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TRIAL

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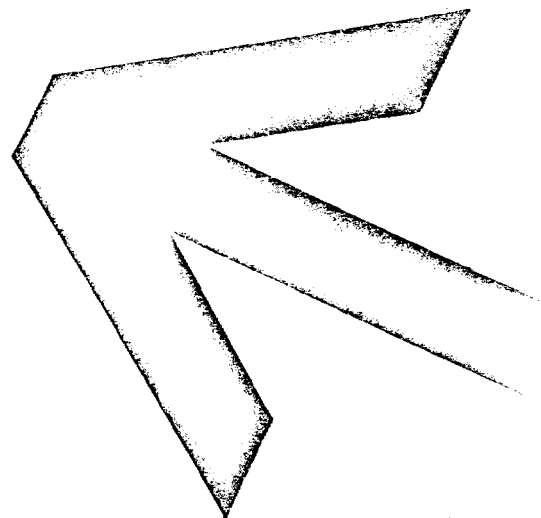
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The husband's rights in abortion

By Amitai Etzioni



When a married woman seeks an abortion, does her husband have any rights regarding the decision?

The Supreme Court ruled on this question on June 30, 1976. The particular case before the Court (*Planned Parenthood v. Danforth*) involved a challenge to a requirement for spousal consent to abortion (under all but life-threatening circumstances) enacted by Missouri in 1974. (Other provisions of the same statute also challenged, such as the requirement for parental consent for unmarried women under 18, do not concern us here.) Eleven other states, including Massachusetts, Florida, and Pennsylvania, had also passed legislation mandating the husband's consent to abortion. In some cases, lower courts had struck down or stayed enforcement of these provisions chiefly on the grounds that they were incompatible with the Supreme Court's 1973 decision holding abortion during the first trimester of pregnancy (and the second trimester as well unless the mother's health is at issue) to be a private matter between a woman and her doctor, in which the state cannot intervene. The federal court that considered Missouri's statute, however, allowed it to stand. Thus, the matter reached the Supreme Court on appeal by Planned Parenthood.

At first consideration one might easily be inclined to dismiss the spousal consent requirement as simply one more attempt on the part of anti-abortion forces to reintroduce the

power of the state on the side of curbing abortion. Yet, whatever the role anti-abortion groups have played in sponsoring these provisions, the question of spousal consent involves legitimate new issues that are quite different and readily separable from those issues surrounding the moral-legal status of abortion per se.

WHO MAKES THE DECISION?

The chief question is this: assuming that government is to have little say over first and second trimester abortion decisions, who is to make them — the pregnant woman alone, or the married couple, when she is married? Do we recognize only two entities — the state and the individual — or is the family also a viable and relevant entity? Does decision-making authority which has been relinquished by government automatically fall to the individual, or may it, in some instances, be more properly assigned to some other sociological unit? Where government is prohibited a direct role may it nonetheless intervene to the extent of fixing the nongovernmental unit (e.g., either the individual or the family) which is to have the right to make the decisions in question?

When two persons marry, the state interjects itself to the extent of rendering legally binding the voluntary acquiescence by each of some individual "sovereignty" to the union they have now formed. Do the rights surrendered include that of sole decision-making with regard to a fetus?

The Supreme Court, in its landmark ruling on abortion, *Roe v. Wade* (1973), made clear that it was *not* addressing these questions, stating:

