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Recommended Citation

Johnsen, Dawn E., "Respecting Intent and Dispelling Stereotypes by Reducing Unintended Pregnancy" (2015). *Articles by Maurer Faculty*. 2516.

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Respecting Intent and Dispelling Stereotypes by Reducing Unintended Pregnancy

Dawn Johnsen

Introduction

In “Expectant Fathers, Abortion, and Embryos,” Dara Purvis considers the interests of “expectational fathers,” as she calls them, in the related contexts of abortion and the disposition of pre-embryos in assisted reproductive technologies (ART).¹ Her thought-provoking essay contributes to a subject — men and reproductive decision-making — that is too little studied. I embrace her emphasis on respect for both men’s equal role in parenting and women’s right to decide whether to terminate or continue pregnancy. In this Comment, I examine her central concern that abortion discourse promotes harmful gender stereotypes by minimizing expectational fathers’ interests. I suggest that Purvis’s own analytic focus on intent, properly applied and extended, actually ameliorates her concern and points instead to a more direct, unapologetic acknowledgment of men’s (and women’s) desires to avoid parenthood in particular circumstances and at particular times in their lives.

For most individuals, avoidance of parenthood is fully consistent with loving and shared parenthood of existing or future children; most men and women desire parenthood, but not as a result of every act of sexual intercourse. Policies that empower men and women to avoid unintended pregnancy are the sensible, win-win, front-line approach to addressing disputes over abortion between expectational fathers and women.

Intent and Stereotypes

Purvis’s principal concern centers on the related concepts of intent and gender stereotypes. She generally supports a more robust role for intent in resolving ART disputes² and worries that adding abortion to the analysis may undermine that position: “[I]f some of the rhetoric debating abortion rights minimizes the expectational parental interest of men, does that rhetoric work at cross-purposes to...application of intent-based rules in other contexts?”³ Similarly, Purvis posits that abortion discourse unfairly portrays men as uninterested in childbearing, which in turn perpetuates gender stereotypes about women. She cites in particular abortion opponents’ contention that men should have the right to avoid parental responsibility because women have the right to decide whether to continue the pregnancy: “By turning from narratives of men saddened by abortion, who had hoped to become fathers, and focusing on unwilling fathers whose parental investment was limited to sending

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checks, abortion critics reinforce the...perception of men as uninvested in children....”⁴

One relatively minor point regarding Purvis’s assertion that abortion opponents bear responsibility for a harmful minimization of expectational fathers’ interests: I suspect that advocates who oppose child support obligations when women continue pregnancies against men’s wishes are largely distinct from abor-

More fundamentally, I question Purvis’s central assumption that prevailing abortion discourse inappropriately minimizes the interests of expectational fathers, either to the detriment of the proper role of intent or the advancement of stereotypes.

tion opponents who would compel all women to continue pregnancies. There may be some overlap in the groups, but the arguments clearly are distinct. *Roe v. Wade*⁵ actually has been cited to support the argument that men’s relative lack of control of parenthood should relieve men of financial liability. Conversely, many who oppose abortion on the view that life begins at conception would recognize that allowing men to avoid child support would be counterproductive to their anti-abortion goals.

More fundamentally, I question Purvis’s central assumption that prevailing abortion discourse inappropriately minimizes the interests of expectational fathers, either to the detriment of the proper role of intent or the advancement of stereotypes. First, as to intent: an accurate portrayal of men’s lack of interest in parenting in the context of abortion decisions need not adversely affect the role intent should play in ART disputes for the simple reason that intent plays a fundamentally different role in the two contexts. When a man and a woman decide to employ ART, it is with the intent and for the purpose of having a child. Parenthood is the desired outcome. Disputes that arise about pre-embryo disposition typically result from changed circumstances. In sharp contrast, the vast majority of abortions follow from a pregnancy that neither party intended; relatively few result from changed circumstances.⁶

In fact, use of the phrase “expectational fathers” in the context of abortion, although a clear improvement over “father” alone, is far from ideal because typically neither party will have had an expectation of par-

enthood at the time of sexual intercourse. As Purvis discusses, however, there is no succinct analogue to “pregnant woman” to describe a man who would be the genetic father of a child who would be born to a woman if she decides to continue a pregnancy and successfully carries to term (fifteen to twenty percent of known pregnancies end in miscarriage). This full description is quite cumbersome, which reflects the complexity of the potential relationship.

Second, regarding stereotypes: Purvis certainly is correct that governmental actors and ordinary citizens alike should be vigilant against the pernicious, often unconscious influences of gender stereotypes on issues of pregnancy and childrearing. Judges, for example, sometimes confuse biological difference and social construct, including by conflating childbearing and childrearing.⁷ However, far from promoting harmful stereotypes, acknowledging that in most instances

neither men nor women want a child to result from a particular act of sexual intercourse is vital to effective public policy. A more complete understanding of the realities of pregnancy, childbearing, and abortion points to policies that address — indeed, preempt — abortion disputes by reducing unintended pregnancy.

