Coe v. Gerstein*, 376 F. Supp. 695 (S.D. Fla. 1974).

51 This objection is raised in letters to the writer from Prof. Thomas Emerson of the Yale Law School, July 16, 1974, Beatrice Blair, Executive Director of the National Abortion Rights League, July 10, 1974, and Arvonne S. Fraser, President of the Women's Equity Action League, July 3, 1974.

52 E.g., the legal proceedings in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952): From the time of placing the case on the docket of the district court to the time of decision of the U.S. Supreme Court, 82 days elapsed. See generally A. WESTIN, *THE ANATOMY OF A CONSTITUTIONAL LAW CASE* (1958).

53 State *ex. rel. Lewis v. Lutheran Social Services*, 47 Wis. 2d 420, 422, 178 N.W.2d 56, 57 (1970) (Hanley, J., concurring).

54 N. LEE, *THE SEARCH FOR AN ABORTIONIST* 56 (1969); J. CHAPMAN, *THE FEMALE MIND AND BODY* 228 (1967).

Notice should not be permitted to take too much time. As one writer noted in considering the time problem created by *Stanley*:

To minimize delay in the adoption process the time for responding [to notice of intention to put up for adoption] should be as short as due process will allow—five or ten days. . . . [F]athers who do not promptly respond cannot complain⁵⁵

That concern and that proposal seem no less valid with regard to abortions. Indeed, *Stanley* only requires notice to the father who has come forward and identified himself. Furthermore, mere published notice seems to satisfy *Stanley*. Absent any showing of bad faith⁵⁶ on the part of the mother, these rules would be reasonable guidelines in the hearing procedure proposed here.

Perhaps not even this much should be required. If the father is not vitally concerned with his child, he should not be allowed to veto the mother's decision to abort. Absent any showing of bad faith, perhaps there should be no requirement of notice of intent at all.⁵⁷

The second objection to be examined concerns the problem of enforcement. Should and could a woman be punished for her defiance of a decision of a hearing board? And if she could not, have we not made a solemn mockery of the whole matter?⁵⁸

First, it is not so certain that there would be large-scale defiance of the board's decisions. Though no more than suggestive, it is interesting to consider the Scandinavian figures which showed that 84 percent of legal abortions would have gone on to delivery had they been refused; of those actually refused in Norway and Sweden 86 percent did go on to deliver.⁵⁹ This source continues:

A more recent London study gives the smaller figure of 59 percent delivery. . . . Among those refused the number known to have turned to an illegal abortion are 20 percent in London and 9 percent and 11 percent in Scandinavia. It is interesting to note that in the last mentioned series 30 percent said they would seek illegal abortions if refused, almost two-thirds changed their minds While suicide is . . . the great fear in refused abortions, in N.Y. City . . . the incidence of suicide is eleven times commoner among women in general than among the pregnant There is a world of difference between threat of suicide and commission of suicide.⁶⁰

In other words, many people will obey laws despite even vehement personal opposition.

Yet, even if this were not the case, it is not clear that substantial problems of compliance and enforcement establish a legitimate basis for denying constitu-

55 Comment, *supra* note 30, at 136 n.105; see also Note, *Plight of the Putative Father in California Child Custody Proceedings: A Problem of Equal Protection*, 6 U. CALIF. DAVIS L. REV. 1, 17 (1973).

56 See N. LEE, *supra* note 54, at 49.

57 Note that this is possibly suggested in *Stanley v. Illinois*, 405 U.S. 645, 657 n.9 (1972).

58 Means, *supra* note 30, at 492.

59 R. GARDNER, *ABORTION: THE PERSONAL DILEMMA* 223 (1972); see also J. BRUDENELL, *OBSTETRICS* 67 (1964); D. CRANFIELD, *THE ABORTION DECISION* 106 (1969); N. LEE, *supra* note 54; Ely, *supra* note 5, at 923 n.26.

