

ARTICLES

CUSTODY AND COUVADE: THE IMPORTANCE OF PATERNAL BONDING IN THE LAW OF FAMILY RELATIONS

GEOFFREY P. MILLER*

*“Il se met au lit quand sa femme est en couche”*¹

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Among the Indian tribes of Guiana, the father, upon birth of a child, takes to his hammock as if he were ill and receives the condolences and congratulations of friends. New fathers of the South American Abipone tribe huddle among mats and skins, abstaining from food.² Among the New Guinea highlanders, men restrict their activities and refrain from hard labor.³ In other cultures, men go

* Professor of Law, New York University Law School. B.A., 1973, Princeton University; J.D., 1978, Columbia University. For suggestions, comments, and criticism, I would like to thank Amy Adler, Mary Anne Case, and Oscar Chase.

1. Traditional French saying, “[H]e takes to his bed when his wife is in labor,” quoted in WARREN R. DAWSON, *THE CUSTOM OF COUVADE* 12 (1929).

2. See LILLIAN EICHLER, *THE CUSTOMS OF MANKIND, WITH NOTES ON MODERN ETIQUETTE AND THE NEWEST TREND IN ENTERTAINMENT* 614 (1924).

3. See Anna Stokes Meigs, *Male Pregnancy and the Reduction of Sexual Opposition in a New Guinea Highlands Society*, 15 *ETHNOLOGY* 393-407 (1976).

into mock labor along with their wives.⁴ These customs, denominated by anthropologists as "couvade," are found in many pre-industrial cultures, and may have developed spontaneously, rather than being transmitted by cultural diffusion.⁵ They seem to reflect something important about the relationship between men and procreation.

Although couvade customs are absent in industrialized cultures, a related phenomenon remains. In nearly all societies a significant percent of men display pregnancy-like symptoms when their mates are expecting a child—weight gain, nausea, irritability, indigestion, and so on. This "couvade syndrome" is both well-documented and perplexing. Why should men experience sympathetic pregnancies?

As couvade customs attest, men have experienced reactions to procreation since time immemorial. In the last decades of the Twentieth Century, however, technological changes have enhanced men's potential for involvement in procreation. Advances in medical science have enhanced men's role in conception itself through participation in contraception and involvement in assisted reproduction procedures. During pregnancy, men now have much greater access to the fetus through amniocentesis, chorionic villum sampling, and sonographic imaging. Expectant fathers are participating in childbirth classes as "coaches" to their wives or girlfriends. They attend labor and delivery, and hold their newborns within minutes of birth. During infancy, men bottle feed their children and help with breast feeding. Men, moreover, enjoy parental leave rights and often have flexible work schedules that enhance their nurturing and care-taking capacities.

American culture has tended to discount or ignore men's capacity and need for involvement in conception, pregnancy, childbirth, and infant care. Prior to 1980, there were virtually no scientific studies on fatherhood. Procreation was seen as the province of mothers and medical personnel. Beginning in the 1980s, however, the cultural blinders began to lift, partly as a result of the influence of feminist studies throughout the social sciences.⁶ Fatherhood became an issue for the culture, instead of an assumption. Over the past twenty years, psychologists, psychoanalysts, sociologists, anthropologists, physicians, nurses, and historians—among others—have investigated the male procreative role from a variety of theoretical perspectives. Running through this literature is a common theme: the importance of paternal bonding.⁷ This new understanding of the

4. See WARREN R. DAWSON, *THE CUSTOM OF COUVADE* 1 (1929).

5. Couvade rituals have been observed in tribal cultures all over the world, with the exception of Australia. See Lennart Y. Bogren, *Couvade*, 68 *ACTA PSYCHIATRICA SCANDINAVICA* 55, 56 (1983).

6. See Katharyn Antle May & Steven Paul Perrin, *Prelude: Pregnancy and Birth*, in *DIMENSIONS OF FATHERHOOD* 68-69 (Shirley M.H. Hanson & Frederick W. Bozett eds., 1985) (research on the father's role in procreation began during the 1970s as a result of feminist insights and the popularity of prepared childbirth classes).

7. In its technical form, "bonding" means a "unique relationship between two people that is specific and endures through time." MARSHALL H. KLAUS & JOHN H. KENNEL, *BONDING: THE*

father's role recognizes the power of the man's emotional connection with his offspring, and the profound reorientation of self that a man experiences when he assumes the role of "father."

The remarkable growth of knowledge about fatherhood and the male role in procreation has not, to date, filtered into American law or legal scholarship. Instead, judicial decisions and academic commentary reflect an anachronistic model grounded in questionable stereotypes of masculinity. These stereotypes paint the male role in procreation as minimal: the man makes a brief appearance at conception and then retires to a safe distance until after birth, when he gradually re-enters the picture and, over a period of years, develops a relationship with his children.

In this Article, I argue for a re-conceptualization of early paternal bonding in the law of family relations.⁸ Drawing on recent scholarship in the social sciences, I argue that the capacity for paternal bonding in both of its aspects—relatedness to the fetus or infant, and adjustment of the concept of self into the paternal role—has not been fully appreciated in the legal treatment of abortion rights, adoption of children born out of wedlock, and adjudication of custody and visitation in divorce. Each of these areas could profit from a better understanding of the importance of paternal bonding in pregnancy and early childhood.

Part I of this Article discusses the traditional concept of the "minimal father"—the view of the man's role in procreation that pervaded American culture during the middle of the Twentieth Century and that still influences popular attitudes today. Part II traces the male experience of procreation through contraception, conception, pregnancy, abortion, perinatal death, labor and delivery, and early childhood care. Part III examines legal controversies in three areas: the expectant father's role in abortion, rights of unwed fathers in adoption, and issues related to custody and visitation. The Article ends with a brief conclusion.

I. TRADITIONAL VIEWS OF FATHER-CHILD BONDING

For many years, and to some extent even today, a popular assumption had it that fathers play only a minimal role in pregnancy, childbirth, and infant care. This assumption seems to reflect cultural attitudes of earlier generations in the United States and elsewhere, when men were largely excluded from the circle of

BEGINNINGS OF PARENT-INFANT ATTACHMENT 2 (1983). Stated from the perspective of a person's internal experience, the term denotes some relatively powerful connection between self and object, or a reorientation of the self that makes such an object relation possible.

8. I treat only the issue of bonding during conception, pregnancy, birth, and the first few months of the baby's life. I deal with later childhood only insofar as the issues in dispute relate to bonding during this period of pregnancy and early childhood. I also do not address the question David Chambers raised in 1984, as to whether fathers who had not previously served as primary parent can competently assume that role if granted custody in divorce. See David L. Chambers, *Rethinking the Substantive Roles for Custody Disputes in Divorce*, 83 MICH. L. REV. 477 (1984).

intimacy surrounding procreation. For many men, those conditions no longer reflect reality: men play an active role throughout the procreative experience. Nevertheless, the cultural stereotype of the distanced father continues to exert sway.

If we examine images of pregnancy and childbirth during early post Second World War period, we find a set of values, myths, and narratives that have influenced the way in which procreation is conceived and treated by the culture. The effect of this social script was to separate men and women in the procreative process, and to leave men (other than male doctors, who had a special dispensation) out of the cycle of information and decision. Pregnancy and childbirth were a woman's domain.

This cultural script included distinctive rituals for different stages of pregnancy. The first ritual was the Announcement, which took its classic form during the first pregnancy. The tradition was that the woman would notice a missed period and suspect that she might be pregnant. Husbands, who didn't make a habit of tracking their wives' menstrual cycles, would usually be unaware. Often, the wife wouldn't tell the husband of the missed period, either out of modesty or because she didn't want to raise false hopes. She would go to the doctor while he was at work. When the happy news came back, she would disclose it to her husband in some special setting, knowing that this moment would be something they would look back on in future years. The Announcement may not have taken the form of Gabriel's trumpet or a star in the heavens, but for each couple, it was a profound and defining event. The husband's scripted response was to radiate joy and confusion, and to look on his wife in a new way—not as sexual object, but rather as a mother to his future children. His role was then to bask in his potency and to work hard at being a “good provider.”

These cultural rituals are illustrated in the story of Lucy Ricardo's pregnancy and the birth of “Little Ricky,” which aired on *I Love Lucy* in 1952-53. In the episode, “Lucy is Enciente,”⁹ an obviously pregnant Lucy complains to her friend Ethel that she's feeling “all dragged out in the morning” and that she's been “putting on a lot of weight.” When Ethel suggests that she might be “going to have a baby” (the word “pregnant” is never spoken; even the title of the episode substitutes the Spanish as a euphemism), Lucy dismisses the idea (leaving the audience to conclude that Lucy must be oblivious to her own menstrual cycle!). Without telling Ricky, on the ground that she doesn't want to worry him, Lucy sees a doctor and finds that she is indeed expecting. She says: “All my life I dreamed about how I was going to tell my husband when we were going to have a baby . . . ‘Ricky, darling, our dream has come true. You and I are going to be blessed with something that means more to us than anything in the whole world.’” A series of misadventures delays the realization of Lucy's dream, but the news finally comes out as Ricky is performing his act at the Tropicana Club. Lucy, who is sitting alone at a table near the bandstand, seems both part of this

9. *I Love Lucy: Lucy is Enciente* (CBS television broadcast, Dec. 8, 1952) (available at the Museum of Television and Radio, New York).

environment and distinct: one can almost sense her abstraction from the excitement of Ricky's world and her increasing focus on her body and on the fetus growing there. Ricky, acting out the cultural script, inadvertently discloses how he will see his wife from this moment forward: he tells the audience, "I want you to meet my mother—I mean, my wife, my wife!" Even though he is flustered, he is also centered in his masculine role, as befits a husband who has just received confirmation of his potency: virile, handsome, and belting out *Lady in Red* to an appreciative crowd.

According to the traditional script, the woman would become increasingly centered in her body as her pregnancy progressed.¹⁰ She would be gripped by deep calm and happiness. Her thoughts would concern the future that she was "expecting." This focus on the anticipated event was reinforced through social rituals. Baby showers made the mother-to-be feel special but also reinforced the sense that she now was living for someone else; the gifts would usually be baby blankets, diapers, formula, and so on. As she approached her term, she would begin to receive deference in ordinary interactions. Whereas as a young woman she might not expect anyone to give up a seat on a bus or subway, she now found herself regularly receiving such offers. Meanwhile, acquaintances and even strangers felt entitled to speak with her about her pregnancy, asking her when she was due, telling her of their own experiences, and so on. Her whole social environment changed.

For men, few of these rituals occurred. Expectant fathers were usually uninformed about the physiological changes that were occurring to their wives. They would not accompany their wives to the obstetrician. Especially if they were first time fathers, they would not know what to expect from the pregnancy. They might not know the due date. They had little concept of labor and delivery. They did not receive baby showers and were not even invited to their own wives' showers. Their physical appearance did not change much, and they would not receive any particular deference or acknowledgment (other than ribbing from buddies). They were expected to carry out their good provider role at the workplace and to return home reliably in order to help manage their wives' "delicate condition." This might mean trips to the delicatessen to gratify food cravings (Ricky gets Lucy a dill pickle and a mango milkshake)—chivalric quests that signaled his wish to be a father even though he didn't really know what was involved. According to the script, what men did know, but might not admit, was that they hoped for a boy. Men dreamed of teaching their boys the ways of masculinity and of living vicariously through their sons' athletic prowess, just as mothers thought of sharing feminine intimacies with a daughter. In *I Love Lucy*, Ricky, hoping for a son, brings home a football and boxing gloves; Lucy buys a

10. As D.W. Winnicott puts it, "[T]he direction of her interest turns from outwards to inwards. She slowly but surely comes to believe that the center of the world is in her own body." KLAUS & KENNELL, *supra* note 7, at 8 (quoting Winnicott). In *I Love Lucy*, this process is symbolized by Lucy's centering herself on the living room couch and knitting. See *I Love Lucy: Lucy Hires an English Tutor* (CBS television broadcast, Dec. 24, 1952) (available at the Museum of Television and Radio, New York).

ballet skirt.

The climax of the pregnancy narrative in post-war American culture was labor and delivery. As the blessed event approached, the mother-to-be was supposed to pack a bag and leave it near the front door where it would not be forgotten. When her labor pains came on, she would somehow “know” it was time to go to the hospital. Her husband would rush her across town, spurred by fear that she would give birth in the back seat of the station wagon. Once at the hospital, he would kiss her goodbye in the main waiting room and watch her being escorted to the lying-in area. Often, he’d return to work and await the news over the telephone. If he did stay at the hospital, he would be barred from the labor and delivery rooms, being relegated instead to a “father’s waiting room,” where he would pace the floor, smoke, drink bad coffee, ineffectually attempt conversation with other men, and leaf through dog-eared copies of *Reader’s Digest*. The architecture of the father’s waiting room symbolized the role assigned to fathers: typically, the room would be separated from the lying-in part of the hospital by a large pane of glass. The father would hear about the birth from a nurse who would convey the two pieces of information that really mattered: the baby’s sex and health. A nurse would display the swaddled newborn from behind the viewing glass; the father could look, but could not touch. At first sight of his baby, he would experience an overpowering mixture of elation and confusion, a sense of being both powerful and powerless at the same time.

These stereotypes are explored in the classic *I Love Lucy* episode about the birth of Little Ricky.¹¹ A forbidding nurse sends the anxious Ricky to the men’s waiting room, where his tension contrasts with the complacency of the other expectant father, Mr. Stanley, a man whose enthusiasm for fatherhood has been dimmed by the fact that his wife’s six previous pregnancies all resulted in girls.¹² Ricky performs the rituals of pacing, smoking, leafing through magazines, and feebly attempting to converse with Mr. Stanley. Eventually he returns from the emasculating milieu of the lying-in hospital to a reassuring terrain of male competence and strength: the Tropicana, where a male chorus of musicians awaits him. He’s doing a voodoo number in war paint and a tribal wig. He’s savage, primal, resembling nothing so much as that “large primitive being covered with hair down to his feet” that Robert Bly claims lies at the bottom of every man’s psyche.¹³

When the call comes in, Ricky rushes to the hospital and is nearly arrested by a policeman who thinks that he might be deranged. A nurse brings Little Ricky out for viewing through the window of the father’s waiting room. Ricky, who’s at the back, can’t see past the others who are crowding around. He slowly

11. *I Love Lucy: Lucy Goes to the Hospital* (CBS television broadcast, Jan. 19, 1953) (available at the Museum of Television and Radio, New York).

12. In a subplot, Mr. Stanley’s blasé attitude is shattered when the nurse tells him that this time he did not have a girl; he’s temporarily delirious with joy until he finds out that what the nurse means is that he’s had triplets—all girls. *See id.*

13. ROBERT BLY, *IRON JOHN* 6 (1990).

approaches the viewing window—and faints dead away from the emotion of seeing his firstborn son. The scene captures both the new father's atavistic sense of masculine validation (symbolized by Ricky's tribal costume and war-paint), and his equally powerful feeling of being overwhelmed and out of control (symbolized by his collapse at the mere sight of Little Ricky through a glass partition).

During the extended hospital stay, which would last up to three days, the father would go to work, visit the mother and baby in the hospital, and go home. An older female relative might stay over during this time to care for the father and to prepare the house for the arrival of mother and baby. The father would hand out cigars to male colleagues and friends. The symbolism of the cigar is hard to miss at one level: even if, as Freud said, sometimes a cigar is just a cigar, in the case of a father announcing the birth of his child, the phallic implications are hard to gainsay. The act had other meanings as well: it signaled the father's potency, but also symbolized his minimal involvement in procreation. The man inseminated the woman and nine months later handed out cigars in a ritual display, but what happened in between was not his department.

