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Custody and Couvade: The Importance of Paternal Bonding  
In the Law of Family Relations

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# Custody and Couvade: The Importance of Paternal Bonding In the Law of Family Relations

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# Custody and Couvade: The Importance of Paternal Bonding In the Law of Family Relations

Geoffrey P. Miller<sup>1</sup>

*“Il se met au lit quand sa femme est en couche”*<sup>2</sup>

*Abstract:* This paper discusses the importance of paternal bonding in the law of family relations. Drawing on the metaphor of couvade – pregnancy symptoms in expectant fathers – the paper argues that men have a closer connection with the process of procreation than is commonly supposed in contemporary family law. The paper evaluates the paternal role in seven stages or events connected with procreation – contraception, conception, pregnancy, abortion, perinatal loss, labor and delivery, and early infant care. The paper then considers three legal context in which paternal bonding during procreation plays a role: abortion, adoption of children born out of wedlock, and custody/visitation during divorce.

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.<sup>3</sup> New fathers of the South American Abipone tribe huddle among mats and skins, abstaining from food.<sup>4</sup> Among the New Guinea highlanders, men restrict their activities and refrain from hard labor.<sup>5</sup> In other cultures, men go into mock labor along with their wives.<sup>6</sup> These customs, denominated by anthropologists as “couvade,” are found in many pre-industrial cultures, and may well have grown up spontaneously, rather than

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<sup>2</sup> Traditional French saying, quoted in Warren R. Dawson, *The Custom of Couvade* 12 (1929) (“he takes to his bed when his wife is in labor”).

<sup>3</sup> See Lillian Eichler, *The Customs of Mankind, With Notes on Modern Etiquette and Entertainment* 614 (1924).

<sup>4</sup> See Lillian Eichler, *The Customs of Mankind, With Notes on Modern Etiquette and Entertainment* 614 (1924).

<sup>5</sup> See A.S. Meigs, *Male Pregnancy and the Reduction of Sexual Opposition in a New Guinea Highlands Society*, 15 *Ethnology* 393-407 (1976).

<sup>6</sup> See Warren R. Dawson, *The Custom of Couvade* 1 (1929).

being transmitted by cultural diffusion.<sup>7</sup> 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 out of mind. 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

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<sup>7</sup> Couvade rituals have been observed in tribal cultures all over the world, with the exception of Australia. See L.Y. Bogren, *Couvade*, 68 *Acta Psychiatrica Scandinavica* 55-65, 56 (1983).

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.<sup>8</sup> Fatherhood became an issue for the culture, instead of an assumption.<sup>9</sup> 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.<sup>10</sup> This new understanding of the father’s role recognizes the power of the man’s emotional connection with his offspring,<sup>11</sup> and the profound reorientation of self that a man experiences when he assumes the role of “father.” When paternal bonding is allowed adequate expression,

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<sup>8</sup> See Katharyn Antle May and Steven Paul Perrin, *Prelude: Pregnancy and Birth*, in S.M.H. Hanson and F.W. Bozett, eds., *Dimensions of Fatherhood* 68-69 (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).

<sup>9</sup> The extensive literature on masculinity and fatherhood that has appeared since 1980 includes work in psychology, see, e.g., R. William Betcher and William S. Pollack, *In a time of Fallen Heroes: the Re-Creation of Masculinity* (1993); M. Lamb, *The Role of the Father in Child Development* (1981); Frank S. Pittman, *Man Enough: Fathers, Sons, and the Search for Masculinity* (1993); William Pollack, *Real Boys: Rescuing our Sons From the Myths of Manhood* (1998); J.L. Shapiro, M.J. Diamond, and M. Greenberg, eds., *Becoming a Father: Social, Emotional, and Clinical Perspectives* (1995); sociology, see, e.g., David D. Gilmore, *Manhood in the Making: Cultural Concepts of Masculinity* (1990); William Marsiglio, ed., *Fatherhood: Contemporary Theory, Research, and Social Policy* (1995); William Marsiglio, *Procreative Man* (1998); history, see, e.g., Robert L. Griswold, *Fatherhood in America: A History* (1993); Michael Kimmel, *Manhood in America: A Cultural History* (1997); Ralph LaRossa, *The Modernization of Fatherhood: A Social and Political History* (1997); Claudia Nelson, *Invisible Men: Fatherhood in Victorian Periodicals 1850-1910* (1995); E. Anthony Rotundo, *American Manhood: Transformations in Masculinity from the Revolution to the Modern Era* (1993); and social theory, see, e.g., David Blankenhorn, *Fatherless America: Confronting Our Most Urgent Social Problem* (1995); Sam Osherson, *Finding Our Fathers: The Unfinished Business of Manhood* (1986).

<sup>10</sup> In its technical form, “bonding” means a “unique relationship between two people that is specific and endures through time.” Marshall H. Klaus and John H. Kennell, *Bonding: The 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. This formulation is consistent with the theory of object relations in psychology, as variously articulated by theorists such as W.R.D. Fairbairn, D.W. Winnicott, John Bowlby, Margaret Mahler, and James Masterson. On object relations theory in psychology, see, e.g., Peter Buckley, ed. *Essential Papers in Object Relations* (1986); Jay R. Greenberg and Stephen A. Mitchell, *Object Relations in Psychoanalytic Theory* (1983).

<sup>11</sup> By “offspring” I mean the fetus or child throughout the process of physiological development. For ease of reference, I use the term “fetus” to refer to all forms of development after conception but prior to birth. Technically, the term refers only to human offspring eight weeks and more after conception;

men are likely to be more involved in their children's lives and to behave more responsibly for protecting their welfare.

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 paper, I argue for a re-conceptualization of early paternal bonding in the law of family relations.<sup>12</sup> 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.

This paper is structured as follows. Section I 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

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earlier, a human offspring is referred to as an “embryo.” See Brian Kearney, High-Tech Conception: A Comprehensive Handbook for Consumers 333 (1998).

<sup>12</sup> I treat only the issue of bonding during conception, pregnancy, birth, and the first year 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

attitudes today. Section II traces the male experience of procreation through contraception, conception, pregnancy, abortion, perinatal death, labor and delivery, and early childhood care. Section 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. I end with a brief conclusion.

### **I. Traditional Views of Father-Child Bonding**

For many years in American culture, 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 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.<sup>13</sup>

This cultural script included distinctive rituals for different stages of pregnancy. The first important ritual was the Announcement, which took its classic form during the

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role if granted custody in divorce. See David L. Chambers, Rethinking the Substantive Roles for Custody Disputes in Divorce, 83 Michigan Law Review 477-569 (1984).



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<sup>14</sup> and to work hard at being a “good provider.”<sup>15</sup>

These cultural rituals are illustrated in the story of Lucy Ricardo's pregnancy and the birth of “Little Ricky,” which screened on *I Love Lucy* in 1952-53. In “Lucy is Enciente,”<sup>16</sup> 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

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<sup>13</sup> See William Marsiglio, *Procreative Man* 53 (1988) (“it is one of the basic ironies of human life that, despite men's disproportionate social, political, and economic power, they have remained alienated in some ways from the reproductive process”).

<sup>14</sup> See Charlene E. Miall, *The Stigma of Involuntary Childlessness*, 33 *Social Problems* 268-82, 270 (1986) (wife's pregnancy indicates husband's virility).

<sup>15</sup> On the importance of the good provider role in male self-esteem and attitudes, see, e.g., Jessie Bernard, *The Good-Provider Role: Its Rise and Fall*, 36 *American Psychologist* 1-12 (1981).

<sup>16</sup> *Lucy is Enciente*, *I Love Lucy*, December 8, 1952 (available at the Museum of Television and Radio, New York, New York).

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's indeed expecting. She says: "All my life I dreamed about how I was going to tell my husband when 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.'" <sup>17</sup> 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's sitting alone at a table near the bandstand, seems both part of this 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!" <sup>18</sup> Even though he's flustered, he's 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. <sup>19</sup>

According to the traditional script, the woman would become increasingly centered in her body as her pregnancy progressed. <sup>20</sup> She would be gripped by deep calm and happiness. Her thoughts would concern the future that she was "expecting." This

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<sup>17</sup> Lucy is Enciente, *I Love Lucy*, December 8, 1952 (available at the Museum of Television and Radio, New York, New York).

<sup>18</sup> Lucy is Enciente, *I Love Lucy*, December 8, 1952 (available at the Museum of Television and Radio, New York, New York).

<sup>19</sup> Lucy is Enciente, *I Love Lucy*, December 8, 1952 (available at the Museum of Television and Radio, New York, New York).

<sup>20</sup> As D.W. Winnicott puts it, "the 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." See Marshall H. Klaus and John H. Kennell, *Bonding: The Beginnings of Parent-Infant Attachment* 8 (1983)(quoting Winnicott). In *I Love Lucy*, this process is symbolized by Lucy's centering herself on the living room couch and knitting. See *Lucy Hires an English Tutor*, *I Love Lucy*, December 24, 1952 (available at the Museum of Television and Radio, New York, New York).

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 parents, 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 often meant trips to the delicatessen to gratify food cravings (Ricky gets Lucy a dill pickle and a mango milkshake)<sup>21</sup> – 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.

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<sup>21</sup> See Lucy Hires an English Tutor, *I Love Lucy*, December 24, 1952 (available at the Museum of Television and Radio, New York, New York).

Men dreamed of teaching their boys the ways of masculinity, and of living vicariously though their sons' athletic prowess, just as mothers thought of sharing feminine intimacies with a daughter.<sup>22</sup>

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 wouldn't 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 *Readers Digest*.<sup>23</sup> 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.

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<sup>22</sup> In *I Love Lucy*, Ricky, hoping for a son, brings home a football and boxing gloves; Lucy buys a ballet skirt. See *Lucy Hires an English Tutor*, *I Love Lucy*, December 24, 1952 (available in at the Museum of Television and Radio, New York, New York).

These stereotypes are explored in the classic *I Love Lucy* episode about the birth of Little Ricky.<sup>24</sup> 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.<sup>25</sup> 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.<sup>26</sup>

When the call comes in, Ricky rushes to the hospital and is nearly arrested by a policeman who thinks 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 approaches the viewing window – and faints dead away from the emotion of seeing his firstborn son.<sup>27</sup> The scene captures both the new father's atavistic sense of masculine validation (symbolized by Ricky's tribal

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<sup>23</sup> See Katharyn Antle May and Steven Paul Perrin, Prelude: Pregnancy and Birth, in S.M.H. Hanson and F.W. Bozett, eds., *Dimensions of Fatherhood* 64-91, 75 (1985) ("nervously pacing a fathers' waiting room, surrounded by coffee cups and cigarette butts").

<sup>24</sup> Lucy Goes to the Hospital, *I Love Lucy*, January 19, 1953 (available at the Museum of Television and Radio, New York, New York).

<sup>25</sup> 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 Lucy Goes to the Hospital, *I Love Lucy*, January 19, 1953 (available at the Museum of Television and Radio, New York, New York).

<sup>26</sup> Robert Bly, *Iron John* 6 (1992).

<sup>27</sup> Lucy Goes to the Hospital, *I Love Lucy*, January 19, 1953 (available at the Museum of Television and Radio, New York, New York).

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, a cigar is sometimes 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 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 to 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.<sup>28</sup> 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 section addresses the role of 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.<sup>29</sup> 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.<sup>30</sup> Some contraceptive technologies

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<sup>28</sup> 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 whatsoever" with their children.)

<sup>29</sup> See Sharon R. Edwards, *The Role of Men in Contraceptive Decision-Making: Current Knowledge and Future Implications*, 26 *Family Planning Perspectives* 77-82, 77 (1994); N.E. Himes, *Medical History of Contraception* (1963); A. McLaren, *A History of Contraception: From Antiquity to the Present Day* (1990); William Marsiglio, *Procreative Man* 32 (1998).

<sup>30</sup> See Deborah Rogow and Sonya Horowitz, *Withdrawal: A Review of the Literature and an Agenda for Research*, 26 *Studies in Family Planning* 140-153, 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.")

also require the man's participation.<sup>31</sup> Condoms are usually his responsibility: it's usually his job to obtain, store, and properly use these devices.<sup>32</sup> 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 comes on the market.<sup>33</sup>

Both men and women can prevent pregnancy through sterilization. For men, the procedure is a vasectomy.<sup>34</sup> The surgeon incises the scrotal sac and blocks the sperm ducts so that sperm does not enter the semen.<sup>35</sup> Men who obtain vasectomies demonstrate their involvement in procreation, even though their act has the effect or more or less

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<sup>31</sup> See Sharon R. Edwards, *The Role of Men in Contraceptive Decision-Making: Current Knowledge and Future Implications*, 26 *Family Planning Perspectives* 77-82 (1994). Fathers traditionally hid condoms among their personal effects where, if they were found by children, they would symbolize the mystery of his potency.

<sup>32</sup> Condom use declined with the introduction of the birth control pill and the intrauterine device in the 1960's, see Koray Tanfer, William R. Grady, Daniel H. Klepinger and John O.G. Billy, *Condom Use Among U.S. Men, 1991*, 25 *Family Planning Perspectives* 61-66, 61 (1993), but have returned to popularity during the AIDS crisis. See J.S. Moran, H.R. Janes, T.A. Peterman, and K.M. Stone, *Increases in Condom Sales Following AIDS Education and Publicity, United States, 80 American Journal of Public Health* 607-09 (1990); Koray Tanfer, William R. Grady, Daniel H. Klepinger and John O.G. Billy, *Condom Use Among U.S. Men, 1991*, 25 *Family Planning Perspectives* 61-66, 61 (1993). Although women are taking a more active interest in condom use, the device is still largely a male responsibility. See V.I. Rickert, M.S. Jay, C.A. Hall, and C. Bridges, *Females' Attitudes and Behaviors Toward Condom Purchase and Use*, 10 *Journal of Adolescent Health Care* 313-16 (1989); J.E. Anderson, R. Brackbill, and W.D. Mosher, *Condom Use for Disease Prevention Among Unmarried U.S. Women*, 28 *Family Planning Perspectives* 25-28 (1996).

