The Courts' Confused (and Confusing) Understanding of the Creation and Taking of Human Life

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THE COURTS' CONFUSED (AND CONFUSING) UNDERSTANDING OF THE CREATION AND TAKING OF HUMAN LIFE* 

Teresa Collett**

I. INTRODUCTION

An ancient proverb (or curse), attributed to the Chinese, says "may you live in interesting times." For observers of the American scene, the last forty years have been “interesting times.” It has yet to become entirely clear whether these years will prove to be a “curse,” or merely a tumultuous time of changing cultural norms. Norms that have been part of American society for over two centuries are changing rapidly, particularly norms defining marriage, parentage, and family. Many of these changes have

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1. In a speech on June 7, 1966, Robert F. Kennedy is reported to have said, “There is a Chinese curse which says, ‘May he live in interesting times.’ Like it or not, we live in interesting times.” Journalists apparently picked up the phrase which has become commonplace. However, the popularity of the “Chinese curse” puzzles Chinese scholars, who have only heard it from Americans. See N. of Boston Libr. Exch., “May You Live in Interesting Times”, http://www.noblenet.org/reference/inter.htm (accessed Mar. 19, 2007); Ho Yong, May You Live in Interesting Times? http://www.chinasprout.com/html/column15.html (accessed Mar. 19, 2007).

2. See e.g. Charles J. Reid, Jr., The Gingerbread Man Thirty Years On: The Parlous State of Marital Theory, 1 U. St. Thomas L.J. 656, 656 (2003).


4. See e.g. J.F. v. D.B., 897 A.2d 1261, 1280–81 (Pa. Super. 2006) (holding that an egg donor, who was the biological mother of triplets and a party to a surrogacy contract between the father, his female cohabitant, and the gestational carrier, was an indispensable party in a custody action by the father against the gestational carrier who attempted to keep the triplets against the wishes of the father and his female cohabitant); K.M. v. E.G., 117 P.3d 673, 680–81 (Cal. 2005) (recognizing that both an egg donor and her lesbian lover who was the gestational carrier are parents of children conceived through in vitro fertilization); Estate of Gordon, 501 N.Y.S.2d 969, 971 (1986) (holding that children conceived by artificial insemination of the wife by a third-party donor with the unwritten consent of the husband, and born during the marriage but before the enactment of a statute requiring written consent of the husband and wife, were legitimate for all purposes and would possess a status as issue of the husband); Woodward v. Commr. of Soc. Sec., 760 N.E.2d 257,
been driven by judicial decisions purporting to interpret constitutional limitation on governmental powers, rather than by Americans freely embracing new values. The premise of this Article is that building new societal norms through acts of judicial activism, rather than emerging societal consensus, has led to an incoherent body of law.

II. The Current Jurisprudence of Privacy

The constitutional "right to privacy" currently recognized by the U.S. Supreme Court, is not a single right found in the text of the Constitution, but rather a muddled combination of textual and extra-textual concepts restricting government's ability to regulate the conduct of citizens. The Court has interpreted the First Amendment guarantees of freedom of religion and freedom of association as furthering family and group privacy. The Third and Fourth Amendments have been understood to protect situational privacy through the protection of private homes from military appropriation and the protection from arbitrary searches and

269–70 (Mass. 2002) (holding that twins born as the result of posthumous use of stored sperm of a woman's deceased husband could inherit from the decedent, but only if the widow established the children's genetic relationship with the decedent and that the decedent had consented before his death, both to reproduce posthumously and to support any resulting child).

5. See Parker v. Hurley, 474 F. Supp. 2d 261, 264 (D. Mass. 2007) ("It is reasonable for public educators to teach elementary school students about individuals with different sexual orientations and about various forms of families, including those with same-sex parents, in an effort to eradicate the effects of past discrimination, to reduce the risk of future discrimination and, in the process, to reaffirm our nation's constitutional commitment to promoting mutual respect among members of our diverse society.").


7. While the origin of a constitutional "right to privacy" is often identified as a law review article written over a century ago by Samuel D. Warren and future Supreme Court Justice Louis D. Brandeis, The Right to Privacy, 4 Harv. L. Rev. 193 (1890) (collecting cases in which relief had been afforded on the basis of, for example, defamation, a breach of confidence, or the invasion of some property right, and grouping them together as a "right to privacy"), a tort action based on a right to privacy was recognized by the Michigan Supreme Court nine years earlier in De May v. Roberts, 9 N.W. 146, 149 (Mich. 1881).


seizures of persons and property.¹⁰ The Fifth Amendment's prohibition of compulsory self-incrimination has been cited in support of both informational and decisional privacy.¹¹ Rights of bodily integrity and independent decision-making have been derived from the First Amendment's protection of free speech¹² and the Ninth Amendment's reservation of unenumerated rights to the people.¹³ Finally, if all other arguments fail, the Court's expansive protection of its notion of privacy has been based upon the Fourteenth Amendment's requirement of due process prior to any deprivation of "life, liberty, [and] property," as well as its requirement of equal protection.¹⁴

As currently interpreted by the Court, the constitutional right to privacy has three strands—locational (or situational) privacy, informational privacy, and decisional privacy.¹⁵ Of these, deci-

¹⁰ In the 1960s, the Supreme Court gave the term "privacy" a central role in the interpretation of the Fourth Amendment. See e.g. id. at 359; Terry v. Ohio, 392 U.S. 1, 8–9 (1968) (stating that the Fourth Amendment protects areas in which one has a reasonable expectation of privacy from unreasonable searches and seizures).

