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PROSPECTIVE FATHERS AND THEIR UNBORN
CHILDREN

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While significant national attention has recently been paid to varying questions about the legal duties of prospective mothers to their unborn children, little comparable focus has been placed on the duties of prospective fathers. Why the difference? Though men and women obviously participate differently in nurturing the development of potential human life, there is much that both prospective parents can do to promote the well-being of their future offspring. This inattention to male responsibilities not only undercuts prevailing governmental interests in protecting potential life, but also may, at times, constitute prohibited sex discrimination.

When attention has been paid to prospective fathers, the results are usually disheartening. Treatment of men is often too lenient; yet, on occasion, treatment is too harsh. Further, many times there is little correlation between the legal duties of prospective mothers and fathers in situations where their conduct is comparable.

This article seeks to prompt greater dialogue on the legal duties of

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prospective fathers to their unborn children. In doing so, it employs a recent case litigated in the courts of Florida and involving certain aspects of a prospective father's legal duties. The article utilizes the case, as well as recent controversies over prebirth maternal duties, to suggest some guidelines for establishing prebirth paternal duties. In particular, it addresses paternal duties in settings involving criminal prosecution, coercive civil laws, and involuntary termination of parental rights—areas which to date have been significantly considered only for prospective mothers. Finally, it examines additional prebirth paternal duties in settings where there are no easy parallels to maternal conduct.

I. A TROUBLING CASE¹

Richard and Mary met during the summer of 1985 in Tempe, Arizona. Mary worked at a bank while raising a son born out of wedlock. Richard had a lucrative sales job.

Soon, Mary was pregnant by Richard. At one time Mary had been using birth control pills, but she failed to renew her prescription when her supply ran out. When Mary learned of her pregnancy in December 1985, Richard was planning a ski trip for them. Richard then knew his job was in jeopardy. Prior to the trip, Richard had saved about \$9000.

Mary did not tell Richard about her pregnancy until the day before departure. Richard opted not to discuss it then. Richard spent about \$4000 on the trip.

Upon return, Richard urged Mary to get an abortion. Mary resisted, and Richard resisted efforts to change his mind. While Mary saw herself as neither financially nor emotionally able to raise two children alone, Richard believed he was not ready for marriage.

The following months were turbulent. Richard continued to live comfortably, though he became unemployed and had to borrow money. Mary lost her job at the bank. While she found other employment three weeks later, she had to ask Richard for rent money. Mary also

1. This case is founded on the events in *Matter of Adoption of Doe*, 543 So. 2d 741 (Fla. 1989), *cert. denied* 110 S. Ct. 405 (1989) (hereinafter *Doe II*), as gleaned from some of the appellate court briefs (which are on file with the author). [In other words, this is a "see if you must" or "trust me, I've looked it up" footnote. Coombs, *Lowering One's Cites*, 76 VA. L. REV. 1099, 1109 (1990)]. This is not to say there were no facts in dispute in *Doe*. *Matter of Adoption of Doe*, 524 So. 2d 1037, 1038 (Fla. Dist. Ct. App. 1988) (hereinafter *Doe I*) ("There are numerous discrepancies between the natural mother's testimony at trial and the testimony concerning her prior statements to social workers, friends, and professionals during her pregnancy with respect to the natural father abandoning her.").

began considering adoption.

Late in March 1986, Mary wrote to Richard's mother, saying adoption was for her alone to decide. Richard discussed the letter with his mother. He wrote to Mary in response:

I respect any decision you make but let's put the axe away. I hope you'll think about our whole situation. I really would like to see my child. I've never had a child before and it hurts me to think that he or she would grow up thinking their father was a monster. No matter what you take away from me, the child will still be part of me. I'll still love the child no matter if I ever see it. Every time you look at that child you'll see part of me there whether you like it or not. That's a decision you and only you can make. I do hope for the very best for you and my child.

By mid-April, Mary was out of full-time work again. She did some babysitting, began receiving unemployment checks, and obtained food stamps. Though Richard was out of work until May, during this time he provided meals for Mary and her son; gave her furniture and clothes; bought her milk and baby food; and paid insurance premiums for Mary's son.

In July, Mary talked by phone with her mother in Florida. She spoke of her predicament and desire for adoption. With Mary's permission, her mother contacted a local Tampa rabbi. Before long, Bob and Jane Doe were told of Mary. The Does asked a Florida law office to pursue possible adoption of Mary's child. The Does were middle-class, married since 1975, childless, and unsuccessful in their attempts to conceive a child. On July 19, 1986, Mary called one of the Does' attorneys. She told him the father of her child "wanted to have nothing to do with her, the pregnancy or the baby," and had not provided support. She said she was financially destitute. When the attorney asked for the father's location, Mary said he would not cooperate. When the attorney asked Mary where she wanted to have the baby, she said Tampa, Florida. The attorney stressed the seriousness of adoption. When asked whether she still loved the father and would marry him, she responded, "No."

Mary left Phoenix for Florida on August 3rd. The Does provided her with one-way airfare. In addition, the Does agreed to support Mary financially from August 1st until a month after birth. Mary and her son left Phoenix quietly, telling Richard by a letter channeled through her sister, who was told not to reveal her whereabouts.