After the birth of the child, the father was supposed to return to his usual schedule. During the first few months, a nurse or grandmother might live in the house and help out. The husband would provide what help he could, but mostly he would expect to go on as before, or even work harder in his good provider role in order to bring in the extra income that the baby's arrival demanded. The mother, meanwhile, would abandon her former activities and devote herself full time to the care of the baby. Over time, the father would take more of an interest in the child, especially when he or she learned to talk. But even then, during the early years of childhood, the father would be more distant than the mother: he would be the dad of *Father Knows Best*—kind, firm, authoritative, occasionally indulgent and somewhat austere, but never deeply warm or intimate.

II. THE FATHER'S CAPACITY FOR CONNECTION WITH THE FETUS AND NEWBORN

The traditional American stereotype of the minimal father underestimated the importance of men's involvement in procreation. The fact is that men are not minimally involved in procreation. They have a highly developed capacity for bonding with their children and for adjusting their self-concept to include a paternal role. Paternal bonding has been part of the human condition at least since people realized that men are necessary for procreation.¹⁴ Added to this apparently innate capacity for bonding, in recent times, is the impact of technology, which has provided unparalleled opportunities for men to become emotionally involved in procreation. This Part addresses the role of

14. When knowledge of physiological paternity is absent, the paternal bond appears to be weaker. See BRONISLAW MALINOWSKI, *THE FATHER IN PRIMITIVE PSYCHOLOGY* 12 (1927) (because Trobriand Islanders were ignorant of the male role in procreation, men had "no bond of union whatever" with their children).

contemporary men in the various stages of procreation: contraception, conception, pregnancy, abortion, perinatal death, labor and delivery, and infant care.

A. Contraception

Men play a role in contraception.¹⁵ Most obviously, they participate in abstinence. Men also have principal responsibility for withdrawal, a technique that depends on the man's self-control and responsibility.¹⁶ Some contraceptive technologies also require the man's participation.¹⁷ Condoms are usually his responsibility: it is usually his job to obtain, store, and properly use these devices.¹⁸ The diaphragm has traditionally been the woman's preserve, but men are aware of the technology because the woman may need to break off a sexual encounter in order to insert it and because an improperly positioned diaphragm may interfere with sex. A man might also assist by applying spermicide or inserting the diaphragm for the woman. The birth control pill and the intrauterine device, on the other hand, limit a man's involvement in contraception. Male responsibility would increase, however, if a male birth control pill enters the market.

Both men and women can prevent pregnancy through sterilization. For men, the procedure is a vasectomy. The surgeon incises the scrotal sac and blocks the sperm ducts so that sperm does not enter the semen.¹⁹ For women, the

15. See NORMAN E. HIMES, *MEDICAL HISTORY OF CONTRACEPTION* (1936); ANGUS MCLAREN, *A HISTORY OF CONTRACEPTION: FROM ANTIQUITY TO THE PRESENT Day* (1990); WILLIAM MARSIGLIO, *PROCREATIVE MAN* 32 (1998); Sharon R. Edwards, *The Role of Men in Contraceptive Decision-Making: Current Knowledge and Future Implications*, 26 *FAM. PLAN. PERSP.* 77 (1994).

16. See Deborah Rogow & Sonya Horowitz, *Withdrawal: A Review of the Literature and an Agenda for Research*, 26 *STUD. IN FAM. PLAN.* 140, 144 (1995) (practice "requires a man to maintain awareness of when he is about to ejaculate and to withdraw his penis from his partner's vagina prior to doing so").

17. See Edwards, *supra* note 15, at 77.

18. Condom use declined with the introduction of the birth control pill and the intrauterine device in the 1960s, see Koray Tanfer et al., *Condom Use Among U.S. Men, 1991*, 25 *FAM. PLAN. PERSP.* 61, 61 (1993), but have returned to popularity during the AIDS crisis. See John S. Moran et al., *Increases in Condom Sales Following AIDS Education and Publicity, United States*, 80 *AM. J. PUB. HEALTH* 607-09 (1990); Tanfer et al., *supra*. Although women are taking a more active interest in condom use, the device is still largely a male responsibility. See John E. Anderson et al., *Condom Use for Disease Prevention Among Unmarried U.S. Women*, 28 *FAM. PLAN. PERSP.* 25 (1996); Vaughn I. Rickert et al., *Adolescents and AIDS: Females' Attitudes and Behaviors Toward Condom Purchase and Use*, 10 *J. ADOLESCENT HEALTH CARE* 313 (1989). Fathers traditionally hid condoms among their personal effects where, if they were found by children, they would symbolize the mystery of his potency.

19. See John L. Pfenninger, *Preparation for Vasectomy*, 30 *AM. FAM. PHYSICIAN* 177 (1984).

sterilization procedure of choice is tubal ligation, a cutting, tying, or blocking of the fallopian tubes.²⁰ When the woman is sterilized, the man has less of an involvement, but he may participate in her decision to become sterilized and may provide emotional and logistical support during the procedure.

B. Conception

Men have played a socially recognized role in conception in every culture that understands physiological fatherhood. However, that role has tended to be both brief and thoroughly subsumed in the society's construction of sexuality. Because conception is not observable or immediately verifiable, and because a high percentage of ejaculations do not cause pregnancy, human cultures have not found a means to ritualize the event for ordinary people. However, modern technologies, most of them introduced during the past generation, have partially overcome these limitations. Conception can be detected quickly and can be manipulated by doctors. One consequence is that men can participate in procreation from the outset of pregnancy. In the process, they can experience early feelings of connection with the fetus and with their paternal role.

The widespread availability of cheap, reliable home pregnancy tests brings the man much more into the action at the beginning. Even when a woman is a few days late with her period, she can get a preliminary result in minutes. The man can be a part of this process: he can go to the pharmacy for the test kit, review the instructions and join in reading the results. The "joyful news" that women in earlier days imparted to their husbands in rituals of annunciation can now be communicated through a line appearing on a test strip. Although such an announcement is neither as dramatic nor as romantic as Lucy Ricardo believed it would be in 1952, it does make the father, along with the mother, the "first to know."

When the couple are having fertility problems, men play an even more central role. The couple are likely to resort first to low-tech measures for timing intercourse to coincide with ovulation—charting the woman's basal body temperature, using over-the-counter test kits to predict when ovulation occurs, and so on. The husband must coordinate his sexual activities to accommodate his wife's cycle.²¹

If low-tech measures fail, the husband's involvement increases. To determine the cause of infertility, the physician examines both the man and the

20. See THE MERCK MANUAL OF MEDICAL INFORMATION, HOME EDITION 1127-28 (1997) [hereinafter MERCK MANUAL]. Traditional tubal ligation requires an abdominal incision and a general or regional anesthetic. Laproscopic techniques, however, have reduced the trauma from the procedure, allowing many women to return home without an overnight hospital stay. In some cases, especially when other problems are present, a woman can be sterilized by surgical removal of the uterus (hysterectomy) or ovaries (oophorectomy).

21. See generally ARTHUR L. GREIL, NOT YET PREGNANT: INFERTILE COUPLES IN CONTEMPORARY AMERICA (1991); Liz Meerabeau, *Husbands' Participation in Fertility Treatment: They Also Serve Who Only Stand and Wait*, 11 SOC. OF HEALTH AND ILLNESS 396-410 (1991).

woman. The man is usually asked to masturbate into a sterile container so that his sperm can be counted and evaluated.²² Although women traditionally bore the blame for infertility, it turns out that in approximately two-fifths of the cases, the problem lies in the man's production or delivery of sperm.²³ Being assigned responsibility for infertility may cause the man to feel anxious and inadequate, but is also likely to enhance paternal bonding if assisted reproduction is successful.

The couple participating in an assisted reproduction program may be required to have intercourse when the woman is ovulating and then dash to the physician's office so that a sample of the woman's cervical mucus can be taken.²⁴ The man becomes part of an engrossing medical drama in which he may feel a degree of empowerment because of its technical and scientific aspect. Even if the woman remains the defined patient, the man plays an important role.

If tests indicate a problem for either spouse, the physician may attempt in vitro fertilization, a process in which an egg is fertilized in a laboratory dish and then implanted in mother's uterus or fallopian tubes.²⁵ Sperm for in vitro fertilization is usually obtained by masturbation. If this does not work, the physician turns to more sophisticated techniques. In microsurgical epididymal sperm aspiration, the surgeon incises the epididymis (the coiled network of tubules that sits atop each testicle),²⁶ and aspirates the epididymal fluid with a micropipette.²⁷ In percutaneous epididymal sperm aspiration, the sperm is harvested from the epididymis by means of a micropipette inserted through the scrotum, eliminating the need for a surgical opening under general anesthesia.²⁸ In testicular sperm extraction, a piece of testicle is cut out, minced, and centrifuged.²⁹ Eggs for in vitro fertilization are obtained by inducing multiple ovulation through drug therapy and aspirating the ovarian follicles with a needle

22. See BRIAN KEARNEY, *HIGH-TECH CONCEPTION: A COMPREHENSIVE HANDBOOK FOR CONSUMERS* 18 (1998). For an interesting discussion of how fertility clinics fail to provide men with a validating and reassuring venue for sperm contribution, see Yoram S. Carmeli & Daphna Birenbaum-Carmeli, *The Predicament of Masculinity: Towards Understanding the Male's Experience of Infertility Treatments*, 30 *SEX ROLES* 663, 671 (1994) (stating that men found the requirement that they masturbate at reproduction clinics to be stressful and embarrassing).

23. See KEARNEY, *supra* note 22, at 112.

24. See *id.* at 18. The test evaluates whether the man's sperm has the ability to swim through the mucus. See *id.*

25. In vitro fertilization began in 1978 with the birth of Louise Brown, the first "test-tube baby." Over a hundred thousand babies have been conceived around the world from this method, or one of its variants, in the years since. See *id.* at xvii.

26. See *id.* at 7.

27. See *id.* at 129.

28. See *id.* at 130. The downside of this procedure is that the surgeon must operate "blind" and may nick nearby tissues.

29. See *id.* A disadvantage of testicular sperm extraction is that the harvested sperm are immature and thus have lower motility. See *id.*

guided by an ultrasound wand.³⁰ The father may be allowed to accompany his partner during this procedure.³¹ If either partner is unable to supply a viable gamete (sperm or egg), the couple may use a donor. They visit an egg or sperm bank and shop for the child's genes, considering factors such as race, ethnic background, physical type, and intelligence. Although this process may be stressful for the infertile partner who knows that he or she will not be the biological parent,³² the couple's cooperation can bring both of them into the pregnancy before conception.³³

Once sperm and egg are obtained, fertility specialists unite them. The sperm may simply be placed near the egg on the laboratory dish, but if this doesn't work, the physician may use micromanipulation techniques. In partial zona dissection, the technician opens the zona pellucida—the covering around the egg that protects against fertilization by more than one sperm—in order to allow the sperm better access; in subzonal insemination, a tiny needle is used to inject the sperm through the zona pellucida, but the sperm is not inserted into the egg; in intracytoplasmic sperm injection, the “ultimate development of micromanipulation,” a physician injects a single sperm cell into the center of an egg.³⁴ This process can achieve fertilization even if the father's sperm is deformed, underdeveloped or low in motility.³⁵ If the egg is successfully fertilized in vitro through any of these procedures, the physician implants the embryo into the mother's uterus or fallopian tubes. The male partner may be allowed to witness this procedure. Assisted reproduction has already gained a significant toehold in American medicine and seems almost certain to become more common during the coming years.³⁶

30. *See id.* at 74 (describing use of ovulation-stimulating drugs, such as follicle-stimulating hormone, gonadotropin-releasing hormone, human chorionic gonadotropin, or human menopausal gonadotropin).

31. *See Carmeli & Birenbaum-Carmeli, supra* note 22, at 669 (in Canada, although not in Israel, male partners were allowed to witness ovum retrieval procedures).

32. *See id.* at 674 (men are more threatened by the use of donated sperm than women are threatened by the use of donated eggs).

33. The in vitro procedure does not require either partner to be the biological parent. It is possible for physicians to fertilize another woman's egg in vitro with another man's sperm and then implant the embryo in the womb of the woman desiring to give birth; the embryos involved can be created years before the actual procedure and frozen for subsequent use. This has actually happened. *See Dateline NBC: Profile: Ready Made; New Jersey Couple Has Triplets Through Embryo Adoption* (NBC television broadcast, Sept. 14, 1998).

34. KEARNEY, *supra* note 22, at 112-13.

35. *See id.* at 117.

36. Couples may soon use high-tech procedures to select their children's sex. In September 1998, the Genetics and IVF Institute in Fairfax, Virginia, announced that it had developed a process of sorting sperm by the amount of DNA they contain. *See* Gina Kolata, *Researchers Report Success in Method to Pick Baby's Sex*, N.Y. TIMES, Sept. 9, 1998, at A1. The researchers reported an 85% success rate at selecting for girls and a 65% success rate for boys. While this technique cannot guarantee results, it stacks the deck in favor of the desired sex. If this process is introduced

If the woman is unable to carry a fetus to term, the couple may use a surrogate. The surrogate is artificially inseminated with the father's sperm and gives the baby over to the contracting couple for adoption.³⁷ Surrogacy can work well, but it is costly³⁸ and subject to legal risk.³⁹ In New York, for example, paid surrogacy contracts are illegal and may result in the court's refusing to approve an adoption unless the surrogate disclaims compensation.⁴⁰ These risks can be mitigated if the surrogacy contract is performed in a state with a more positive view of the process.⁴¹ Parties can further reduce their legal risk by using "gestational" surrogacy, in which the surrogate is implanted with an embryo formed in vitro without any of her genetic endowment.⁴² As compared with standard surrogacy, these arrangements are more likely to be legally enforceable,⁴³ and less likely to be repudiated by the surrogate,⁴⁴ but they are also more expensive because of the extra procedures involved.

commercially, it will allow both men and women to plan their families in a way never before thought possible.

37. Surrogacy can also be utilized by male homosexual partners who wish to have a baby with one of them as the birth father. For an example, see Susan Swartz, *SR Woman Carrying Baby for Gay Couple*, SANTA ROSA (CA) PRESS DEMOCRAT, June 28, 1998, at B1.

38. The costs can include both payments of fees and expenses to the surrogate mother and payments to the agency that connects prospective parents with the surrogate. One recent surrogacy contract reportedly ran in the neighborhood of \$20,000. *See id.*

39. *See In re Baby M*, 537 A.2d 1227 (N.J. Sup. Ct. 1988) (upholding the right of surrogate mother to change her mind and keep the child, on ground that contracts for surrogacy were against the state's public policy).

40. *See In re Adoption of Paul*, 550 N.Y.S.2d 815 (N.Y. Fam. Ct., Kings County, 1990) (holding that surrogacy contract violated statutory prohibition on payment of money for adoption, and refusing to allow adoption by surrogate parents unless surrogate mother disclaimed right to promised payment).

41. *See Swartz*, *supra* note 37. California courts hold that surrogacy contracts cannot be enforced against the surrogate by the intended father, *see In re Marriage of Moschetta*, 30 Cal. Rptr. 2d 893 (Cal. Ct. App. 1994), but do not view the contract for surrogacy as illegal in itself.

42. The fetus in gestational surrogacy cases can have any of four backgrounds: (a) father's sperm and mother's egg; (b) father's sperm and donated egg; (c) donated sperm and mother's egg; and (d) donated sperm and donated egg.