<sup>33</sup> See Carl Djerassi and S.P. Leibo, *A New Look at Male Contraception*, 370 *Nature* 11-12 (1994). Men have indicated a willingness to use such a pill under some circumstances. See H.G. Gough, *Some Factors Related to Men's Stated Willingness to Use a Male Contraceptive Pill*, 15 *Journal of Sex Research* 27-37 (1979). At present, a birth control pill for men is under study and has proven effective at reducing sperm counts to near zero, but it requires weekly supplementary injections. See *Doctors Report Breakthrough on Male Birth Control Pill*, Agence France-Presse, March 17, 1998. A pill that does not require injections is not expected for at least seven years. See *Doctors Report Breakthrough on Male Birth Control Pill*, Agence France-Presse, March 17, 1998.

<sup>34</sup> See R. Forste, K. Tanfer, and L. Tedrow, *Sterilization Among Currently Married Men in the United States*, 27 *Family Planning Perspectives* 100-107 (1995).



permanently disabling them from reproducing.<sup>36</sup> For women, the sterilization procedure of choice is tubal ligation, a cutting, tying, or blocking of the fallopian tubes.<sup>37</sup> 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.<sup>38</sup> However, modern technologies, most of them introduced during the past generation, have 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.

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<sup>35</sup> See John L. Pfenninger, Preparation for Vasectomy, 30 Am Fam Physician 177-184 (1984).

<sup>36</sup> Although some vasectomies can be reversed, doctors typically advise the patient to consider the operation to be permanent. See The Merck Manual of Medical Information, Home Edition 1126 (1997). However, a man does have the option of producing sperm prior to vasectomy, which can be frozen and used for artificial insemination if the man wishes to become a parent afterwards. See Carl Djerassi and S.P. Leibo, A New Look at Male Contraception, 370 Nature 11-12 (1994).

<sup>37</sup> See The Merck Manual of Medical Information, Home Edition 1127-28 (1997). 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. See The Merck Manual of Medical Information, Home Edition 1127-28 (1997). In some cases, especially when other problems are present, a woman can be sterilized by surgical removal of the uterus (hysterectomy) or ovaries (oophorectomy). See The Merck Manual of Medical Information, Home Edition 1128 (1997)

<sup>38</sup> Christianity, however, constructed elaborate rituals to celebrate the miraculous conception of Christ.

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, can review the instructions, and can 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 change in color on a piece of paper. 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.<sup>39</sup> 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.<sup>40</sup>

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<sup>39</sup> Although infertility has long been considered as a woman’s problem, researchers today recognize that both partners experience the psychological pain of not being able to conceive. See, e.g., T. Friedman, *Infertility and Assisted Reproduction*, 3 *Baillieres Clin Obstet Gynaecol* 751-67 (1989)(discussing psychological distress of infertility); Charlene E. Miall, *The Stigma of Involuntary Childlessness*, 33 *Social Problems* 268-282, 274 (1986)(respondents considered male infertility more discrediting to masculinity than female infertility was to femininity); Yoram S. Carmeli and Daphna Birenbaum-Carmeli, *The Predicament of Masculinity: Towards Understanding the Male’s Experience of Infertility Treatments*, 30 *Sex Roles* 663-699, 672-73 (1994)(describing distress experienced by men diagnosed as infertile); B.J. Abbey, L.J. Halman, and F.M. Andrews, *Psychological, Treatment and Demographic Predictors of the Stress Associated with Infertility*, 57 *Fertility and Sterility* 122-28 (1992); B.J. Berg., J.F. Wilson, and P.J. Weingartner, *Psychological Sequelae of Infertility Treatments: The Role of Gender and Sex Role Identification*, 33 *Social Science and Medicine* 1071-1080 (1991); R.D. Nachtigall, G. Becker, and M. Wozny, *The Effects of Gender-Specific Diagnosis on Men’s and Woman’s Response to Infertility*, 57 *Fertility and Sterility* 113-121 (1992); A.L. Stanton, H. Tennen, G. Affleck and R. Mendola, *Cognitive Appraisal and Adjustment to Infertility*, 17 *Woman and Health* 1-15 (1991).

<sup>40</sup> See A.L. Greil, *Not Yet Pregnant: Infertile Couples in Contemporary America* (1991); L. Meerabeau, *Husbands’ Participation in Fertility Treatment: They Also Serve Who Only Stand and Wait*, 11 *Sociology of Health and Illness* 396-410 (1991).

If low-tech measures fail, the husband's involvement increases. To determine the cause of infertility, the physician examines both the man and the woman.<sup>41</sup> The man is usually asked to masturbate into a sterile container so that his sperm can be counted and evaluated.<sup>42</sup> Although women traditionally bore the blame for infertility, it turns out that in two-fifths of the cases, the problem lies in the man's production or delivery of sperm.<sup>43</sup> Being assigned responsibility for infertility may cause the man to feel anxious and inadequate,<sup>44</sup> but are 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.<sup>45</sup> 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,<sup>46</sup> the man plays an important role.<sup>47</sup>

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<sup>41</sup> See Brian Kearney, *High-Tech Conception: A Comprehensive Handbook for Consumers* 16-18 (1998).

<sup>42</sup> 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 and Daphna Birenbaum-Carmeli, *The Predicament of Masculinity: Towards Understanding the Male's Experience of Infertility Treatments*, 30 *Sex Roles* 663-699, 671 (1994)(men found the requirement that they masturbate at reproduction clinics to be stressful and embarrassing).

<sup>43</sup> See Brian Kearney, *High-Tech Conception: A Comprehensive Handbook for Consumers* 112 (1998).

<sup>44</sup> See William Marsiglio, *Procreative Man* 10 (1998); Yoram S. Carmeli and Daphna Birenbaum-Carmeli, *The Predicament of Masculinity: Towards Understanding the Male's Experience of Infertility Treatments*, 30 *Sex Roles* 663-677 (1994).

<sup>45</sup> See Brian Kearney, *High-Tech Conception: A Comprehensive Handbook for Consumers* 18 (1998). The test evaluates whether the man's sperm has the ability to swim through the mucus. *Id.*

<sup>46</sup> See Yoram S. Carmeli and Daphna Birenbaum-Carmeli, *The Predicament of Masculinity: Towards Understanding the Male's Experience of Infertility Treatments*, 30 *Sex Roles* 663-699, 664-65 (1994)(females are most commonly the defined patient in high-tech fertility treatments).

<sup>47</sup> Moreover, even if the woman is the patient, the man may need to raise the money for the treatments. See Yoram S. Carmeli and Daphna Birenbaum-Carmeli, *The Predicament of Masculinity: Towards Understanding the Male's Experience of Infertility Treatments*, 30 *Sex Roles* 663-699 (1994)(7 of

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.<sup>48</sup> Sperm for in vitro fertilization is usually obtained by masturbation. If this doesn't 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), and aspirates the epididymal fluid with a micropipette.<sup>49</sup> 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.<sup>50</sup> In testicular sperm extraction, a piece of testicle is cut out, minced, and centrifuged.<sup>51</sup> Eggs for in vitro fertilization are obtained by inducing multiple ovulation through drug therapy<sup>52</sup> and aspirating the ovarian follicles with a needle guided by an ultrasound wand.<sup>53</sup> The father may be allowed to accompany his partner during this

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23 women in the survey stopped working during infertility treatments, requiring more working hours by spouses).

<sup>48</sup> 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 Brian Kearney, *High-Tech Conception: A Comprehensive Handbook for Consumers* xvii (1998).

<sup>49</sup> See Brian Kearney, *High-Tech Conception: A Comprehensive Handbook for Consumers* 129 (1998).

<sup>50</sup> See Brian Kearney, *High-Tech Conception: A Comprehensive Handbook for Consumers* 130 (1998). The downside of this procedure is that the surgeon must operate "blind" and may nick nearby tissues.

<sup>51</sup> See Brian Kearney, *High-Tech Conception: A Comprehensive Handbook for Consumers* 130 (1998). A disadvantage of testicular sperm extraction is that the harvested sperm are immature and thus have lower motility. *Id.*

<sup>52</sup> See Brian Kearney, *High-Tech Conception: A Comprehensive Handbook for Consumers* 74 (1998)(describing use of ovulation-stimulating drugs, such as follicle-stimulating hormone, gonadotropin-releasing hormone, human chorionic gonadotropin, or human menopausal gonadotropin).

<sup>53</sup> See Brian Kearney, *High-Tech Conception: A Comprehensive Handbook for Consumers* 74 (1998).

procedure.<sup>54</sup> 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,<sup>55</sup> the couple's cooperation can bring both of them into the pregnancy before conception.<sup>56</sup>

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.<sup>57</sup> 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.<sup>58</sup> 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.<sup>59</sup> In intracytoplasmic sperm injection, the “ultimate development of micromanipulation,” a technician injects a single

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<sup>54</sup> See Yoram S. Carmeli and Daphna Birenbaum-Carmeli, *The Predicament of Masculinity: Towards Understanding the Male's Experience of Infertility Treatments*, 30 *Sex Roles* 663-699, 669 (1994)(in Canada, although not in Israel, male partners were allowed to witness ovum retrieval procedures).

<sup>55</sup> See Yoram S. Carmeli and Daphna Birenbaum-Carmeli, *The Predicament of Masculinity: Towards Understanding the Male's Experience of Infertility Treatments*, 30 *Sex Roles* 663-677, 674 (1994)(men are more threatened by the use of donated sperm than women are threatened by the use of donated eggs).

<sup>56</sup> The in vitro procedure doesn't 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 Profile: Ready Made; New Jersey Couple has Triplets Through Embryo Adoption, *Dateline NBC*, September 14, 1998.

<sup>57</sup> See Brian Kearney, *High-Tech Conception: A Comprehensive Handbook for Consumers* 112 (1998).

<sup>58</sup> See Brian Kearney, *High-Tech Conception: A Comprehensive Handbook for Consumers* 112 (1998).

<sup>59</sup> See Brian Kearney, *High-Tech Conception: A Comprehensive Handbook for Consumers* 112 (1998).

sperm cell into the center of an egg.<sup>60</sup> This process can achieve fertilization even if the father's sperm is deformed, underdeveloped, or low in motility.<sup>61</sup> 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.<sup>62</sup> Assisted reproduction has already gained a significant toehold in American medicine, and seems almost certain to become more common during the coming years.<sup>63</sup>

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.<sup>64</sup> Surrogacy can work well, but it is costly<sup>65</sup> and subject to legal risk.<sup>66</sup> 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

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<sup>60</sup> See Brian Kearney, *High-Tech Conception: A Comprehensive Handbook for Consumers* 112 (1998).

<sup>61</sup> See Brian Kearney, *High-Tech Conception: A Comprehensive Handbook for Consumers* 117 (1998).

<sup>62</sup> See Yoram S. Carmeli and Daphna Birenbaum-Carmeli, *The Predicament of Masculinity: Towards Understanding the Male's Experience of Infertility Treatments*, 30 *Sex Roles* 663-699, 669 (1994)(male partners are allowed to witness embryo transfer procedures in Canada, but not in Israel).

<sup>63</sup> 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*, *New York Times*, September 9, 1998, at A1. The researchers reported an 85 percent success rate at selecting for girls and a 65 percent success rate for boys. See Gina Kolata, *Researchers Report Success in Method to Pick Baby's Sex*, *New York Times*, September 9, 1998, at A1. While this technique cannot guarantee results, it stacks the deck in favor of the desired sex. If this process is introduced commercially, it will allow both men and women to plan their families in a way never before thought possible.

<sup>64</sup> 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.

<sup>65</sup> The costs can include both payments of fees and expenses to the surrogate mother for acting as surrogate, 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 Susan Swartz, *SR Woman Carrying Baby for Gay Couple*, *Santa Rosa (CA) Press Democrat*, June 28, 1998.

<sup>66</sup> See *Matter of Baby M*, 109 N.J. 396, 537 A.2d 1227 (N.J.Sup.Ct., 1988)(upholding 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).

compensation.<sup>67</sup> These risks can be mitigated if the surrogacy contract is performed in a state with a more positive view of the process.<sup>68</sup> 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.<sup>69</sup> As compared with standard surrogacy, these arrangements are more likely to be legally enforceable,<sup>70</sup> and less likely to be repudiated by the surrogate,<sup>71</sup> but they are also more expensive because of the extra procedures involved.

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.

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<sup>67</sup> See *In the Matter of the Adoption of Paul*, 146 Misc.2d 379, 550 N.Y.S.2d 815 (Family Court, 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).

<sup>68</sup> See Susan Swartz, *SR Woman Carrying Baby for Gay Couple*, Santa Rosa (CA) Press Democrat, June 28, 1998. California courts hold that surrogacy contracts cannot be enforced against the surrogate by the intended father, see *In re Marriage of Moschetta*, 25 Cal. App.4<sup>th</sup> 1218, 30 Cal.Rptr. 893 (1994), but do not view the contract for surrogacy as illegal in itself.

<sup>69</sup> 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.