On August 8th, Mary phoned Richard, said she was in Florida,

and told him why. Afterwards, Mary and Richard frequently talked by phone. Mary gave Richard only her Florida phone number. These phone conversations chiefly concerned their relationship. Mary refused to accept Richard's offer to return to Arizona at his expense and to live with him outside of marriage. She told him that her unborn child would be better off in a stable two-parent home.

On August 12th, Mary was interviewed by an officer of the Florida Human Rehabilitative Services (HRS). She was shown and she read a form regarding consent to adoption. She was told about its irrevocable nature and was cautioned not to sign it if she had doubts. Mary told the agency officer that the father had never offered financial support, but that he did not deny paternity. The agency never contacted Richard.

By early September, Mary had brought to the office of the Does' attorneys a letter written by Richard. Dated August 18th, it asked that Mary "at least think about" letting him raise his child, who he hoped would look like him. Attorneys for the Does concluded that the letter contained nothing which altered their assessment that Richard's consent to an adoption was not mandated by the Florida Adoption Act. They neither contacted Richard nor informed the Does of the letter.

Just prior to birth, Mary encountered new pressures. She sought the counsel of a Roman Catholic nun who worked at BETA House, a center for unwed mothers. Mary expressed to the nun doubts about the adoption. On September 4th, Richard proposed marriage and Mary accepted. Mary bought a wedding dress and told her mother. She told Richard she would keep the child, though she did not tell the Does, HRS, or others. Richard and Mary talked about reimbursing the Does. Richard later changed his mind. Mary then asked Richard to let her alone decide about the child, and he did not say no.

During a later phone conversation, Richard urged Mary not to sign any papers. Mary then determined she would keep the baby. When she told her mother, however, her mother became angry and said that Mary would have to fend for herself if there was no adoption. Mary changed her mind again.

After John was born to Mary on September 12th, Mary unsuccessfully tried to call Richard and her counselor at BETA House. She also asked the hospital to contact a rabbi, but no one responded.

Early on Sunday morning, September 14th, Mary told a nurse she did not wish to see John anymore. She took medicine to dry her breast milk. Later that morning, two attorneys for the Does and a nurse

watched Mary sign adoption papers, who later stated she knew what she was signing, although she did not like it. Mary left the hospital that day, and John left the next day with the Does.

Richard did not learn what happened until later when he was called by an ex-girlfriend who was asked by Mary to give him the news. He then called Mary, and proposed they get John back and get married. Richard also called his mom saying: "Mother, can you believe I have a son? I'm going to get it."

On September 17th, Richard called one of the Does' attorneys and vowed to stop the adoption. Soon after, Richard flew to Florida with baby clothes in hand. On September 18th, Mary cancelled her appointment with one of the Does' attorneys. On September 19th, Richard filed an acknowledgement of paternity with the state of Florida and signed John's birth certificate. Finally, on September 22nd, the Does were told by one of their attorneys (who had received a call from Richard and Mary's attorney) about Richard and Mary's plans.

Bob and Jane Doe declined to relinquish John, and on October 22nd filed an adoption petition. Richard and Mary were married on November 15th in Arizona.

A three-day, non-jury trial on the adoption petition was held in May 1987 in Florida. A month later, the adoption was granted. The court determined that Mary's written consent was valid and could not be withdrawn absent clear and convincing evidence of fraud or duress.² It rejected arguments that Mary had a right to withdraw consent any time prior to a final adoption order.³

As for Richard, the court found that he had impliedly consented to adoption by his prebirth conduct and, thus, was barred under Florida law from urging that his written consent to an adoption was required.⁴ Specifically, it found Richard impliedly consented to adoption by failing to provide meaningful support to Mary during pregnancy despite full knowledge of her pregnancy and poor financial condition.⁵ Further, it held that Richard's written consent to the adoption was unnecessary

2. *Doe I*, 524 So. 2d at 1041.

3. *Doe II*, 543 So. 2d at 744.

4. *Doe I*, 524 So. 2d at 1042.

5. *Id.* Incidentally, the relevant Florida statute makes no provision for other than a written consent after birth. FLA. STAT. ANN. § 63.062 (West 1985). In the one case used by the trial court where an unwritten consent by the father prior to birth was found sufficient to excuse the absence of a written consent after birth, the father actually assented to the adoption. *Wylie v. Botos*, 416 So. 2d 1253 (Fla. Ct. App. 1982).

because Richard had abandoned his developing child.⁶ The finding of abandonment was grounded on Richard's failure to provide Mary with meaningful, repetitive, and customary support before her consent to adoption.⁷

Richard and Mary appealed. The intermediate appeals court concurred that Mary's consent was freely given and irrevocable.⁸ However, because abandonment covered only children born alive,⁹ it held that Richard's prebirth conduct could not constitute abandonment¹⁰ and that the adoption was void for want of Richard's written consent; consent was needed because Richard had filed an acknowledgment of paternity.¹¹

The Florida Supreme Court affirmed the decisions regarding Mary in April 1989.¹² Further, it ruled that Richard's prebirth conduct was relevant to the determinative question of whether Richard had abandoned his living child, including the issue of whether Richard "evinced a settled purpose to assume parental duties."¹³ The high court found Richard's prebirth efforts and his efforts in the days following John's

6. *Doe I*, 524 So. 2d at 1042.