43. *See Johnson v. Calvert*, 851 P.2d 776 (Cal. 1993) (upholding parental rights of biological mother and father against claims of gestational surrogate); *Moschetta*, 30 Cal. Rptr. 2d at 903 ("Infertile couples who can afford the high-tech solution of in vitro fertilization and embryo implantation in another woman's womb can be reasonably assured of being judged the legal parents of the child, even if the surrogate reneges on her agreement."). Although legally more secure, gestational surrogacy is more expensive than standard surrogacy, requiring the technology of in vitro fertilization rather than the much simpler—and cheaper—method of artificial insemination.

44. *See* Stephen Smith, *Gestational Surrogates*, NPR MORNING EDITION, Apr. 10, 1998 (available at 1998 WL 3307000) (quoting a gestational surrogate "with this, I just feel like an incubator or a house for the baby to grow and so, it to me is completely different [than a standard surrogacy arrangement.]").

Men are often deeply involved in the surrogacy process. If a man is the genetic father, he may develop a bond with the future child that is even closer than the bond formed by his partner who is not a genetic parent. Regardless of which partner is the genetic parent, moreover, the father may participate in the negotiations and financial transactions incident to the surrogacy arrangement.

Another alternative for infertile couples is adoption. Here, too, the man's role vis-à-vis his partner is heightened as compared with ordinary pregnancy. If the couple adopts from an agency, they will be interviewed by caseworkers to assess their competence and potential as parents. The father as well as the mother must submit to these questions. If the parties adopt privately, the father may still have an important role in the negotiations with the birth mother or her representatives. The adoptive father and mother may be able to attend the birth and enjoy the benefits of early bonding that participation at a birth offers. Increasingly, in recent years, American parents are also adopting abroad.⁴⁵ The prospective parents travel to the country of the adoptive child's birth. They screen candidates for adoption in person or by videotape. The couple may have to live abroad. Both adoptive parents share responsibility for managing stress while these details are sorted out and ensuring that the process is not derailed by bureaucratic snafus.⁴⁶

C. Pregnancy

Pregnancy matters to men. Its significance in a man's life is vividly illustrated by customs of couvade, which are found in many tribal societies, and which have deep historical roots. The term "couvade" is derived from the French or Basque *couver*, meaning to "brew, hatch, or sit on eggs." The connotation is that men share in the experience of pregnancy and childbirth. The term denotes rituals in which the father participates in behaviors that are physiologically natural for the mother during and after childbirth;⁴⁷ these customs "require that the father of a child, at or before its birth and for some time after the event, should take to his bed . . . and behave generally as though he, and not his wife,

45. In 1997, Americans adopted 13,000 children from abroad. See Corin Cummings, *Adopting from Russia: A War of Perceptions*, *RUSSIAN LIFE*, June/July 1998, at 10-17; Gordon Dickson, *Romanian Brothers Move to New Home; An Area Agency Helps a North Richland Hills Couple Adopt Two Young Boys*, *FORT WORTH STAR-TELEGRAM*, Aug. 2, 1998 (Arlington), at 3; Pat Underwood, *Men Go the Distance to Earn Daddy Status*, *ARIZ. REPUBLIC*, June 21, 1998 (East Valley Sunday Community), at EV1.

46. For a compelling story of a couple's experiences with international adoptions, see Dickson, *supra* note 45.

47. See A.L. KROEBER, *ANTHROPOLOGY* 543 (1923). A related custom is the performance by men of rituals in which pregnancy and childbirth are acted out—as in the case of the *pia manadi* dances performed by Carib Indian men, in which the actors assume female dress and act out a Caesarian section performed by a doctor on a pregnant woman. See Robert L. Munroe, *Male Transvestitism and the Couvade: A Psycho-Cultural Analysis*, 8 *ETHOS* 49, 56-57 (1980).

were undergoing the rigours of confinement."⁴⁸ Couvade rituals include practices ranging from the husband's participation in the mother's rest and recuperation, to fasting and dietary controls, to avoidance of work. Although couvade may appear beneficial to the husband, it is not an unmixed blessing: the man often must undergo starvation and endure other austerities.

Couvade customs begin early in a woman's pregnancy. Among the Car Nicobar, husbands do little or no work for a few months before the birth, abstaining from vigorous activities such as felling trees or digging post holes.⁴⁹ Among the Monumbo of Papua New Guinea, expectant husbands are shunned.⁵⁰ In other cultures, expectant husbands restrict their diet in order to ward off miscarriage and birth defects. They may be excluded from activities such as hunting, fishing, or warfare.⁵¹

Couvade typically peaks during labor and delivery. Sometimes, the husband engages in a full-fledged imitation of birth. The husband may pretend to be lying-in, "sometimes even simulating by groans and contortions the pains of labour, and . . . even dressing in his wife's clothes."⁵² Among tribes of Southern India, for example, the husband, on being informed that his wife is going into labor, "immediately takes some of her clothes, puts on his forehead the mask which the women usually place on theirs, retires into a dark room, where there is only a very dim lamp, and lies down on the bed, covering himself up with a long cloth. When the child is born, it is washed and placed on the cot beside the father."⁵³ Ritual items of food are given to the father, not the mother; and, during the days of ceremonial uncleanness, "the man is treated as the other Hindus treat their women on such occasions. He is not allowed to leave his bed, but has everything needful brought to him."⁵⁴ Among the Korama of Mysore, the husband, when his wife's labor pains come on, takes to his bed for three days and takes medicine consisting of chicken and mutton broth spiced with ginger, pepper, onions, and garlic. While a midwife assists the wife, the husband "does nothing but eat, drink, and sleep." After the birth, the clothes of the husband, wife, and midwife are purified.⁵⁵

Couvade rituals continue after the birth of the child. Among the Motu of New Guinea, the husband goes into isolation and fasts.⁵⁶ In Buka, near Bouganville Island, the husband retires to a hut and dozes before the fire for three days, only

48. DAWSON, *supra* note 4, at 1.

49. See HUTTON WEBSTER, *TABOO: A SOCIOLOGICAL STUDY* 79 (1942).

50. See *id.* at 52.

51. See *id.* All sorts of other ritual behavior related to sympathetic magic are also associated with couvade. For example, husbands may avoid turning a lock, in the belief that if he does so the child's fingers will be twisted, or tying a knot, lest his wife experience difficulties in delivery. See *id.* at 49.

52. DAWSON, *supra* note 4.

53. WEBSTER, *supra* note 49, at 79.

54. *Id.* at 79-80.

55. *Id.* at 80.

56. See *id.* at 78.

returning to normal life over a period of weeks or months.⁵⁷ Among the Paraiyans of Travancore, the husband fasts for seven days, eating no cooked rice or other food, but only roots and fruit.⁵⁸ Among the tribes of Guiana, the father is considered to be as unclean as the mother after childbirth, and may have to purify himself by serving an older man for several months.⁵⁹ Similar restrictions on the father's postpartum activities are observed in many other cultures.⁶⁰

One of the most extensive accounts of couvade is Margaret Mead's description of childbirth practices among the Arapesh. In this culture, the verb "to bear a child" is used for both parents, and the burdens of childbirth are considered to be as heavy for the man as for the woman.⁶¹ After the infant is born and washed, the father lies down with the baby by his wife's side and is then said to be "in bed having a baby."⁶² Father and mother fast for the first day.⁶³ If it is a first child, the father must be purified with the aid of an older male sponsor. The father goes into seclusion with his wife for five days, then accompanies his sponsor to a water-side hut, performs rituals of cleaning and drinking, and captures a large white ring, called an "eel," which the sponsor has put at the bottom of the pool. The eel, Mead observes, is symbolically connected to the phallus and thus the ceremony may "symbolize the regaining of the father's masculine nature after his important share in feminine functions."⁶⁴

Explanations for couvade vary.⁶⁵ The most convincing is that the custom is a means by which a father proclaims his paternity, and thus assumes parental obligations.⁶⁶ In Malinowski's view,

[i]t is of high biological value for the human family to consist of both father and mother; if traditional customs and rules are there to establish a social situation of close moral proximity between father and child; if

57. *See id.*

58. *See id.* at 80.

59. *See id.* at 81.

60. *See id.* at 79-81 (Paduang Karen, Tangkhul, Car Nicobar, and Kuravar peoples).

61. MARGARET MEAD, *SEX AND TEMPERAMENT IN THREE PRIMITIVE SOCIETIES* 32 (Morrow Paperback ed. 1963).

62. *Id.* at 33.

63. *See id.* at 34.

64. *Id.* at 35.

65. Munroe and Munroe propose that couvade allows men to express a feminine gender identity in socially approved ways. *See generally* Robert L. Munroe & Ruth H. Munroe, *Male Pregnancy Symptoms and Cross-Sex Identity in Three Societies*, 84 *J. SOC. PSYCHOL.* 11 (1971). Bruno Bettelheim, writing from a psychodynamic perspective, sees in the custom a man's attempt to find out what it is like to give birth and to maintain to himself that he can have a child. *See* BRUNO BETTELHEIM, *SYMBOLIC WOUNDS* 208 (1954). Another psychiatrist, Theodor Reik, views the custom as reflecting the father's ambivalent attitude of tender and hostile feelings towards his wife. *See* THEODOR REIK, *RITUAL: PSYCHO-ANALYTIC STUDIES, COUVADE AND THE PSYCHOGENESIS OF THE FEAR OF RETALIATION* 27-89 (1946).

66. *See* WEBSTER, *supra* note 49, at 81.

all such customs aim at drawing the man's attention to his offspring, then the *couvade* which makes man simulate the birth-pangs and the illness of maternity is of great value and provides the necessary stimulus and expression for paternal tendencies. The *couvade* and all the customs of its type serve to accentuate the principle of legitimacy, the child's need of a father.⁶⁷

Along similar lines, Webster observes that

[f]ather and mother, having brought a child into the world, thus indicate their readiness to care for it, even though doing so requires them to observe many irksome and often painful restrictions. The inclusion of the child in the birth ceremonial binds it to the parents by ties of custom superimposed upon those of natural affection and also gives to it a recognized status in the community.⁶⁸

Today industrial societies have no explicit *couvade* customs. But we do have the curious, little-understood, but widespread phenomenon of medical *couvade*—pregnancy symptoms in expectant fathers.⁶⁹ Onset is usually in the beginning of the second trimester, with a secondary increase late in the third.⁷⁰ Symptoms include bloating, cramps, toothache, irritability, nausea, indigestion, diarrhea, constipation, headache, moodiness, restlessness, and insomnia. Men may develop large appetites, as if "eating for two."⁷¹ In unusual cases, *couvade* can cause extreme responses, including psychosis. *Couvade* is associated with a much higher frequency of doctor visits by expectant fathers seeking medical attention for pregnancy-related symptoms.⁷²

Couvade symptoms have been found in many societies.⁷³ They occur even when the expectant father is apart from his wife during pregnancy,⁷⁴ and whether

67. BRONISLAW MALINOWSKI, *SEX AND REPRESSION IN SAVAGE SOCIETY* 215-16 (1927).

68. WEBSTER, *supra* note 49, at 81-82.

69. The syndrome was first named in W.H. Trehowan & M.F. Conlon, *The Couvade Syndrome*, III BRIT. J. PSYCH. 57-66 (1965).

70. See Hilary Klein, *Couvade Syndrome: Male Counterpart to Pregnancy*, 21 INT'L J. PSYCH. IN MED. 57, 58 (1991).

71. Kenneth E. Reid, *Fatherhood and Emotional Stress: The Couvade Syndrome*, 2 J. OF SOC. WELFARE 3, 7 (1975).

72. Lipkin and Lamb, in a study of the mates of 267 postpartum women, representing a sample of all births in a health maintenance organization of 36,000 members, found that the 60 men who sought treatment for *couvade* symptoms had a twofold increase in visits, had four times more symptoms than during control periods, and received twice as many prescriptions for medication as the men who were not affected. See Mack Lipkin, Jr. & Gerri S. Lamb, *The Couvade Syndrome: An Epidemiologic Study*, 96 ANNALS OF INTERNAL MED. 509, 510 (1982).

73. See, e.g., Chantima Khanobdee et al., *Couvade Syndrome in Expectant Thai Fathers*, 30 INT'L J. NURSING STUD. 125, 130 (1993) (syndrome appeared in 61% of the 172 expectant Thai fathers studied).

74. For example, soldiers on active duty during World War II reported symptoms around

or not the husband has taken prenatal classes or is otherwise prepared for childbirth.⁷⁵ Estimates of incidence range from a low of about eleven percent to a high of more than sixty percent.⁷⁶ When symptoms such as changes in sexual behavior, fear and curiosity are taken into account the incidence is even higher, with one study finding more than nine in ten expectant fathers displaying at least one couvade symptom.⁷⁷

There is no generally accepted explanation for the syndrome. Candidates include somatized anxiety,⁷⁸ envy of the wife's ability to give birth,⁷⁹ identification with the patient's mother,⁸⁰ and ambivalent or empathic feelings for the wife.⁸¹ Another explanation is that couvade symptoms symbolize the man's preparation for his role as a father.⁸² Regardless of the explanation, it is clear that couvade syndrome represents something important about the role of men in procreation.

Even when they do not manifest physical symptoms of couvade, men are more involved in pregnancies than has often been supposed.⁸³ Men have powerful reactions upon learning of their partners' pregnancies.⁸⁴ Their feelings range from ambivalence to wonder, nurturance, and anticipation.⁸⁵ Expectant fathers feel greater anxiety, tension, and apprehensiveness than childless married

the time their wives were thought to be in labor, and experienced relief as soon as news of the delivery was received. See Kenneth E. Reid, *Fatherhood and Emotional Stress: The Couvade Syndrome*, 2 J. SOC. WELFARE 7 (1975).

75. See Bogren, *supra* note 5, at 63-64.

76. See S. Masoni et al., *The Couvade Syndrome*, 15 J. PSYCHOSOMATIC OBSTETRICS & GYNAECOLOGY 125-31 (1994).

77. See *id.* (91.78% of men in sample displayed symptoms of emotional involvement in their wives' pregnancies).

78. See Bogren, *supra* note 5, at 64.

79. See generally M. DAVID ENOCH ET AL., SOME UNCOMMON PSYCHIATRIC SYNDROMES (1967).

80. See W.N. Evans, *Simulated Pregnancy in Males*, 20 PSYCHOANALYTIC Q. 165 (1978).

81. See Reid, *supra* note 74, at 9-10.

82. For example, Longobucco and Freston found that expectant fathers experiencing symptoms scored higher on scales measuring paternal-role preparation than men not experiencing symptoms. See Diane Carol Longobucco & Margie S. Freston, *Relation of Somatic Symptoms to Degree of Paternal-Role Preparation of First-Time Expectant Fathers*, 18 J. OBSTETRIC GYNECOLOGIC AND NEONATAL NURSING 482-88 (1989). The relatively small sample size (65 men) makes this study difficult to evaluate, however.

83. See B. Chalmers & D. Meyer, *What Men Say About Pregnancy, Birth and Parenthood*, 17 J. PSYCHOSOMATIC OBSTETRICS & GYNAECOLOGY 47-52 (1996).

84. Chalmers and Meyer surveyed 115 first-time fathers in 1988 and 1989; 76.5% of the respondents said they were "thrilled" to hear of the pregnancy, and 73.9% said they were "excited." Other reported feelings included worries about finances (32.6%), fear (13%) and ambiguity (8.7%). *Id.* at 49.

85. See May & Perrin, *supra* note 6, at 74.

men.⁸⁶ Many of these feelings seem to be part of a bonding process with the fetus that begins even prior to delivery.⁸⁷ Men caress the fetus through their mates' bellies, sense its movements, and so on.⁸⁸ They report that they "feel" pregnant.⁸⁹ They want to know when the fetus moves and in what direction it is facing. They talk to the fetus and listen for its heartbeat.⁹⁰ As the pregnancy progresses they develop a mental image of their future child. They come to "anticipate" the baby, and, as part of that process, they prepare themselves physically and psychologically to become good caretakers.⁹¹ They begin to act like and conceive of themselves as fathers.