<sup>70</sup> See *In re Marriage of Moschetta*, 25 Cal. App.4<sup>th</sup> 1218, 1234-35, 30 Cal.Rptr. 893, 903 (1994)(“infertile couples who can afford the high-tech solution of an 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”); *Johnson v. Calvert*, 5 Cal. 4<sup>th</sup> 84, 19 Cal. Rptr.2d 494, 851 P.2d 776 (1993)(upholding parental rights of biological mother and father against claims of gestational surrogate). 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.

<sup>71</sup> See Stephen Smith, *Gestational Surrogates*, NPR Morning Edition, April 10, 1998 (available at 1998 WL 3307000)(gestational surrogate quoted as saying “with this, I feel just like an incubator or a house for the baby to grow, and so, it is to me completely different [than a standard 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.<sup>72</sup> 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.<sup>73</sup>

### 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,<sup>74</sup> and which have deep

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<sup>72</sup> In 1997, Americans adopted over 13,000 children from abroad. See 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*, August 2, 1998; Pat Underwood, *Men Go the Distance to Earn Daddy Status*, *Arizona Republic*, June 21, 1998; Corin Cummings, *Adopting from Russia: A War of Perceptions*, *Russian Life*, June 1, 1998.

<sup>73</sup> For one compelling story of a couple's experiences with international adoptions, see 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*, August 2, 1998.

<sup>74</sup> The earliest extended treatment is Warren R. Dawson, *The Custom of Couvade* (1929). For other anthropological accounts, see H. Heggenhoughen, *Father and Childbirth: An Anthropological Perspective*, *25 Journal of Nurse-Midwifery* 21-35 (1980); A.S. Meigs, *Male Pregnancy and the Reduction of Sexual Opposition in a New Guinea Highlands Society*, *15 Ethnology* 393-407 (1976); Margaret Mead and N. Newton, *Cultural Patterning of Perinatal Behavior*, in S. Richardson and A. Guttmacher, eds. *Childbearing -- Its Social and Psychological Aspects* 142-224 (1967); Hutton Webster, *Taboo: A Sociological Study* (1942); Margaret Mead, *Sex and Temperament in Three Primitive Societies* (1963 ed.); Robert L. Munroe, *Male Transvestitism and the Couvade: A Psycho-Cultural Analysis*, *8 Ethos* 49-59 (1980); Bronislaw



historical roots.<sup>75</sup> The term “couvade” is derived from the French or Basque *couver*, meaning to “brew, hatch, or sit on eggs.”<sup>76</sup> 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;<sup>77</sup> 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, were undergoing the rigours of confinement.”<sup>78</sup> 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 and abstinence from hunting and fishing.<sup>79</sup> Although couvade may appear beneficial to the husband, it is not an unmixed blessing: the man often must undergo starvation and endure other austerities.<sup>80</sup>

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.<sup>81</sup> Among the Monumbo of Papua New Guinea, expectant husbands are shunned.<sup>82</sup> In other cultures, expectant husbands

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Malinowski, *Sex and Repression in Savage Society* (1927); Kenneth E. Reid, *Fatherhood and Emotional Stress: The Couvade Syndrome*, 2 *Journal of Social Welfare* 3-14 (1975).

<sup>75</sup> See Eileen Grief Fishbein, *The Couvade: A Review*, 10 *Journal of Obstetric, Gynecological and Neonatal Nursing* 356-59, 356 (1981)(tracing the institution to at least 60 B.C.E.).

<sup>76</sup> See Theodor Reik, *Ritual: Psycho-Analytic Studies* 27 (1946).

<sup>77</sup> 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* 49-59, 56-57 (1980).

<sup>78</sup> Warren R. Dawson, *The Custom of Couvade* 1 (1929).

<sup>79</sup> See Warren R. Dawson, *The Custom of Couvade* 8 (1929).

<sup>80</sup> See Warren R. Dawson, *The Custom of Couvade* 1 (1929).

<sup>81</sup> See Hutton Webster, *Taboo: A Sociological Study* 79 (1942).

<sup>82</sup> Hutton Webster, *Taboo: A Sociological Study* 52 (1942).

restrict their diet in order to ward off miscarriage and birth defects.<sup>83</sup> They may be excluded from activities such as hunting, fishing, or warfare.<sup>84</sup>

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.”<sup>85</sup> 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.”<sup>86</sup> 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.”<sup>87</sup> 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.<sup>88</sup> While a midwife assists the wife, the husband “does nothing but eat, drink, and sleep.”<sup>89</sup> After the birth, the clothes of the husband, wife, and midwife are purified.<sup>90</sup>

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<sup>83</sup> Hutton Webster, *Taboo: A Sociological Study* 49 (1942).

<sup>84</sup> Hutton Webster, *Taboo: A Sociological Study* 52 (1942). 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. Hutton Webster, *Taboo: A Sociological Study* 49 (1942).

<sup>85</sup> Warren R. Dawson, *The Custom of Couvade* 1 (1929).

<sup>86</sup> Hutton Webster, *Taboo: A Sociological Study* 79 (1942).

<sup>87</sup> Hutton Webster, *Taboo: A Sociological Study* 79-80 (1942).

<sup>88</sup> Hutton Webster, *Taboo: A Sociological Study* 80 (1942).

<sup>89</sup> Hutton Webster, *Taboo: A Sociological Study* 80 (1942).

<sup>90</sup> Hutton Webster, *Taboo: A Sociological Study* 80 (1942).

Couvade rituals continue after the birth of the child. Among the Motu of New Guinea, the husband goes into isolation and fasts.<sup>91</sup> In Buka, near Bougainville Island, the husband retires to a hut and dozes before the fire for three days, only returning to normal life over a period of weeks or months.<sup>92</sup> Among the Paraiyans of Travancore, the husband fasts for seven days, eating no cooked rice or other food, but only roots and fruits.<sup>93</sup> 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.<sup>94</sup> Similar restrictions on the father's postpartum activities are observed in many other cultures.<sup>95</sup>

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.<sup>96</sup> 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."<sup>97</sup> Father and mother fast for the first day.<sup>98</sup> 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

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<sup>91</sup> Hutton Webster, *Taboo: A Sociological Study* 78 (1942).

<sup>92</sup> Hutton Webster, *Taboo: A Sociological Study* 78 (1942).

<sup>93</sup> Hutton Webster, *Taboo: A Sociological Study* 80 (1942).

<sup>94</sup> Hutton Webster, *Taboo: A Sociological Study* 81 (1942).

<sup>95</sup> See Hutton Webster, *Taboo: A Sociological Study* 79-81 (1942)(Paduang Karen, Tangkhul, Car Nicobar, and Kuravar peoples).

<sup>96</sup> Margaret Mead, *Sex and Temperament in Three Primitive Societies* 32 (1963 ed.).

<sup>97</sup> Margaret Mead, *Sex and Temperament in Three Primitive Societies* 33 (1963 ed.).

<sup>98</sup> Margaret Mead, *Sex and Temperament in Three Primitive Societies* 34 (1963 ed.).

the ceremony “may symbolize the regaining of the father’s masculine nature after his important share in feminine functions.”<sup>99</sup>

Explanations for couvade vary.<sup>100</sup> The most convincing is that the custom is a means by which a father proclaims his paternity, and thus assumes parental obligations.<sup>101</sup> In Malinowski’s view, “[i]t is of high biological value for the human family to consist of both father and mother; if the traditional customs and rules are there to establish a social situation of close moral proximity between father and child, if all such customs aim at drawing a man’s attention to his offspring, then the couvade which makes man simulate the birth-pangs and 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.”<sup>102</sup> 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.”<sup>103</sup>

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<sup>99</sup> Margaret Mead, *Sex and Temperament in Three Primitive Societies* 35 (1963 ed.).

<sup>100</sup> Munroe and Munroe propose that couvade allows men to express a feminine gender identity in socially approved ways. Robert Munroe and Ruth H. Munroe, *Male Pregnancy Symptoms and Cross-Sex Identity in Three Societies*, 84 *Journal of Social Psychology* 11-25 (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. 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. Theodor Reik, *Ritual: Psycho-Analytic Studies* 27-89 (1946).

<sup>101</sup> See Hutton Webster, *Taboo: A Sociological Study* 81 (1942).

<sup>102</sup> See Bronislaw Malinowski, *Sex and Repression in Savage Society* 215-16, 285 (1927).

<sup>103</sup> Hutton Webster, *Taboo: A Sociological Study* 81-82 (1942).

Today we have no explicit couvade customs. But we do have the curious, little-understood, but widespread phenomenon of medical couvade – pregnancy symptoms in expectant fathers.<sup>104</sup> Onset is usually in the beginning of the second trimester, with a secondary increase late in the third.<sup>105</sup> Symptoms include bloating, cramps, toothache, irritability, nausea, indigestion, diarrhea, constipation, headache, moodiness, restlessness, and insomnia.<sup>106</sup> Men may develop large appetites, as if “eating for two.”<sup>107</sup> In unusual

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<sup>104</sup> The syndrome was first named in W.H. Trehowan and M.F. Conlon, *The Couvade Syndrome*, 3 *British Journal of Psychiatry* 57-66 (1965). This initial article spawned a rather large literature on the nature, symptoms and etiology of the syndrome. See L.Y. Bogren, *Couvade*, 68 *Acta Psychiatrica Scandinavica* 55-65 (1983); L.Y. Bogren, *The Couvade Syndrome: Background Variables*, 70 *Acta Psychiatr Scand* 316-20 (1984); Jacqueline F. Clinton, *Expectant Fathers at Risk For Couvade*, 35 *Nursing Research* 290-95 (1986); D.C. Longobucco and M.S. Freston, *Relation of Somatic Symptoms to Degree of Paternal-Role Preparation of First-Time Expectant Fathers*, 18 *J Obstet Gynecol Neonatal Nurs* 482-88 (1989); G.K. Conner and V. Denson, *Expectant Fathers' Response to Pregnancy: Review of Literature and Implications for Research in High-Risk Pregnancy*, 4 *J Perinat Neonatal Nurs* 33-42 (1990); P. Sizaret, A. DeGiovanni, P. Gaillard, and C. Benichu, *Une Enquete sur les Symptomes Somatiques de Couvade [A survey on the somatic symptoms of couvade]*, 149 *Ann Med Psychol (Paris)* 230-33 (1991); Hillary Klein, *Couvade Syndrome: Male Counterpart to Pregnancy*, 21 *International Journal of Psychiatry in Medicine* 57-69 (1991); O.L. Strikland, *The Occurrence of Symptoms in Expectant Fathers*, 36 *Nursing Research* 184-89 (1987); Eileen Greif Fishbein, *The Couvade: A Review*, 10 *Journal of Obstetric, Gynecological and Neonatal Nursing* 356-59 (1981); L.N. Sherwen, *The Pregnant Man*, in L.N. Sherwen, ed., *Psychosocial Dimensions of the Pregnant Family* 157-176 (1987); Timothy E. Quill, Mack Lipkin, and Gerri S. Lamb, *Health Care Seeking by Men in their Spouse's Pregnancy*, 46 *Psychosomatic Medicine* 277-83 (1984); S. Gerzi and E. Berman, *Emotional Reactions of Expectant Fathers to their Wives' First Pregnancy*, 54 *British Journal of Medical Psychology* 259-65 (1981); Jacqueline F. Clinton, *Physical and Emotional Responses of Expectant Fathers Throughout Pregnancy and the Early Postpartum Period*, 24 *International Journal of Nursing Studies* 59-68 (1987); Mack Lipkin, Jr. and Gerri S. Lamb, *The Couvade Symptom: An Epidemiologic Study*, 96 *Annals of Internal Medicine* 509-511 (1982); Katharyn Antle May and Steven Paul Perrin, *Prelude: Pregnancy and Birth*, in S.M.H. Hanson and F.W. Bozett, eds., *Dimensions of Fatherhood* 64-91 (1985); Robert L. Munroe and Ruth H. Munroe, *Male Interpretation of Male Initiation Rites: The Case of Pregnancy*, 21 *International Journal of Psychiatry in Medicine* 57-69 (1991); W.H. Trehowan, *The Couvade Syndrome—Some Further Observations*, 12 *Journal of Psychosomatic Research* 107-15 (1968); D. Holditch-Davis, B.P. Black, B.G. Harris, M. Sandelowski, and L. Edwards, *Beyond Couvade: Pregnancy Symptoms in Couples with a History of Infertility*, 15 *Health Care Woman International* 537-48 (1994); S. Masoni, A. Maio, G. Trimarchi, C. de Punzio, and P. Fioretti, *The Couvade Syndrome*, 15 *Journal of Psychosomatic Obstet Gynaecol* 125-31 (1994). Medical couvade can occur in societies with a formalized ritual of couvade. See Robert Munroe and Ruth H. Munroe, *Male Pregnancy Symptoms and Cross-Sex Identity in Three Societies*, 84 *Journal of Social Psychology* 11-25, 17 (1971)(high rate of pregnancy-like symptoms in Black Caribs who also practice formal couvade rituals).

<sup>105</sup> See Hillary Klein, *Couvade Syndrome: Male Counterpart to Pregnancy*, 21 *International Journal of Psychiatry in Medicine* 57-69 (1991).