¹¹ See e.g. Boyd v. U.S., 116 U.S. 616, 630 (1886).

¹² E.g. Stanley, 394 U.S. at 565 ("If the First Amendment means anything, it means that a State has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch."); Lojuk v. Quandt, 706 F.2d 1456, 1465 (7th Cir. 1988) ("First, several courts have found that compulsory treatment with mind-altering drugs may invade a patient's First Amendment interests in being able to think and communicate freely. Second, compulsory treatment with antipsychotic drugs may invade a patient's interest in bodily integrity, personal security and personal dignity. Finally, compulsory treatment may invade a patient's interest in making certain kinds of personal decisions with potentially significant consequences." (citations omitted)).


¹⁵ See Whalen v. Roe, 429 U.S. 589, 598–600 (1977) ("The cases sometimes characterized as protecting 'privacy' have in fact involved at least two different kinds of interests. One is the individual interest in avoiding disclosure of personal matters, and another is the interest in independence in making certain kinds of important decisions.") (footnotes omitted). Dean Prosser identified four strands of a right to privacy in tort law: "1. Intrusion upon the plaintiff's seclusion or solitude, or into his private affairs. 2. Public disclosure of embarrassing private facts about the plaintiff. 3. Publicity which places the plaintiff in a false light in the public eye. 4. Appropriation, for the defendant's advantage, of the plaintiff's name or likeness." William L. Prosser, Privacy, 48 Cal. L. Rev. 383, 389 (1960). For a more recent treatment, see Jerry Kang, Information Privacy in Cyberspace Transactions, 50 Stan. L. Rev. 1193, 1202–03 (1998) (finding three distinct categories of privacy interests: (1) physical space, such as that violated by trespass and unwarranted search and seizure; (2) decisional privacy, as discussed in Roe v. Wade; and (3) informational privacy or "control over the processing—i.e., the acquisition, disclosure, and use—of personal information.").
sional privacy, or the "constitutional protection [for] personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education," is the most controversial. Within this strand the Court has found constitutional rights of minors to obtain contraception without parental consent, of adults to possess obscene materials, of women to obtain abortions, even after an unborn child is capable of living outside the womb, and of all individuals to engage in sodomy and other acts historically characterized as "deviate sexual intercourse."

Planned Parenthood of Southeastern Pennsylvania v. Casey provides the most extravagant statement of the judicially-created right to decisional privacy:

These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.

The Court subsequently sought to limit the reach of this passage in Washington v. Glucksberg, a case rejecting the claim of a constitutional right to physician-assisted suicide. Yet the language reemerged as a constitutional justification for finding all criminal prohibitions of sodomy unconstitutional in Lawrence v. Texas.

19. Stenberg v. Carhart, 530 U.S. 914, 937-38 (2000) (stating that a post-viability prohibition of intact dilation and extraction abortion (i.e., partial-birth abortion) must contain an exception for the health of the mother); but see Carhart, 127 S. Ct. at 1639 (finding the federal prohibition of intact dilation and extraction abortion (i.e., partial-birth abortion) is constitutional).
21. Casey, 505 U.S. at 851. Based on this statement, the Court invalidated the Pennsylvania requirement that a husband be notified of his wife's intention to obtain an abortion, absent the wife providing the physician a written statement that (1) her spouse is not the father of the child; (2) her spouse, after diligent effort, could not be located; (3) the pregnancy is a result of spousal sexual assault, which has been reported to law enforcement; or (4) she has reason to believe that the furnishing of notice to her spouse is likely to result in the infliction of bodily injury upon her by her spouse or by another individual. Id. at 893-94; 18 Pa. Consol. Stat. Ann. § 3209 (2006).
23. Lawrence, 539 U.S. at 572 (quoting Casey, 505 U.S. at 851).
This "sweet mystery-of-life passage" has been derided by legal commentators, who have characterized it as "popular mythology," the product of "philosopher-kings," "startling," "radical," and representing "the view that moral relativism is a constitutional command."