One important factor for enhancing this bonding process is the ubiquity of prepared childbirth classes—a phenomenon now so widespread as to be a plausible Western analog to ritual *couvade*.⁹² The Lamaze, Bradley, and other childbirth methods emphasize the importance of the father's (or other partner's) involvement.⁹³ Men not only have the opportunity to learn the details of pregnancy and delivery, but also join their partner during pregnancy, labor, and delivery. This process increases the attachment that expectant fathers may feel towards their future child.⁹⁴ Beyond prepared childbirth classes, men show other signs of involvement with their partners' pregnancies. For example, they increase their work around the house and otherwise help to prepare for the baby's arrival.⁹⁵ Popular culture is beginning to recognize the trend. Baby showers, formerly an exclusively female enclave, now sometimes include the father, who might be invited as part of a "couple's shower," or who might even receive a shower of his own.⁹⁶

86. See *id.* at 75.

87. See Mecca S. Cranley, *Roots of Attachment: The Relationship of Parents with Their Unborn*, 17 BIRTH DEFECTS: ORIGINAL ARTICLE SERIES 59, 62-63 (1981).

88. See R. Weaver & Mecca Cranley, *An Exploration of Paternal-Fetal Attachment Behavior*, 32 NURSING RES. 68 (1983).

89. Cranley, *supra* note 87, at 63.

90. See Mary J. Worth, *Becoming a Father of a Stillborn Child*, 6 CLINICAL NURSING RES. 71, 84 (1997).

91. Cranley, *supra* note 87, at 63.

92. See May & Perrin, *supra* note 6, at 70 (comparing prepared childbirth classes to *couvade*).

93. See, e.g., *The Bradley Method of Natural Childbirth*, <<http://www.bradleybirth.com/index.html>> (visited Mar. 7, 2000).

94. See generally J. Wapner, *The Attitudes, Feelings, and Behaviors of Expectant Fathers Attending Lamaze Classes*, 3 BIRTH FAM. 5 (1976).

95. See Cranley, *supra* note 87, at 70 (one-half of the expectant fathers surveyed did more work around the house during their wives' pregnancies and 88% helped prepare the house for the baby's arrival).

96. MARSIGLIO, *supra* note 15, at 7. Although men tend to be more involved, this does not mean that all aspects of the traditional stereotype are being discarded. A recent survey indicated that, just as in the cultural narrative of the 1950s, men today are much more likely to wish for a boy as for a girl, although approximately half the respondents indicated that they would be happy either

Male participation in pregnancy is enhanced by technologies of prenatal testing and monitoring. The most common is ultrasound, which can be used independently or as an adjunct to other prenatal tests.⁹⁷ Ultrasound rules out medical conditions (heart malformations, spina bifida, etc.), but it offers an additional benefit: it facilitates bonding between parents and fetus⁹⁸ and stimulates the expectant couple to adjust their self-identities to include the role of parents.⁹⁹ Sonograms show details that previously had been left to the imagination, including a beating heart, face, feet, hands, sexual organs—even the fetus sucking its thumb. They are a “window on the womb” through which the expectant parents can observe the fetus in motion.¹⁰⁰ Usually, the technicians let the parents videotape the sonogram for later viewing. If the parents return for repeated procedures, they can observe how the fetus evolves. Ultrasound also discloses the sex of their fetus. Knowing the sex allows the parents to name the fetus and to imagine it as a real part of their lives. All this facilitates bonding.¹⁰¹

In amniocentesis, physicians obtain fetal cells by inserting a needle into the amniotic sac.¹⁰² Usually performed between fifteen and seventeen weeks of pregnancy, amniocentesis can determine the sex of the baby; it also tests for spina bifida, anencephaly, and other abnormalities.¹⁰³ Another procedure, chorionic villus sampling, is usually performed earlier in the pregnancy than amniocentesis. The physician removes a sample of tissue from a part of the placenta—the chorionic villi—that contains fetal cells.¹⁰⁴ The results, in the form of a chromosomal map, provide the parents with their first “picture” of the fetus. Although the chromosomes do not show the fetus itself, they carry another meaning: they symbolize the fact that the fetus carries their genetic endowment. This imagery may be particularly potent for fathers, who can observe their own paternity in the squiggly images the procedure generates.

Enhanced knowledge of medical risks also can involve the expectant father. For example, the mother-to-be may decide to quit smoking in order to protect the

way. See Chalmers & Meyer, *supra* note 83, at 49-50 (expectant fathers are about twice as likely to wish for a boy as for a girl).

97. See MERCK MANUAL, *supra* note 20, at 1132, 1135. On the impact of ultrasound on a man's relationship with his children, see, for example, MARSIGLIO, *supra* note 15, at 6.

98. See Worth, *supra* note 90, at 72 (“With the use of technology, particularly early ultrasounds, attachment [between parent and child] can begin even earlier than was once thought.”).

99. See *id.* at 7 (citing research findings that visual perception is an important stimulus for assuming paternal role).

100. RICHARD W. WERTZ & DOROTHY C. WERTZ, LYING-IN: A HISTORY OF CHILDBIRTH IN AMERICA 246 (expanded ed., 1989).

101. See Worth, *supra* note 90, at 71.

102. See KEARNEY, *supra* note 22, at 305-06.

103. See MERCK MANUAL, *supra* note 20, at 1134.

104. The fetal tissue can then be diagnosed for genetic abnormalities. The advantage of CVS over amniocentesis is that it can be performed much earlier in the pregnancy (at about nine weeks) and thus the abortion decision can be made earlier and with less trauma. See KEARNEY, *supra* note 22, at 306.

fetus against risks of decreased birth weight, pre-term labor, and birth defects. Her partner may quit smoking himself in order to offer moral support, to reduce his partner's temptation to smoke, or to limit the risk of secondhand smoke. Similarly, the expectant father may become involved in his partner's efforts to abstain from alcohol or other drugs.¹⁰⁵ If alcohol or drug use is an important part of the couple's life style, cessation of these activities can have an impact both on the relationship of the parties and on the father's experience with the fetus. While the father may find that foregoing desired habits in consideration for fetal welfare is frustrating, the impact on the father's habits and lifestyle calls attention to the needs of the fetus, and thus facilitates the creation of an emotional bond.

If the pregnancy results in medical complications, the expectant father's role may increase further. Fetal-assessment studies, such as non-stress tests or oxytocin challenge tests, appear to accelerate parental attachment.¹⁰⁶ If the mother is at high risk of pre-term labor, she may need to alter her behavior, and may have to stay in bed during the final stages of pregnancy. The mother's immobilization is likely to place increased care-taking demands on the father. In some cases, the mother may be supplied with home uterine monitoring devices that track signs of pre-term labor. Because home monitoring provides a constant reminder to both parents of the fetus and its needs, these devices are likely to spark enhanced feelings of bondedness in both parents.

D. Abortion

Men play a significant, although under-appreciated, role in abortion.¹⁰⁷ Most women tell their partners about their decision to abort.¹⁰⁸ Men, in turn, often want to offer assistance,¹⁰⁹ and usually play a role if they have an ongoing

105. In addition to providing moral support for the mother's smoking and drinking cessation efforts, the father may be able to improve the child's health directly by reducing his intake of these substances. See Theodore J. Cicero, *Effects of Paternal Exposure to Alcohol on Offspring Development*, 18 ALCOHOL HEALTH AND RESEARCH WORLD 37-40 (1994) (suggesting that paternal exposure to alcohol can harm fetus).

106. See Cranley, *supra* note 87, at 80.

107. Men played a similar role even before the advent of modern abortion. Among the Arapesh peoples, for example, the midwife tells the father the child's sex, whereupon the father answers "wash it" or "do not wash it." If the latter command is given, the baby is left to die. See MEAD, *supra* note 61, at 32-33.

108. See Barbara Ryan & Eric Plutzer, *When Married Women Have Abortions: Spousal Notification and Marital Interaction*, 51 J. MARRIAGE & THE FAM. 41-50, 44 (1989) (82.5% of women surveyed told their partner of their decision to abort).

109. Shostak and McLouth's survey of 1000 men at abortion waiting rooms found that 58% of the respondents believed that an unmarried man should have as much say in the matter as his lover, and 80% believed that a husband should have as much say as his wife. See ARTHUR B. SHOSTAK & GARY MCLOUTH, *MEN AND ABORTION: LESSONS, LOSSES, AND LOVE* 34 (1984). Most men, however, agreed with the proposition that a woman "owns" her body and should have ultimate

relationship with the woman.¹¹⁰ Men often accompany their partner to the abortion clinic,¹¹¹ and frequently pay some of the bill.¹¹² Most would like to be present during the procedure, although they usually are excluded.¹¹³ They keep vigil in waiting rooms¹¹⁴ while their partner is being treated.¹¹⁵

Men experience a wide range of emotions concerning abortion, including fear, guilt, anxiety, self-doubt, and self-pity.¹¹⁶ Many have feelings and thoughts about the fetus: curiosity, troublesome feelings, and sadness.¹¹⁷ They tend to experience the day of the abortion as emotionally moving, but positive.¹¹⁸ However, the longer-range consequences can be more difficult, either because intimate relationships suffer, or because the man feels guilt or remorse.¹¹⁹ Some men acutely feel the loss of the fetus and of their role as father, and find their

authority over how she uses it. *Id.*

110. See Akin Adebayo, *Male Attitudes Toward Abortion: An Analysis of Urban Survey Data*, 22 SOC. INDICATORS RES. 213-28 (1990); Ryan & Plutzer, *supra* note 108.

111. See SHOSTAK & MCLOUTH, *supra* note 109, at 299-304. While estimates vary, it is probable that males accompany women to the abortion clinic about 50% of the time. *See id.* at 17 n.1. The authors estimated that as of 1984, about 600,000 men accompanied women to abortion clinics. *See id.* at 2. A later study by Ryan and Plutzer found that about two-thirds of husbands accompanied their wives to the clinic. *See* Ryan & Plutzer, *supra* note 108, at 45.

112. Shostak and McLouth's survey found that 57% of the men they interviewed in abortion clinic waiting rooms paid the entire bill, 29% paid half, and another 6% paid for some; only 8% paid nothing. *See* SHOSTAK & MCLOUTH, *supra* note 109, at 36.

113. Most men would prefer to assist their partners in these locations: 69% of men surveyed by Shostak and McLouth wanted to accompany their partners in the procedure room and 91% wanted to join them in the recovery room. *See id.* at 61.

114. *See id.* at 52. Only 12% of the abortion clinics surveyed by Shostak and McLouth allowed men to accompany their partners in the abortion procedure or recovery rooms. *See id.* at 60. Many men find their exclusion to be stressful or irksome. *See id.* at 55-56.

115. Like expectant fathers of a previous generation, men waiting at abortion clinics stare into space, gulp coffee, snooze, fiddle with shoelaces, talk, read, and so on. They "leaf through tattered copies of old magazines, leaving the stories unread. For the most part, they avoid eye contact with one another, and when the fight to concentrate on the magazines is lost, their eyes remain fixed on the floor." *Id.* at 52. The difference is that, instead of expecting a baby to appear through the glass viewing screen, the men anticipate only that they will be able to accompany their partners away from the clinic with the procedure having been completed successfully.

Interestingly, men seem to behave in a similar fashion in reproductive clinics. Carmeli and Birenbaum-Carmeli observed that in contrast with female patients who shared information and supported one another, male patients at such clinics avoided one another, never approached other patients, spent most of their time behind newspapers, and showed embarrassment when called by their names. *See* Carmeli & Birenbaum-Carmeli, *supra* note 22, at 673.

116. *See* SHOSTAK & MCLOUTH, *supra* note 109, at 41.

117. *See id.* at 40.

118. *See id.* at 63.

119. *See id.* at 105.

thoughts returning to those topics long afterwards.¹²⁰ Often, they hide stress by controlling or denying feelings, either because the feelings are too painful, or because they feel a need to support their partners.¹²¹ Men may be particularly stressed because of the lack of anyone to talk to about their feelings. Even if the couple has not explicitly decided to maintain confidentiality, the man may feel embarrassed or ashamed, or may simply lack the ability to share feelings.¹²² For many men, their partner is their only confidante.¹²³

E. Perinatal Loss

Perinatal loss—miscarriage, stillbirth, neonatal death, and sudden infant death syndrome—has a profound effect on both men and women.¹²⁴ Such events, which remain common even in an era of widespread perinatal and neonatal health care delivery,¹²⁵ provide powerful evidence of the depth and importance of parental bonding with the fetus and newborn. The extent of parental grief over perinatal loss was long underestimated, perhaps because, in an era of high infant mortality, infant death was such a common event. Even as late as the 1940s, prominent psychologists believed that because attachment to the child occurred only at birth, perinatal loss could not cause grief.¹²⁶ Fathers especially were ignored.¹²⁷ The traditional view was that men should get on with life and support their wives.¹²⁸ In fact, however, men feel confusion, depression, sadness, and anxiety.¹²⁹ Many report intimate feelings towards the fetus before birth.¹³⁰ When

120. See *id.* at 108-09 (finding, *inter alia*, that 69% of men surveyed long after the abortion had thoughts about the fetus, and 9% had such thoughts frequently).

121. See *id.* at 37.

122. On men's difficulty in expressing their feelings, see, e.g., REUBEN FINE, *TROUBLED MEN: THE PSYCHOLOGY, EMOTIONAL CONFLICTS, AND THERAPY OF MEN* 262-82 (1988); TERRENCE REAL, *I DON'T WANT TO TALK ABOUT IT: OVERCOMING THE SECRET LEGACY OF MALE DEPRESSION* 55 (1997).

123. Shostak and McLouth find that three out of four men had spoken with no one but their partners. See SHOSTAK & MCLOUTH, *supra* note 109, at 26.

124. For general introduction, see KLAUS & KENNEL, *supra* note 7, at 162-96.

125. See Cynthia Bach Hughes & Judith Page-Lieberman, *Fathers Experiencing a Perinatal Loss*, 13 *DEATH STUD.* 537, 538 (1989).

126. See Helene Deutch, *Bereavement Following a Stillborn Child*, 222 *PRACTITIONER* 115-18 (1945) (grief over perinatal death represents painful of non-fulfillment of fantasized wish, rather than genuine mourning).

127. See Worth, *supra* note 90, at 72.

128. See generally John E. Puddifoot & Martin P. Johnson, *The Legitimacy of Grieving: The Partner's Experience at Miscarriage*, 45 *SOC. SCI. MED.* 837 (1997).

129. See, e.g., Rosanne Harrigan et al., *Perinatal Grief: Response to the Loss of an Infant*, 12 *NEONATAL NETWORK* 25 (1993); Hughes & Page-Lieberman, *supra* note 125; Puddifoot & Johnson, *supra* note 128; Worth, *supra* note 90.

130. See Hughes & Page-Lieberman, *supra* note 125, at 544 (43% of fathers surveyed experienced shock at perinatal death, and 45% reported feeling close to the fetus before birth).

the fetus dies, they go through the stages of the grief process—shock and disbelief, denial, anger, bargaining, depression, and finally, acceptance.¹³¹ For many such men, the grief is associated with the loss of the father's role for which they had been preparing.¹³² They feel the absence of a baby to hold, cuddle, and carry.