60 R. GARDNER, *supra* note 59, at 223-25.

tional rights. Despite any noncompliance and nonenforcement in the area of civil rights law since 1954, few would argue that courts were, therefore, wrong in seeking to protect individuals' rights. Few would argue that *Brown v. Board of Education*⁶¹ was wrong because of the depth of feeling of its opponents.⁶² If the father does have constitutionally protected rights in a dispute regarding a proposed abortion, admitted problems of enforcement cannot validly be raised to vitiate those rights.

The major objection to providing a hearing procedure is the burden upon the mother and upon her claim of right. As to the burden of pregnancy and delivery, the chief medical finding seems to be that this is a subject simply not conducive to generalizations, for the degree of hardship varies immensely with each individual woman.⁶³ The findings suggest further, however, that it is the nervous, angry, resentful pregnant woman who is most likely to have a difficult pregnancy.⁶⁴ Not only is she the mother most likely to have a difficult pregnancy, she is also the one most likely to deal with the situation through violence towards herself or towards the fetus.⁶⁵ Even if her anger and resentment do not lead her to take violent action, there is some medical data to suggest that her strong angry feelings implant themselves on the health and the disposition of the fetus.⁶⁶ For this woman there must seem to be a world of difference between bearing a child because of force of circumstance and bearing a child because of force of law; and that vast and unhappy difference is likely to affect all parties involved, including the unborn child.

A hearing board should know all of these factors in reaching its decisions. Still, there may be countervailing factors as well. Fathers need not be disinterested in and unconcerned about having children. The mother's desire to abort may be matched by an even stronger paternal desire for a child. While in some instances, the continuation of an unwanted pregnancy places heavy burdens on the mother, in other instances, the medical findings indicate this may simply not be the case. Indeed, it may be possible for the father to advance arguments in opposition to an abortion based upon danger to his health.

Not only are there fathers whose mental health would be strongly affected by the abortion, but there are also some fathers who so want to have children that

61 347 U.S. 483 (1954).

62 There are similar problems in other areas of the law. Should enforcement problems lead us, for instance, to repeal our laws against perjury or obscene phone calls (to cite just two areas of the law where there is flagrant defiance and little enforcement)? Is the fact that the law cannot do everything in some areas good reason for the law to refrain from trying to do anything in those areas? Note Justice Holmes' response to that question in *Buck v. Bell*, 274 U.S. 200, 208 (1927).

Note also that the problem here is distinct from and less difficult than the problem of enforcing penalties against "victimless crimes." See generally E. SCHUR, *CRIMES WITHOUT VICTIMS* (1965). For here there is a clear, complaining victim: the father.

63 See Curran, *Equal Protection of the Law: Pregnant School Teachers*, 285 N.E.J. MED. 336 (1971).

64 See J. BRUDENELL, *supra* note 59, at 38, 54; J. CHAPMAN, *supra* note 54, at 231.

65 But cf. the data at note 60 *supra*.

66 Note the interchange between Dr. Huthsteiner (neuropsychiatrist), Miss Joselyn (adoption caseworker) and Dr. Aaron (psychiatrist, obstetrician and gynecologist in *ABORTION: LEGAL AND ILLEGAL* 40-41 (F. Kummer ed. 1967)); cf., Caplan, *The Disturbance of the Mother-Child Relationship by Unsuccessful Attempts at Abortion*, 38 MENTAL HYGIENE 67 (1954). See also J. CHAPMAN, *supra* note 54, at 243.

they are prepared to take on all parental responsibilities.⁶⁷ If such fathers do exist, should the law not take cognizance of their concerns as well as the mothers'? The author who made the observation concerning involuntary servitude went on to point out:

Quite a different argument would be presented if the prospective father was truly to undertake the burdens of parenthood himself rather than expecting the unwilling mother to bear all or most of those burdens. In such a case the state might want to confer a veto over abortion on the theory that the man's right to raise his own child is important enough to justify the burdens of coerced pregnancy for the woman.⁶⁸

In such situations there may be justice in balancing the woman's right, based upon whether the abortion is sought to save her life or simply for convenience.⁶⁹