7. *Id.* In one of the precedents used by the trial court on the question of abandonment, the issue of abandonment was never reached at the appellate level. *Wylie*, 416 So. 2d at 1256 n.3. *But see id.* at 1256 (while not addressing the father's abandonment, by finding the father had done nothing to require the adoptive parents to secure his consent, the court necessarily found the father had not provided his child with "support in a repetitive, customary manner," FLA. STAT. ANN. § 63.062(1)(b)(5) (West 1985)). Two other cases were used by the trial court, *In re Adoption of Mullenix*, 359 So. 2d 65 (Fla. Dist Ct. App. 1978) (court implicitly found that natural unmarried father failed to provide child with customary and repetitive support, with findings relating to both prebirth and postbirth conduct) and *Hinkle v. Lindsey*, 424 So. 2d 983 (Fla. Dist Ct. App. 1983) (postbirth withholding of child support insufficient to establish abandonment in view of other circumstances).

8. *Doe I*, 524 So. 2d at 1041.

9. Because the Florida statutory provision excusing the written consent of a parent in an adoption case where the parent has abandoned his or her child contains no definition of abandonment, the court utilized the statutory definition of abandonment in dependency and termination of parental rights cases. *Doe I*, 524 So. 2d at 1044 (citing FLA. STAT. ANN. § 39.01(1) (West 1985)).

10. *Doe I*, 524 So. 2d at 1043-44 (though it cited to cases from three different states where abandonment was found due to prebirth paternal conduct).

11. *Id.* at 1043, distinguishing *Wylie*, 416 So. 2d at 1255 (unlike Richard, the acknowledgment of paternity by the father was filed after, not before, the adoption petition was filed). *But see* FLA. STAT. ANN. § 63.062(1)(b)(4) (West 1985) (indicating an adoption petition may be granted only if there is written consent by a father who has filed an acknowledgement of paternity, without expressly indicating such an acknowledgment must be filed before the adoption petition is filed) and *Wylie*, 416 So. 2d at 1256 n.2 (noting the need for legislative action to address the unclear statutes).

12. *Doe II*, 543 So. 2d at 744.

13. *Id.* at 746.

live birth "marginal" and insufficient to show a "settled purpose" to assume parental duties.¹⁴ Finding abandonment, the high court determined Richard's written consent to the adoption was not required. After dismissing Richard's federal constitutional claims,¹⁵ it upheld the adoption. The U.S. Supreme Court declined requests to entertain the controversy.¹⁶

This case is troubling in a number of ways. Certainly, questions can be raised about Mary's consent, the financial arrangements between Mary and the Does, and the conduct of the Does' lawyers. This article will employ the case to address only the conduct of prospective fathers, however. This focus is prompted by both sympathy for Richard and the view that the acknowledged prebirth paternal duty of support was both too limited and too severe. More generally, focus on paternal duties to the unborn seems appropriate given our recent preoccupation with maternal duties—especially in criminal, compelled conduct, and termination of parental rights cases.

How was Richard mistreated? The Florida high court found Richard had not "evinced a settled purpose to assume parental duties."¹⁷ Yet, the written laws did not expressly condition his notice of and participation in the adoption process on such a purpose.¹⁸ Further, there was no consideration of whether the lack of a purpose to assume parental duties prior to birth can be overcome after birth by acts evincing such a purpose. Finally, unmarried natural fathers, like Richard, still

14. *Id.* at 747; *Doe I*, 524 So. 2d at 1042 (finding Richard abandoned his son during the pregnancy and the first two days of his son's life after birth).

15. *Doe II*, 543 So. 2d at 747-49 (due process and equal protection claims).

16. 110 S. Ct. 405 (1989).

17. *Doe II*, 543 So. 2d at 746.

18. In fact, Richard's postbirth written consent to the adoption of his son was necessary before any adoption petition could be granted if Richard had either filed an acknowledgment of paternity (which he did a month before the Does even petitioned for an adoption order) or provided his son "with support in a repetitive, customary manner" (which no Florida court found that he failed to do), unless it was found he had abandoned his son. FLA. STAT. ANN. § 63.062(1)(b)(5) (West 1985). While the trial court found abandonment by Richard through the pregnancy and for the first two days after birth, *Doe I*, 524 So. 2d at 1042, findings to which the supreme court paid "due deference," *Doe II*, 543 So. 2d at 747, neither court focused on whether Richard later abandoned his abandonment (by acknowledging paternity, marrying Mary, and contesting the adoption petition from the moment it was filed) nor on why Richard's evincing a settled purpose to assume parental duties two days after birth and beyond was insufficient to overcome the effects of his earlier conduct which amounted merely to "marginal" support. Compare FLA. STAT. ANN. § 39.41(4)(b) (West 1988) (temporary suspension of parental rights must be accompanied by reasonable effort to prevent or eliminate the need for removal of the child from his home) and § 39.001 (West 1988) (legislative purpose is to preserve and strengthen the child's family ties wherever possible).

have few clues on what prebirth paternal conduct will give rise to the right to notice and a chance to be heard on their child's adoption.

How was the Florida high court's recognition of a prebirth duty of paternal support too limited and too severe? Surely, the court was correct in finding in an adoption case that a prospective father has prebirth responsibilities. Yet, was it too limited in finding such responsibilities to be legally relevant only in adoption proceedings? If Mary had kept her baby, should Richard's claims for visitation or custody be determined without consideration of his prebirth conduct? And, if Mary had determined Richard's marginal support was adversely affecting her future child's well-being, should she be able to seek additional help when it is most needed, that is, prior to birth? Finally, was it too severe when, after finding Richard had abandoned John through September 17th, five days after birth, it failed to consider whether prebirth and postbirth child abandonment can be overcome by a natural parent whose conduct changes and who evinces a settled purpose to assume parental duties before an adoption has been granted, or before an adoption petition has even been filed?