The father's sense of loss is likely to be particularly acute following stillbirth. Most fathers of stillborn children attend the birth, a quarter hold their baby's body, and one fifth return for follow-up appointments.¹³³ Men often need to affirm their paternal role in the face of stillbirth. One dressed the child for the funeral in the same outfit his other two children wore home from the hospital, wrapped the child in a special blanket, and read the family's favorite bedtime story to the child on the way to the funeral.¹³⁴

While fathers experience grief over perinatal loss, they may recover more quickly and experience the loss less acutely than their wives.¹³⁵ However, it is possible that the reports of less intense male grief are an artifact of the questions asked, which may not pick up on the different ways men and women express mourning.¹³⁶ Men act out their grief. They seek comfort in a "masculine" role characterized by the need to be strong, to deny pain, and to avoid the topic in conversation.¹³⁷ They often take on the father function for which they had been preparing as if the child had lived:¹³⁸ they may lose themselves in their "good provider" roles,¹³⁹ or may deny their own pain in order to help their partners

131. See *id.* at 549-51. For a classic account of the grieving process, see ELIZABETH KUBLER-ROSS, *ON DEATH AND DYING* (1969).

132. See Worth, *supra* note 90.

133. See Rita J. Revak-Lutz & Kenneth R. Kellner, *Paternal Involvement After Perinatal Death*, 14 J. PERINATOLOGY 442-45 (1994) (sample of 722 cases of perinatal death, mostly among parents of lower socioeconomic status). These authors recommend that fathers be included in grief counseling when perinatal death occurs. See *id.* at 442.

134. See *id.* at 81.

135. See J.C. Vance et al., *Psychological Changes in Parents Eight Months After the Loss of an Infant from Stillbirth, Neonatal Death, or Sudden Infant Death Syndrome—A Longitudinal Study*, 96 PEDIATRICS 933, 936 (1995) (finding that both mothers and fathers experienced a lifting of anxiety and depression eight months after the loss, and that fathers' symptoms decreased more than mothers).

136. See *id.* at 936-37 (observing that while fathers may have recovered more rapidly from depression and anxiety, this did not necessarily mean that fathers grieve less; the study did not consider other possible grief reactions such as changes in alcohol consumption or work behavior).

137. Atle Dyregrov, *Parental Reactions to the Loss of an Infant Child: A Review*, 31 SCANDINAVIAN J. PSYCHOL. 266, 269 (1990) (surveying literature and noting findings that fathers tend not to want to talk about loss).

138. See generally Worth, *supra* note 90.

139. Manfred Beutel et al., *Similarities and Differences in Couples' Grief Reactions Following a Miscarriage: Results from a Longitudinal Study*, 40 J. PSYCHOSOMATIC RES. 245, 249 (1996) (men sought distraction by immersion in work); Dyregrov, *supra* note 137, at 269 (predominant coping mechanism in fathers is to keep busy and directing their energies outwards).

cope.¹⁴⁰

F. Labor and Delivery

One of the most important recent changes in the medical approach to labor and delivery is the presence of fathers at birth.¹⁴¹ Most hospitals welcome fathers, and many provide rooms where the couple can share the birth experience in a home-like setting.¹⁴² Men who are present during labor and delivery generally enjoy the experience.¹⁴³ Their support has real benefits for the mother as well. Several studies suggest that women whose husbands stay with them suffer less pain and require less medication during childbirth and experience a lower rate of depression afterwards.¹⁴⁴

Men can play an important role when medical interventions are indicated. For example, men and women today can share in the decision of when labor occurs, thanks to labor-inducing medications such as oxytocin.¹⁴⁵ Many hospitals also allow the father to be present during routine Caesarian sections. This allows the father to participate, much as in a vaginal delivery, except that the mother's medication may actually make the father the more actively involved parent. If the operation requires complete anesthesia, the father will probably be excluded, but he is likely to observe the infant moments after birth. In such a case, the father may hold and rock the child while the mother recovers from the anesthetic.

G. Infant Care

Once the baby is born, the father and mother must complete the psychological transition to parenthood. This can be as dramatic for the father as for the mother.¹⁴⁶ Many men bond with their children at first sight.¹⁴⁷ Greenberg

140. See MERCK MANUAL, *supra* note 20, at 1172.

141. See *id.* at 1172. Husbands appear to have been more involved during the Nineteenth Century, see J. Jill Suitor, *Husbands' Participation in Childbirth: A Nineteenth-Century Phenomenon*, 1981 J. FAM. HIST. 278, 278, and were at least nearby during the first part of the Twentieth Century because many deliveries occurred at home. See Eileen Greif Fishbein, *The Couvade: A Review*, 10 J. OBSTETRIC, GYNECOLOGICAL & NEONATAL NURSING 356, 358 (1981). Husbands were excluded when doctors gained control of the process. See May & Perrin, *supra* note 6, at 76 (documenting physician resistance to father participation).

142. See MERCK MANUAL, *supra* note 20, at 1172.

143. See, e.g., Mary Reid Nichols, *Paternal Perspectives of the Childbirth Experience*, 21 MATERNAL CHILD NURSING J. 99 (1993).

144. See Dwenda K. Gjerdingen et al., *The Effects of Social Support on Women's Health During Pregnancy, Labor and Delivery, and the Postpartum Period*, 23 FAM. MED. 370, 373 (1991) (reviewing studies).

145. See MERCK MANUAL, *supra* note 20, at 1182. Although traditionally administered only in cases of obstetric or medical problems, labor induction is sometimes practiced in order to provide the parents with the ability to plan the birth of their baby in advance.

146. See Jacqueline F. Clinton, *Physical and Emotional Responses of Expectant Fathers Throughout Pregnancy and the Early Postpartum Period*, 24 INT'L J. OF NURSING STUD. 59, 67

and Morris term this experience "engrossment," a word that connotes the intense, almost hypnotic power that the newborn exercises over the father's attention.¹⁴⁸ Elements of engrossment include the father's joy in seeing the face of his newborn, his desire for and pleasure in tactile contact with the newborn, his awareness of the distinct characteristics of the newborn, and his perception that the newborn is perfect.¹⁴⁹ As one father reported, "I just sit and stare at it and talk to the wife and comfort her a bit. But the main thing is the baby. I just want to hold the baby"¹⁵⁰ Fathers often experience a "high" around their newborns; they feel "stunned, stoned, drunk, dazed, off-the-ground, full of energy, feeling ten feet tall, feeling different, abnormal, taken away, taken out of yourself."¹⁵¹

Many new fathers experience engrossment in the sense of immediate, intense love. In Chalmers and Meyer's survey, 69.7% of new fathers reported feeling love at first sight, and 12.1% reported feelings of love after a few hours.¹⁵² These paternal feelings continue through the first months of parenthood. Chalmers and Meyer found that the vast majority (84.2%) of fathers felt the first few months to be a "most wonderful experience."¹⁵³ These global feelings were matched by satisfying specific emotions—pride (92.9%), happiness (84.2%), excitement (84.2%), and a sense of being loved (59.7%).¹⁵⁴

New fathers also feel stress. Like women, men experience the first few months of parenting as an emotional roller coaster. They suffer postpartum mood swings similar to those experienced by women,¹⁵⁵ and experience above-average levels of nervousness, difficulty concentrating, fatigue, headaches, and restlessness.¹⁵⁶ Furthermore, they may feel additional stress because they want to provide emotional support for their partner.¹⁵⁷

(1987).

147. See MARSIGLIO, *supra* note 15, at 6 (discussing the importance of early holding); M. Rodholm, *Effects of Partner-Infant Postpartum Contact on Their Interaction 3 Months After Birth*, 5 EARLY HUMAN DEV. 79 (1981).

148. Martin Greenberg & Norman Morris, *Engrossment: The Newborn's Impact on the Father*, 44 AM. J. ORTHOPSYCHIATRY 520, 521 (1974).

149. *See id.* at 522-25.

150. *Id.* at 524.

151. *Id.*

152. *See* Chalmers & Meyer, *supra* note 83, at 50-51.

153. *Id.* at 51.

154. *See id.*

155. *See* David Quadagno et al., *Post-partum Moods in Men and Women*, 154 AM. J. OF OBSTETRICS AND GYNECOLOGY 1018, 1023 (1986) (men and women experience post-partum period in an emotionally similar way).

156. *See* Clinton, *supra* note 146, at 66.

157. When men provide emotional, tangible, or informational support during the post-partum period, their spouses tend to experience an enhanced sense of well-being. *See* Gjerdingen et al., *supra* note 144, at 371 (reviewing the literature). Occasionally the new father may even experience a mental breakdown. *See generally* Stanley Shapiro & Jack Nass, *Postpartum Psychosis in the*

Men can bond with their newborn children in numerous ways today that were not technologically or socially feasible in years past. A simple means for enhancing paternal connection is to educate fathers about the child's basic abilities and reflexes.¹⁵⁸ Such information seems to facilitate bonding because the father becomes more aware of, and attuned to, his child's experience of life. Men can also bond through feeding. They bottle-feed their babies,¹⁵⁹ using either formula or breast milk, and, in the process, share an intimacy that was once available only to mothers.¹⁶⁰ When the mother breast-feeds, the father can still play a role: his feedback influences his partner's decision about breast feeding,¹⁶¹ and he can bring the baby to the mother or return it to the crib.¹⁶² Men are also increasingly taking time to be with their babies,¹⁶³ and thus learn the joys

Male, 19 PSYCHOPATHOLOGY 138 (1986).

158. See generally Barbara J. Myers, *Early Intervention Using Brazelton Training with Middle-Class Mothers and Fathers of Newborns*, 53 CHILD DEV. 462 (1982) (reporting that fathers who were taught to perform a Brazelton exam on their newborns were both more knowledgeable about their newborns and were more involved in caretaking after four weeks than control fathers).

159. See Chalmers & Meyer, *supra* note 83, at 51 (70.8% of the fathers of newborns surveyed whose babies were being bottle-fed did so at least once or more every day).

160. The single most cogent image in society of parent-child bonding is that of the baby "at the breast." D.W. WINNICOTT, *THE CHILD, THE FAMILY, AND THE OUTSIDE WORLD* 30 (1964) ("[I]nfant feeding is a matter of infant-mother relationship, a putting into practice of a love-relationship between two human beings."); MARILYN YABLON, *A HISTORY OF THE BREAST* 5 (1997) (citing the example of the baby Jesus suckling at his mother's breast as a "metaphor for the spiritual nurturance of all Christian souls"). Freud described the connection between the mother and the suckling baby as the "prototype of every relation of love." SIGMUND FREUD, *THREE ESSAYS ON THE THEORY OF SEXUALITY* 48 (1962). Men, being unable to breast feed, were deprived by nature from the closeness that the mother feels for her baby when it suckles. That situation changed, however, with the discovery of pasteurization and sterilization, which made it safe to feed babies from a bottle. Men could feed babies from a bottle just as easily as women. On the growth of bottle-feeding during the Nineteenth Century, see YABLON, *supra*, at 126.

161. For example, in a study of 556 Australian mothers, Scott, Binns, and Aroni found that the most important factor influencing a woman's decision to breast feed was the father's reported preference. See J.A. Scott et al., *The Influence of Reported Paternal Attitudes on the Decision to Breast-Feed*, 33 J. PEDIATRICS & CHILD HEALTH 305, 306 (1997) (women who perceived and stated that their partners had a definite preference for breast-feeding were ten times more likely to initiate breast-feeding than those whose partners either preferred bottle-feeding or were ambivalent about the method of feeding).

162. On father assistance in breast feeding, see generally Naomi Bromberg Bar-Yam & Lori Darby, *Fathers and Breastfeeding: A Review of the Literature*, 13 J. HUM. LACTATION 45 (1997).

163. Federal law guarantees up to twelve weeks unpaid leave to any employee of a large company to attend to family business, including the birth of a baby. See Family and Medical Leave Act of 1993, 29 U.S.C. §§ 2601-2654 (1994). To date, men have not often taken advantage of this opportunity. For example, the *Washington Post* reported in 1993 that of Campbell's Soup employees who were offered a three-month unpaid parental leave, 95% of the eligible women took advantage of the perquisite, and no men did. See ELLIS COSE, *A MAN'S WORLD: HOW REAL IS*

and frustrations of feeding, diapering, bathing, burping, holding, rocking, and soothing an infant.¹⁶⁴ Men who care for their newborns seem to develop strong early bonds and experience the transition into the paternal role with greater ease.¹⁶⁵

III. PATERNAL BONDING AND THE LAW

So far, I have discussed social science research indicating that fathers have a capacity to bond emotionally with their offspring—a capacity that has flourished in recent years as a result of technological and social changes. What are the implications of this analysis for the law?

Paternal bonding becomes an issue for the law in three principal areas: abortion, adoption of infants born out of wedlock, and custody and visitation. Judges struggling with these cases have adopted a model of paternal bonding as a function of time. The general view is that prospective fathers have minimal bonding with the fetus during pregnancy—so little that their interests tend to be ignored or phrased in terms of an emotionally distanced, technical role. The courts tend to view paternal bonding as present, but weak during the first year or so after birth. Thereafter, the courts recognize that fathers can develop strong emotional bonds with their children, and look to certain stylized behaviors as evidence of bonding—time spent with the children, involvement in caretaking, acknowledgement of the paternal role, and fulfillment of the obligations incident to fatherhood. This model of paternal bonding can be found in decisions across a range of doctrinal categories. Despite its ubiquity, the model is only partially consistent with the literature cited above. The courts recognize male capacities to develop paternal bonds. However, they tend to underestimate the importance of such bonding during pregnancy and early childhood. Moreover, in looking only to certain stylized indicia of bonding, the courts may overlook other relevant evidence. These issues are addressed in the present section.

A. Abortion

We have seen that men have a promise to bond with their potential children even before birth and to prepare themselves in important ways for their roles as fathers. We have also seen that many men participate with the prospective mother in important decisions about the pregnancy, and that they often provide logistical, emotional, and financial support for an abortion. On the other hand, the pregnant woman enjoys a right of privacy to control her own body and to make fundamental decisions about her pregnancy, including the decision to abort.¹⁶⁶ This tension between the interests of the father and the mother raises

MALE PRIVILEGE—AND HOW HIGH IS ITS PRICE? 119 (1995).

164. See generally MARTIN O'CONNELL, WHERE'S PAPA: FATHERS' ROLE IN CHILD CARE (1993).

165. See Ann M. Taubenheim, *Paternal-Infant Bonding in the First-Time Father*, 10 J. OF OBSTETRIC, GYNECOLOGICAL AND NEONATAL NURSING 261, 263 (1981).

166. See *Roe v. Wade*, 410 U.S. 113 (1973).

important and difficult issues of legal and social policy.

The Supreme Court first addressed these issues in *Planned Parenthood v. Danforth*.¹⁶⁷ At issue was a statute requiring the husband's consent to an abortion during the first trimester, unless a doctor certified that the abortion was necessary to save the woman's life. Writing for the Court, Justice Blackmun concluded that the spousal veto infringed upon the woman's right of privacy under *Roe v. Wade*.¹⁶⁸

Although the holding in *Danforth* was quite reasonable, given *Roe*, the analysis offered to support that holding was problematic. As regards the interests of the father, Justice Blackmun said the following: "[We] are not unaware of the deep and proper concern and interest that a devoted and protective husband has in his wife's pregnancy and in the growth and development of the fetus she is carrying."¹⁶⁹ Although this language appears to represent a nod in the direction of fathers' rights, its practical effect is otherwise. For starters, the Court's use of the double negative ("we are not unaware") expressed a supercilious attitude towards the father's interests; double negatives in judicial opinions almost always entail the positive but imply the negative.¹⁷⁰ When the rest of the language is parsed, it becomes evident that the forbidding tone of the introductory clause was not accidental. The paternal concern recognized by the Court existed only within the framework of the woman's interests: the husband is properly interested in "his wife's pregnancy." The implication is that the husband's concerns are derivative of the wife's.