V. *Roe* versus *Stanley*

While there has not yet been a case involving the theoretical conflict between *Roe* and *Stanley* there have been parallel mother-father disputes in the law which may be helpful to this analysis. The first relevant principle found in the common law is that the husband as well as the wife has legal interests in the offspring. Secondly, the father, if another man is married to the mother, has no legal interest in the offspring.⁷⁰ Moreover, whatever legal interests either the husband or father has in some matters concerning the offspring, he traditionally has no legal right with regard to the decision whether or not the fetus should be aborted.⁷¹

However, the uniformity of these views is merely a recognition of and response to certain pervasive societal assumptions. The unquestioned different life roles of men and women—perhaps suggested by the different penalties which Adam and Eve had to pay for eating the forbidden fruit⁷²—had the support of social structure, biblical teaching, and even the law. In the words of the Supreme Court:

67 See Jordan & Little, *Early Comments on Single-Parent Adoptive Homes*, 45 CHILD WELFARE J. 536. All of these single-parent adoptions had been to lone women and were considered "successful" by the agency. Since the time of that writing, a number of men made single-parent adoptions, all of which were also considered "successful." Telephone conversation between this writer and Velma Jones, District Case Director of the Los Angeles County Bureau of Adoptions. See, also the single-parent adoption of Dojo and Kwame Odo noted in 11 Ms. 55 (May, 1974).

68 Tribe, *supra* note 5, at 40. See Note, *Sex Discrimination in Employment: An Attempt to Interpret Title VII of the Civil Rights Act of 1964*, 1968 DUKE L.J. 671, 722:

Because the maternal function is so basic to the female biological-cultural role, penalizing the fulfilling of that role seems an undeniable discrimination, at least where men are not similarly required to surrender part of their basic cultural role. (Emphasis added.)

69 This latter possibility is raised and evaluated in Thomson, *A Defense of Abortion*, 1 PHILOSOPHY & PUB. AFFAIRS 47 (1971), and is labelled as "positively indecent." *Id.* at 65-66. The point is, of course, that in following an "across the board" approach, courts deciding mother-father abortion disputes must sanction an abortion desired for even this reason.

70 Comment, *supra* note 30, at 116; Note, *supra* note 55, at 1.

71 Means, *supra* note 30, at 34. But see note 50 *supra* and accompanying text.

72 That is, apparently God's intent is to punish Adam and Eve severely, in a way central to their existence. Adam is cursed to the pain of gathering subsistence only through great toil and effort. Eve is cursed to the pain of childbirth. *Genesis* 3:16-19.

[L]aw, as well as nature herself, has always recognized a wide difference in the respective spheres and destinies of man and woman. . . . The constitution of the family organization, which is founded in the divine ordinance, as well as the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood. . . . The paramount destiny and mission of woman are to fulfill the noble and benign office of wife and mother. This is the law of the Creator.⁷³

This is the traditional view, the stereotype reinforced by both the civil and common law. However, in the last several decades, such thinking has increasingly been challenged and, particularly in the last five years, these challenges have become successful. Despite women's "natural delicacy,"⁷⁴ a federal district court ruled in 1969 that it was an error for the trial judge summarily to forbid consideration of women for service on a jury which was being empanelled to hear a malpractice suit involving cancer of the groin.⁷⁵ Despite long-standing traditions, laws automatically preferring men over women as disposers of estates,⁷⁶ certain regulations based on the assumption that men are the financial supporters of their families,⁷⁷ laws barring women from particular occupations open to men,⁷⁸ laws requiring job-leave for pregnant women,⁷⁹ as well as other protective laws⁸⁰ have all failed to pass constitutional scrutiny.

Although not so consistently, men also have had success in overcoming the sexual stereotype. For example, it is now possible for widowers to receive benefits under the Social Security Act.⁸¹ The view that fathers cannot be and do not want to be vitally concerned with the upbringing of their children was laid partially to rest with official recognition of a father's claim for a child-rearing leave.⁸² The prejudice that fathers cannot care for their infant children was set aside in three instances where placement of the infant with the unwed father was preferred to placement with the state,⁸³ placement with maternal relatives,⁸⁴ or placement with a promiscuous mother.⁸⁵ Even the view that fathers have no place in deciding upon abortions has been questioned: A husband was permitted to bring a civil action against an illegal abortionist because of the husband's

73 *Bradwell v. Illinois*, 83 U.S. (16 Wall.) 130, 140 (1873) (Bradley, J., concurring).