II. PREBIRTH PATERNAL DUTIES

How can we recognize more fully the prebirth duties of potential fathers while simultaneously doing justice to Richard, Mary, John, and the Does? An examination of the recent controversy over women's prebirth duties seems useful. As noted, the controversy has involved criminal prosecution, court-compelled conduct, and involuntary termination of parental rights.

A. Criminal Prosecution

There has been much recent discussion of prosecuting women for acts committed during pregnancy.¹⁹ In California in 1986, Pamela Rae Stewart was charged with willfully omitting to furnish care to her

19. See e.g., Note, *The Criminalization of Maternal Conduct During Pregnancy*, 64 IND. L. J. 357 (1988-89) (reviewing cases and urging restraints on the criminal prosecution of pregnant women); Note, *Pregnancy Police: The Health Policy and Legal Implications of Punishing Pregnant Women for Harm to Their Fetuses*, 16 N.Y.U. L. REV. & SOC. CHANGE 277 (1987-88) (same); Note, *Maternal Rights and Fetal Wrongs: The Case Against the Criminalization of "Fetal Abuse,"* 101 HARV. L. REV. 994 (1988) (same). Cf. Note, *Maternal Substance Abuse: The Need to Provide Legal Protection for the Fetus*, 60 S. CAL. L. REV. 1209 (1987) (more sympathetic to criminal prosecution).

fetus.²⁰ Specifically, during pregnancy Pamela allegedly disregarded advice to discontinue amphetamine use, to abstain from sex, and to seek medical aid. These acts were said to have contributed to her later-born child's brain damage and death. In Florida in 1989, Jennifer Johnson was convicted of delivering illegal drugs to her newborn child through the umbilical cord.²¹

Criminalization of certain conduct during pregnancy is not particularly troubling.²² But, the relative lack of crimes for acts against the unborn by non-mothers is disturbing. Such crimes are far less controversial as they typically do not involve constitutional rights and they promote both maternal and societal interests in securing live and healthy births. Consider the 1970 case of Robert Keeler, whose wife, Teresa, was pregnant by another man.²³ Robert became "extremely upset" at seeing Teresa's abdomen and said: "I'm going to stomp it out of you." He pushed her, shoved his knee into her abdomen, and hit her in the face several times. Teresa fainted and Robert left. Teresa survived but her fetus was stillborn. In California in 1970, Robert was not guilty of homicide because there was no child born alive; in most states today, men like Robert remain innocent of homicide.²⁴ Yet, his conduct seems far more culpable than that of Pamela Rae Stewart or Jennifer Johnson. Criminalizing such non-maternal conduct against the unborn seems warranted since pregnant women's, as well as general societal, interests would be promoted.²⁵

Incidentally, in response to *Keeler*, the California legislature redefined murder to include "killing of a human being, or a fetus."²⁶ Thereafter, Karl Andrew Smith caused his wife, Jolene, to miscarry during

20. The case is described in Note, *Pregnancy Police*, *supra* note 19, at 286-87.

21. The case is described in Brannigan, *Mother Guilty of Delivering Drugs at Birth*, *The Wall Street Journal*, July 17, 1989, at B 8, col. 6.

22. Testimony of Jeffrey A. Parness, before the Subcommittee on Children, Families, Drugs and Alcoholism of the U.S. Senate Committee on Labor and Human Resources during a hearing in Indianapolis, Indiana, on October 9, 1989, on maternal alcohol and drug abuse (copy available from author).

23. *Keeler v. Superior Court*, 2 Cal. 3d 619, 87 Cal. Rptr. 481, 470 P.2d 625 (1970).

24. For critiques of the "born alive" rule, see, e.g., Parness, *Crimes Against the Unborn: Protecting and Respecting the Potentiality of Human Life*, 22 HARV. J. ON LEGIS. 97, 127-36 (1985) and Forsythe, *Homicide of the Unborn Child: The Born Alive Rule and Other Legal Anachronisms*, 21 VAL. U. L. REV. 563 (1987).

25. Parness, *supra* note 24, at 98-102 (reviewing varying interests which may be involved when the state protects potential human life).

26. CAL. PENAL CODE § 187 (West 1988).

her fourth month.²⁷ Angered by Jolene's extramarital affair, Karl choked, hit, and kicked Jolene while saying he did not want the baby to live and shouting "Bleed, baby, bleed." Karl was found not guilty of murder in 1976 as the new California law was deemed by a court applicable only to viable fetuses.²⁸ Since then, the law remains unchanged.²⁹

Returning to Richard and Mary, related issues involve the circumstances under which the likes of Richard should be prosecuted for failing to provide adequate prenatal support. The issues are not easy. Yet, is it not surprising that we hear so little about the adverse effects on future children caused by men's conduct and so much about women's prenatal drug use? Are the consequences on the unborn, or the social concerns about the conduct, so dramatically different? Think but for a moment about the abuse of pregnant women like Teresa Keeler and Jolene Smith.