Consider also the terms Justice Blackmun enlisted to flesh out the image: the husband is credited with being "devoted" and "protective." Each of these adjectives is directed toward the wife. They do not define the husband as an autonomous actor, but rather fix him in orbit around his wife by the gravitation of implied prepositions—the husband is devoted *to* his wife and interested *in* her pregnancy.¹⁷¹ The implication is that if a husband is truly "devoted" to his wife, he will recognize that his own interests should give way in the event of a conflict. Similarly, if the husband is "protective," he will provide safety for his wife, including giving her the emotional security she needs to nurture her own body. Again, the implication is that the husband should defer.

To the extent the fetus is the object of the potential father's concern, the Court conceived of it only as an object *within* the woman's body: a devoted and protective husband is interested and concerned in the "growth and development of the fetus *she is carrying*."¹⁷² Grammar recapitulates ontogeny here: "fetus"

167. 428 U.S. 52 (1976).

168. See *Roe*, 410 U.S. at 113.

169. *Danforth*, 428 U.S. at 69.

170. Consider how the tone of the opinion would have changed if the Court had said "we are aware" instead of "we are not unaware."

171. Obviously, the devotion and protectiveness involved are directed towards the wife rather than the fetus (an expectant father who was "protective" of the fetus might be inclined to contest his wife's wish to abort).

172. *Id.* (emphasis added).

is embedded within a womb of words dedicated to "wife." The implication is that the father's concern is not for the fetus *per se*, but only for the fetus as an extension of his wife.

There is a further qualification, moreover, implicit in the Court's reference to "growth and development." The father's concern, as recognized by the Court, is not actually for the fetus as a being, an object to which the father can bond, but rather for the *processes* that occur to the fetus. The father is interested in the fetus in the same way, for example, as he might be involved in monitoring the progress of a house that a contractor is building for his family. In phrasing the man's interest in a technical and distancing way, Justice Blackmun discounted the capacity for paternal bonding.

Perhaps the most telling aspect of the Court's formulation is that it never acknowledged that the father can have a direct bond with the fetus, or that pregnancy can alter a man's self-concept as he grows into the role of "father." The Court could easily have admitted these propositions without slipping into the problematic territory of recognizing the fetus as a "human being." Designating a fetus as a human being is not a threshold requirement for the potential father to emotionally bond with it, or for the pregnancy to induce a change in the potential father's self-concept. Whatever its existential status, the fetus may be the object of paternal attachment.

The man's job, within the framework of the *Danforth* opinion, was to be a provider, a problem solver, and a supplier of emotional support for his wife. He looked after his wife's pregnancy from a distance, respectfully, and with due acknowledgement that the matter falls within the wife's domestic sphere. If a problem arose in the pregnancy, he was prepared to intervene, applying his male capacities for logic and reason to counterbalance his wife's capacity for emotionality. His job was to support his wife by being devoted and protective. The opinion in *Danforth*, in short, was premised on a stereotype of the Good Husband of the 1950s and 1960s.¹⁷³

The low opinion that the *Danforth* Court seemed to harbor towards the possibility of paternal bonding during pregnancy is illustrated by the analysis the Court employed to reject a husband's veto of the wife's abortion decision. The Court could have structured the analysis as a *balancing* between the woman's privacy interest in controlling her body, the state's interest in protecting potential life, and the potential father's interest in his paternity and emotional connection with the fetus. In this balancing of interests, it might well have been proper for

173. This Good Husband role has roots in the Victorian period. As one leading authority commented in 1904,

Man has a far less exquisite tenderness for his off-spring than woman. There is little else than moral sympathy which attaches the father to the infant. Paternal love *does not exist* save as a thing of growth, of education. The sense of proprietorship, a sort of manly pride is about the extent of a father's feeling toward his infant during the first days or weeks of its life. Not so with the mother; she loves her child as the fruit of her womb, as the purest of her blood, as her own life

WILLIAM H. WALLING, *SEXOLOGY* 128 (1904).

the Court to conclude, as it did, that the woman should have the final call. But the Court did not engage in such a balancing test. Instead of weighing the potential father's interest, the Court simply ignored it.

Justice Blackmun invalidated the paternal consent requirement, not because the pregnant woman's interests were more compelling than the potential father's, but because the state could not "delegate" to the father the power to prevent an abortion when it lacked power to bar abortion directly.¹⁷⁴ This analysis seems out of place. The paternal consent requirement at issue in *Danforth* was not a delegation of power to the potential father, any more than a statute guaranteeing a woman's right to abortion would "delegate" power to the potential mother. Instead, the statute recognized the father's independent right to protect his own interests in an important area of social policy. The father who used the statutory power to refuse consent would not act as an agent of the state, but rather as a champion of his own interests. By characterizing the issue as one of delegation, the opinion in *Danforth* denied the father's juridical rights in the law of abortion.

A harder case was presented in *Planned Parenthood v. Casey*.¹⁷⁵ In *Casey*, the state did not require spousal consent, but only notification: except in cases of medical emergency, a married woman had to provide her physician with a signed statement that she had notified her spouse of the abortion.¹⁷⁶ The woman had the option of providing an alternative statement certifying that her husband was not the father, that her husband could not be located, that the pregnancy was the result of a reported spousal sexual assault, or that she believed that notifying her husband would cause him or someone else to inflict bodily injury on her.¹⁷⁷

The issue in *Casey* was not whether the woman's interest in her pregnancy outweighed the man's interest. That question had been resolved in *Danforth*. The issue was rather whether, given *Danforth*, the woman's interest in keeping her husband uninformed about her intention to abort trumped the husband's interest in knowing. Writing jointly for the Court on this issue, Justices O'Connor, Kennedy and Souter struck down the spousal notification requirement as an impermissible infringement of a woman's right to privacy.¹⁷⁸ The Court offered three reasons for holding that a wife could not be compelled to inform her husband of her intent to abort.

First, the Court discounted the husband's interests by pointing to the realities of nature: "It is an *inescapable biological fact* that state regulation with respect to the child a woman is carrying will have a far greater impact on the mother's liberty than on the father's."¹⁷⁹ In other words, because the fetus is in the woman and not the man, the woman's interests trump.

This reasoning might be questioned on several fronts. First, it is not the case that biology is all within the women. As dozens of studies of couvade syndrome

174. *Danforth*, 428 U.S. at 69.

175. 505 U.S. 833 (1992).

176. *See id.* at 844.

177. *See id.* at 887.

178. *See id.* at 898.

179. *Id.* at 895 (emphasis added).

indicate, expectant fathers experience biological symptoms of pregnancy along with their partners.¹⁸⁰ Both partners may feel nausea, irritability, food cravings, indigestion, and so on. Both can anticipate discomforts from pregnancy and the stresses of infant care. While the man's aches and pains are "psychosomatic" and are likely to be less intense than the woman's, they are not inconsequential.

In any event, the right to privacy recognized in *Roe v. Wade* is not based solely on biology, but also on issues of emotion and identity. Justices O'Connor, Kennedy and Souter stated as much in *Casey*, observing that the Fourteenth Amendment protects "the most intimate and personal choices a person may make in a lifetime, *choices central to personal dignity and autonomy*."¹⁸¹ These choices include "the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life."¹⁸² This is not the language of biology, but of religion or philosophy.

The greater maternal involvement in biological pregnancy cannot by itself resolve these larger issues. What matters, in addition to the physical effects on the body, are the consequences of abortion for the individual's basic value structure and self-concept. Once the liberty interest protected by the Fourteenth Amendment is phrased in terms of choices and self-concept, rather than biology alone, the argument that the woman's interests should trump the man's requires further justification. Both men and women face choices about their roles as parents and their concepts of their own identities. Both men and women bond with the fetus. The fetus may be physically growing in the woman's belly, but in the geography of the psyche, it is inside the man as well. To exclude expectant fathers from juridical notice on grounds of biology is to miss the importance of pregnancy in a man's concept of himself as a parent and a procreative being and his vision of the meaning of his life.

A second reason offered by the *Casey* Court for favoring the wife's right to secrecy over the husband's right to know was the concern that a wife, or perhaps a child, would suffer abuse at the hands of the husband if she told. The Court reasoned that most women would tell their husbands about their intent to abort, even if not compelled to do so, and that when a woman did not want to tell her husband, her reticence was probably due to a reasonable fear that he would harm her.¹⁸³ Forcing the woman to inform her husband under such circumstances, in the Court's view, would place an undue burden on her right to abortion.¹⁸⁴

It is instructive to compare the model of manhood in *Casey* with the image suggested in *Danforth*. *Danforth* painted the husband as devoted and protective, concerned for his wife's welfare, and anxious to act as a good provider and problem-solver in order to allow his wife to flourish within the female realm of home, hearth, and family.¹⁸⁵ These stereotypes appeared outmoded even in 1976,

180. See *supra* Parts I-II.

181. *Casey*, 505 U.S. at 851 (emphasis added).

182. *Id.*

183. See *id.* at 887.

184. See *id.* at 892-96.

185. See *Planned Parenthood v. Danforth*, 428 U.S. 52, 69 (1976).

when *Danforth* was decided; they seem anachronistic today. The *Casey* Court, however, calls forth quite a different stereotype of manhood. Gone is the devoted and protective husband of *Danforth*. The husband depicted in *Casey* was a vicious wife-batterer, a man who commits “family violence” both “gruesome and torturous.”¹⁸⁶ He is prone to “sexual abuse,” “marital rape” and “sexual mutilation.”¹⁸⁷ In his zeal to coerce his wife, he may abuse the children. If he finds out she is pregnant, he may assault her for being unfaithful.¹⁸⁸ If she flees to a shelter, he may track her down.¹⁸⁹ This apotheosis of violence is not just an imaginary construct. He is real—so real that one woman in eight is battered by her husband in a given year.¹⁹⁰ As many as one-third of all women will be physically assaulted by a partner or ex-partner during their lifetimes.¹⁹¹ The battering husband is not some stranger, some intruder; he is a friend, a neighbor, a co-worker.

Without discounting the ubiquity and baneful effects of domestic abuse in American life and culture, one might still inquire into the Court’s use of the specter of domestic abuse to strike down the spousal notification requirement in *Casey*. The Court readily acknowledged that most wives *do* tell their husbands, indicating that spousal abuse in the context of abortion notification is uncommon.¹⁹² Even with respect to spouses who don’t want to inform their husbands, the conclusion that they are likely to be battered if they tell was not well supported. The Court acknowledged that there was a “limited” amount of research on spousal notification, involving “samples too small to be representative.”¹⁹³ In fact, the *only* study of spousal notification cited in the O’Connor-Kennedy-Souter opinion was Ryan and Plutzer’s paper, *When Married Women Have Abortions*.¹⁹⁴ These authors surveyed 506 female clients of an abortion clinic about their husbands’ responses to learning that their wives were pregnant or that they intended to obtain an abortion.¹⁹⁵ Although some of the husbands were angry (twelve percent) or upset (six percent), there was only one reported instance of verbal abuse and *none* of physical violence.¹⁹⁶ Under the circumstances, which might involve the husband’s discovery of an extramarital affair, the response by the husbands appears to have been pacific, not abusive. The Court neglected to mention this detail.

186. *Casey*, 505 U.S. at 888 (quoting district court findings of fact). Although the Justices cited the district court, they appeared to undertake a *de novo* review of the empirical evidence, citing in the process a number of sources not mentioned by the lower court.

187. *Id.* at 889 (quoting district court findings of fact).

188. *See id.*

189. *See id.*

190. *See id.* at 890.

191. *See id.* at 891.

192. *See id.* at 893.

193. *Id.* at 892.

194. *See id.* (citing Ryan & Plutzer, *supra* note 108, at 41).

195. *See* Ryan & Plutzer, *supra* note 108, at 41.

196. *See id.* at 41-50.

Lacking empirical support for the specific proposition that spousal notification would increase spousal assault, the Court fell back on statistics that wife-battering is a serious problem in American society and that battering husbands often psychologically abuse and control their wives.¹⁹⁷ This argument, however true, is hardly a reason for striking down the statute in *Casey*. The Court never adequately explained why the statute in question did not address the problem of anticipated abuse. The statute contained an exception for cases where the woman feared abuse: she could avoid obtaining spousal consent by signing a statement to the effect that she believed notifying her husband would cause him or someone else to harm her physically. The statute, in other words, addressed the problem of spousal violence and made accommodations for women who feared for their safety.¹⁹⁸

While the Court recognized the reality of women's fears of male violence after notification, it failed to consider other, potentially countervailing concerns. Disclosure to the husband would not always have negative consequences for the wife, even in cases where the wife didn't want to tell. Honesty among spouses—even honesty over difficult issues such as abortion—might increase communication and enhance intimacy. Some husbands might surprise their wives by supporting the abortion and helping with the finances and logistics.¹⁹⁹ The couple might even decide to continue the pregnancy rather than cutting off a potential life.

Conversely, going ahead with an abortion without telling her husband might

197. See *Casey*, 505 U.S. at 890-91.

198. The Court suggested that the exception was insufficient because a woman could be psychologically abused:

Many [women] may fear devastating forms of psychological abuse from their husbands, including verbal harassment, threats of future violence, the destruction of possessions, physical confinement to the home, the withdrawal of financial support, or the disclosure of the abortion to family and friends. These methods of psychological abuse may act as even more of a deterrent to notification than the possibility of physical violence, but women who are the victims of the abuse are not exempt from [the statute's] notification requirement.

Id. at 893. But in most cases, if the woman fears psychological abuse, she would have reason to fear physical abuse as well, and therefore could take advantage of the statutory exception. Moreover, the legislature may have had reason not to provide an exception from spousal notification in cases where the woman fears psychological abuse only. Unlike physical abuse, psychological abuse has no clear-cut definition and may be hard to distinguish from the fear that the husband will be angry—a concern that in itself would not seem to provide a sufficient reason for keeping the husband in the dark. The Court also suggested that husbands might take their rage out on the children. See *id.* However, the Court provided no evidence that husbands frequently engage in transfer abuse when informed of their wives' pregnancies. Moreover, because husbands who abuse their children also are likely to abuse their wives, the danger, if any, of transferred abuse would ordinarily be covered by the statutory exception for cases in which the wife herself fears abuse.

199. See generally SHOSTAK & MCLOUTH, *supra* note 109.

not always work to the wife's advantage. Wives might sometimes feel remorse about the abortion, which could potentially have been avoided if the wife had confided in her husband and, after discussion, decided to go through with the pregnancy. For their part, husbands who find out after the fact about the abortion are likely to feel much more betrayed and angry than they would feel if notified in advance.²⁰⁰ The danger of abuse that might follow a belated revelation would seem to counteract some of the benefits to the wife of maintaining secrecy in the first place. Finally, even if the husband does not find out, it is not clear that allowing the wife to keep an abortion secret would save her from abuse. Most battered wives are battered repeatedly. Revelation of an intended abortion might be an excuse for battering, but, even in the absence of such an excuse, violent husbands might use another pretext for an assault. For too many women, the right not to inform their husbands about the abortion might not materially decrease their risk of being battered.