74 *Id.* at 141.

75 *Abbott v. Mines*, 411 F.2d 353 (6th Cir. 1969).

76 *Reed v. Reed*, 404 U.S. 71 (1971).

77 *Frontiero v. Richardson*, 411 U.S. 677 (1973).

78 *See Sail'er Inn, Inc. v. Kirby*, 5 Cal. 3d 1, 485 P.2d 529, 95 Cal. Rptr. 329 (1971).

79 *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632 (1974).

80 *See Schattman v. Texas Employment Comm'n*, 330 F. Supp. 328 (W.D. Tex. 1971), *rev'd*, 459 F.2d 32 (5th Cir. 1972), *cert. denied*, 409 U.S. 1107 (1973); Equal Employment Opportunity Commission Guidelines, 29 C.F.R. § 1604.1(a) (1973).

81 *Rosen, Widower Wins: Benefits for Men*, Civil Liberties (Newsletter of the American Civil Liberties Union), March, 1974, at 4, cols. 1-4.

82 *Id.*

83 Reported in *Young GI's Victory—Custody of Son*, San Francisco Chronicle, March 8, 1973, at 1, col. 1.

84 *In re Zink*, 264 Minn. 500, 119 N.W.2d 731 (1963).

85 *Fee v. Fee*, 11 Mich. App. 593, 162 N.W.2d 95 (1968); *Morrissey v. Morrissey*, 182 Neb. 268, 154 N.W.2d 66 (1967).

marital and paternal interests,⁸⁶ despite the fact that the wife had consented to the abortion.

This lower court activity, however, constitutes but a chipping away at the edges. The basic rule remains: "Of course, the rule must be that the abortion decision must be the woman's decision—the man has no place here."⁸⁷ The continued strength of this view can be seen in *Coe v. Gerstein*⁸⁸ and *Jones v. Smith*.⁸⁹ In these two recent cases, fathers sought to prevent abortions. In both cases the fathers lost since the court assumed an almost absolute right of privacy to the woman⁹⁰ and operated from the unarticulated premise that fathers could not have substantial interests in preventing abortions. They reasoned that even if such interests existed, *Roe* forbade the state from enforcing them at least until viability,⁹¹ and acted as if *Roe's* footnote 67 scarcely existed.

A closer look at the facts of *Jones* more clearly focuses this unarticulated premise. Mr. Jones, 27 years old and the admitted father, wished to marry Miss Smith and take on all obligations toward the unborn child. She did not, however, wish to marry Mr. Jones or bear the child.

Mr. Jones claimed that the abortion would deny him the companionship of his son or daughter and, further, that the abortion would be disastrous to his mental health. He presented a psychiatrist who testified supporting his claim. Miss Smith presented no psychiatrist to rebut that testimony, nor did she raise any claim about her own health, either mental or physical.⁹² The three-judge court, relying on an arguably erroneous reading of *Roe*, unanimously held for Miss Smith.

This exclusivity of the mother's decision and total disregard for the claims of the father is a fundamentally sexist expression. It is this sexist language which belies new realities. In some families, as one study observes: "Husbands and wives are joint homemakers and joint wage earners. Men care for babies, women manage family finances . . . [M]any husbands wish to attend ante-natal classes with their wives, and take a keen interest in the physiology of pregnancy."⁹³ Such a husband as this, continues another source, "is no longer an outsider but rather part of a team, which does seem to entitle him to follow the entire procedure through from beginning to end."⁹⁴ Thus far, the courts have not acknowledged this expanded male role.

However, the most recent decision may signal the beginning of a change.

86 *Touriel v. Benveniste*, Civ. No. 766790 (Los Angeles County Super. Ct., Oct. 20, 1961). See also 14 STAN. L. REV. 901 (1962); 110 U. PA. L. REV. 908 (1962). Cf. *McCandless v. New York*, 3 App. Div. 2d 600, 162 N.Y.S.2d 570 (1957); *Herko v. Uviller*, 203 Misc. 108, 114 N.Y.S.2d 618 (Kings County Sup. Ct. 1952).