It has also formed the basis of a variety of claims by plaintiffs seeking to broaden the scope of constitutionally protected conduct. The New Jersey Supreme Court quoted the mystery passage as part of its rationale for striking down that state's statutory requirement of parental notification prior to the performance of an abortion on a minor. The passage has become almost an obligatory citation in briefs of activists asserting a constitutional claim to recognition of same-sex unions as marriages. In Fleck & Asso-

24. Id. at 588 (Scalia, J. dissenting).
25. E.g. Bradley P. Jacob, Back to Basics: Constitutional Meaning and "Tradition", 39 Tex. Tech. L. Rev. 261, 275 (2007) ("Other constitutional rights in the popular mythology are not found anywhere in the Constitution itself, but the misperception is certainly understandable because the United States Supreme Court has declared that people have a constitutional right to privacy, to abortion, to homosexual sodomy, and even to ‘define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life.’" (quoting Casey, 505 U.S. at 851)); John M. Breen & Michael A. Scaperlanda, Never Get Out'ta the Boat: Stenberg v. Carhart and the Future of American Law, 39 Conn. L. Rev. 297, 312 (2006) ("The Court is able to ignore this violence because, in the case of abortion, it has abandoned the idea of ordered liberty in favor of a maximal conception of human freedom."); Kenneth L. Grasso, The Rights of Monads or of Intrinsically Social Beings? Social Ontology and Rights Talk, 3 Ave Maria L. Rev. 233, 237–38 (2005) (characterizing the language from Casey as creating a "[m]egaright" of individual autonomy) (quoting Casey, 505 U.S. at 851); Patrick McKinley Brennan, Against Sovereignty: A Cautionary Note on the Normative Power of the Actual, 82 Notre Dame L. Rev. 181, 191 (2006) ("It is the same Supreme Court that in one breath, per Justice Kennedy in a breathtaking bit of anti-metaphysics, identifies the ‘heart of liberty [as] the right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life,’ that, in a next breath, per the same Justice Kennedy, makes metaphysical claims that would delight the medieval mind." (quoting Casey, 505 U.S. at 851)).
26. Jacob, supra n. 25, at 275.
32. See e.g. Br. for Amicus Curiae in Support of Appellants at 5 n. 1, Hernandez v. Robles, 855 N.E.2d 1, (N.Y. 2006) (Br. available at 2006 WL 1930145) (quoting Casey, 505
ciates, Inc. v. City of Phoenix, the plaintiff argued that "defin[ing] one's own concept of existence" encompasses a right to operate a business where adults can view or participate in live sex acts. An adult bookstore employee relied upon the mystery passage to challenge the constitutionality of a criminal prohibition of promoting an "obscene device." A group of law school faculty claimed that this language from Casey created a right to "educational autonomy," which permitted colleges to disregard the Solomon amendment, a federal law prohibiting the exclusion of military recruiters from campuses receiving federal funds. A little league coach invoked the mystery passage as part of his claim that he was entitled to continue coaching, notwithstanding his disregard of instructions by the organization establishing the league.

Perhaps the most creative use of the passage was by an ex-husband who argued that his "concept of existence" did not include the payment of court-ordered alimony. That federal district court was unimpressed, declaring that any conflict between the judicial order and the man's concept of existence was legally irrelevant, at least in light of the extensive state proceedings related to the husband's liability.

III. MEN'S STRICT LIABILITY FOR THE LIVES THEY CREATE

The failure of the husband's claim is almost a foregone conclusion when considered in light of the genesis of the mystery passage, and the disposition of other cases in which men have asserted claims that are detrimental to a woman's "conception of her spiritual imperatives and her place in society." Several times

U.S. at 851); Br. for Appellants at 10, Smelt v. Orange Co., 447 F.3d 673 (9th Cir. 2006) (Br. available at 2005 WL 3227255).
33. Fleck & Assocs., Inc. v. City of Phoenix, 471 F.3d 1100 (9th Cir. 2006).
34. Id. at 1104-05.
39. Id.
40. Casey, 505 U.S. at 851.
41. Id. at 852.
males have asserted a right to avoid the responsibilities of parent-
ing a child conceived after misrepresentations by their sexual partners,42 or because they were victims of sexual assault.43 The
courts have been uniformly unsympathetic, with the exception of
cases involving the disposition of frozen embryos.44

State of Louisiana v. Frisard45 is perhaps the most factually
troubling of the cases involving allegations of misrepresentation
raised in defense against a paternity claim. According to Mr.
Frisard, the defendant and putative father, he never had vaginal
intercourse with the plaintiff.46 Rather, while visiting his sick
parents in the hospital, the plaintiff, a member of the nursing
staff, approached him and offered to perform fellatio on him.47

42. Erika M. Hiester, Child Support Statutes and the Father's Right Not to Procreate, 2
Ave Maria L. Rev. 213, 216–18 nn. 19–24 (2004); Michelle Oberman, Sex, Lies, and the
Duty to Disclose, 47 Ariz. L. Rev. 871, 930–31 (2005); Jill E. Evans, In Search of Paternal
Equity: A Father's Right to Pursue a Claim of Misrepresentation of Fertility, 36 Loy. U. Chi.
Right to Terminate His Interests in and Obligations to the Unborn Child, 7 J.L. & Policy 1,
23–28 (1998); Sarah E. Rudolph, Inequities in the Current Judicial Analysis of Misrepresen-
tation of Fertility Claims, 1989 U. Chi. Leg. Forum 331; Martha Chamallas, Consent,
Equality, and the Legal Control of Sexual Conduct, 61 S. Cal. L. Rev. 777, 810–13 (1988);
Laura W. Morgan, It's Ten O'Clock: Do You Know Where Your Sperm Are? Toward a Strict
supportguidelines.com/articles/art199903.html); Anne M. Payne, Sexual Partner's Tort Lia-
Bility to Other Partner for Fraudulent Misrepresentation Regarding Sterility or Use of Birth
Control Resulting in Pregnancy, 2 A.L.R.5th 301 (1992) (collecting cases).

