"Roe v. Wade for Men"? A Men's Rights Group Makes A Farfetched Claim for Avoidance of Child Support

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In a recent, controversial lawsuit, Matt Dubay, a 25-year-old computer programmer, challenges a court order directing him to pay $500 per month in child support.

Dubay alleges that when he engaged in sexual relations with his girlfriend, he was relying on her assurances that, due to a medical condition, she was unable to get pregnant, and that, in any case, she was using some form of contraception to be absolutely safe. He also alleged that he clearly informed her that he was not interested in becoming a parent at that point in time.

However, just three months into their relationship, she conceived a daughter - to whom she ultimately gave birth. Dubay now would like to disclaim any paternal responsibility toward the child - and asks the court to strike down the child support order as unconstitutional.

This order, Dubay's suit claims, violates his reproductive rights. The argument was crafted by the National Center for Men (NCM), a nonprofit group with the stated mission to "educate the public about how men are hurt by sex discrimination."

While Dubay's suit has gotten an unusual amount of press, his allegations are not unusual. Indeed, lawsuits based on exactly parallel facts have been pursued in a host of jurisdictions, using a variety of legal theories. Across the board, they have failed. For the reasons explained below, Dubay's suit will likely fail too.
Using the Constitution to Avoid Child Support? A Losing Pursuit

When the Saginaw County, Michigan prosecutor ordered him to pay child support, Dubay alleges, it violated the Equal Protection Clause of the Fourteenth Amendment of the U.S. Constitution by treating him differently because he is a man.

Under Roe v. Wade, women have the ability to avoid procreation by making the decision to abort. Under state law, they also have a greater ability in many cases to control the decision whether a child is put up for adoption because states require unwed fathers to jump through technical hoops - hoops they often are not aware of -- in order to have a say in the decision. Men, Dubay thus complains, have substantially less opportunity to decline parenthood once conception occurs. For the legal situation to be equal, men must be afforded equal, or at least comparable, opportunity to avoid or decline fatherhood after the fact, just as women can avoid or decline motherhood.

In a separate column yesterday, Sherry Colb discussed men's and women's relative rights to escape parental responsibility by giving a child up for adoption. Here, I will discuss the constitutional Equal Protection doctrine that governs the claim Dubay did make, as well as the fraud claim he might have made (but didn't).

Column continues below ↓

The "Similarly Situated" Requirement: Deeming Pregnant Women Unique

The Equal Protection Clause embodies a commitment to formal equality: It mandates that likes be treated alike. It thus only guarantees that men and women be treated the same to the extent they are "similarly situated."

This limitation has operated in many respects as an obstacle to women's quest for equality. For example, the Equal Protection Clause does not protect against pregnancy discrimination. In Geduldig v. Aiello, the Supreme Court held that classification based on pregnancy is not a classification based on sex, even though only women get pregnant. And since "pregnant persons" are not similarly situated to "non-pregnant persons," the Court reasoned, there is no constitutional guarantee that the groups be treated alike.

To some extent, federal and state laws equating pregnancy and sex discrimination, and prohibiting both, negate the practical effect of this holding. Governments can - but need not - go beyond what the
Constitution requires, and here, they have. Thus, most employers are forbidden to discriminate on the basis of pregnancy, but the ban is a product of enacted statutes rather than constitutional guarantees.

As a matter of pure constitutional doctrine, pregnancy is a unique condition and pregnant women are a unique group - they cannot make claims to equal treatment vis-à-vis any other group. While this analytical anomaly usually operates to disadvantage pregnant women - a frequent target of discriminatory treatment -- here it works against a man like Dubay.

**How the Requirement Applies At Different Stages of Potential and Actual Parenthood**

Before conception, men and women are arguably "similarly situated" with respect to potential procreation. Both have the ability to abstain from sexual contact that might result in pregnancy. Both also have the right, under the Supreme Court's privacy jurisprudence, to make use of available contraceptives to avoid pregnancy.

But that is where the similarity ends.

After a child is conceived, the mother and father are no longer similarly situated. The woman carries and gives birth to the child, while the man has no continuing role in procreation. The woman's unique, physical role in this process is constitutionally significant, and she thus has control over whether to continue with or terminate the pregnancy, as long as she exercises her decision within valid limits set by state law. (If those limits impose an "undue burden" on her exercise of her rights, however, they will be invalidated.)

Once the child is born, the similarities between mother and father re-emerge. Mothers and fathers are, in theory, equally liable to support the child, with the liability adjusted based on their means and the child's needs. Married mothers and fathers have essentially identical parental rights, and those rights, which include the right to the care, control, and custody of the child, are fundamental and thus cannot be abrogated by the state without a compelling reason.

Unwed fathers do not automatically have parental rights, but instead must follow statutory procedures to earn them. Although those procedures vary from state to state, most are derived from a line of Supreme Court cases in the 1970s and 1980s that outlined the constitutional minimum for the rights of unwed fathers. In most states, an unwed father can gain parental rights - and thus the ability to argue for custody and visitation or to veto an adoption - if he has admitted paternity, openly behaved as a father to a child, or lived with or subsequently married the child's mother. He may also file with the state's "putative father" registry in case the mother never informs him about her pregnancy or the child's birth. A father will also have legal rights (and concomitant obligations) if his paternity has been adjudicated or if the mother has listed him on the birth certificate or otherwise identified him as the father. If any of these requirements have been satisfied, an unwed father has rights similar to those of unwed mothers.