87 Means, *supra* note 30, at 428-29.

88 376 F. Supp. 695 (S.D. Fla. 1974).

89 278 So. 2d 339 (Fla. Dist. Ct. App. 1973).

90 *Id.* at 341-42.

91 376 F. Supp. at 697-98.

92 Cf. *Murray v. VanDevander*, 522 P.2d 302 (Okla. Ct. App. 1974). Here the Oklahoma court held for the physician in performing the medically advisable hysterectomy, which had the wife's consent, but not the husband's. The husband strongly opposed the operation, since it would mean that his wife could no longer bear a child. Because of the medical considerations, the case was probably decided correctly.

93 P. FLEURY, *MATERNITY CARE: MOTHER'S EXPERIENCES OF CHILDBIRTH* 93-94 (1967).

94 S. DELEE, *supra* note 74, at 35.

*Doe v. Doe*⁹⁵ was decided by the Massachusetts Supreme Judicial Court on July 3, 1974. Mr. Doe, arguing for the companionship of his child, sought to prevent his wife's abortion. He was defeated by the same misreading of *Roe's* footnote 67, the same disregard of *Stanley*, and the same disregard of changing social roles, which had defeated Mr. Coe and Mr. Jones. The difference in *Doe v. Doe*, is that, for the first time on this subject, the court was not unanimous.

While agreeing with the court's decision not to prevent the abortion, Judge Hennessey in his dissent in part, asserts that the father does indeed have fundamental rights and that *Roe* did not strip away those rights. In a separate dissent, Judge Reardon asserts that the *Roe* privacy is not absolute and must be weighed against other interests. He acknowledges the fact that a particular father may have such a compelling interest, sees *Roe* as not altering this since it dealt with the interests of the state rather than of the father, deplores the lack of legislative guidelines to help judges in balancing the interests of the father and the mother, and recognizes the obligation of courts to undertake that delicate balancing. Judge Reardon's dissent correctly reads the law and relevant social changes and, at last, judicially recognizes the rights of the father.⁹⁶

VI. Conclusion

The proper goal must be not to give women a better status within the traditional stereotype but to shatter the stereotype. *Stanley* was not merely a victory for men's rights, nor were *Reed v. Reed* and *Frontiero v. Richardson* merely victories for women; all three were victories for individuals whose rights should not be a function of sex. Professor Kanowitz has recognized that fathers, too, are victimized by sexism:

In thousands of ways, in law, social mores, employment pattern, and psychological health, males are victims, along with women, of a system that arbitrarily assigns roles on the basis of sex. . . . [M]any people now see the issue as one of a more rational and humane allocation of social roles without regard to sex rather than one as simply involving women's rights.⁹⁷

This commentary expresses the hope that our courts will recognize this expansion of the battle for equal rights and will accordingly allocate legal protection to fathers.

95 — Mass. —, 314 N.E.2d 128 (1974).

96 In a telephone conversation with Mr. Mark I. Benson, Mr. Doe's attorney, the author was told that no appeal of the case was planned. Judge Reardon's position will have to await another case for vindication.

97 KANOWITZ, *The Male Stake in Women's Liberation*, CALIF. W. L. REV. 424, 427 (1972). This view has been expressed by many leaders of the women's rights movement. *E.g.*, "The first significant discovery we shall make as we racket along our female road to freedom is that men are not free . . ." G. GREER, *THE FEMALE EUNUCH* 328 (1971). "What I am trying to say is, please don't use any differences in biology or physiology to prevent me from doing the things I can do." Testimony of Jean Faust, Legislative Assistant to Representative William Fitz Ryan, *Hearings on H.R. 208 before Subcomm. No. 4 of the House Comm. on the Judiciary*, 92d Cong., 1st Sess., at 103 (1971). See also B. JONES & J. BROWN, *TOWARDS A FEMALE LIBERATION MOVEMENT 2* (no date); Johnston, *Sex and Property: The Common Law Tradition, the Law School Curriculum and Developments Toward Equality*, 47 N.Y.U.L. REV. 1033 (1972).