43. See Ellen London, Student Author, A Critique of the Strict Liability Standard for
Determining Child Support in Cases of Male Victims of Sexual Assault and Statutory Rape,

44. See Davis v. Davis, 842 S.W.2d 588, 604 (Tenn. 1992), cert. denied, 507 U.S. 911
(1993) (holding that if no prior agreement exists regarding disposition of frozen embryos,
the will of the one seeking the embryos' destruction or non-use will prevail, unless no other
reasonable means of becoming a parent (including adoption) is available to the party seeking
if a dispute arises regarding disposition of frozen embryos, and the couple has entered
into a prior agreement, that agreement will be enforced); A.Z. v. B.Z., 725 N.E.2d 1051,
1059 (Mass. 2000) (holding that any agreement allowing implantation by one progenitor
over the contemporaneous objection of the other progenitor violates public policy); J.B. v.
M.B., 783 A.2d 707, 719 (N.J. 2001) (holding that an agreement is presumptively valid, but
may be altered by notice of the objection of either progenitor at any time up until implanta-
tion or destruction. If the progenitors disagree regarding the disposition of the embryos,
there is a presumption in favor of the party seeking to avoid parenthood.); Litowitz v.
Litowitz, 48 P.3d 261, 271 (Wash. 2002) (holding that parties are bound by prior agree-
ment); In re Marriage of Witten, 672 N.W.2d 768, 782–83 (Iowa 2003) (holding that present
agreements of the parties dictate the disposition of the embryos, but if there is a dispute, the
party seeking to withdraw from the agreement prevails).

45. State v. Frisard, 694 So. 2d 1032 (La. App. 5th Cir. 1997); but see Phillips v. Irons,

46. Frisard, 694 So. 2d at 1035.

47. Id.
Mr. Frisard testified, "[A]s being any male would [sic], I did not refuse and I wish I would have refused."48 He wore a condom during the act at the plaintiff's request, leading to his speculation that the woman subsequently used the sperm to inseminate herself.49 The appellate court seemed indifferent to the truth of his account, opining:

In the present case, regardless of the reasons given by the trial judge, the evidence presented clearly supported her determination that defendant is the father of the minor child, A.D.W. The evidence of paternity consisted of plaintiff's affidavit in which she named defendant as the father of the child, admitted that she had sexual intercourse with him in September of 1983, and further claimed that she did not have sexual intercourse with any other man thirty days prior to or thirty days after the date of conception which was estimated to be September 1, 1983. In addition, the results of the blood testing showed a 99.9994% probability of paternity as compared to an untested, unrelated, random person of the Caucasian population. Moreover, defendant's own testimony showed that he had some sort of sexual contact with plaintiff around the time frame of alleged conception, although he denied that they had sexual intercourse.50

The court's refusal to recognize any legal interest of Mr. Frisard, based on his reasonable reliance on the assumption that oral sex would not result in pregnancy, is radically different from the solicitude courts show to women's claims that their pregnancies were unintended.51 Yet the conclusion of the Louisiana court in Frisard is completely consistent with logic offered by the California court in Stephen K. v. Roni L.,52 one of the first cases to deal with a man's claim of contraceptive fraud.

As to Stephen's claim that he was tricked into fathering a child he did not want, no good reason appears why he himself could not have taken any precautionary measures. Even if Roni had regularly been

48. Id.
49. Id.
50. Id. at 1035–36 (emphasis added).
51. The most striking illustration of this view is found in the plurality opinion of Planned Parenthood of S.E. Pa. v. Casey:

But to do this would be simply to refuse to face the fact that for two decades of economic and social developments, people have organized intimate relationships and made choices that define their views of themselves and their places in society, in reliance on the availability of abortion in the event that contraception should fail. The ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives. 505 U.S. 833, 856 (1992).
taking birth control pills, that method, though considered to be the most reliable means of birth control, is not 100 percent effective. Although slight, there is some statistical probability of conception.53 Since the appeal was from the trial court’s dismissal based on the pleadings, the fact that the woman had represented that she was taking birth control pills at the time of the sexual act was uncontrotested.