<sup>106</sup> See, e.g., S. Masoni, A. Maio, G. Trimarchi, C. de Punzio, and P. Fioretti, *The Couvade Syndrome*, 15 *Journal of Psychosomatic Obstet Gynaecol* 125-31 (1994); Hillary Klein, *Couvade Syndrome: Male Counterpart to Pregnancy*, 21 *International Journal of Psychiatry in Medicine* 57-69 (1991); D.C. Longobucco and M.S. Freston, *Relation of Somatic Symptoms to Degree of Paternal-Role Preparation of First-Time Expectant Fathers*, 18 *J Obstet Gynecol Neonatal Nurs* 482-88 (1989); L.Y.

cases, couvade can cause extreme responses, including psychosis.<sup>108</sup> Couvade is associated with a much higher frequency of doctor visits by expectant fathers seeking medical attention for pregnancy-related symptoms.<sup>109</sup>

Couvade symptoms have been found in many societies.<sup>110</sup> They occur even when the expectant father is apart from his wife during pregnancy,<sup>111</sup> and whether or not the husband has taken prenatal classes or is otherwise prepared for childbirth.<sup>112</sup> Estimates of the incidence range from a low of about 11 percent to a high of more than 60 percent.<sup>113</sup> 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.<sup>114</sup>

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Bogren, Couvade, 68 *Acta Psychiatrica Scandinavica* 55-65 (1983); Mack Lipkin, Jr. and Gerri S. Lamb, The Couvade Syndrome: An Epidemiologic Study, 96 *Annals of Internal Medicine* 509-11 (1982); L.G. Wilson, The Couvade Syndrome, 15 *Am Fam Physician* 157-60 (1977); W.H. Trethowan and M.F. Conlon, The Couvade Syndrome, 3 *British Journal of Psychiatry* 57-66 (1965); W.H. Trethowan, The Couvade Syndrome — Some Further Observations, 12 *Journal of Psychosomatic Research* 107-115, 107 (1968).

<sup>107</sup> Kenneth E. Reid, Fatherhood and Emotional Stress: The Couvade Syndrome, 2 *Journal of Social Welfare* 3-14, 7 (1975).

<sup>108</sup> See T. Tenyi, M. Trixley, and F. Jadi, Psychotic Couvade: 2 Case Reports, 29 *Psychopathology* 252-54 (1996); Stanley Shapiro and Jack Nass, Postpartum Psychosis in the Male, 19 *Psychopathology* 138-42 (1986); R.D. Towne and J. Afterman, Psychosis in Males Related to Parenthood, 19 *Bulletin of the Menninger Clinic* 19-26 (1955).

<sup>109</sup> Lipkin and Lamb, in a study of the mates of 267 postpartum women, representing a systemic 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. Mack Lipkin, Jr. and Gerri S. Lamb, The Couvade Syndrome: An Epidemiologic Study, 96 *Annals of Internal Medicine* 509-11 (1982).

<sup>110</sup> See, e.g., Chantima Khanobdee, Varunee Sukratanachaiyakul, and Janice Templeton Gay, Couvade Syndrome in Expectant Thai Fathers, 30 *International Journal of Nursing Studies* 125-31, 130 (1993) (syndrome appeared in 61 percent of the 172 expectant Thai fathers studied).

<sup>111</sup> For example, soldiers on active duty during World War II reported symptoms at around 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 *Journal of Social Welfare* 3-14, 7 (1975).

<sup>112</sup> See L.Y. Bogren, Couvade, 68 *Acta Psychiatrica Scandinavica* 55-65, 63-63 (1983).

<sup>113</sup> See S. Masoni, A. Maio, G. Trimarchi, C. de Punzio, and P. Fioretti, The Couvade Syndrome, 15 *Journal of Psychosomatic Obstet Gynaecol* 125-31 (1994).

<sup>114</sup> See S. Masoni, A. Maio, G. Trimarchi, C. de Punzio, and P. Fioretti, The Couvade Syndrome, 15 *Journal of Psychosomatic Obstet Gynaecol* 125-31 (1994) (91.78% of men in sample displayed symptoms of emotional involvement in their wives' pregnancies).

There is no generally accepted explanation for the syndrome. Candidates include somatized anxiety,<sup>115</sup> envy of the wife's ability to give birth,<sup>116</sup> identification with the patient's mother,<sup>117</sup> and ambivalent<sup>118</sup> or empathic feelings for the wife.<sup>119</sup> Another explanation is that couvade symptoms symbolize the man's preparation for his role as a father.<sup>120</sup> 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.<sup>121</sup> Men have powerful reactions on learning of their partners' pregnancies.<sup>122</sup> Their feelings range from ambivalence to wonder, nurturance, and anticipation.<sup>123</sup> Expectant fathers feel greater anxiety, tension, and apprehensiveness than childless married men.<sup>124</sup> Many of these feelings seem to be part of a bonding process with the fetus<sup>125</sup> that begins within a few months of

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<sup>115</sup> See, e.g., L.Y. Bogren, *Couvade*, 68 *Acta Psychiatrica Scandinavica* 55-65 (1983).

<sup>116</sup> M.D. Enoch, W.H. Trethawan, and J.C. Barker, *Some Uncommon Psychiatric Syndromes* (1967).

<sup>117</sup> W.N. Evans, *Simulated Pregnancy in Males*, 20 *Psychoanalytic Quarterly* 165-78 (1951).

<sup>118</sup> See Kenneth E. Reid, *Fatherhood and Emotional Distress: The Couvade Syndrome*, 2 *Journal of Social Welfare* 3-14, 9-10 (1975).

<sup>119</sup> Kenneth E. Reid, *Fatherhood and Emotional Distress: The Couvade Syndrome*, 2 *Journal of Social Welfare* 3-14, 9-10 (1975).

<sup>120</sup> For example, Longobucco and Freston found that expectant fathers experiencing symptoms scored higher on scales measuring paternal-role preparation than men not experiencing symptoms. D.C. Longobucco and M.S. Freston, *Relation of Somatic Symptoms to Degree of Paternal-Role Preparation of First-Time Expectant Fathers*, 18 *J Obstet Gynecol Neonatal Nurs* 482-88 (1989). The relatively small sample size (65 men) makes this study difficult to evaluate, however.

<sup>121</sup> See B. Chalmers and D. Meyer, *What Men Say About Pregnancy, Birth and Parenthood*, 17 *Journal of Psychosomatic Obstetrics and Gynaecology* 47-52 (1996).

<sup>122</sup> Chambers and Meyer surveyed 115 first-time fathers in 1988 and 1989; 76.5 percent of the respondents said they were "thrilled" to hear of the pregnancy, and 73.9 percent said they were "excited". B. Chalmers and D. Meyer, *What Men Say About Pregnancy, Birth and Parenthood*, 17 *Journal of Psychosomatic Obstetrics and Gynaecology* 47-52, 49 (1996). Other reported feelings included worries about finances (32.6 percent), fear (13 percent) and ambivalence (8.7 percent).

<sup>123</sup> See Katharyn Antle May and Steven Paul Perrin, *Prelude: Pregnancy and Birth*, in S.M.H. Hanson and F.W. Bozett, eds., *Dimensions of Fatherhood* 64-91, 74 (1985).

<sup>124</sup> Katharyn Antle May and Steven Paul Perrin, *Prelude: Pregnancy and Birth*, in S.M.H. Hanson and F.W. Bozett, eds., *Dimensions of Fatherhood* 64-91, 75 (1985).

<sup>125</sup> See, e.g., Mecca S. Cranley, *Roots of Attachment: The Relationship of Parents to the Unborn*, 17 *Birth Defects: Original Article Series* 59-83 (1981).

conception.<sup>126</sup> Men caress the fetus through their mates' bellies, sense its movements, and so on.<sup>127</sup> They report that they "feel" pregnant.<sup>128</sup> They want to know when the fetus moves and in what direction it is facing.<sup>129</sup> They talk to the fetus and listen for its heartbeat.<sup>130</sup> As the pregnancy progresses they develop a mental image of their future child.<sup>131</sup> They come to "anticipate" the baby,<sup>132</sup> and, as part of that process, they prepare themselves physically and psychologically to become good caretakers.<sup>133</sup> 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.<sup>134</sup> The Lamaze, Bradley, and other childbirth methods emphasize the importance of the father's (or other partner's) involvement.<sup>135</sup> Men not only have the opportunity to learn the details of pregnancy and delivery, but also join their partner during pregnancy, labor, and delivery.<sup>136</sup> This process increases the

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<sup>126</sup> See Mecca Cranley, *Roots of Attachment: The Relationship of Parents to the Unborn*, 17 *Birth Defects: Original Article Series* 59-83, 63 (1981).

<sup>127</sup> See R. Weaver and M. Cranley, *An Exploration of Paternal-Fetal Attachment Behavior*, 32 *Nursing Research* 68-72 (1983).

<sup>128</sup> See Mecca Cranley, *Roots of Attachment: The Relationship of Parents to the Unborn*, 17 *Birth Defects: Original Article Series* 59-83, 63 (1981).

<sup>129</sup> See Mecca Cranley, *Roots of Attachment: The Relationship of Parents to the Unborn*, 17 *Birth Defects: Original Article Series* 59-83, 63 (1981).

<sup>130</sup> See Nancy J. Worth, *Becoming a Father of a Stillborn Child*, 6 *Clinical Nursing Research* 71-89, 84 (1997).

<sup>131</sup> See M.C. Stainton, *Parents' Awareness of their Unborn Infant in the Third Trimester*, 17 *Birth* 92-96 (1990).

<sup>132</sup> The felicitous phrase is from Nancy J. Worth, *Becoming a Father to a Stillborn Child*, 6 *Clinical Nursing Research* 71-89, 77 (1997).

<sup>133</sup> See Mecca Cranley, *Roots of Attachment: The Relationship of Parents to the Unborn*, 17 *Birth Defects: Original Article Series* 59-83, 63 (1981)(men prepare themselves for fatherhood by identifying with the pregnancy).

<sup>134</sup> See Katharyn Antle May and Steven Paul Perrin, *Prelude: Pregnancy and Birth*, in S.M.H. Hanson and F.W. Bozett, eds., *Dimensions of Fatherhood* 64-91, 70 (1985)(comparing prepared childbirth classes to couvade).

<sup>135</sup> See, e.g., <http://www.bradleybirth.com/tbm5.htm> (website for Bradley method).

<sup>136</sup> See J. Heinowitz, *Pregnant Fathers – How Fathers Can Enjoy and Share the Experiences of Pregnancy and Childbirth* (1982).



attachment that expectant fathers may feel towards their future child.<sup>137</sup> 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.<sup>138</sup> 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.<sup>139</sup>

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.<sup>140</sup> Ultrasound rules out medical conditions (heart malformations, spina bifida, etc.), but it offers an additional benefit: it facilitates bonding between parents and fetus<sup>141</sup> and stimulates the expectant couple to adjust their self-identities to include the role of parents.<sup>142</sup> Sonograms show details that previously had been left to the imagination, including a beating heart, face, feet, hands, sexual organs –

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<sup>137</sup> See J. Wapner, *The Attitudes, Feelings, and Behaviors of Expectant Fathers Attending Lamaze Classes*, 3 *Birth Fam. J.* 5-23 (1976).

<sup>138</sup> See Mecca Cranley, *Roots of Attachment: The Relationship of Parents to the Unborn*, 17 *Birth Defects: Original Article Series* 59-83, 70 (1981)(one-half of the expectant fathers surveyed did more work around the house during their wives' pregnancies and 88 percent helped prepare the house for the baby's arrival).

<sup>139</sup> See William Marsiglio, *Procreative Man* 7 (1998). 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 way. See B. Chalmers and D. Meyer, *What Men Say About Pregnancy, Birth and Parenthood*, 17 *Journal of Psychosomatic Obstetrics and Gynaecology* 47-52, 49-50 (1996)(expectant fathers are about twice as likely to wish for a boy as for a girl).

<sup>140</sup> See *The Merck Manual of Medical Information, Home Edition* 1142, 1135 (1997). On the impact of ultrasound on a man's relationship with his children, see, e.g., William Marsiglio, *Procreative Man* 6 (1998).

<sup>141</sup> See Nancy J. Worth, *Becoming a Father to a Stillborn Child*, 6 *Clinical Nursing Research* 71-89, 72 (1997)( "[w]ith the use of technology, particularly early ultrasounds, attachment [between parent and child] can begin even earlier than was once thought.")

<sup>142</sup> See Nancy J. Worth, *Becoming a Father to a Stillborn Child*, 6 *Clinical Nursing Research* 71-89, 7 (1997)(citing research findings that visual perception is an important stimulus for assuming paternal role).

even the fetus sucking its thumb.<sup>143</sup> They are a “window on the womb” through which the expectant parents can observe the fetus in motion.<sup>144</sup> 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.<sup>145</sup> 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.<sup>146</sup>

In amniocentesis, technicians obtain fetal cells by inserting a needle into the amniotic sac.<sup>147</sup> Usually performed between 15 and 17 weeks of pregnancy,<sup>148</sup> amniocentesis can determine the sex of the baby; it also tests for spina bifida, anencephaly, and other abnormalities.<sup>149</sup> Another procedure, chorionic villus sampling, is usually performed earlier in the pregnancy than amniocentesis.<sup>150</sup> The physician removes a sample of tissue from a part of the placenta – the chorionic villi – that contains fetal cells.<sup>151</sup> The results, in the form of a chromosomal map, provide the parents with their first “picture” of the fetus. Although the chromosomes don’t show the fetus itself, they

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<sup>143</sup> See Richard W. Wertz and Dorothy C. Wertz, *Lying-In: A History of Childbirth in America* 246 (expanded version 1989).

<sup>144</sup> Richard W. Wertz and Dorothy C. Wertz, *Lying-In: A History of Childbirth in America* 246 (expanded version 1989)(through ultrasound, the expectant parents can discover that the fetus “looks and acts far more like a newborn than previous medical texts or childbirth-preparation books suggested.”); *The Merck Manual of Medical Information, Home Edition* 1142 (1997)(ultrasound images are live-action).