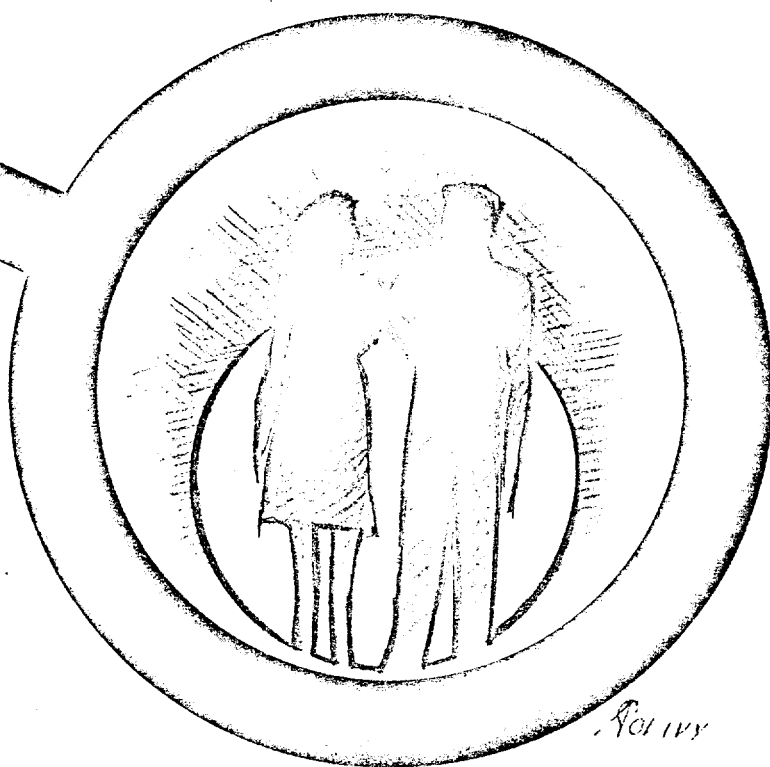
"Neither in this opinion nor in *Doe v. Bolton*, post, do we discuss the

father's rights, if any exist in the constitutional context, in the abortion decision . . . We are aware that some statutes recognize the father under certain circumstances . . . We need not decide whether provisions of this kind are constitutional. 410 U.S. at 165, N.67."

In 1976, it seemed, the time for the Court to decide had come.

The questions the justices asked as this recent case was being argued suggest that a side issue may have been very much on their minds: Is the spousal consent provision discriminatory, "sexist?" Justice Marshall, for instance, asked whether there were other Missouri statutes requiring spousal consent for any other medical procedures. According to a report prepared by Judith Mears of the Women's Rights Project of the American Civil Liberties Union, Mr. Danforth, representing Missouri's side of the case, re-

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plied that there were not. Similarly, when Danforth argued that spousal consent for abortion is constitutional because an abortion fundamentally changes family relations, Justice Blackmun, according to Mears, inquired whether Missouri required spousal consent for a hysterectomy; again the answer was no. Chief Justice Burger then asked about sterilization — to which the answer was yes.

The Court, of course, is basically limited to “reacting” rather than “legislating” but in principle either of two remedies could be applied to the implied inconsistency: Have *no* spousal consent requirement for *any* such procedures, or apply *one* uniformly to *all* such procedures, including sterilization and vasectomy and abortion. (Whether one ought in fact to consider hysterectomy and even therapeutic abortion as falling into the same category as the more purely elective interventions is a question we shall

return to later.)

After all the deliberations were completed the Supreme Court ruled 6 to 3 that the states may not require a woman to get the consent of her husband before she has an abortion.

EFFECT ON THE FAMILY

Although the views expressed seem not to have affected the final decision, both lower court judges and those of the Supreme Court commented on this key question: what is the effect on the marital bond of establishment of the locus for this decision-making authority? Does granting the woman sole rights over the fetus further weaken what many see as our society's already too fragile family ties? The following cases illustrate the views expressed and the issues raised.

In *Jones v. Smith* 278 So. 2d 339 (1973) *cert. den.* 415 U.S. 958 (1974), characterized by the court as a case of

first impression on the right of a “potential putative father” to participate in the decision to terminate a pregnancy, a Florida court affirmed a lower court denial of an injunction against the mother's abortion — but in this case the father had never been married to the mother. The court rejected the notion that by consenting to have sex with the man involved without a contraceptive, an implied contract was made to bear a child if conception were to result, or that the mother gave up her right to privacy (the legal mainstay of the 1973 decision upholding a woman's right to choose abortion.)

The Supreme Judicial Court of Massachusetts ruled similarly in the case of an estranged husband, though the grounds were different and came closer to affirming a view of the two members of a marital union as fully sovereign individuals. Stated the court: “We would not order either a husband or a wife to do what is necessary to conceive a child or to prevent conception . . . We think the same considerations prevent us from forbidding the wife to do what is necessary to bring about or prevent birth.”