These (and similar) opinions can be explained on the basis that liability exists because the man voluntarily engaged in sexual acts that he knew could, no matter how improbably, result in the creation of new life.54 This justification for liability, however, is not sufficient to explain the outcomes in cases recognizing paternal liability of male victims of sexual assault.55

Two cases illustrate the disturbing nature of paternal liability in cases involving the sexual assault of males. In S.F. v. State ex rel. T.M.,56 the court held that a thirty-seven-year-old man, who was unconscious during sexual intercourse, was legally required to provide financial support to the child conceived during the sexual assault.57 In San Luis Obispo Co. v. Nathaniel J.,58 the California Court of Appeals held that a fifteen-year-old boy, who was seduced by a thirty-four-year-old woman, was legally liable to support the child resulting from his sexual relations with the mother,59 notwithstanding that the boy was the adjudicated victim of unlawful sexual intercourse with a minor.60 The court observed that the father engaged in sexual intercourse five times over a two-week period, noting that “[o]ne who is injured as a result of criminal conduct in which he willingly participated is not a typical crime victim,” and concluded that for purposes of child-support, he was not a victim of sexual abuse.61

53. Id. at 645.
57. Id. at 1187, 1189.
59. Id. at 845.
60. Id. at 843–44.
61. Id. at 844.
This message was recently echoed by the Oklahoma Court of Civil Appeals in a case involving a child conceived during a nineteen-year-old woman’s statutory rape of a fifteen-year-old boy.\footnote{In re Paternity of K.B., 104 P.3d 1132, 1133 (Okla. Civ. App. 2004); see also State ex rel. Hermesmann v. Seyer, 847 P.2d 1273, 1274, 1279 (Kan. 1993) (holding that a thirteen-year-old who had been sexually victimized by his seventeen-year-old babysitter was responsible for monetary support of his child regardless of his age).}

Stringer was not an innocent victim of Baker’s criminal act, and the law should not excuse him from his responsibility to support his biological child. Oklahoma’s public policy mandating parental support of children outweighs any policy of protecting minors from the consequences of their willing participation in sexual misconduct with adults.\footnote{In re Paternity of K.B., 104 P.3d at 1135.}

While volunteerism may justify cases involving adult men who engage in sexual acts resulting in the conception of a child (notwithstanding the men’s reasonable assumptions that no child will be conceived by their acts), the imposition of liability for child support upon an unconscious adult man or a minor male does not comport with the general rules of American jurisprudence.

These cases suggest a settled approach to the establishment of nonmarital paternity in the contemporary American legal system. In these cases, genetic relationships establish legal paternity regardless of whether the genetic fathers gave legal consent, or were capable of giving legal consent, to an act of sexual intercourse that resulted in the pregnancies. Indeed, \textit{Frisard} treats the issue of whether there was an act of sexual intercourse as irrelevant, and \textit{S.F.} seems to consider the issue of whether the man deemed the father took part in any action that caused the pregnancy irrelevant. The perspective behind the foundation of these decisions is that being the genetic father is a sufficient condition for grounding a paternal legal obligation to support a child.\footnote{Hubin, supra n. 54, at 55 (footnote omitted); see also Ronald K. Henry, \textit{The Innocent Third Party: Victims of Paternity Fraud}, 40 Fam. L.Q. 51 (2006).}

The traditional view in the United States is that minors cannot make legally binding contracts. The effort to “get the numbers up” in paternity establishments, however, has resulted in abrogation of this disability in a number of states. In some states, a minor can sign a binding paternity acknowledgment without the consent of his parents and without the appointment of a guardian \textit{ad litem}. A fifteen-, sixteen-, or seventeen-year-old boy, unrepresented by counsel, his parents, or a guardian \textit{ad litem} is an easy target for false paternity establishment, either by default judgment or by an uninformed signature on a paternity acknowledgment form. \footnote{Id. at 63 (footnote omitted).}
The message of the courts regarding males' liability relating the
use of their sexual powers is "you play, you pay" (and sometimes
even if you don't play!). 65

Commentators have criticized these cases as relying upon ste-
reotypes of male sexual behavior, 66 or the biological definition of
parenthood. 67 Such critiques reject the presumption that a volun-
tary act resulting in the unintended (but foreseeable) consequence
of the conception of a child should create legal responsibility to
nurture the child to adulthood. These critiques fail to acknowledge
the unique dependency of the child, created by the sexual
activity of the parents, independent of the parents' intentions re-
garding their sexual activity. This omission is consistent with
current abortion jurisprudence and its underlying disregard of
children's dependency. 68 Sadly, such disregard, while morally
questionable, is not without precedent in other areas of the law.

IV. THE UNDERVALUING OF CHILDREN'S LIVES

In DeShaney v. Winnebago County Department of Social Ser-

cices, 69 the U.S. Supreme Court rejected liability arising under
the Constitution for government officials' failure to protect chil-
dren, even in cases when officials have notice that the children's
lives are threatened. Joshua DeShaney lived with his father after
his parents divorced during his infancy. 70 The father moved to
Winnebago County, Wisconsin, where the father's second wife told

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65. For a proposal separating the obligations and rights of genetic fathers, see Nancy E.
Dowd, From Genes, Marriage and Money to Nurture: Redefining Fatherhood, 10 Cardozo
Women's L.J. 132, 140 (2003) ("[G]enetic fatherhood would generate economic responsibil-
ity but not relational rights; relational rights would be dependent upon satisfying a defini-
tion of nurturing fatherhood.").