A final reason for striking down the spousal notification provision, in the view of Justices O'Connor, Kennedy and Souter, was that the requirement reflected an outmoded model of relationships between men and women, one "repugnant to our present understanding of marriage and of the nature of the rights secured by the Constitution."²⁰¹ The concept here was that women are autonomous people capable of making their own decisions. It is insulting to a woman's dignity and to her equal stature under the law to require her to report to her husband before she undertakes an action that the Constitution recognizes as within her sole and complete discretion. In sum, "a State may not give to a man the kind of dominion over his wife that parents exercise over their children."²⁰²

Few would dispute the force of the Court's observation that the status of women has changed since the days of the common law, and that these changes have been beneficial. However, the Court's analysis was a *non sequitur*. Upholding the spousal notification requirement would not have been equivalent to endorsing an outmoded common-law view of women's subordinate role. The statute at issue in *Casey* did not deny women full legal rights of equal citizenship. Indeed, the statute recognized that women enjoy *superior* rights to men in the matter of abortion. The issue in *Casey* was merely whether the husband had the right to know of the wife's intention to abort. Granting the husband such a right would hardly have revived outmoded common law conceptions of male supremacy.²⁰³

200. It plausible that a husband would find out despite the wife's efforts to conceal an abortion. Even though abortion clinics maintain confidentiality, the husband might be able to trace the payment (for example, by examining the checkbook or credit card statement), or might hear about the abortion from a friend in whom his wife has confided. The wife herself might let the fact slip, or might admit the abortion in a moment of weakness, remorse, or emotional stress.

201. *Casey*, 505 U.S. at 898.

202. *Id.*

203. Although the *Casey* Court accused the state of entertaining outmoded stereotypes of a woman's role, the opinion itself suggested stereotypes of its own. The image of the pregnant

Neither *Danforth* nor *Casey* fully appreciated the male role in procreation. Instead, in rejecting the father's interest, the Court drew on stereotypes of masculinity: in *Danforth*, the traditional post-War image of the minimal father; in *Casey*, the Nineties image of the vicious wife-batterer. Like all stereotypes, these have elements of validity—some husbands are distant, others abusive. These images of masculinity, however, were incomplete. In valorizing certain pictures of manhood, the Court discounted others. In particular, it omitted the image of procreative man, the man whose emotional structure and personal identity are deeply involved in conception, pregnancy, and birth. The results in *Danforth* and *Casey* are not necessarily erroneous, given *Roe v. Wade*. But the cases were marred by the Court's failure to give the father's interests an appropriate weight (or even any real weight) in the abortion calculus.

B. Adoption of Infants Born Out of Wedlock

Once a child is born, the relative interests of father and mother shift to some extent. The fault line here concerns the rights of unwed fathers to block adoption. In this area the courts have been somewhat more responsive to the interests of fathers than they have been in the case of abortion, but the full extent of the father's potential for bonding and growing into the paternal role is not developed. The key to the decisions appears to be the courts' perceptions of whether the father has, in fact, established a paternal bond.

The first important decision in this area, *Stanley v. Illinois*,²⁰⁴ established that the state could not deny a father parental rights simply because he was not married to the child's mother, without a hearing as to the father's fitness or proof of neglect. In upholding the father's "cognizable and substantial" claim,²⁰⁵ the Court observed that a man's interest "in the children he has sired and raised, undeniably warrants deference and, absent a powerful countervailing interest, protection."²⁰⁶ What is noteworthy about the opinion, for present purposes, is that the father had apparently established bonds with his children: he had lived with the mother for eighteen years, and during those years they had raised the children together.²⁰⁷ The Court signaled its sensitivity to the father's relationship

woman in *Casey* resembled, to some extent, the Fifties housewife of the *I Love Lucy* era. She wants something but does not want to tell her husband lest he be angry or forbidding. The difference in the narratives between the 1950s and the 1990s is that in *I Love Lucy*, the wife always ended up being caught in her deception; the message was that women were silly to compete with or subvert their husbands. In the Nineties, the deception is socially approved as a way of expressing her autonomy and right to self protection. This change in cultural script attributable to a revised image of the husband, from the benign patriarch of *Father Knows Best* to the raging abuser of *Thelma and Louise*. If the husband is kind, then the woman's reasons for deceiving him appear whimsical and headstrong; if he is violent and dangerous, then she has little choice but to deceive him.

204. 405 U.S. 645 (1972).

205. *Id.* at 652.

206. *Id.* at 651.

207. *See id.* at 646. There had apparently been a few gaps in the periods of cohabitation,

with his children by noting, in the introduction to the opinion, that when the mother died, the father "lost not only her but also his children."²⁰⁸

In contrast, the Court in *Quilloin v. Walcott*²⁰⁹ upheld as applied a Georgia statute that gave unwed mothers, but not unwed fathers, the right to refuse consent to adoption. Again, the decision appeared to turn on the presence or absence of bonding between the child and its father. In *Quilloin*, the biological father had shown some degree of bonding. He consented to be named in the birth certificate, provided irregular financial support, and visited the child fairly frequently.²¹⁰ On the other hand, he never lived with the child, waited eleven years before petitioning for paternity, never sought or exercised any form of legal custody, and never "shouldered any significant responsibility with respect to the daily supervision, education, protection, or care of the child."²¹¹ Meanwhile, the mother had married another man and lived with him for nine years while raising the child as sole custodian.²¹² During that period, the child had the opportunity to bond with the mother's husband as a father figure. The trial court concluded that the best interests of the child would not be served by granting the biological father's petition for legitimation, which would cut off the opportunity for the stepfather to adopt.²¹³ In these circumstances, the Supreme Court upheld the state statute, but only as applied to these facts, which indicated that the biological father's connection with his child was not all that it could have been, and that the child had developed a substitute paternal bond with the stepfather.

The Court reached a different result in *Caban v. Mohammed*.²¹⁴ A mother and stepfather petitioned to adopt a child born out of wedlock. The biological father objected, but was turned down by the New York courts on the basis of a law that allowed unwed mothers, but not unwed fathers, to block adoption of illegitimate children. The statute at issue was similar to the Georgia law that had been upheld, as applied, in *Quilloin*. However, in *Caban v. Mohammad*, the Supreme Court struck down the law. The principal difference between *Quilloin* and *Caban* appears to be that the biological father in *Caban* bonded emotionally with the child and accepted his paternal role, and no strong substitute paternal bond formed. The biological father was living with the mother at the time the child was born. He listed his name on the child's birth certificate.²¹⁵ After the couple separated, the father contributed to the child's financial support and continued to see him on a regular basis. He had, as the Court observed, "come forward to participate in the rearing of his child."²¹⁶ Meanwhile, the child was

because the Court indicated that father and mother lived together "intermittently" for 18 years.

208. *Id.* at 645.

209. 434 U.S. 246 (1978).

210. *See id.* at 250.

211. *Id.* at 256.

212. *See id.* at 246.

213. *See id.* at 253.

214. 441 U.S. 380 (1979).

215. *See id.* at 382.

216. *Id.* at 392.

only two years old at the time of the adoption petition in *Caban*, and thus did not have the extended period of bonding with the stepfather as occurred in *Quilloin*. The evidence, in short, supported the existence of strong and unambiguous paternal bonding, and when such bonding was present, the Court recognized that the father had the same rights as the mother.

Paternal bonding resurfaced four years later in *Lehr v. Robertson*.²¹⁷ Lehr was the biological father of a child born out of wedlock. Prior to the child's birth, the mother left Lehr for another man, whom she subsequently married.²¹⁸ This couple raised the child for two years, during which time Lehr had little to do with the child, never offered to provide financial support, and never entered his name in a state "putative fathers registry" which would have entitled him to notice of adoption.²¹⁹ The husband and wife obtained an order of adoption without informing Lehr. When Lehr found out, he attempted to set aside the adoption.²²⁰ The Supreme Court, however, declared the adoption valid, notwithstanding the fact that the state required fathers to undertake actions to preserve their claims of paternity (filing with the putative fathers registry) that were not required of mothers.²²¹ The key to the decision appears to have been the father's failure to bond with the child and his negligence in affirming his paternal role.

A number of important state court opinions have addressed questions left open by this line of Supreme Court cases. In *Friehe v. Schaad*,²²² the Nebraska Supreme Court upheld a statute that cut off the biological father's right to object to the placement of his out-of-wedlock child for adoption if he did not file a notice of intent to claim paternity within five days of the child's birth.²²³ Because it is probable that most biological fathers would not know of this abbreviated time frame, the result of the statute was that some, like the father in *Friehe v. Schaad*, would lose their rights even though they wished to exercise them. In upholding the statute, the court emphasized that the father had not bonded with the baby, so that the only right he was deprived of was an "opportunity" to bond, which warrants a lower level of constitutional scrutiny.²²⁴ The defect in the court's reasoning was its assumption that bonding could not take place before birth. If bonding occurred before birth, then the father was deprived, not of a mere "opportunity" to bond, but with an actual bonding relationship. Further, the father was arguably deprived of the distinct right to

217. 463 U.S. 248 (1983).

218. *See id.* at 250.

219. *Id.* at 251.

220. *See id.* at 250.

221. *See id.* at 268.

222. 545 N.W.2d 740 (Neb. 1996).

223. *See id.* at 743.

224. The court distinguished a prior state case in which the statute had been declared unconstitutional as applied to a father who had bonded with his child for at least nineteen months before the mother placed the child up for adoption. *See In re Application of S.R.S. and M.B.S.*, 408 N.W.2d 272 (Neb. 1987).

experience himself in the paternal role. Because, as shown above,²²⁵ expectant fathers frequently develop strong bonds with their offspring and experience their identities as parents even before birth, the court's assumption reflected dated notions of the father's role in procreation. The strongest justification for the statute was the compelling need to clear title to the child in order to provide assurance to adoptive parents that the birth father would not appear later to demand a right of redemption.²²⁶ But that interest could have been served by means less draconian than the termination of the father's rights five days after birth. The state might have protected the birth father, without excessive cost, by requiring that the father be notified of the birth and be informed that failure to file within a short, but reasonable period—say, several weeks—would result in loss of paternal rights.

A California case from 1995, *Adoption of Michael H.*,²²⁷ displays an equally troubling attitude. The unwed father, Mark, displayed many indications of prenatal bonding. Even during the first few months of pregnancy, when he and his girlfriend were intending to place the baby for adoption, Mark demonstrated attachment to the fetus.²²⁸ He attended birthing classes, purchased items for the baby, and made financial contributions. He went to his girlfriend's medical appointments, and purchased a videotape of the ultrasound.²²⁹ He reported that after seeing the ultrasound, he "began to warm up to the idea of fatherhood" and suggested that they "just go straight through with it" and keep the child.²³⁰ After the fifth month he consistently opposed adoption. His girlfriend, however, moved to California and arranged a private adoption.²³¹ Mark checked into a rehabilitation hospital and decided to quit using drugs, seek stable employment and residence, and continue with counseling. Lacking money to hire an attorney, he researched the law himself and filed a pro se petition for custody.²³² Eventually he found an attorney willing to take the case free of charge. When he found out through his attorney that the baby had been born, he immediately asked for custody, sent out birth announcements, and bought a car seat, a crib, and baby clothes. He established a home, maintained steady employment, and continued to seek custody of the baby against the claims of the putative adoptive parents, who were attempting to terminate his parental rights.²³³ He sought visitation with the child, but the adoptive parents refused to allow it. The trial court found that Mark had "fought unyieldingly" for custody, that his efforts were "nothing short of impressive," that he had "acted with a tenacity that demonstrates undeniable commitment and speaks well of his ability to weather the frustrating demands of

225. See *supra* Parts I & II.

226. See *Friehe*, 545 N.W.2d at 743.

227. 898 P.2d 891 (Cal. 1995).

228. See *id.* at 893.

229. See *id.* at 904 (Kennard, J., concurring and dissenting).

230. *Id.*

231. See *id.* at 893.

232. See *id.* at 901 (Kennard, J., concurring and dissenting).

233. See *id.* at 904.

parenthood," that he "never wavered in expressing his desire to take full responsibility of fatherhood," and that he "incessantly, relentlessly" urged his lawyers to seek visitation.²³⁴

Nevertheless, four years after the child's birth, the California Supreme Court held that Mark had no constitutional right to block the adoption and that his parental rights should have been terminated under the California statute.²³⁵ The rationale was that he had not "promptly" come forward to demonstrate a full commitment to his parental responsibilities.²³⁶ The decision might be justified on the ground that the best interests of a four-year-old child would not be served by being taken away from the only parents the child had ever known. But the four-year delay in adjudicating parental rights was hardly the biological father's fault. It was a problem with the judicial system. It seems unfair that the court should blame a twenty-year-old man for not having come forward on day one to take paternal responsibility, in light of his extraordinary efforts, under adverse conditions, beginning at the fifth month of pregnancy.

It is difficult to discern any public policy that could be served by a draconian requirement that an unwed father come forward immediately to take responsibility, without time for reflection or advice. The mother had three or four months notice that the father opposed the adoption and wanted to take custody of the child. There was no danger that adoptive parents would take a child and then be surprised when a previously unknown biological parent appeared to seek custody. The court blamed the father for the law's delay and thus abdicated its own responsibility. While the result may have been in the best interests of this particular child, the articulated rule fails to accommodate and recognize the importance of paternal bonding.

Other issues bearing on paternal bonding in adoption surfaced in a recent decision from West Virginia.²³⁷ After the birth mother became pregnant and informed the potential father, she moved to California. The father could not locate her, but apparently suspected that she intended to put the child up for adoption because he obtained an injunction *in absentia* against her doing so.²³⁸ The mother gave birth and put the child up for adoption. A Canadian couple adopted the baby and took him back to Canada. By the time the birth father found out, the six-month period for challenging adoptions under Canadian law had expired, and the birth father was left without any legal means to recover his child.²³⁹ Eventually the birth father was able to obtain a judgment against the birth mother and her family, awarding damages for conspiring to hide the child. Although an award of damages may have been the court's only recourse, it

234. *Id.* at 905.

235. *See id.* at 901.

236. *Id.*

237. The case is described in *Man Wants Son, Not Millions: Court Ordered Damage Payment to Father as Victim of Adoption Without Consent*, CHARLESTON GAZETTE, July 28, 1998, available in 1998 WL 5965084.

238. *See id.*

239. *See id.*

appears to be a rather Pyrrhic victory for a man who had evidenced from the very beginning—even before the child's birth—that he wanted to exercise his paternal rights and objected to the child's adoption.

Taken as a whole, the adoption cases illustrate a somewhat more receptive attitude towards the potential for paternal bonding than the abortion cases. We may infer that the courts apply a model in which the father's bond with a child becomes cognizable after birth, but is still seen as less powerful than the mother's for a period of time. The father must establish his rights by acknowledging paternity and coming forward to act in a parental role. The Court in *Caban v. Muhammad* was quite explicit about this model. In upholding the father's claims, the Court rejected the argument that there was "any universal difference between maternal and paternal relations at every phase of a child's development."²⁴⁰ In so doing, the Court did not dispute that in the earliest phases of childhood, the mother's bond may be stronger: "Even if unwed mothers as a class were closer than unwed fathers to their newborn infants . . . this generalization concerning parent-child relations would become less acceptable as a basis for legislative distinctions as the age of the child increased."²⁴¹

Although the Court in *Caban v. Muhammad* properly acknowledged the father's capacity for bonding with older children, the implication of minimal paternal involvement during infancy is unfortunate, given the social science research demonstrating that fathers establish bonds with their offspring even before the moment of birth. As in the abortion area, many of the adoption cases may be correctly decided; what is disturbing is not so much their results, but their failure to give sufficient weight to the importance of early paternal bonding.

C. Custody and Visitation

When adjudicating matters of custody and visitation, courts routinely look to the degree of bonding with the adult figure as an important element in determining the best interests of the child. For judicial purposes, "bonding" occurs as a result of "the parent's personal and emotional investment and the relationship that develops from that investment."²⁴² Bonding thus has two elements: the individual's emotional connection with the offspring, and his or her self-concept as a person whose existence is defined in part, by the parental role. The relationship between bonding and the best interests of the child consists, at least in part, on the fact that an adult who bonds with a child is likely to be an empathetic and understanding caretaker, and is more likely to sacrifice his or her own interest for the child's benefit than someone who has not bonded with the child.²⁴³

240. 441 U.S. 380, 389 (1979).