In striking down Florida's spousal consent requirement, a federal court rejected the notion that since the recent judicial trend has been to give greater weight to the rights of fathers in respect to existing children (e.g., in custody cases), this ought also apply to the fetus. And the court clinched its arguments by positing “. . . inescapably that the State may not statutorily delegate to husbands and parents an authority the State does not possess.”

But the courts have not entirely disregarded the other, family-oriented side of the sociological coin. The Massachusetts court wrote: “Surely, if the family life is to prosper he [the

husband-father] should participate with his wife in the decision." The court was not willing, however, to allow the Commonwealth to "enforce" his *veto*." Similarly, a federal court reviewing Florida's spousal consent statute recognized the husband's interest in the fetus but added that his interest was insufficient "to force upon the woman the mental and physical dangers of childbirth." [Italics mine.]

Some dissenting judges in these cases referred to the need to protect the family union and the interest of the husband, father-to-be, in the child. Citing child-care literature, Judge Reardon of the Supreme Judicial Court of Massachusetts put it best: "Furthermore, it would be absurd to posit that this interest [between father and child] springs into existence full grown on the day of birth. As in the case of the mother, the gestation is for the father one of anxiety, anticipation, and growth in feeling for the unborn child."

As I see it, there exists a reasonable middle course between forcing a woman to bear a child she does not want on the one hand and utterly disregarding the wishes of the father on the other. The husband's *consent* ought not be required; evidence that he has been notified and consulted, should be. And this should hold not just for the issue at hand but all parallel issues. (In keeping with the notion of family decision-making we would also favor, for example, a requirement that both parents be informed and consulted prior to a child's non-emergency surgery.) Concretely, with respect to abortion this would mean that before the procedure could be per-

Evidence that the husband has been consulted should be required.

formed, a married woman would be expected to file with her physician, hospital, or clinic a form signed by her husband indicating that he had been informed and consulted. The purpose of this form would be, on the one hand, to hinder abortion by a married woman who has not first informed her husband, while at the same time leaving the ultimate decision to her; so if the husband has had his say and is opposed, but she is not convinced, she can still proceed. (If the couple is separated or the husband not reachable — say he is at war — a statement to this effect would void the requirement to inform and consult.)

In the event that a woman claimed her husband was trying to exercise veto power by refusing to sign the form acknowledging consultation, official

means of assuring notification — e.g., a registered letter from the physician or clinic to the husband — would satisfy the notification requirement. The same would hold for sterilization of the wife and, with the husband's and wife's roles reversed, vasectomy. While it would seem at first that hysterectomies and therapeutic abortions might be excluded as they are generally performed for health, rather than birth control, purposes, nonetheless, as these two procedures deeply affect the family, no immediate reason comes to mind why the husband should not be informed or consulted in a nonemergency situation.

Feelings should be aired before irreversible action is taken.

The principal sociological rationale for requiring consultation with the spouse is to encourage an airing of feelings between the couple *before* any irreversible action is taken. Husband and wife may not necessarily end up with the same views, but alienation resulting from one person taking a unilateral and clandestine step will be avoided.

Some family planning advocates would undoubtedly counter my suggestion by calling it a middle class luxury. They would argue that a minority or lower-class woman might not be able to "work this out with her husband" and thus be left with only the options of obeying his wishes or acting surreptitiously. As I see it, firstly, many lower class women are far from the spineless types implied. Second, in those instances where the woman feels thus intimidated, she could still seek an abortion following a temporary separation (e.g., she might stay with her parents) or through some other such circumvention.

Our main point is that the law does not merely regulate our lives, it articulates and symbolizes our values and mores. In an era when the family has been rendered increasingly vulnerable to dissolution, we should not gratuitously add to the stress by enshrining in law the starkly individualistic view that a child in the making, a future shared project of the family, is wholly and completely a "private" matter for the woman to determine, with no concern at all for the wishes of the father — when he is her husband. Concretely, this may mean that when the next occasion arises, the Supreme Court, which really ruled against the husband's right to *veto* his wife's abortion, may yet rule that he has a right to be informed and consulted. □