<sup>145</sup> A survey of first time fathers in South Africa, conducted in 1988 and 1989, found that only 15.2 percent of the respondents knew the baby’s gender prior to birth. See B. Chalmers and D. Meyer, *What Men Say About Pregnancy, Birth and Parenthood*, 17 *Journal of Psychosomatic Obstetrics and Gynaecology* 47-52, 50 (1996).

<sup>146</sup> See Nancy J. Worth, *Becoming a Father to a Stillborn Child*, 6 *Clinical Nursing Research* 71-89, 71 (1997).

<sup>147</sup> See Brian Kearney, *High-Tech Conception: A Comprehensive Handbook for Consumers* 305-06 (1998).

<sup>148</sup> See *The Merck Manual of Medical Information, Home Edition* 1135 (1997).

<sup>149</sup> See *The Merck Manual of Medical Information, Home Edition* 1134 (1997).

<sup>150</sup> See Centers for Disease Control and Prevention, *Chorionic Villus Sampling and Amniocentesis: Recommendations for Prenatal Counseling*, *Morb Mortal Wkly Rep* 1-12 (Jul 21 1995).

<sup>151</sup> 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

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 fetus against risks of decreased birth weight, pre-term labor, and birth defects.<sup>152</sup> 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.<sup>153</sup> 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.<sup>154</sup> 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

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abortion decision can be made earlier and with less trauma. See Brian Kearney, *High-Tech Conception: A Comprehensive Handbook for Consumers* 306 (1998).

<sup>152</sup> See *The Merck Manual of Medical Information, Home Edition* 1150 (1997).

<sup>153</sup> 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).

<sup>154</sup> See Mecca Cranley, *Comments*, in Mecca Cranley, *Roots of Attachment: The Relationship of Parents to the Unborn*, 17 *Birth Defects: Original Article Series* 59-83, 80 (1981).

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.<sup>155</sup> Most women tell their partners about their decision to abort.<sup>156</sup> Men, in turn, often want to offer assistance,<sup>157</sup> and usually play a role if they have an ongoing relationship with the woman.<sup>158</sup> Men often accompany their partner to the abortion clinic,<sup>159</sup> and frequently pay some of the bill.<sup>160</sup> Most would like to be present during the procedure, although they

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<sup>155</sup> 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 Margaret Mead, *Sex and Temperament in Three Primitive Societies* 32-33 (1963 ed.).

<sup>156</sup> See Barbara Ryan and Eric Plutzer, *When Married Women Have Abortions: Spousal Notification and Marital Interaction*, 51 *Journal of Marriage and the Family* 41-50, 44 (1989)(82.5 percent of women surveyed told their partner of their decision to abort).

<sup>157</sup> Shostak and McLouth's survey of 1,000 men at abortion waiting rooms found that 58 percent of the respondents believed that an unmarried man should have as much say in the matter as his lover, and 80 percent believed that a husband should have as much say as his wife. Arthur B. Shostak and 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 authority over how she uses it. *Id.*

<sup>158</sup> See Barbara Ryan and Eric Plutzer, *When Married Women Have Abortions: Spousal Notification and Marital Interaction*, 51 *Journal of Marriage and the Family* 41-50 (1989); Kain Adebayo, *Male Attitudes Toward Abortion: An Analysis of Urban Survey Data*, 22 *Social Indicators Research* 213-218 (1990).

<sup>159</sup> See P. Zelles, *Feedback from 521 Waiting Room Males*, in Arthur B. Shostak and Gary McLouth, *Men and Abortion: Lessons, Losses, and Love* 299-304 (1984). While estimates vary, it's probable that males accompany women to the abortion clinic about 50 percent of the time. See Arthur B. Shostak and Gary McLouth, *Men and Abortion: Lessons, Losses, and Love* 17 n.1 (1984). The authors estimated that as of 1984, about 600,000 men accompanied women to abortion clinics. *Id.* at 2. A later study by Ryan and Plutzer found that about two-thirds of husbands accompanied their wives to the clinic. Barbara Ryan and Eric Plutzer, *When Married Women Have Abortions: Spousal Notification and Marital Interaction*, 51 *Journal of Marriage and the Family* 41-50, 44 (1989).

<sup>160</sup> Shostak and McLouth's survey found that 57 percent of the men they interviewed in abortion clinic waiting rooms paid the entire bill, 29 percent paid half, and another 6 percent paid for some; only 8 percent paid nothing. See Arthur B. Shostak and Gary McLouth, *Men and Abortion: Lessons, Losses, and Love* 36 (1984).

usually are excluded.<sup>161</sup> They keep vigil in waiting rooms<sup>162</sup> while their partner is being treated.<sup>163</sup>

Men experience a wide range of emotions around abortion, including fear, guilt, anxiety, self-doubt, and self-pity.<sup>164</sup> Many have feelings and thoughts about the fetus: curiosity, troublesome feelings, and sadness.<sup>165</sup> They tend to experience the day of the abortion as emotionally moving, but positive.<sup>166</sup> However, the longer-range consequences can be more difficult, either because intimate relationships suffer, or because the man feels guilt or remorse.<sup>167</sup> Some men acutely feel the loss of the fetus and

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<sup>161</sup> Most men would prefer to assist their partners in these locations: 69 percent of men surveyed by Shostak and McLouth wanted to accompany their partners in the procedure room and 91 percent wanted to join them in the recovery room. See Arthur B. Shostak and Gary McLouth, *Men and Abortion: Lessons, Losses, and Love* 61 (1984).

<sup>162</sup> Only 12 percent of the abortion clinics surveyed by Shostak and McLouth allowed men to accompany their partners in the abortion procedure or recovery rooms. See Arthur B. Shostak and Gary McLouth, *Men and Abortion: Lessons, Losses, and Love* 60 (1984). Many men find their exclusion to be stressful or irksome. See Arthur B. Shostak and Gary McLouth, *Men and Abortion: Lessons, Losses, and Love* 55-56 (1984).

<sup>163</sup> 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.” Linda Bird Francke, *Abortion and Men*, *Esquire*, January 1981, p. 59, quoted in Arthur B. Shostak and Gary McLouth, *Men and Abortion: Lessons, Losses, and Love* 52 (1984). The difference is that, in place 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 Yoram S. Carmeli and Daphna Birenbaum-Carmeli, *The Predicament of Masculinity: Towards Understanding the Male’s Experience of Infertility Treatments*, *30 Sex Roles* 663-699, 673 (1994).

<sup>164</sup> See Arthur B. Shostak and Gary McLouth, *Men and Abortion: Lessons, Losses, and Love* 41 (1984).

<sup>165</sup> See Arthur B. Shostak and Gary McLouth, *Men and Abortion: Lessons, Losses, and Love* 40 (1984).

<sup>166</sup> See Arthur B. Shostak and Gary McLouth, *Men and Abortion: Lessons, Losses, and Love* 63 (1984)(81 percent agreed that the experience had definitely changed them, but only 15 percent felt that the change had been in a negative direction).

<sup>167</sup> See Arthur B. Shostak and Gary McLouth, *Men and Abortion: Lessons, Losses, and Love* 105 (1984).

of their role as father, and find their thoughts returning to those topics long afterwards.<sup>168</sup> Often, they hide stress by controlling or denying feelings,<sup>169</sup> either because the feelings are too painful, or because they feel a need to support their partners.<sup>170</sup> Men may be particularly stressed because of the lack of anyone to talk to about their feelings towards abortion. 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.<sup>171</sup> For many men, their partner is their only confidante.<sup>172</sup>

### **E. Perinatal Loss**

Perinatal loss – miscarriage, stillbirth, neonatal death and sudden infant death syndrome – has a profound effect on both men and women.<sup>173</sup> Such events, which remain common even in an era of widespread perinatal and neonatal health care delivery,<sup>174</sup> provide powerful evidence of the depth and importance of parental bonding with the fetus and newborn. The extent and depth 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 1940's, prominent psychologists held that because

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<sup>168</sup> See Arthur B. Shostak and Gary McLouth, *Men and Abortion: Lessons, Losses, and Love* 108-09 (1984) (finding, inter alia, that 69 percent of men surveyed long after the abortion had thoughts about the fetus, and 9 percent had such thoughts frequently).

<sup>169</sup> See Arthur B. Shostak and Gary McLouth, *Men and Abortion: Lessons, Losses, and Love* 37 (1984).

<sup>170</sup> See Arthur B. Shostak and Gary McLouth, *Men and Abortion: Lessons, Losses, and Love* 42 (1984).

<sup>171</sup> 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); Terrance Real, *I Don't Want to Talk About it: Overcoming the Secret Legacy of Male Depression* 55 (1997).

<sup>172</sup> Shostak and McLouth find that three out of four men had spoken with no one but their partners. Arthur B. Shostak and Gary McLouth, *Men and Abortion: Lessons, Losses, and Love* 26 (1984).

<sup>173</sup> For a general introduction, see Marshall H. Klaus and John H. Kennell, *Bonding: The Beginnings of Parent-Infant Attachment* 162-91 (1983).

<sup>174</sup> Perinatal deaths account for approximately 6 percent of all deaths each year. See Cynthia Bach Hughes and Judith Page-Lieberman, *Fathers Experiencing a Perinatal Loss*, 132 *Death Studies* 537-556, 538 (1989).

attachment to the child occurred only at birth, perinatal loss could not cause grief.<sup>175</sup> Fathers especially were ignored.<sup>176</sup> The traditional view was that men should get on with life and support their wives.<sup>177</sup> In fact, however, men feel confusion, depression, sadness, and anxiety.<sup>178</sup> Many report intimate feelings towards the fetus before birth.<sup>179</sup> When the fetus dies, they go through the stages of the grief process – shock and disbelief, denial, anger, bargaining, depression, and acceptance.<sup>180</sup> For many such men, the grief is associated with the loss of the father's role for which they had been preparing.<sup>181</sup> They feel the absence of a baby to hold, cuddle, and carry around.<sup>182</sup>

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

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<sup>175</sup> See Helene Deutch, Bereavement Following a Stillbirth, 222 *Practitioner* 115-118 (1945)(grief over perinatal death represents painful feeling of non-fulfillment of a fantasized wish, rather than genuine mourning).

<sup>176</sup> See Nancy J. Worth, Becoming a Father to a Stillborn Child, 6 *Clinical Nursing Research* 71-89, 72 (1997).

<sup>177</sup> See J.E. Puddifoot, M.P. Johnson, The Legitimacy of Grieving: The Partner's Experience at Miscarriage, 45 *Soc Sci Med* 837-45 (1997).

<sup>178</sup> See, e.g., R. Harrigan, M.M. Naber, K.A. Jensen, A. Tse, and D. Perez, Perinatal Grief: Response to the Loss of an Infant, 12 *Neonatal Netw* 25-31 (1993); J.E. Puddifoot and M.P. Johnson, The Legitimacy of Grieving: The Partner's Experience at Miscarriage, 45 *Soc Sci Med* 837-45 (1997); A.L. Wilson, D. Witzke, L.J. Fenton, and D. Soule, Parental Response to Perinatal Death: Mother-Father Differences, 139 *Am J Dis Child* 1235-38 (1985); R.J. Knapp and L.G. Peppers, Doctor-Patient Relationships in Fetal/Infant Death Encounters, 54 *J Med Educ* 775-80 (1979); Nancy J. Worth, Becoming a Father to a Stillborn Child, 6 *Clinical Nursing Research* 71-89 (1997); C. Wallerstedt and P. Higgins, Facilitating Perinatal Grieving Between the Mother and the Father, 25 *J Obstet Gynecol Neonatal Nurs* 389-94 (1996); J.C. Vance, J.M. Najman, M.J. Thearle, G. Embelton, W.J. Foster, and F.M. Boyle, 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* 933-38 (1995); G. Fairbarin, When a Baby Dies--A Father's View, 1 *Nurs Pract* 167-68 (1986); Cynthia Bach Hughes and Judith Page-Lieberman, Fathers Experiencing a Perinatal Loss, 13 *Death Studies* 537-556 (1989).

<sup>179</sup> See Cynthia Bach Hughes and Judith Page-Lieberman, Fathers Experiencing a Perinatal Loss, 13 *Death Studies* 537-556, 544 (1989)(43 percent of fathers surveyed experienced shock at perinatal death, and 45 percent reported feeling close to the fetus before birth).

<sup>180</sup> See Cynthia Bach Hughes and Judith Page-Lieberman, Fathers Experiencing a Perinatal Loss, 13 *Death Studies* 537-556, 549-51 (1989). For the classic account of the grief process, see Elizabeth Kübler-Ross, *On Death and Dying* (1969).

<sup>181</sup> See Nancy J. Worth, Becoming a Father to a Stillborn Child, 6 *Clinical Nursing Research* 71-89 (1997).

<sup>182</sup> See Nancy J. Worth, Becoming a Father to a Stillborn Child, 6 *Clinical Nursing Research* 71-89 (1997).

one fifth return for follow-up appointments.<sup>183</sup> 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.<sup>184</sup>

While fathers experience grief over perinatal loss, they may recover more quickly and experience the loss less acutely.<sup>185</sup> However, it's 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.<sup>186</sup> 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.<sup>187</sup> They often taken on the father function for which they

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<sup>183</sup> See Rita J. Revak-Lutz and Kenneth R. Kellner, *Paternal Involvement After Perinatal Death*, 14 *Journal of Perinatology* 442-45 (1994)(sample of 772 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. *Id.* at 442.

<sup>184</sup> See Nancy J. Worth, *Becoming a Father to a Stillborn Child*, 6 *Clinical Nursing Research* 71-89, 81 (1997).