241. *Id.*

242. *State of West Virginia ex rel. Roy Allen S. v. Honorable Robert B. Stone*, 474 S.E.2d 554, 562 (W. Va. 1996).

243. *See, e.g., State of Utah in the Interest of H.R.V. and B.P.V. v. S.V.*, 906 P.2d 913 (Utah 1995).

If bonding occurs between parent and child, courts will err on the side of awarding parental rights, even in the face of countervailing factors, such as a history of violence between the parents²⁴⁴ or a lack of biological parenthood.²⁴⁵ When both parents have bonded with the children, courts ask which parent has developed the stronger bond,²⁴⁶ although they are less willing to engage in a comparative analysis when the dispute is between a parent and a relative such as a grandparent.²⁴⁷ The presence of a strong emotional bond between a non-custodial parent and child may be sufficient to prevent the custodial parent from disrupting that bond by relocating,²⁴⁸ and may even be sufficient to support a transfer of physical custody.²⁴⁹ Conversely, when a biological parent has failed

[I]t is rooted in the common experience of mankind, which teaches that parent and child normally share a strong attachment or bond for each other, that a natural parent will normally sacrifice personal interest and welfare for the child's benefit, and that a natural parent is normally more sympathetic and understanding and better able to win the confidence and love of the child than anyone else.

Id. at 916-17.

244. *See, e.g.,* *Neff v. Neff*, No. 73094, 1998 WL 433386 (Ohio Ct. App. July 30, 1998) (father awarded visitation despite the history of violence between the parents, in light of the strong parental bond between father and child).

245. *See, e.g.,* *Buness v. Gillan*, 781 P.2d 985 (Alaska 1989) (recognizing that the man who was not the child's biological father could obtain custody in the dispute with the biological mother, in light of the fact that the man had been the child's primary caretaker and had developed a strong psychological bond with the child); *W.C., In the Interest of A.M.K., a Child*, 907 P.2d 719 (Colo. Ct. App. 1995) (rejecting the biological father's claim to paternal rights when the mother's husband had bonded with the child for a substantial period); *In re Christopher S.*, 662 N.Y.S.2d 200 (N.Y. Fam. Ct., Dutchess County 1997) (wife held equitably estopped from asserting ex-husband's lack of biological parenthood as a defense to petition to obtain primary residential custody, when wife had agreed that ex-husband would enjoy parental rights over child and strong parental bond had formed between child and ex-husband).

246. *See* *Vissicchio v. Vissicchio*, 498 S.E.2d 425 (Va. Ct. App. 1998) (primary physical custody awarded to the mother, *inter alia*, on the ground that the mother had stronger bond with the child).

247. *See, e.g.,* *Dodge v. Dodge*, 505 S.E.2d 344 (S.C. Ct. App. 1998) (evidence of a strong bond between child and grandparents and stepfather held not sufficient to rebut presumption that custody would revert to the father on death of the mother); *Duncan v. Howard*, 918 P.2d 888 (Utah 1996) (upholding award of custody to the biological father over maternal grandparents, even though emotional bond between the child and the father was not found to be strong). At least this is true if the biological parent has not previously lost custody. *See* *State of Utah, in the Interest of H.R.V. and B.P.V. v. S.V.*, 906 P.2d 913 (Utah 1995) (parental presumption did not apply when the parent had previously lost custody). *Cf.* *Troxel v. Granville*, 120 S. Ct. 2054 (2000) (recognizing superior due process rights of mother in visitation dispute with father's parents in case of a child born out of wedlock).

248. *See, e.g.,* *Ramos v. Ramos*, 687 So.2d 280 (La. Ct. App. 1997) (denying mother's petition to relocate, in part because of father's bonding with child).

249. *See, e.g.,* *Burr v. Emmett*, 670 N.Y.S.2d 637 (N.Y. App. Div. 1998) (transferring

to bond with a child, the courts may terminate parental rights,²⁵⁰ and award them to foster parents or other custodians who have established such bonds.²⁵¹ However, if a bond does exist between parent and child, courts are usually loath to terminate parental rights altogether, even if the parent displays undesirable qualities²⁵² or engages in illegal acts.²⁵³

Bonding can be established by a variety of forms of evidence. Psychological tests of the capacity for bonding have been utilized in a few cases, but courts tend to be skeptical of their statistical validity and wary of the possibility of manipulation.²⁵⁴ Testimony by mental health professionals will usually be admitted if offered,²⁵⁵ especially the views of court-appointed psychologists or psychiatrists²⁵⁶ and social caseworkers.²⁵⁷ Fact witnesses may testify about the nature of the bonding they observed between adult and child.²⁵⁸ Factors that

custody to father when mother relocated to California).

250. See, e.g., *In the Interest of F.G. et al., Children*, No. A98A1441, 1998 WL 344486 (Ga. Ct. App. June 29, 1998) (terminating incarcerated father's parental rights over twin daughters, inter alia, on ground that the children had been in foster care since they were two months old and had not bonded with the father); *In re B.M., Juvenile*, 682 A.2d 477, 480 (Vt. 1996) (in upholding termination of father's parental rights, court suggested that the "most important fact" was the lack of a "significant relationship or bond" with the daughter); *In re Dependency of J.W.*, 953 P.2d 104, 107 (Wash. Ct. App. 1998) (noting finding of fact that child did not know father and had no significant bond with him).

251. See, e.g., *In re Jessica Lynn B.*, 1997 WL 576413, at *15 (Conn. Super. Ct. May 13, 1997) (terminating rights of biological parent and noting that Department of Child and Family Services hoped to place child with foster parents for adoption); *In re Robert F.*, 1996 WL 512619, at *6 (Conn. Super. Ct. Aug. 27, 1996) (terminating parental rights and noting that child's foster parents were bonded with him and wanted to adopt him); *In re the Dependency of K.R. and R.J.*, 904 P.2d 1132, 1137 (Wash. Ct. App. 1995) (en banc) (terminating parental rights and noting that child had bonded with foster parent).

252. See *State ex. rel. Juvenile Department of Multnomah County v. Wyatt*, 579 P.2d 889, 890 (Or. Ct. App. 1978) (mother's behavior was "willful, hedonistic and totally self-indulgent").

253. See *id.* at 891 (prostitution).

254. See, e.g., *In re Wyatt*, 579 P.2d at 891 (refusing to terminate mother's parental rights based on MMPI results that correlated with parental abuse); *In re B.M., Juvenile*, 682 A.2d 477, 481 (Vt. 1996) (criticizing trial court's reliance on results of Minnesota Multiphasic Personality Inventory (MMPI) and Parenting Awareness Skills Survey (PASS) tests showing that father had egocentric personality and weak capacities for empathy).

255. See, e.g., *In re the Marriage of Steven M. Roberts and Jennifer L. Roberts*, 649 N.E.2d 1344, 1347 (Ill. App. Ct. 1995) (citing testimony of clinical psychologist that father had strongly bonded with child and that continuation of the relationship was essential to the child's ability to develop long term relationships in the future).

256. See, e.g., *Keese v. Keese*, 675 So.2d 655 (Fla. Dist. Ct. App. 1996); *Joe v. Lebow*, 670 N.E.2d 9 (Ind. Ct. App. 1996).

257. See, e.g., *In re Jasmine S.*, 68 Cal. Rptr.2d 24 (Cal. Ct. App. 1997) (citing testimony of family social workers).

258. See, e.g., *In re the Marriage of Steven M. Roberts and Jennifer L. Roberts*, 649 N.E.2d

indicate bonding include whether the parent acts in a loving and considerate way to the child, is physically affectionate, consistently keeps scheduled visitations, acts as a significant caregiver, spends time with the child, and engages in enjoyable and appropriate activities with the child. In a few cases, the courts have inquired into other indicia of early bonding. For example, a parent's experience of observing the fetus by means of ultrasound technology has been influential in a few decisions.²⁵⁹ However, this type of evidence appears sporadic and is only infrequently offered by counsel as bearing on bonding.

Although the courts have established criteria for determining the existence of bonding in custody and visitation that are ostensibly gender-neutral, their application is not. As Eleanor E. Maccoby and Robert H. Mnookin demonstrate in their study of divorce in California,²⁶⁰ the courts in that state continue to award custody preferentially to mothers, even though the written law establishes no preference for either parent. When both mother and father request sole physical custody, the courts favor the mother by a four-to-one margin;²⁶¹ in cases where the mother requests sole physical custody and the father requests joint custody, the courts grant the mother's wishes more than twice as often as the father's.²⁶² Maccoby and Mnookin conclude that even though gender differences have been formally eliminated, they continue to operate throughout the judicial system: "[T]he actual custodial outcomes still reflect profound gender differentiation between parents: the decree typically provides that the children will live with the mother."²⁶³

Many factors are at play in the custody determination, and one should not infer from mere disparity of result that the courts are evidencing bias against men. On the other hand, the courts do appear to continue the traditional

1344, 1347 (Ill. App. Ct. 1995) (citing testimony of friends who supported the father's claim to have a close and supportive emotional bond with the child); *Tucker v. Tucker*, 910 P.2d 1209 (Utah 1996).

259. See, e.g., *Adoption of Michael H.*, 29 Cal.Rptr.2d 251, 252 (Cal. Ct. App. 1994) (father "arranged for a videotape of [mother's] ultrasound showing the developing child"), *rev'd*, 877 P.2d 762 (Cal. 1995); *In the Interest of J.J., a Minor*, 615 N.E.2d 827, 829 (Ill. App. Ct. 1993) (concluding that mother had "good bonding" with her baby before pregnancy, in part because she "could see the baby on the video screen during sonographies, and asked questions regarding the parts of the baby").

260. See ELEANOR E. MACCOBY & ROBERT H. MNOOKIN, *DIVIDING THE CHILD: SOCIAL AND LEGAL DILEMMAS OF CUSTODY* (1992).

261. See *id.* at 104 (mothers received sole physical custody in 45.3% of the cases and fathers received sole custody in only 11.3% of the cases; in the remaining cases, custody was either joint or split).

262. See *id.* In such cases, courts awarded custody to the mother 66.4% of the time and joint custody 28.2% of the time. The courts granted the father's request on an equal basis to the mothers only when the mother requested joint custody and father requested sole custody: here, 42.9% of the cases resulted in sole custody for the father and 42.9% of the cases resulted in sole custody for the mother. See *id.*

263. *Id.* at 114.

approach to custody, which views the mother as the presumptively fitter parent, especially if the child is of "tender years."²⁶⁴ A key premise of the traditional approach is that fathers play a secondary role in parenting when the child is very young. The tender years doctrine not only favors the interest of the mother during a child's early years, but also presumes that the mother is more firmly bonded with the child during this period. Even in later years, courts return to early childhood as the most important period for the establishment of a parent-child bond.²⁶⁵ Fathers may thus face a lethal combination of a judicial perception of weak paternal bonding in early childhood, coupled with the proposition that the strongest bonds are formed in early childhood. This approach reflects stereotypes about fatherhood that are not supported by the recent social science research.

To counteract traditional stereotypes, courts and counsel might usefully consider types of evidence that bear on whether a father has established a bond with his child during pregnancy or early childhood. A checklist can identify many of the facts a court might admit, such as:

1. Did the father play an active role in pregnancy planning and/or pregnancy prevention?
2. Did the father indicate a desire for a baby?
3. Did the father display an interest and involvement in the pregnancy from an early point?
4. Did the father accompany his partner on visits to the physician to monitor the pregnancy? Did he review and attempt to understand the results of testing such as ultrasound, amniocentesis, or CVS?
5. Did the father participate in unusual steps to achieve conception?
6. During pregnancy, did the father show symptoms of *couvade*—appetite disturbance, headache, toothache, weight gain, nausea, indigestion, irritability, food cravings, and the like?
7. Did the couple experience a perinatal loss? If so, did the father manifest objectively verifiable grieving behaviors?
8. Did the father participate in prepared childbirth classes?
9. If the baby was adopted or born through surrogacy, did the father participate?
10. Was the father present during labor and delivery?
11. Did the father hold the child soon after birth?
12. Did the father report a feeling of being fascinated, joyful, or "in love" with the newborn?
13. Did the father take time off from work to be with the baby?
14. Did the father show signs of postpartum emotionality, such as irritability, insomnia, tearfulness, or depression?
15. Did the father participate in the decision as to bottle versus breast feeding? Did he help in the feedings themselves, for example by bottle

264. *Id.* (describing the tender years doctrine in California).

265. *See, e.g., In re B.M., Juvenile*, 682 A.2d 477, 482 (Vt. 1996) ("[T]he early years of a child's life are critical to forming a parent-child bond . . .").

feeding the child or by bringing the baby to the mother?

16. Did the father display a strong interest in the baby's growth, capacities, and reactions to external stimuli?
17. Did the father participate actively in diapering, bathing, soothing and holding, walking in a stroller, clothing, burping, feeding, and so on?
18. Did the father help create a space for the newborn, such as a nursery?
19. Did the father increase care-taking around the house in order to assist the mother—for example, by taking over more of the cooking, dishwashing, laundry, or housekeeping duties?

Obviously, this list is not exclusive, nor should the presence or absence of any particular factor dictate any particular outcome. Moreover, in cases where the children are older, subsequent events play an important role. Nevertheless, adjudication in the area of family relations might be enhanced by a more explicit consideration of early paternal bonding.

CONCLUSION

This Article has considered the importance of paternal bonding during pregnancy, childbirth, and early childhood. I use the metaphor of couvade to highlight men's potential in this area. Drawing on scholarship from the fields of anthropology, sociology, history, psychology, psychiatry, nursing, and medicine, I argue that men have the capacity to develop two important kinds of bonding with their offspring: emotional connection with the child or fetus and paternal role identification.

Paternal bonding can begin at conception, or even earlier if the couple is actively involved in procreation (for example through the use of new reproductive technologies). Once conception has occurred, the bonding process accelerates, as indicated by phenomena such as couvade symptoms, the pronounced paternal grief reactions in perinatal death, and even male responses to abortion. New medical imaging technologies such as ultrasound facilitate paternal bonding by providing a "window on the womb" through which the expectant father can view the future child. Fathers' involvement in birth has increased with the advent of prenatal classes and changes in hospital policies that now encourage them to be present during labor and delivery. Fathers experience a profound feeling of engrossment when they hold and caress their newborns. Changing attitudes about gender and flexible work environments allow fathers to spend more time playing with and caring for their infants than in years past.

Paternal bonding intersects with the law in three principal areas: abortion, rights of unwed fathers over adoption, and custody and visitation. Across these doctrinal areas, we observe the courts applying an implicit model of paternal bonding that deviates in some respects from the model that can be extracted from the social science literature. In the judicial model, paternal bonding is principally a function of time. Virtually no paternal bonding is recognized during pregnancy. Some degree of paternal bonding is recognized as to infants, but unless the father is actively involved with and takes responsibility for the baby, the law may discount his attachment. For older children the law recognizes that fathers can have equal bonding with their children as mothers, but looks to a

limited set of facts to determine whether bonding has occurred. The standard evidence introduced in courts does not include extensive inquiry into whether the father established deep bonds with his offspring in pregnancy or early childhood.

This Article has argued that courts should revise their concept of early paternal bonding, in order to accommodate a more realistic model that recognizes both the father's capacity to adjust his self-concept to include the paternal role, and his emotional connection with his offspring. Such an analysis could signal a constructive engagement with changing conceptions of fatherhood and with the rapidly growing body of scientific knowledge about men and procreation.