Criminal prosecution of potential fathers is possible under the California law used against Pamela Rae Stewart. That act says, in part: "If a parent of a minor child willfully omits . . . to furnish necessary . . . care . . . he or she is guilty of a misdemeanor A child conceived but not yet born is to be deemed an existing person"³⁰ The court dismissed charges against Pamela because it found the act covered only financial support.³¹ Seemingly, the act would apply to Richard's "marginal support" of Mary during her pregnancy. Such a holding would be troubling, however, in that the statutory purpose seems better accomplished in other ways. Criminalizing Richard's expenditures of \$4000 for the ski trip just does not seem warranted. Yet,

27. *People v. Smith*, 59 Cal. App. 3d 751, 129 Cal. Rptr. 498 (1976).

28. In reaching its decision, the California appellate court did not rely upon legislative intent; rather, it was guided by a fundamental misunderstanding of the holding in *Roe v. Wade*, 410 U.S. 113 (1970). See Parness, *supra* note 24, at 112-13 (criticizing the court's rationale); State v. Merrill, 450 N.W.2d 318, 322 (Minn. 1990) (rejecting the argument that the holding in *Roe* forecloses a state from protecting by criminal laws both embryos and nonviable fetuses).

29. While California has not extended its homicide law protections to all unborn, some states have. See, e.g., MINN. STAT. ANN. §§ 609.266-609.2663 (West 1987) (varying degrees of murder of unborn child, defined as "unborn offspring of a human being conceived, but not yet born") and ILL. ANN. STAT. ch. 38, ¶ 9-1.2 (Smith-Hurd Supp. 1990) (homicide of an unborn child, defined as any individual of the human species from fertilization until birth). Note that Minnesota and Illinois did not follow California in combining the born and the unborn in a single criminal law provision, but rather maintain separate criminal law provisions for the born and the unborn.

30. CAL. PENAL CODE § 187 (West 1988).

31. Note, *Pregnancy Police*, *supra* note 19, at 287 n.64.

application of the statute to Robert Keeler or Karl Smith seems precluded, as neither case involved finances. The failure to criminalize the conduct of Keeler and Smith is also troubling. Other effective means of deterrence and punishment seem unavailable. Attacks on the unborn by the likes of Keeler and Smith undermine not only societal interests in potential human life but also the individualized, and very significant, interests of pregnant women in securing live and healthy births.

B. Preventing Harm by Coercion

Besides crimes, there has been much recent discussion of coercive governmental action against pregnant women to prevent harm to the unborn.³² On occasion, as with blood transfusions³³ and caesarean sections,³⁴ courts have been asked to order involuntary medical treatment for a pregnant woman to promote the woman's and fetus' health. Sometimes, courts have even been asked to protect a fetus though the mother's well-being will be impaired.³⁵ Comparably, courts struggle when asked to protect the unborn by coercing such non-medical conduct as drug counselling and rehabilitation.³⁶

32. See *Developments in the Law — Medical Technology and the Law*, 103 HARV. L. REV. 1519, 1525-84 (1990) (reproductive technologies and state intervention during pregnancy); Field, *Controlling the Woman to Protect the Fetus*, 17 LAW, MEDICINE & HEALTH CARE 114 (1989); Rhoden, *The Judge in the Delivery Room: The Emergence of Court-Ordered Caesareans*, 74 CALIF. L. REV. 1951 (1986); Robertson, *Procreative Liberty and the Control of Conception, Pregnancy, and Childbirth*, 69 VA. L. REV. 405 (1983).

33. See, e.g., *Raleigh Fitkin-Paul Morgan Memorial Hosp. v. Anderson*, 42 N.J. 421, 201 A.2d 537 (1964), cert. denied 377 U.S. 985 (1964) (over religious objections, blood transfusions ordered to save viable fetus and mother).

34. See, e.g., *Jefferson v. Griffin Spalding County Hosp. Auth.*, 247 Ga. 86, 274 S.E.2d 457 (1981) (caesarean section ordered despite pregnant woman's religious objections where without the procedure there was a 99-100% chance of fetal death and a 50% chance of maternal death and where with the procedure there was nearly a 100% chance both would survive).

35. See, e.g., *In re A.C.*, D.C. Ct. App. (en banc), No. 87-609 (April 26, 1990), as reported in 58 U.S.L.W. 2644 (May 8, 1990) (a "case of an incompetent pregnant patient whose own life may be shortened by a caesarean section, and whose unborn child's chances of survival may hang on the court's decision").

36. Both civil and criminal courts have been presented with such requests. See *Matter of Dittrick*, 80 Mich. App. 219, 263 N.W.2d 37 (1977) (probate court reads probate code on child custody not to include the unborn, but declares that amendments are desirable); *In re Steven S.*, 126 Cal. App. 3d 23, 178 Cal. Rptr. 525 (1981) (superior court decides pregnant woman could not be detained because her unborn child was a dependent child under the Welfare and Institutions Code); *Pregnant? Go Directly to Jail*, 74 A.B.A. J. 20 (1988) (pregnant woman convicted of theft is sent to jail until her child is born because she had a cocaine problem); see also MINN. STAT. ANN. §§ 253 B.05, 626.5561 (West Supp. 1990) (emergency admission to treatment facility of pregnant drug-using woman who refuses or fails recommended treatment).