<sup>185</sup> See J.C. Vance, J.M. Najman, M.J. Thearle, G. Embelton, W.J. Foster, and F.M. Boyle, *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* 933-38, 36 (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); Atle Dyregrov, *Parental Reactions to The Loss of an Infant Child: A Review*, 31 *Scandinavian Journal of Psychology* 266-80, 269 (1990)(grief reactions in mother are stronger and more prolonged); John T. Condon, *Management of Established Pathological Grief Reaction After Stillbirth*, 143 *American Journal of Psychiatry* 987-92 (1986)(focusing on therapy for grieving mothers); Cynthia Bach Hughes and Judith Page-Lieberman, *Fathers Experiencing a Perinatal Loss*, 13 *Death Studies* 537-56 (1989); Manfred Beutel, Hans Willner, Rainer Deckardt, Michael Von Rad, and Herbert Weiner, *Similarities and Differences in Couples' Grief Reactions following a Miscarriage: Results from a Longitudinal Study*, 40 *Journal of Psychosomatic Research* 245-53 (1996)(men's grief, while real, is less intense and long-lasting than women's).

<sup>186</sup> See, e.g., J.C. Vance, J.M. Najman, M.J. Thearle, G. Embelton, W.J. Foster, and F.M. Boyle, *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* 933-38, 936-37 (1995)(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).

<sup>187</sup> See Atle Dyregrov, *Parental Reactions to the Loss of an Infant Child: A Review*, 31 *Scandinavian Journal of Psychology* 266-80, 269 (1990)(surveying literature and noting findings that fathers tend not to want to talk about their loss)



had been preparing if the child had lived:<sup>188</sup> they may lose themselves in their “good provider” roles,<sup>189</sup> or may deny their own pain in order to help their partners cope.<sup>190</sup>

## 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.<sup>191</sup> Most hospitals welcome fathers, and many provide rooms where the couple can share the birth experience in a home-like setting.<sup>192</sup> Men who are present during labor and delivery generally enjoy the experience.<sup>193</sup> Their support has real benefits for the mother as well: several studies suggest that women

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<sup>188</sup> Nancy J. Worth, *Becoming a Father to a Stillborn Child*, 6 *Clinical Nursing Research* 71-89 (1997).

<sup>189</sup> See Manfred Beutel, Hans Willner, Rainer Deckardt, Michael Von Rad, and Herbert Weiner, *Similarities and Differences in Couples' Grief Reactions Following a Miscarriage: Results From a Longitudinal Study*, 40 *Journal of Psychosomatic Research* 245-53, 249 (1996)(men sought distraction by immersion in work); Atle Dyregrov, *Parental Reactions to the Loss of an Infant Child: A Review*, 31 *Scandinavian Journal of Psychology* 266-80, 269 (1990)(predominant coping mechanism in fathers is to keep busy and directing their energies outwards).

<sup>190</sup> J.E. Puddifoot and M.P. Johnson, *The Legitimacy of Grieving: The Partner's Experience at Miscarriage*, 45 *Soc Sci Med* 837-45 (1997); Nancy J. Worth, *Becoming a Father to a Stillborn Child*, 6 *Clinical Nursing Research* 71-89, 79 (1997)(fathers felt sad over the death of their child, but thought they had to be strong to support their wives); Atle Dyregrov, *Parental Reactions to The Loss of an Infant Child: A Review*, 31 *Scandinavian Journal of Psychology* 266-80, 269 (1990)(noting studies in which fathers reported the need to remain strong in order to support their wives); Jack M. Stack and Kim Barnas, *Stillbirth*, 35 *American Family Physician* 117-124 (1987); Cynthia Bach Hughes and Judith Page-Lieberman, *Fathers Experiencing a Perinatal Loss*, 13 *Death Studies* 537-556 (1989).. Although men score lower on most grief measures than women in cases of miscarriage, they score extremely high compared to women on the measure of “concern for partner.” See Manfred Beutel, Hans Willner, Rainer Deckardt, Michael Von Rad, and Herbert Weiner, *Similarities and Differences in Couples' Grief Reactions Following a Miscarriage: Results from a Longitudinal Study*, 40 *Journal of Psychosomatic Research* 245-53, 249 (1996).

<sup>191</sup> See *The Merck Manual of Medical Information, Home Edition* 1172 (1997). Husbands appear to have been more involved during the Nineteenth Century, see J. Jill Sutor, *Husbands' Participation in Childbirth: A Nineteenth-Century Phenomenon*, *Journal of Family History* 278-93, 278 (Fall 1981), 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 *Journal of Obstetric, Gynecological and Neonatal Nursing* 356-59, 358 (1981). Husbands were excluded when doctors gained control of the process. See Katharyn Antle May and Steven Paul Perrin, *Prelude: Pregnancy and Birth*, in S.M.H. Hanson and F.W. Bozett, eds., *Dimensions of Fatherhood* 64-91, 76 (1985)(documenting physician resistance to father participation).

<sup>192</sup> See *The Merck Manual of Medical Information, Home Edition* 1172 (1997).

<sup>193</sup> See, e.g., N.R. Nichols, *Paternal Perspectives of the Childbirth Experience*, 21 *Matern Child Nurs J* 99-108 (1993).

whose husbands stay with them suffer less pain and require less medication during childbirth and experience a lower rate of depression afterwards.<sup>194</sup>

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.<sup>195</sup> 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.<sup>196</sup> Many men bond with their children at first sight.<sup>197</sup> Greenberg and Morris term this experience "engrossment," a word that connotes the intense, almost hypnotic power that the newborn exercises over the father's attention.<sup>198</sup> Elements of engrossment include the

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<sup>194</sup> See Dwenda K. Gjerdingen, Debra G. Froberg, and Patricia Fontaine, *The Effects of Social Support on Women's Health During Pregnancy, Labor and Delivery, and the Postpartum Period*, 23 *Family Medicine* 370-375, 373 (1991)(reviewing studies).

<sup>195</sup> See *The Merck Manual of Medical Information, Home Edition* 1182 (1997). 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.

<sup>196</sup> See Jacqueline F. Clinton, *Physical and Emotional Responses of Expectant Fathers Throughout Pregnancy and the Early Postpartum Period*, 24 *International Journal of Nursing Studies* 59-68, 67 (1987).

<sup>197</sup> On the importance of early holding, see, e.g., William Marsiglio, *Procreative Man* 6 (1998); M. Rodholm, *Effects of Father-Infant Postpartum Contact on Their Interaction 3 Months After Birth*, 5 *Early Human Development* 79-85 (1981).

<sup>198</sup> Martin Greenberg and Norman Morris, *Engrossment: the Newborn's Impact on the Father*, 44 *American Journal of Orthopsychiatry* 520-531 (1974). Engrossment "refers to the link-up of father to newborn from the point of reference of the father." Martin Greenberg and Norman Morris, *Engrossment:*

father's joy on 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.<sup>199</sup> 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 . . ."<sup>200</sup> 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."<sup>201</sup>

Engrossment, in the sense of immediate, intense love, happens to many new fathers. In Chalmers and Meyer's survey, 69.7 percent of new fathers reported feeling love at first sight and 12.1 percent reported feelings of love after a few hours.<sup>202</sup> These paternal feelings continue through the first months of parenthood. Chalmers and Meyer found that the vast majority (84.2 percent) of fathers felt the first few months to be a "most wonderful experience."<sup>203</sup> These global feelings were matched by satisfying specific emotions – pride (92.9 percent), happiness (84.2 percent), excitement (84.2 percent), and a sense of being loved (59.7 percent).<sup>204</sup> New fathers also feel stress. Like women, men experience the first few months of parenting as an emotional roller coaster.

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the Newborn's Impact on the Father, 44 *American Journal of Orthopsychiatry* 520-531, 521 (1974) See also See G.H. Peterson, L.E. Mehl, and P.H. Leiderman, The Role of Some Birth Related Variables in Fathers' Attachment, 49 *American Journal of Orthopsychiatry* 330-38 (1979).

<sup>199</sup> Martin Greenberg and Norman Morris, Engrossment: the Newborn's Impact on the Father, 44 *American Journal of Orthopsychiatry* 520-531, 522-24 (1974).

<sup>200</sup> Martin Greenberg and Norman Morris, Engrossment: the Newborn's Impact on the Father, 44 *American Journal of Orthopsychiatry* 520-531, 524 (1974).

<sup>201</sup> Martin Greenberg and Norman Morris, Engrossment: the Newborn's Impact on the Father, 44 *American Journal of Orthopsychiatry* 520-531, 524 (1974).

<sup>202</sup> See B. Chalmers and D. Meyer, What Men Say About Pregnancy, Birth and Parenthood, 17 *Journal of Psychosomatic Obstetrics and Gynaecology* 47-52, 50-51 (1996).

<sup>203</sup> See B. Chalmers and D. Meyer, What Men Say About Pregnancy, Birth and Parenthood, 17 *Journal of Psychosomatic Obstetrics and Gynaecology* 47-52, 51 (1996).

<sup>204</sup> See B. Chalmers and D. Meyer, What Men Say About Pregnancy, Birth and Parenthood, 17 *Journal of Psychosomatic Obstetrics and Gynaecology* 47-52, 51 (1996).

They suffer postpartum mood swings similar to those experienced by women,<sup>205</sup> and experience above-average levels of nervousness, difficulty concentrating, fatigue, headaches, and restlessness.<sup>206</sup> They may feel additional stress because they want to provide emotional support for their partner.<sup>207</sup>

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 teach information about the child's basic abilities and reflexes.<sup>208</sup> 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,<sup>209</sup> using either formula or breast milk, and in the process, share an intimacy that was once available only to mothers.<sup>210</sup> When the mother breast-feeds,

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<sup>205</sup> See David Quadagno, Laurie Ann Dixon, Nancy W. Denny and Henry W. Buck, Postpartum Moods in Men and Women, 154 *American Journal of Obstetrics and Gynecology* 1018-1023, 1023 (1986)(men and women experience post-partum period in an emotionally similar way).

<sup>206</sup> See Jacqueline F. Clinton, Physical and Emotional Responses of Expectant Fathers Throughout Pregnancy and the Early Postpartum Period, 24 *International Journal of Nursing Studies* 59-68, 66 (1987).

<sup>207</sup> When men do provide emotional, tangible, or informational support during the post-partum period, their spouses tend to experience an enhanced sense of well-being. See Dwenda K. Gjerdingen, Debra G. Froberg, and Patricia Fontaine, The Effects of Social Support on Woman's Health During Pregnancy, Labor and Delivery, and the Postpartum Period, 23 *Family Medicine* 370-75, 371 (1991)(reviewing the literature). Occasionally the new father may even experience a mental breakdown. See Stanley Shapiro and Jack Nass, Postpartum Psychosis in the Male, 19 *Psychopathology* 138-42 (1986).

<sup>208</sup> See Barbara J. Myers, Early Intervention Using Brazelton Training With Middle-Class Mothers and Fathers of Newborns, 53 *Child Development* 462-71 (1982)(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).

<sup>209</sup> See B. Chalmers and D. Meyer, What Men Say About Pregnancy, Birth and Parenthood, 17 *Journal of Psychosomatic Obstetrics and Gynaecology* 47-52, 51 (1996)(70.8 percent of the fathers of newborns surveyed whose babies were being bottle fed them at least once or more every day).

<sup>210</sup> The single most cogent image in society of parent child bonding is that of the baby "at the breast." See Marilyn Yablon, *A History of the Breast* 5 (1997)(citing the example of the baby Jesus sucking at his mother's breast as a "metaphor for the spiritual nurturance of all Christian souls"); D.W. Winnicott, *The Child, the Family, and the Outside World* 30 (1964)("infant feeding is a matter of infant-mother relationship, a putting into practice of a love-relationship between two human beings.") 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*, in 7 S. Freud, *The Standard Edition of the Complete Psychological Works of Sigmund Freud* 125-245, 222. 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

the father can still play a role: his feedback influences his partner's decision about breast feeding,<sup>211</sup> and he can bring the baby to the mother or return it to the crib.<sup>212</sup> Men are also increasingly taking time to be with their babies,<sup>213</sup> and thus learn the joys and frustrations of feeding, diapering, bathing, burping, holding, rocking, and soothing an infant.<sup>214</sup> Men who do care for their newborns seem to develop strong early bonds and experience the transition into the paternal role with greater ease.<sup>215</sup>

### 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?

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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 Marilyn Yablon, *A History of the Breast* 126 (1997).

<sup>211</sup> 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. J.A. Scott, C.W. Binns, and R.A. Aroni, *The Influence of Reported Paternal Attitudes on the Decision to Breast-Feed*, 33 *Journal of Pediatrics and Child Health* 305-07, 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 women who perceived and stated that their partners either preferred bottle-feeding or were ambivalent about the method of feeding). See also L.A. Kessler, A.C. Gielen, M. Diener-West, and D.M. Paige, *The Effect of a Woman's Significant Other on Her Breastfeeding Decision*, 11 *J Hum Lact* 103-09 (1995); Naomi Bromberg Bar-Yam and Lori Darby, *Fathers and Breastfeeding: A Review of the Literature*, 13 *Journal of Human Lactation* 45-50 (1997); H. Littman, S.V. Medendorp and J. Goldfarb, *The Decision to Breastfeed: The Importance of Father's Approval*, 33 *Clin Pediatr* 214-19 (1994)(strong approval of breastfeeding by father found associated with high incidence of breastfeeding).

<sup>212</sup> On father assistance in breast-feeding, see Naomi Bromberg Bar-Yam and Lori Darby, *Fathers and Breastfeeding: A Review of the Literature*, 13 *Journal of Human Lactation* 45-50, 45 (1997)(survey article).