67. Hubin, supra n. 54, at 55; Leslie Joan Harris, Reconsidering the Criteria for Legal
Fatherhood, 1996 Utah L. Rev. 461, 480 (arguing that functional parenthood is the best
method for assigning the duties and granting the privileges of parenthood); Melanie B.
Jacobs, Applying Intent-based Parentage Principles to Nonlegal Lesbian Coparents, 25 N.
Ill. U. L. Rev. 433, 436–37 (2005); David D. Meyer, Parenthood in a Time of Transition:
Tensions between Legal, Biological, and Social Conceptions of Parenthood, 54 Am. J. Comp.
L. 125, 132–36 (2006); but see Lynn D. Wardle, Form and Substance in Parentage Law, 15
Wm. & Mary Bill Rights J. 203, 231–45 (2006); Jana Singer, Marriage, Biology, and Patern-
(arguing for reinvigorating the marital presumption of paternity because "[m]arriage mat-
ters—and should continue to matter—in allocating parental rights and responsibilities").

68. For an excellent review of dependency theory, see Elizabeth R. Schiltz, West,
MacIntyre, & Wojtyla: Pope John Paul II's Contribution to the Development of a Depen-


70. Id. at 191.
police that the father "had previously 'hit the boy causing marks and [was] a prime case for child abuse.'" 71

Government officials interviewed the father, but dropped the investigation after he denied the accusations. 72 During the next two years, Joshua was admitted two times to local hospitals for various injuries. Each time the treating physicians suspected that the injuries were caused by child abuse and contacted county officials. Each time county officials left Joshua in his father's custody. 73 The third time, four-year-old Joshua was admitted to the hospital because his father had again beaten him, leaving him in a coma. Joshua suffered severe brain damage: "brain surgery revealed a series of hemorrhages caused by traumatic injuries to the head inflicted over a long period of time." He will spend his life in an institution for profoundly retarded individuals. His father was convicted of child abuse. 74

Joshua's mother sued Winnebago County and its employees for depriving "Joshua of his liberty without due process of law, in violation of his rights under the Fourteenth Amendment, by failing to intervene to protect him against a risk of violence at his father's hands of which they knew or should have known." 75 In rejecting this claim, the Court stated:

While the State may have been aware of the dangers that Joshua faced in the free world, it played no part in their creation, nor did it do anything to render him any more vulnerable to them. That the State once took temporary custody of Joshua does not alter the analysis, for when it returned him to his father's custody, it placed him in no worse position than that in which he would have been had it not acted at all; the State does not become the permanent guarantor of an individual's safety by having once offered him shelter. Under these circumstances, the State had no constitutional duty to protect Joshua.76

The Court suggested that the county might have potential liability arising under state tort law, 77 but such liability seems unlikely given the broad protection afforded government entities and officials under sovereign and official immunity. 78

71. Id. at 192 (brackets in original).
72. Id.
73. Id. at 192–93.
74. Id.
75. DeShaney, 489 U.S. at 193.
76. Id. at 201.
77. Id. at 201–02.
Even if persuaded that Winnebago County officials’ negligence did not violate Joshua’s constitutional rights, few would argue that protecting Joshua was beyond the constitutional powers of government. That argument is only given credence in the context of unborn children. Two cases illustrate this.

In *Ferguson v. City of Charleston*, 79 medical personnel at a public hospital perceived an increase in the number of pregnant patients using cocaine. In response, the hospital created a policy of testing patients for drug use, and urging those patients who tested positive to enter treatment. As an incentive to enter treatment, the hospital would warn patients that refusing treatment, failing to complete treatment, or testing positive a second time would result in law enforcement intervention. The hospital found that possible involvement of the police “provided the necessary ‘leverage’ to make the [p]olicy effective” 80 and was “essential to the program’s success in getting women into treatment and keeping them there.” 81

Ten patients challenged the hospital policy as an illegal search since patients were not informed of the possible release of the test results to police prior to undergoing the test. 82 The Court agreed that the program was unconstitutional and struck it down, notwithstanding the fact that “the program now under review, which gives the cocaine user a second and third chance, might be replaced by some more rigorous system.” 83 The Court was unmoved by the hospital’s claim that its purposes were benign, 84 declining to address “the fact that only 30 of 253 women testing positive for cocaine were ever arrested, and only 2 of those prosecuted.” 85 Also unaccounted for in the majority opinion is the absence of any patient-physician privilege under South Carolina law. 86 Instead the Court relied upon an amicus brief by the American Medical Association for the proposition that “[t]he reasonable expectation of privacy enjoyed by the typical patient undergoing diagnostic tests in a hospital is that the results of those tests will not be shared with nonmedical personnel without her consent.” 87

80. Id. at 72 (quoting Br. of Resp. at 8) (brackets in original).
81. Id.
82. Id. at 73.
83. Id. at 90 (Kennedy, J., concurring).
84. Id. at 81 (majority).
85. *Ferguson*, 532 U.S. at 103 (Scalia, J., dissenting).
86. Id. at 95.
87. Id. at 78 (majority).