Obviously, a man can not be similarly coerced to help his unborn offspring. Yet, various forms of coercion against men can protect potential human life. One form involves a court in a prebirth paternity action ordering financial or other support. While many states permit a prebirth paternity action, significant proceedings are typically stayed until after birth.³⁷ Such stays are usually either automatic³⁸ or at the man's request.³⁹ In North Carolina, a postbirth establishment of paternity of a child born out of wedlock does trigger a man's responsibility "for medical expenses incident to the pregnancy and the birth of the child."⁴⁰ Preferable, however, is the Arkansas law authorizing a paternity court to make "temporary orders . . . pending . . . birth;" if a final order differs, "judgment is rendered against the mother for the amount paid."⁴¹ In Delaware, a prebirth paternity action is automatically stayed until after birth, except for "support proceedings."⁴² Prebirth support orders help the unborn in ways somewhat comparable to orders of maternal surgery, drug rehabilitation, and the like. Yet, they less frequently trigger thorny constitutional issues.⁴³

With Mary and Richard, either could have benefitted from a prebirth paternity action. Mary might have sued to reduce her financial difficulties, to access better nourishment for her future child, or to lessen the pressures for adoption. Richard might have sued to show his concern for Mary and their future child, perhaps evincing thereby "a settled purpose to assume parental duties."

Undoubtedly, there are difficulties with imposing an unmitigated support obligation on absent, especially involuntarily absent, prospective fathers. The level of prebirth paternal support should reflect the

37. See, e.g., CONN. GEN. STAT. ANN. § 46b-160 (West Supp. 1990) ("proceedings to establish paternity of a child born or conceived out of lawful wedlock") and FLA. STAT. ANN. § 742.011 (West Supp. 1990) ("Any woman who is pregnant . . . may bring proceedings . . . to determine the paternity of the child . . ."). Compare IDAHO CODE § 7-1107 (1990) ("Proceedings to establish paternity . . . may be instituted only after the birth of the child . . .").

38. See, e.g., ALA. CODE § 26-17-6(d) (1986), GA. CODE ANN. § 19-7-43(c) (Supp. 1989), HAWAII REV. STAT. § 584-6(d) (1985), and MINN. STAT. ANN. § 257.57(b)(5) (West Supp. 1990).

39. See, e.g., IOWA CODE ANN. § 675.9 (West 1987); ME. REV. STAT. ANN. tit. 19, § 276 (1981); and MISS. CODE ANN. § 93-9-19 (1973).

40. N.C. GEN. STAT. § 49-15 (1984).

41. ARK. CODE ANN. § 9-10-103 (1987).

42. DEL. CODE ANN. tit. 13, § 805(d) (Supp. 1988).

43. But consider *Boddie v. Connecticut*, 401 U.S. 371, 380-81 (1971) (dependency of marriage dissolution on the ability to pay court fees and costs was an unconstitutional denial of due process).

“social relationship” between the prospective father and the unborn child, as well as the biological or marital link.”⁴⁴ Further, prebirth support orders should not “be turned into an income transfer program from poor fathers to lawyers and welfare bureaucrats.”⁴⁵ Nevertheless, it now seems appropriate to consider expanding the availability of prebirth paternity actions.⁴⁶

C. Involuntary Termination of Parental Rights

Besides crimes and coerced conduct, there has been much recent debate about using prenatal conduct to suspend or terminate maternal interests in children born alive. Increasingly, a pregnant woman's acts will trigger loss of parental interests at birth. Loss may be permanent or temporary; it may be grounded on the view that mom abused or neglected the fetus,⁴⁷ or that her prebirth conduct shows she is not now a fit parent.⁴⁸ Such maternal abuse or unfitness often involves cocaine, heroin, or alcohol use during pregnancy; proceedings may now be easier for the states to initiate with the advent of mandatory reporting laws for certain physical conditions of newborns.⁴⁹

Obviously, a man's relevant prebirth conduct differs significantly. Yet, the Florida Supreme Court was correct in observing in Richard's case that a prospective father's prebirth conduct “directly impacts” upon his future child.⁵⁰ Specifically, the Florida court noted:

Because prenatal care of the pregnant mother and unborn child is

44. Krause, *Child Support Reassessed: Limits of Private Responsibility and the Public Interest*, 1989 U. ILL. L. REV. 367, 386.

45. *Id.* at 379.

46. Another coercive measure against men which seeks to prevent harm to the unborn is a court order of protection where there has been prior physical abuse of an expectant woman. *See, e.g., Gloria C. v. William C.*, 124 Misc. 2d 313, 476 N.Y.S.2d 991 (Fam. Ct. 1984). A review of the literature on abuse during pregnancy appears in Bohn, *Domestic Violence and Pregnancy*, 35 J. NURSE-MIDWIFERY 86 (March/April, 1990).

47. *See, e.g., In re Ruiz*, 27 Ohio Misc. 2d 31, 500 N.E.2d 935 (Ohio Com. Pl. 1986) (heroin use during pregnancy constitutes abuse under child abuse statute); and ILL. ANN. STAT. ch. 37, §§ 802-3, 802-5 (Smith-Hurd 1990) (neglected minor includes a newborn whose blood or urine contains a controlled substance, and such a minor can be taken into temporary state custody without a warrant).

48. *See, e.g., Matter of “Male” R.*, 102 Misc. 2d 1, 422 N.Y.S.2d 819 (1979) (excessive drug use during pregnancy supports a finding of neglect based on the theory that the parent would not be able to provide adequate care after birth).