<sup>213</sup> 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. Family and Medical Leave Act of 1993, 29 U.S.C. §§ 2601-2654. To date, men are not often taking 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 percent of the eligible women took advantage of the perquisite, and no men did. See Ellis Cose, *A Man's World: How Real is Male Privilege—And How High is its Price* 119 (1995).

<sup>214</sup> See Martin O'Connell, *Where's Papa: Fathers' Role in Child Care* (Population Reference Bureau 1993).

<sup>215</sup> See Ann M. Taubenheim, *Paternal-Infant Bonding in the First-Time Father*, 10 *Journal of Obstetric, Gynecological and Neonatal Nursing* 261-64, 263 (1981).

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 distancing, technical role. During the first year or so after birth, the courts tend to view paternal bonding as present, but weak. Thereafter, the courts recognize that fathers can develop strong emotional bonds with their children, and look to certain stylized behaviors as evidencing bonding – time spent with the children, involvement in caretaking, acknowledgement of the paternal role, and fulfillment of the obligations incident to that 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 do recognize men’s 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 potential to become bonded with their potential children even before birth, and to prepare themselves in important ways for their role as fathers. We have also seen that many men participate with the prospective mother in important decisions about the pregnancy, and that they will often provide logistical, emotional, and financial support for the abortion. Potential fathers thus have an

important stake in 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.<sup>216</sup> This tension between the interests of the father and those of the mother raises important and difficult issues of legal and social policy.

The Supreme Court first addressed these issues in *Planned Parenthood v. Danforth*.<sup>217</sup> 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 the woman's right of privacy under *Roe v. Wade*.<sup>218</sup>

Although the holding in *Danforth* was quite reasonable, given *Roe*, the analysis offered to support that holding was somewhat 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.”<sup>219</sup> 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.<sup>220</sup> 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

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<sup>216</sup> *Roe v. Wade*, 410 U.S. 113 (1973).

<sup>217</sup> 428 U.S. 52 (1976).

<sup>218</sup> 410 U.S. 113 (1973).

<sup>219</sup> 428 U.S. at 69.

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 towards 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.<sup>221</sup> 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*.” Grammar recapitulates ontogeny here: “fetus” 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; rather the father’s concern is for the *processes* that are occurring to the fetus. The father is interested in the fetus in the same way, for example,

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<sup>220</sup> Consider how the tone of the opinion would have changed if the Court had said “we are aware” instead of “we are not unaware.”



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." There is no need for the fetus to be a human being for the potential father to have an emotional 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, further, 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.<sup>222</sup>

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<sup>221</sup> 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).

<sup>222</sup> This Good Husband role has roots in the Victorian period. As one leading authority commented in 1904, "[m]an 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

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 his emotional connection with the fetus. In this balancing of interests, it might well have been proper for 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.<sup>223</sup> 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 juridical 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 be acting 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* implicitly denied the father's juridical rights in the law of abortion.

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child as the fruit of her womb, as the purest of her blood, as her own life . . ." William H. Walling, *Sexology* 128 (1904).

<sup>223</sup> 428 U.S. at 69.

A harder case was presented in *Planned Parenthood v. Casey*.<sup>224</sup> 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. 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 the woman believed that notifying her husband would cause him or someone else to inflict bodily injury on her.<sup>225</sup>

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 being able to keep her husband uninformed about her intention to have an abortion trumped the husband's interest in knowing. Writing jointly for the Court on this aspect of the decision, Justices O'Connor, Kennedy and Souter struck down the spousal notification requirement as an impermissible infringement on a woman's right to privacy. The Court offered three basic reasons for holding that a wife could not be compelled to inform her husband of her intent to abort.

1. First, the Court discounted the husband's interests by pointing to the realities of nature: "[i]t 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

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<sup>224</sup> 505 U.S. 833 (1992).

<sup>225</sup> 505 U.S. at 887-88.

the father's.”<sup>226</sup> In other words, because the fetus is in the woman and not the man, the woman's interests trump.<sup>227</sup>

This reasoning might be questioned on several fronts. First, it is not the case that the biology is all with the women. As dozens of studies of couvade syndrome indicate, expectant fathers experience biological symptoms of pregnancy along with their partners.<sup>228</sup> 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. Men and women both experience biological effects of pregnancy.

In any event, the right to privacy recognized in *Roe v. Wade* is not based on biology only, 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.*”<sup>229</sup> 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.”<sup>230</sup> 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 a

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<sup>226</sup> 505 U.S. at 895 (emphasis added).

<sup>227</sup> 505 U.S. at

<sup>228</sup> See notes xx-xx and accompanying text, *supra*.

<sup>229</sup> 505 U.S. at 851 (emphasis supplied).

concept of the self, rather than biology alone, the argument that the woman's interests should trump the man's requires further elaboration. Both men and women face choices about their roles as parents and their concepts of their own identities. Both men and women become bonded 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.

2. 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 obtain an abortion, 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.<sup>231</sup> 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.

It is instructive to compare the model of manhood in *Casey* with the image suggested in *Danforth*. *Danforth* had 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. These stereotypes appeared outmoded even in 1976, when *Danforth* was decided; they seem anachronistic today. The *Casey* Court, however, calls forth quite a

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<sup>230</sup> 505 U.S. at 851.

<sup>231</sup> 505 U.S. at 887.

different stereotype of manhood. Gone is 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.”<sup>232</sup> He is prone to “sexual abuse,” “marital rape” and “sexual mutilation.”<sup>233</sup> 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.<sup>234</sup> If she flees to a shelter, he may track her down.<sup>235</sup> 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.<sup>236</sup> As many as one-third of all women will be physically assaulted by a partner or ex-partner during their lifetimes.<sup>237</sup> 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. 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.”<sup>238</sup> In fact, the *only* study of spousal notification cited in the O’Connor-

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<sup>232</sup> 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.

<sup>233</sup> 505 U.S. at 889 (quoting district court findings of fact).

<sup>234</sup> 505 U.S. at 889 (quoting district court findings of fact).

<sup>235</sup> 505 U.S. at 889 (quoting district court findings of fact).

<sup>236</sup> 505 U.S. at 890.

<sup>237</sup> 505 U.S. at 891.

<sup>238</sup> 505 U.S. at 892.

Kennedy-Souter opinion was Ryan and Plutzer’s paper, “When Married Women Have Abortions.”<sup>239</sup> 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.<sup>240</sup> Although some of the husbands were angry (12 percent) or upset (6 percent), there was only one reported instance of verbal abuse and *none* of physical violence.<sup>241</sup> Under the circumstances, which might involve the husband’s learning of an extramarital affair, the response by the husbands appears to have been pacific, not abusive. The Court neglected to mention this detail.

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. 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.<sup>242</sup>

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<sup>239</sup> See 505 U.S. at 892, citing Barbara Ryan and Eric Plutzer, When Married Women Have Abortions: Spousal Notification and Marital Interaction, 51 Journal of Marriage and the Family 41 (1989).

<sup>240</sup> 505 U.S. at 892.

<sup>241</sup> See Barbara Ryan and Eric Plutzer, When Married Women Have Abortions: Spousal Notification and Marital Interaction, 51 Journal of Marriage and the Family 41-50 (1989).

<sup>242</sup> The Court suggested that the exception was insufficient because a woman could be psychologically abused: “[m]any [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

While it recognized the reality of women’s fears of male violence after notification, the Court 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.<sup>243</sup> The couple might even decide to go ahead with the pregnancy rather than cutting off a potential life.

Conversely, going ahead with an abortion without telling her husband might 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.<sup>244</sup> The danger of abuse that might follow a belated revelation would seem to counteract some of the benefits to the wife of being allowed to maintain secrecy in the first place. Finally, even if the

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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.” 505 U.S. 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. 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.

<sup>243</sup> See notes xx-xx and accompanying text, *supra*.

<sup>244</sup> It plausible that a husband would find out. Even though abortion clinics maintain confidentiality, the husband might be able to trace the funds (for example, by examining the checkbook or credit card



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 increase their risk of being battered.

3. 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."<sup>245</sup> 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."<sup>246</sup>

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

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statement), or might hear about it 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.

<sup>245</sup> 505 U.S. at 898.

<sup>246</sup> 505 U.S. at 898.

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.<sup>247</sup>

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 devoted, 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.

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<sup>247</sup> Although the *Casey* Court accused the state of entertaining outmoded stereotypes of a woman's role, the opinion itself suggested stereotypes of its own. It assumed that the wife had so little autonomy and independent will that even requiring her to inform her husband of her intent to have an abortion would be too much of a burden. The image of the pregnant woman in *Casey* resembled, to some extent, the Fifties housewife of the *I Love Lucy* era. She wants something but doesn't want to tell her husband lest he be angry or forbidding. This is the plot of many *I Love Lucy* episodes. The difference in the narratives between the Fifties and the Nineties 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 is made possible by the revision of the 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.

## 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 father 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 for growing into the paternal role is not fully 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*,<sup>248</sup> 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,<sup>249</sup> 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."<sup>250</sup> 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.<sup>251</sup> The Court's signaled its sensitivity to the father's relationship 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."<sup>252</sup>

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<sup>248</sup> 405 U.S. 645 (1972).

<sup>249</sup> 405 U.S. at 651.

<sup>250</sup> 405 U.S. at 650.

<sup>251</sup> 405 U.S. at 645. There had apparently been a few gaps in the periods of cohabitation, since the Court indicated that father and mother had lived together "intermittently" for the eighteen years.

<sup>252</sup> 405 U.S. at 645.

In *Quilloin v. Walcott*,<sup>253</sup> in contrast, the Court 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, in substantial part, on the presence or absence of bonding between the child and its father figures. 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.<sup>254</sup> On the other hand, he never lived with the child,<sup>255</sup> waited eleven years before petitioning for legitimation,<sup>256</sup> 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.”<sup>257</sup> Meanwhile, the mother had married another man and lived with him for nine years while raising the child as sole custodian.<sup>258</sup> 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.<sup>259</sup> In these circumstances, the Supreme Court upheld the state statute, but only as applied to 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.

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<sup>253</sup> 434 U.S. 246 (1978).

<sup>254</sup> 434 U.S. at 250.

<sup>255</sup> 434 U.S. at 247.

<sup>256</sup> 434 U.S. at 249.

<sup>257</sup> 434 U.S. at 256.

<sup>258</sup> 434 U.S. at 246.

<sup>259</sup> 434 U.S. at 253.

The Court reached a different result in *Caban v. Mohammed*.<sup>260</sup> 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 in issue was very 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 the fact that the biological father in *Caban* had bonded emotionally with the child and had accepted his paternal role, and no strong substitute paternal bond had 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. 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."<sup>261</sup> Meanwhile, the child was 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*.<sup>262</sup> Mr. 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. This couple raised the child for two years, during which time Lehr had basically nothing to do with the

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<sup>260</sup> 441 U.S. 380 (1979).

<sup>261</sup> 441 U.S. at 392.

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. The husband and wife obtained an order of adoption without informing Lehr. When Lehr found out, he attempted to set aside the adoption. 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. 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 in this line of Supreme Court cases.<sup>263</sup> In *Friehe v. Schaad*,<sup>264</sup> the Nebraska Supreme Court upheld a statute that cut off the biological father’s right to object to placing his out-of-wedlock child for adoption if he did not file a notice of intent to claim paternity within five days. Since it is probable that most biological fathers would not know of the abbreviated time frame provided by the law, 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 of which he was being deprived was an “opportunity” to bond, which was entitled to a lower level of constitutional scrutiny.<sup>265</sup> 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

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<sup>262</sup> 463 U.S. 248 (1983).

<sup>263</sup> In addition to the cases discussed below, see, e.g., *cites*.

<sup>264</sup> 249 Neb. 825, 545 N.W.2d 740 (1996).

arguably deprived of the distinct right to experience himself in the paternal role. Since, as shown above, expectant fathers frequently develop strong bonds with their offspring even before birth, the court's assumption that no bonding was possible reflected dated notions of the role of the father in procreation. The strongest justification for the state 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 after the fact to demand a right of redemption. But that interest could have been served by means less draconian than termination of the father's rights five days after birth. The state might have protected the birth father, without suffering 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.*,<sup>266</sup> displays an equally troubling attitude toward paternal bonding. 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. 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.<sup>267</sup> He reported that after seeing the ultrasound, he “began to warm up to the idea of fatherhood” and suggested that they “just go straight

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<sup>265</sup> 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. *In re Application of S.R.S. and M.B.S.*, 225 Neb. 759, 408 N.W.2d 272 (1987).

<sup>266</sup> 10 Cal.4<sup>th</sup> 1043, 898 P.2d 891, 43 Cal. Rptr. 2d 445 (1995).

<sup>267</sup> 10 Cal.4<sup>th</sup> at 1064, 898 P.2d at 904, 43 Cal. Rptr. 2d at 458 (1995)(Kennard, J., concurring and dissenting).

through with it” and keep the child.<sup>268</sup> After the fifth month he consistently opposed adoption.<sup>269</sup> His girlfriend, however, moved to California and arranged a private adoption. 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.<sup>270</sup> 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.<sup>271</sup> 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 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.<sup>272</sup>

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

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<sup>268</sup> 10 Cal.4<sup>th</sup> at 1064, 898 P.2d at 904, 43 Cal. Rptr. 2d at 458 (1995)(Kennard, J., concurring and dissenting).

<sup>269</sup> 10 Cal.4<sup>th</sup> at 1048, 898 P.2d at 893, 43 Cal. Rptr. 2d at 447 (1995).