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Such a belief would appear to be misplaced in light of South Carolina law.

Justice Kennedy’s concurring opinion appears to take seriously the harm experienced by unborn children from cocaine use by their mothers:

There can be no doubt that a mother’s ingesting this drug can cause tragic injury to a fetus and a child. There should be no doubt that South Carolina can impose punishment upon an expectant mother who has so little regard for her own unborn that she risks causing him or her lifelong damage and suffering. The State, by taking special measures to give rehabilitation and training to expectant mothers with this tragic addiction or weakness, acts well within its powers and its civic obligations.88

Yet, because of the close cooperation of the hospital with the police in addressing the problem of pregnant women’s cocaine use, and the majority’s “unreal” assumption that the testing was done with no voluntary consent at all, Justice Kennedy concurred in the judgment.89

Thornburgh v. American College of Obstetricians and Gynecologists90 presents another example of the Court’s unwillingness to protect the interest of children. At issue was a Pennsylvania statute requiring a second physician be present during a post-viability abortion in order to “take control of the child and . . . provide immediate medical care for the child, taking all reasonable steps necessary, in his judgment, to preserve the child’s life and health.”91 The provision was found to be unconstitutional because it contained no emergency exception to protect the health and life of the mother, and the Court was unwilling to imply one from other provisions of the Abortion Control Act.92 While portions of Thornburgh were overruled in Casey,93 this section of the decision was not overruled.94 The recent opinion of Gonzales v. Carhart brings into question the constitutional necessity of an exception

88. Id. at 89–90 (Kennedy, J., concurring).
89. Id. at 91.


Id. (parallel citations omitted).
to protect the health of the mother, but the absence of a life exception remains a constitutional requirement for regulations related to abortion.

V. PERSONAL SECURITY AND THE KILLING OF OTHERS

_DeShaney, Ferguson, and Thornburgh_ evidence the Court's indifference to the well-being of children, particularly those in utero. The judicially created "privacy" right has resulted in judicial abandonment of the most vulnerable of society. While the Constitution does not provide a general right to safety, the Court has recognized the right to "personal security" as an aspect of liberty protected by the Due Process Clause in other cases. For example, in _Youngberg v. Romeo_, a mentally retarded man alleged that the state had taken responsibility for ensuring his physical safety and then failed to protect him from physical injury. The Court accepted the plaintiff's claim, stating that "the right to personal security constitutes a 'historic liberty interest' protected substantively by the Due Process Clause." In _Washington v. Glucksberg_, the Court observed, "[t]he right to life and to personal security is not only sacred in the estimation of the common law, but it is inalienable." The origin of the right to personal security has been traced back to Article 39 of the _Magna Carta_. Yet, the unborn do not fall within its protection.

One reason given for excluding unborn children from the law's protection is women's need "to control their reproductive lives" "in the event that contraception should fail." Such reasoning fails to provide any satisfactory justification for the means by which women exercise their control—by killing another human being who is innocent of any crime.

95. _Carhart_, 127 S. Ct. at 1635–36 (holding that a health exception is not required when a dispute as to its necessity exists within the medical community).
97. Id. at 309.
98. Id. at 315 (citation omitted).
100. Id. at 714 (quoting _Martin v. Commw._, 37 S.E.2d 43, 47 (Va. 1946)).
103. To assert that the unborn child is a human being is merely to state a biological fact. _But see Carhart_, 127 S. Ct. at 1650 (Ginsburg, J., dissenting). It does not include the more contentious proposition that the unborn child is a person for purposes of constitutional protection. _Roe v. Wade_, 410 U.S. 113, 157–58 (1973) ("[T]he word 'person,' as used in the
Killing innocent human beings is not permissible as a means to protect personal rights in any other context, or for any other class of human beings in American law, even in cases in which the killing appears necessary to preserve the lives of oneself and others.\footnote{104} In \textit{U.S. v. Holmes},\footnote{105} a ship hit an iceberg and began to sink. Approximately half the passengers and all of the crew escaped into two small boats, described as a long-boat and a jolly-boat.\footnote{106} The two boats parted, and the next night the long-boat carrying almost all the passengers began to sink. The crew members on board decided to lighten the load and threw fourteen passengers into the icy sea.\footnote{107}

In finding Holmes, one of the seamen involved in throwing the passengers overboard, guilty of manslaughter, the court rejected the claim that necessity required the taking of the passengers' lives. The duties of the crew were to protect the passengers, not kill them.