49. *See, e.g., ILL. ANN. STAT. ch. 23, §§ 2052* (Smith-Hurd 1988) and 2053 (Smith-Hurd Supp. 1990) (Abused and Neglected Child Reporting Act includes newborn whose blood or urine contains a controlled substance and whose best interests must be protected by a state agency).

50. *Doe II*, 543 So. 2d at 746.

critical . . . the biological father, wed or unwed, has a responsibility to provide support during the prebirth period. Respondent natural father's argument that he has no parental responsibility prior to birth . . . is not a norm that society is prepared to recognize. Such an argument is legally, morally, and socially indefensible.⁵¹

While the Florida court did not err in finding a man has a prebirth duty of support, it failed to describe the duty adequately, to urge the legislature to do so, or describe in much detail how Richard breached it. The court also failed to afford Richard the opportunity to demonstrate how his later acts in seeking custody of John might have overcome his earlier failure of support or his abandonment of John. More importantly, the court and later lawmakers in Florida have failed to distinguish this duty in settings involving possible criminal prosecution, financial support orders, and termination of parental rights.

Some better coordination of social policy on prebirth parental duties seems appropriate. Duties for both men and women should be discussed. The duties imposed in criminal, child support, and termination of parental rights cases should be jointly considered, though certainly not equalized. Criminal child abuse, thus, should differ from abuse relevant in a parental rights hearing or from conduct triggering a prebirth support order. Employing such differentiations, Richard's conduct may have constituted inadequate financial support, but seemingly was neither criminal nor sufficient to terminate forever his parental rights.

D. Further Inquiries on Paternal Duties

Inquiries into prebirth paternal duties should not simply parallel current inquiries into the duties of pregnant women. Comprehensive inquiries require more.

Consider, for example, putative father registries. Typically, prior to birth such registries are used by men intending to claim paternity of children born out of wedlock.⁵² Registration usually assures the men of notice of subsequent adoption proceedings.⁵³ Thus, by registering, men

51. *Id.*

52. *See, e.g.*, N.Y. SOC. SERV. § 372-c (McKinney 1983) (putative father registry contains names of persons filing notices, before or after birth, of their intent to claim paternity) and UTAH CODE ANN. § 78-30-4.8 (Supp. 1990) (those claiming to be fathers of children born outside of marriage may file a notice of claim of paternity even prior to birth).

53. *See, e.g.*, N.Y. DOM. REL. § 111-a (McKinney 1988) (in adoption proceeding involving child born out-of-wedlock, notice must be given to any person who has timely filed an unrevoked notice of intent to claim paternity) and UTAH CODE ANN. § 78-30-4.8 (Supp. 1990) (in adoption

like Richard can better assure their own participation in hearings on their children's future. Yet, why not allow Mary (or Richard's mom,⁵⁴ perhaps after viability) to register Richard's possible fatherhood? Registration by others could prompt the state to notify the men of their possible fatherhood and of their legal rights and duties.

More controversial would be fatherhood notice laws. Some parents must now be told of their child's intent to abort,⁵⁵ and some husbands must now be informed of their wives' similar intent.⁵⁶ Why not require pregnant women to notify the prospective fathers of their potential parenthood? Especially after viability, should notice of possible fatherhood be left solely to maternal discretion and to fortune? Under U.S. Supreme Court precedent, a natural father's biological link with his child only affords him the chance to establish constitutionally protected interests in parenthood; it does not guarantee those interests.⁵⁷ A father's constitutional interests in parenthood thus require some affirmative acts beyond procreation.⁵⁸ But how can fathers act when they are uninformed? Obviously, fatherhood notice laws⁵⁹ require sensitivity to

proceeding, notice must be given to any man who filed a notice of his claim of paternity prior to the time the child is relinquished to a licensed child-placing agency or before an adoption petition is filed), whose constitutionality was sustained in *Swayne v. L.D.S. Social Services*, 761 P.2d 932 (Utah Ct. App. 1988), *aff'd*, 795 P.2d 637 (Utah 1990) (reviewing putative father registry laws of other states).

54. Usually, the family members of new parents are keenly interested in the welfare of their new relations. See, e.g., *Wylie*, 416 So. 2d at 1255 (a new mother's mother and stepfather seemingly prompt the new mother and the new father to seek to halt an adoption earlier agreed upon).

55. *H.L. v. Matheson*, 450 U.S. 398, 419 (1981) (a parental notice requirement does not constitute per se an invalid burden on a minor's right to make an abortion decision); *Hodgson v. Minnesota*, 110 S. Ct. 2926 (1990) (majority finds a two-parent notice law constitutional).

56. *H.L. v. Matheson*, 450 U.S. 398 (1981) (spousal notice law not addressed); *Scheinberg v. Smith*, 659 F.2d 476 (5th Cir. 1981), *reh'g denied*, 667 F.2d 93 (5th Cir. 1981) (a Florida spousal notice law could be constitutional); *Planned Parenthood of Rhode Island v. Board of Medical Review*, 598 F. Supp. 625 (D.R.I. 1984) (a R.I. spousal notice law is unconstitutional); 18 PA. CONS. STAT. ANN. § 3209 (Purdon Supp. 1990) (1989 spousal notice law).

57. *Lehr v. Robertson*, 463 U.S. 248, 262 (1983) ("The significance of the biological connection is that it offers the natural father an opportunity that no other male possesses to develop a relationship with his offspring.")