Let's return to Dubay's claim. Taken together, the constitutional guarantees and statutory rules mean that Dubay's claim must fail. Before the child was conceived, Dubay and his girlfriend both had - but did not exercise - the same right to avoid procreative behavior. During the period he and the child's mother were not similarly situated - while she was pregnant - they did not have the same rights and the constitution does not say that they must.

Now, they are similarly situated - they are both the biological parents of a child in need of support - and accordingly, they have the same rights and obligations. The fact that he does not want to be a father is constitutionally irrelevant. (For all we know, his ex-girlfriend does not...
want to be a mother - but may have become one because she does not believe in abortion.)

As the highest court in New York held in a similar case, Pamela P. v. Frank S., "[the father's] constitutional entitlement to avoid procreation does not encompass a right to avoid a child support obligation simply because another person has not fully respected his desires in this regard. However unfairly [the father] may have been treated by [the mother's] failure to allow him an equal voice in the decision to conceive a child, such a wrong does not rise to the level of a constitutional violation."

**Suing for Fraud? Not Alleged Here, but Also a Losing Pursuit**

Dubay does have another option, though - but one that has been generally unsuccessful in these kinds of cases. He has not yet done so, but in theory, he could sue the mother of his child for fraud - legally defined as an intentional, knowing misrepresentation, reliance upon which causes another person injury. Here, the "injury" would be Dubay's having to pay child support.

If Dubay won this claim, the child support order would still remain intact. But even though he'd have to comply with it, he might be able to use the money damages from the fraud claim to do so, at least for a while.

Even if a court were willing to apply conventional tort principles here - treating this kind of "fraud" as it would a fraud in the business context - the mother might still have strong defenses.

Was her misrepresentation really intentional and knowing? Or did she make an honest mistake - believing a doctor's mistaken pronouncement of her infertility, or forgetting she'd forgotten to take the pill that day?

And what, exactly, is the injury here? It is not clear why the birth of a normal, healthy child is "injurious" in the way that other torts are. (Courts have, by contrast, permitted recovery for intentional misrepresentations about sterility, birth control, or sexual health where the misled party contracts a sexually transmitted disease, or suffers an ectopic pregnancy that requires surgical intervention. There, the injuries are obvious.)

Finally, even if the rights facts were alleged and proven, courts have been unwilling to apply conventional tort principles to this type of case. A "purely legalistic" approach, in the words of one court, would be inappropriate for a case involving such private conduct and interaction between two adults. (A California court suggested that the inquiry into the facts by a court would itself violate the parties' constitutional right to privacy and control over reproductive decisionmaking.)

Under state child support laws, monetary obligations to children are determined based solely on parental income and children's needs, without regard to any parental misconduct and without consideration of the parents' relative desire to become parents. Courts have thus refused to apply tort or contract principles in a way that negates or undermines those calculations.

**Regardless of the Theory, Public Policy Dictates Against Permitting Lawsuits Based on Unplanned Pregnancies**

Whether the claim is rooted in the Constitution or in tort principles, there are myriad public policy considerations, most of which weigh against recognition of a claim for unplanned pregnancies.

First and foremost, the welfare of children is paramount. Children have obvious needs, and the best way to satisfy them is to impose
support obligations on both parents. The "better them than us" argument - a reference to the state's (and taxpayers') role in providing assistance to needy families - is persuasive to courts, and leads them to find parental obligations of support to be virtually absolute.

Second, the private nature of the conduct involved in these cases makes judicial intervention of any kind undesirable. The Due Process Clause of the Constitution protects individuals against unwarranted intrusions into decisions about consensual sexual relationships and procreation. Recognizing a claim under either an equal protection or fraud theory might independently contravene those rights by giving courts license to intrude into parties' reproductive behavior and decisionmaking.

Third, the subjective nature of the inquiry here makes it unlikely that courts would uncover the "truth" in most cases. This is a classic "he said, she said" situation: In most cases there will be no witnesses or other tangible evidence to prove whether a misrepresentation was made or, if it was, whether the other party relied on it when engaging in sexual conduct. Would Dubay really have abstained from sex with his girlfriend if he had known pregnancy was a possibility? It will be hard for a court to answer that question with any confidence in its finding.

Regret is a powerful force, and many people facing an unplanned pregnancy (or birth) experience it. That regret might be an inducement to lie about what was said and done prior to conception - especially if doing so enabled an unwilling father to avoid nearly two decades of child support payments. No wonder, then, that most states have abolished so-called "heart balm actions" such as wrongful seduction, or breach of promise to marry, out of fear of false claims - claims by women non-marital sex was either accompanied by a promise of marriage or procured by deception.

Finally, one might consider that the recognition of these claims would give an incentive for abortion in some cases. More women might terminate pregnancies if they know they will bear sole financial responsibility for the resulting child. While it is important that women have the right to terminate a pregnancy, unnecessary economic hardship due to the father's abdication of his obligations should not push them to make that decision.

The author would like to thank her colleagues at Hofstra Law School who, in a lively e-mail exchange, both piqued her interest in the case and pointed her to some of the most relevant sources to analyze it.

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