Varying however, or however modified, the laws of all civilized nations, and, indeed, the very nature of the social constitution, place sailors and passengers in different relations. And, without stopping to speculate upon overnice questions not before us, or to involve ourselves in the labyrinth of ethical subtleties, we may safely say that the sailor's duty is the protection of the persons intrusted to his care, not their sacrifice,—a duty we must again declare our opinion, that rests on him in every emergency of his calling, and from which it would be senseless, indeed, to absolve him exactly at those times when the obligation is most needed.\footnote{108}

Holmes was convicted and sentenced to six months hard labor and a $20 fine: the leniency of the sentence suggests the court's implicit recognition of his role in preserving the lives of the remaining passengers through his efforts to attract the attention of a passing ship.\footnote{109}


106. \textit{Id.} at 360 (reporter's commentary).

107. \textit{Id.} at 363 (reporter's commentary). Although sixteen people drowned, the evidence was unclear whether the two women who drowned were thrown overboard or jumped. \textit{Id.} at 363 n. 5 (reporter's commentary).

108. \textit{Id.} at 368–69 (opinion).

109. \textit{Id.} at 369.}
A little over forty years later a similar case was presented to the English courts in *The Queen v. Dudley & Stephens*. Three crewmen and a cabin boy were adrift in a small boat after abandoning their sinking ship in a storm. The court described the desperate nature of their circumstances thus:

\[
\text{[I]n this boat they had no supply of water and no supply of food, except two 1 lb. tins of turnips, and for three days they had nothing else to subsist upon. That on the fourth day they caught a small turtle, upon which they subsisted for a few days, and this was the only food they had up to the twentieth day when the act now in question was committed. That on the twelfth day the remains of the turtle were entirely consumed, and for the next eight days they had nothing to eat. That they had no fresh water, except such rain as they from time to time caught in their oilskin capes.}\]

On the eighteenth day after the foursome had abandoned ship, the men had had nothing to eat for a week, and it was suggested that one of them should be sacrificed in order to save the rest. The original plan was that they should draw lots to determine who was to be killed, but the next day two of the men decided that it was better to sacrifice the cabin boy since the men had families. The two then killed the boy, who was weak from starvation and sick from drinking seawater. The three crewmen survived by eating the boy's body and drinking his blood until they were rescued by a passing ship four days later.

When they returned to England, the two men who killed the cabin boy were prosecuted for murder. Like their American counterpart, Seaman Holmes, they defended their actions on the basis that necessity justified the killing and cannibalizing of their weaker shipmate. The court rejected this defense, pointedly asking:

Who is to be the judge of this sort of necessity? By what measure is the comparative value of lives to be measured? Is it to be strength, or intellect, or what? It is plain that the principal leaves to him who is to profit by it to determine the necessity which will justify him in deliberately taking another's life to save his own. In this case the weakest, the youngest, the most unresisting, was chosen.

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112. *Id.* at 274–75 (reporter's commentary).

113. *Id.* at 287 (opinion).
The two sailors were sentenced to death, but the sentence was eventually commuted to six months imprisonment by the Crown.

VI. Conclusion

What is to be made of the widely divergent rulings and rationales in these cases? A person may not kill another in order to preserve his own life, nor may he sacrifice the lives of those entrusted to his care to preserve the lives of himself or others. Yet a woman can kill her unborn child for any (or no) reason prior to the child becoming capable of living outside the womb.

The Constitution provides no right to government protection against physical assaults, and has been interpreted to bar the protection of unborn children. The woman, who consciously chooses to engage in conduct that she knows could result in the creation of new life, has no responsibility to preserve or protect the life she creates prior to the birth of her child. Law enforcement officials cannot be told that a woman is using cocaine during her pregnancy, nor can a state require the presence of a second physician to care for the child when the woman chooses a post-viability abortion, unless an exception is provided for the woman's "health," a word that the Court has defined to include "all factors—physical, emotional, psychological, familial, and the woman's age—relevant to the well-being of the [woman]."

A man who is sexually assaulted while unconscious is legally responsible to support the child created by the assault for a minimum of eighteen years, yet a woman's husband is not entitled to know of his wife's intention to abort his child.

These inconsistencies and contradictions are not the product of some patchwork of legislation pieced together by legislators, many of whom lack legal training, but rather are the result of the nine most powerful lawyers in the country asserting their political preferences as constitutional mandates. With no constitutional text guiding their decisions, each justice becomes a law unto himself and the resulting jurisprudence is as inconsistent as the col-

114. Id. at 288.
115. Id. at 287 n. 17.
116. Even this limitation can be argued to be moving into the child's infancy with the passage of laws allowing a mother to abandon a newborn with no criminal liability. See Carol Sanger, Infant Safe Haven Laws: Legislating in the Culture of Life, 106 Colum. L. Rev. 753 (2006).
lective preferences of the justices. While this certainly makes for "interesting" case law, the instability and unpredictability engrafted onto the nation's constitutional structure by this ad hoc process of judicial decision-making proves to be a curse, as the purported Chinese proverb foretells.\footnote{Supra n. 1.}