58. Exemplary of such action is a court adjudication of fatherhood, the filing with the state of a notice of intent to claim paternity, an acknowledgment of paternity on the birth certificate, marriage to the mother at or shortly after birth, and cohabitation with the mother and child with declarations of fatherhood. *Id.* at 251 n.5 (conduct triggering the right to receive notice of an adoption proceeding in New York).

59. For a proposal protecting a natural father's right to know of his parenthood in a setting where a child born out-of-wedlock is the subject of an adoption petition, see Note, *The Unwed Father and the Right to Know of His Child's Existence*, 76 Ky. L.J. 949, 1002 n.407 (1987-88).

mothers' interests in privacy⁶⁰ as well as to fathers' parenting interests.

Finally, consider laws promoting informed and conscious decision-making about parenting. Many laws provide that doctors or others must convey certain information to women considering abortion.⁶¹ Why not require that prospective parents be given information on beneficial prebirth conduct, and perhaps on prebirth parental duties?⁶² With such laws, men like Richard would be better informed of the consequences and expectations resulting from their procreative conduct. Recent laws requiring warning labels on cigarette packages⁶³ and whiskey bottles⁶⁴ simply do not go far enough in promoting greater sensitivity to the risks posed to future generations by present conduct, and do little to inform prospective parents about their legal duties.

As understanding of the reproductive process grows and as new reproductive technologies develop, additional laws on paternal duties will be in order. Likely to soon require consideration are laws involving dangers posed to the procreative potential of men at the workplace,⁶⁵ laws on paternal rights when artificial insemination is employed in very

60. Such privacy interests include a woman's "interest in avoiding disclosure of personal matters" (the right to be let alone) and her "interest in independence in making certain kinds of important decisions" (the right to decide without state interference matters relating to marriage, procreation, contraception, family relationships, child rearing, and education). *Whalen v. Roe*, 429 U.S. 589, 599-600 (1977). At least some sensitivity to such interests is found in Pennsylvania's spousal notice law regarding abortion. 18 PA. CONS. STAT. ANN. § 3209 (Purdon Supp. 1990) (married woman need not notify spouse of upcoming abortion if her spouse is not the potential father, and unmarried woman granted more decisionmaking independence as she is not required to notify the potential father of the upcoming abortion).

61. *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52, 66-67 (1976) (legitimate state interest in assuring that the decision to abort, an important and often a stressful one, be made with full knowledge of its nature and consequences); *City of Akron v. Akron Center for Reproductive Health*, 462 U.S. 416, 444-45 (1983) (ordinance overturned as it specified "a litany of information that the physician must recite to each woman," including "a parade of horrors intended to suggest abortion is a particularly dangerous procedure"); 18 PA. CONS. STAT. ANN. § 3205(a) (Purdon Supp. 1990) (new informed consent law as earlier law was invalidated in *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747 (1986) because of its anti-abortion character).

62. Consider N.H. REV. STAT. ANN. § 457.23 (Supp. 1989) (both parties seeking a marriage license must be given a brochure concerning fetal alcohol syndrome).

63. 15 U.S.C.A. § 1333(a) (West Supp. 1990).

64. 27 U.S.C.A. § 215(a) (West Supp. 1990).

65. *Becker, From Muller v. Oregon to Fetal Vulnerability Policies*, 53 U. CHI. L. REV. 1219, 1245 (1986). Of course, comparable dangers to women have received much attention since the U.S. Supreme Court decided to hear a case about the effects of a manufacturer's fetal vulnerability policies on women. *International Union, UAW v. Johnson, Controls, Inc.* 886 F.2d 871 (7th Cir. 1989), cert. granted 110 S. Ct. 1522 (1990).

private settings (where no outsiders are involved),⁶⁶ and laws involving tortious acts by men and others affecting the procreative potential of men.⁶⁷

III. CONCLUSION

The case of Richard, Mary, John, the Does, and their lawyers is troubling. In focusing on the legal treatment of prospective fathers, this article urges that prebirth paternal duties be considered as prebirth maternal duties are considered. Laws on prebirth parental duties should differentiate between men and women, as well as between such diverse settings as crimes, child support, and parental rights termination.

66. In these settings, the general rule that the donor is not a parent of a child conceived through assisted conception, Uniform Status of Children of Assisted Conception Act, § 4, reprinted in 15 Fam. L. Rep. 2009, 2011 (BNA 1989), is often found overcome because of the understanding of the participants. See, e.g., *In re R.C.*, 775 P.2d 27 (Colo. 1989) (semen donor may have parental rights where unmarried recipient agreed to recognize his paternity) and *McIntyre v. Crouch*, 98 Ore. App. 462, 780 P.2d 239 (1989), cert. denied 109 L. Ed. 2d 288 (1990) (same conclusion).

67. Consider tort duties for fertile men regarding the safeguarding of their sperm supply or the possibility of a so-called preconception tort action based on a third-party's interference with a man's procreative potential. Compare Olsen, *Unravelling Compromise*, 103 HARV. L. REV. 105, 129 (1989) (discussing a law forbidding men to ejaculate outside a fertile woman's vagina) and *Renslow v. Mennonite Hospital*, 67 Ill. 2d 348, 367 N.E.2d 1250 (1977) (injured child sues hospital for negligent blood transfusion to the mother years earlier).