<sup>270</sup> 10 Cal.4<sup>th</sup> at 1060, 898 P.2d at 901, 43 Cal. Rptr. 2d at 455 (1995)(Kennard, J., concurring and dissenting).

<sup>271</sup> 10 Cal.4<sup>th</sup> at 1066, 898 P.2d at 905, 43 Cal. Rptr. 2d at 456 (1995)(Kennard, J., concurring and dissenting).

<sup>272</sup> 10 Cal.4<sup>th</sup> at 1066, 898 P.2d at 905, 43 Cal. Rptr. 2d at 459 (1995)(Kennard, J., concurring and dissenting).



should have been terminated under the California statute. The rationale was that he had not “promptly” come forward to demonstrate a full commitment to his parental responsibilities. 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 20 year old man for not having come forward on day one to take paternal responsibility, in light of his extraordinary efforts, under adverse conditions, to do so from the fifth month of pregnancy on. 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 even time for reflection or advice. The mother had three or four months notice that the father opposed the abortion 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 for the mess. While the result may have been in the best interests of the child in the particular case, the rule articulated to support the result fails to accommodate and recognize the importance of paternal bonding.

Other issues bearing on paternal bonding in adoption surfaced in a recent decision out of West Virginia.<sup>273</sup> 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

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<sup>273</sup> The case is described in Associated Press, *Man Wants Son, Not Millions: Court Ordered Damage Payment to Father as Victim of Adoption Without Consent*, *Charleston Gazette*, July 28, 1998.

injunction *in absentia* against her doing so. 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 what had happened, 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. 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 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 are applying 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 bona fides 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."<sup>274</sup> In so doing, however, the Court did not dispute that in the earliest phases of childhood, the mother's bond may be stronger: "[e]ven 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

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<sup>274</sup> 441 U.S. at 388.

for legislative distinctions as the age of the child increased.”<sup>275</sup> This implication of minimal paternal involvement during infancy is unfortunate, given the social science research demonstrating that fathers establish bonds with their newborns from virtually the moment of birth. As in the abortion area, the adoption cases themselves 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.”<sup>276</sup> Bonding thus has two elements: the individual’s emotional connection with his or her 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, in the fact that an adult who has bonded with a child is likely to be an empathetic and understanding caretaker, and is more likely that someone who has not bonded to sacrifice his or her own interest for the benefit of the child.<sup>277</sup>

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

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<sup>275</sup> 441 U.S. at 388.

<sup>276</sup> State of West Virginia ex rel. Roy Allen S. v. Honorable Robert B. Stone, 196 W.Va. 624, 632, 474 S.E.2d 554, 562 (1996).

<sup>277</sup> See, e.g., State of Utah in the Interest of H.R.V. and B.P.V. v. S.V., 906 P.2d 913, 916-17 (Utah 1995)(“[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

violence between the parents<sup>278</sup> or a lack of biological parenthood.<sup>279</sup> When both parents have bonded with the children, courts ask which parent has developed the stronger bond,<sup>280</sup> 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.<sup>281</sup> 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,<sup>282</sup> and may even be a weighty enough factor to support a transfer of physical custody.<sup>283</sup> Conversely, when a biological parent has failed to bond with a child, the courts may terminate parental rights,<sup>284</sup> and award them to foster parents or other custodians who have established such

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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.")

<sup>278</sup> See, e.g., *Neff v. Neff*, 1998 WL 433386 (Ohio App. 1998)(father awarded visitation despite history of violence between the parents, in light of strong parental bond between father and child).

<sup>279</sup> See, e.g., *In the Matter of Christopher S. v. Ann Marie S.*, 173 Misc.2d 824, 662 N.Y.S.2d 200 (Family Court, 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); *Buness v. Gillan*, 781 P.2d 985 (Alaska 1989)(recognizing that man who was not the child's biological father could obtain custody in dispute with biological mother, in light of the fact that the man had been 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 (Co. App. 1995)(rejecting biological father's claim to paternal rights when mother's husband had bonded with child for a substantial period).

<sup>280</sup> See *Vissicchio v. Vissicchio*, 27 Va.App. 240, 498 S.E.2d 425 (1998)(primary physical custody awarded to mother, inter alia, on the ground that mother had stronger bond with the child).

<sup>281</sup> See, e.g., *Dodge v. Dodge*, 1998 SW 195868 (S.C.App. 1998)(evidence of strong bond between child and grandparents and stepfather held not sufficient to rebut presumption that custody would revert to father on death of mother); *Duncan v. Howard*, 918 P.2d 888 (Utah 1996)(upholding award of custody to biological father over maternal grandparents, even though emotional bond between child and 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 parent had previously lost custody).

<sup>282</sup> See, e.g., *Ramos v. Ramos*, 687 So.2d 280 (La. App. 1997)(denying mother's petition to relocate, in part because of father's bonding with child).

<sup>283</sup> See, e.g., *Burr v. Emmett*, 670 N.Y.S.2d 637 (N.Y. Sup. 1998)(transferring custody to father when mother relocated to California despite father's strong bond with child).

<sup>284</sup> See, e.g., *In the Interest of F.G. et al., Children*, 1998 WL 344486 (Ga. App. 1998)(terminating incarcerated father's parental rights over twin daughters, inter alia, on ground that children had been in foster care since they were two months old and had not bonded with father); *In re B.M., Juvenile*, 165 Vt. 331, 682 A.2d 477 (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.*, 90 Wash. App. 417, 953 P.2d 104 (1998)(noting that child did not know father and had no significant bond with him).

bonds.<sup>285</sup> 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 qualities<sup>286</sup> or engages in illegal acts.<sup>287</sup>

Bonding can be established by a variety of different 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 of the possibility of manipulation.<sup>288</sup> Testimony by mental health professionals will usually be admitted if offered,<sup>289</sup> especially the views of court-appointed psychologists or psychiatrists<sup>290</sup> and social caseworkers.<sup>291</sup> Fact witnesses may testify about the nature of the bonding they observed between adult and child.<sup>292</sup> Factors that indicate bonding include whether the parent acts in a loving and considerate way to the child, is physically affectionate,

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<sup>285</sup> See, e.g., *In re Jessica Lynn B., a.k.a. Jessica Lynn*, 1997 WL 576413 (Conn. Super. 1998)(terminating rights of biological parent and noting that Department of Family and Child Services hoped to place child with foster parents for adoption); *In re Robert F.*, 1996 WL 512619 (Conn.Super.)(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.*, 128 Wash.2d 129, 904 P.2d 1132 (1995)(en banc)(terminating parental rights and noting that child had bonded with foster parent).

<sup>286</sup> See *State ex. rel. Juvenile Department of Multnomah County v. Wyatt*, 34 Or.App. 793, 579 P.2d 889 (1978)(mother's behavior was "willful, hedonistic and totally self-indulgent").

<sup>287</sup> *State ex. rel. Juvenile Department of Multnomah County v. Wyatt*, 34 Or.App. 793, 579 P.2d 889 (1978)(prostitution).

<sup>288</sup> See, e.g., *In re B.M., Juvenile*, 165 Vt. 331, 682 A.2d 477 (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); *In re Wyatt*, 34 Or.App. 793, 579 P.2d 889 (1978)(en banc)(refusing to terminate mother's parental rights based on MMPI results that correlated with parental abuse).

<sup>289</sup> See, e.g., *In re the Marriage of Steven M. Roberts and Jennifer L. Roberts*, 271 Ill.App.3d 972, 649 N.E.2d 1344, 208 Ill.Dec. 683 (1995)(citing testimony of clinical psychologist that father had strongly bonded with child and that continuation of relationship was essential to child's ability to develop long term relationships in the future).

<sup>290</sup> See, e.g., *Joe v. Lebow*, 670 N.E.2d 9 (Ind. App. 1996); *Keese v. Keese*, 675 So.2d 655 (Fla. App. 1996).

<sup>291</sup> See, e.g., *In re Jasmine S. et al. v. Aubrey S.*, 68 Cal.Rptr.2d 24 (Cal.App. 1997)(citing testimony of family social workers).

<sup>292</sup> See, e.g., *In re the Marriage of Steven M. Roberts and Jennifer L. Roberts*, 271 Ill.App.3d 972, 649 N.E.2d 1344, 208 Ill.Dec. 683 (1995)(citing testimony of friends who support man's claim to have a close and supportive emotional bond with the child); *Tucker v. Tucker*, 910 P.2d 1209 (Utah 1996).

consistently keeps scheduled visitations,<sup>293</sup> acts as a significant caregiver,<sup>294</sup> spends time with the child,<sup>295</sup> and engages in enjoyable and appropriate activities with the child.<sup>296</sup> 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.<sup>297</sup> However, this type of evidence appears sporadically in the cases, and apparently is only infrequently offered by counsel as bearing on bonding.

Although the criteria established by the courts for determining the existence of bonding in custody and visitation are ostensibly gender-neutral, their application is not. As Eleanor E. Maccoby and Robert H. Mnookin demonstrate in their study of divorce in California,<sup>298</sup> 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;<sup>299</sup> in cases where the mother requests sole physical custody and the father requested joint custody, the courts grant the mother's wishes more than twice as often as

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<sup>293</sup> See *In the Matter of Wilson Children*, 1996 WL 363434 (Ohio App. 5 Dist.)(1996)(in action to terminate parental rights, court noted that mother had missed nine of last eighteen scheduled visitations and did not appear strongly bonded to the children).

<sup>294</sup> See, e.g., *In re the Marriage of Steven M. Roberts and Jennifer L. Roberts*, 271 Ill.App.3d 972, 649 N.E.2d 1344, 208 Ill.Dec.683 (1995)(admitting testimony).

<sup>295</sup> See *Tucker v. Tucker*, 910 P.2d 1209, 1216 (Utah 1996)(bonding with father shown in part by amount of time father spent with child).

<sup>296</sup> See, e.g., *Nancy R.C. v. Terence L.R.*, 1995 WL 806814 (Del.Fam.Ct.)(cooking and sharing meals together, shopping, and playing "dress-up").

<sup>297</sup> See, e.g., *In the Interest of J.J., a Minor*, 246 Ill.App.3d 143, 146, 615 N.E.2d 827, 829, 186 Ill.Dec. 23, 25 (Ill. App. 1993)(court concluded 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"); *Adoption of Michael H.*, 29 Cal.Rptr.2d 251, 252 (Cal. App. 1994)(father "arranged for a videotape of [mother's] ultrasound showing the developing child").

<sup>298</sup> Eleanor E. Maccoby and Robert H. Mnookin, *Dividing the Child: Social and Legal Dilemmas of Custody* (1992).

<sup>299</sup> Eleanor E. Maccoby and Robert H. Mnookin, *Dividing the Child: Social and Legal Dilemmas of Custody* 104 (1992)(mothers received sole physical custody in 45.3 percent of the cases and fathers received sole custody in only 11.3 percent of the cases; in the remaining cases, custody was either joint or split).

the father's.<sup>300</sup> Maccoby and Mnookin conclude that, even though gender differences have been formally eliminated, they continue to operate through the judicial system: “the actual custodial outcomes still reflect profound gender differentiation between parents: the decree typically provides that the children will live with the mother.”<sup>301</sup>

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 be continuing the traditional approach to custody, which views the mother as the presumptively fitter parent, especially if the child is of “tender years.”<sup>302</sup> 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 early childhood, but also carries forward a presumption that the mother is more firmly bonded with the child during this period. Even in later years, courts look back to early childhood as the most important period for the establishment of a parent-child bond.<sup>303</sup> Fathers may thus face a lethal combination of a judicial perception of weak paternal bonding in early childhood, coupled with the proposition that it is in early childhood when the strongest bonds are formed. This approach reflects stereotypes about fatherhood that are not supported by the recent social science research.

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<sup>300</sup> Eleanor E. Maccoby and Robert H. Mnookin, *Dividing the Child: Social and Legal Dilemmas of Custody* 104 (1992)(in such cases, courts awarded custody to the mother 66.4 percent of the time and joint custody 28.2 percent 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 percent of the cases resulted in sole custody for the father. Eleanor E. Maccoby and Robert H. Mnookin, *Dividing the Child: Social and Legal Dilemmas of Custody* 104 (1992).

<sup>301</sup> Eleanor E. Maccoby and Robert H. Mnookin, *Dividing the Child: Social and Legal Dilemmas of Custody* 114 (1992).

<sup>302</sup> See Eleanor E. Maccoby and Robert H. Mnookin, *Dividing the Child: Social and Legal Dilemmas of Custody* (1992)(describing previous tender years doctrine in California).

To counteract traditional stereotypes that may no longer reflect an accurate understanding of the paternal role, courts and counsel might usefully consider types of evidence that bears 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 in considering the presence or absence of early paternal bonding. These could include:

1. Did the father play an active role in pregnancy planning and/or pregnancy prevention?
2. Did the father indicate a wish and 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 grief reactions?
8. Did the father participate in prepared childbirth classes?

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<sup>303</sup> See, e.g., *In re B.M., Juvenile*, 165 Vt. 331, 682 A.2d 477 (1996) (“the early years of a child’s life are critical to forming a parent-child bond”).



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 feeding the child himself 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 paper 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 face, feet, toes, sexual organs, and heart of his future child. Fathers' involvement in birth has increased with the advent of prenatal classes and changes in hospital policies that now encourage fathers 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 in divorce. 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 or not bonding has occurred. The standard evidence introduced in courts on the issue of paternal bonding does not include an extensive inquiry into whether the father established deep bonds with his offspring in early childhood.

This paper has argued that courts should revise their concept of early paternal bonding, in order to accommodate a more realistic model that recognizes the father's capacity both to adjust his self-concept to include the paternal role, and his deep 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.