Non-Procreative Sex and Intentional Parenthood

A desire to engage in sexual intercourse without risking parenthood is not a wholesale rejection of parenthood, by men or women. It is, quite simply, a sentiment shared at some point by almost all people who have sexual intercourse with opposite sex partners. Those same individuals also typically desire parenthood — not as a potential result of every heterosexual encounter, but at a time and with a partner of their choosing. Virtually all American women who have sex with men use contraception at some point in their lives.⁸ Eighty-five percent of women and seventy-six percent of men will have a child by age forty.⁹ An estimated three in ten women will have an abortion in their long reproductive lifetimes, but those same women bear children and are mothers.¹⁰ Contrary to stereotypes, most women who have abortions are mothers: Sixty-one percent have at least one child, and thirty-four percent have two or more children.¹¹ In one study, nearly four in ten women cited among the reasons for having an abortion that they had completed their childbearing, and almost one-third said that they were not ready to have a child.¹²

The unintended pregnancy rate in the United States is extraordinarily high at half of all pregnancies, amounting to more than three million a year; about forty percent of women decide to terminate and sixty percent decide to continue an unintended pregnancy.¹³ Where the decision is contrary to men's wishes, men suffer a real and consequential loss of procreative control. In the cases where abortion results, a man may suffer emotional distress from the loss of a desired child or the belief that abortion is the moral equivalent of killing a person. When a woman chooses to continue an unintended pregnancy, the course of a man's life can be greatly altered by unplanned parenthood, particularly if the woman is not his chosen life partner. Although the responsible and legally mandated course is to pay child support and be a loving father, we should not deny the complexity and costs of this real-world situation.

outside of marriage, the forced notification requirement touched only about one percent of expectational fathers.¹⁶ The impact on those women, however, often would have been devastating. The *Casey* Court explained, "In well-functioning marriages, spouses discuss important intimate decisions such as whether to bear a child. But there are millions of women in this country who are the victims of regular physical and psychological abuse at the hands of their husbands."¹⁷ Battering, which can include marital rape, can escalate with news of a pregnancy and also may extend to the couple's children. "[T]he primary reason women do not notify their husbands is that the husband and wife are experiencing marital difficulties, often accompanied by incidents of violence."¹⁸

Attempts to restrict abortion have escalated in recent years, but given *Casey's* strong holding against mandated husband notification, restrictions have

As the four Justices dissenting in *Hobby Lobby* noted, however, an IUD can cost up to a month's salary for an employee earning minimum wage and struggling to provide for a family. Our nation accrues enormous benefits — including the avoidance of abortion disputes between women and expectational fathers — by assisting women and men in their efforts to time the birth of children for when they are best able to bear and care for them.

The Supreme Court on Men and Abortion

The U.S. Supreme Court captured much of this when it first addressed the issue of government-mandated husband consent to abortion in 1976. A husband has a "deep and proper concern and interest...in his wife's pregnancy," but "when the wife and husband disagree on this decision, the view of only one...can prevail." The Court held that the woman must prevail because "it is the woman who physically bears the child and who is the more directly and immediately affected by the pregnancy."¹⁴ In its second and most recent decision on the issue, *Planned Parenthood v. Casey*, the Supreme Court in 1992 helped dispel some important stereotypes about the nature of such disputes.¹⁵ *Casey* is best known for its five-four partial reaffirmation of *Roe v. Wade*, but the outcome was mixed: the Court upheld some challenged provisions in a Pennsylvania law, but held unconstitutional a requirement that a woman notify her husband before obtaining an abortion.

As the Court explained, the vast majority of women (about ninety-five percent) voluntarily involve their husbands in abortion decisions. Given these voluntary consultations and the incidence of pregnancy

taken other forms, usually aimed at shutting down providers of abortion services.¹⁹ Before *Casey*, however, the anti-abortion movement sought to create a test case to overrule *Roe* through the dissemination of a "Fathers' Rights Litigation Kit."²⁰ The sample proceedings in the "kit" sparked lawsuits by men seeking to block women's abortions, until the Supreme Court made clear it would not take such a case.²¹ I served as co-counsel representing those women, who suffered harassment, privacy intrusions, and delays until courts vindicated their rights; those cases, too, involved dysfunctional, sometimes abusive relationships. Again, the men who have sought to enlist the force of government to compel childbirth — or to avoid child support payments — are not representative of the vast majority of men, who work out difficult decisions and disagreements in the context of personal relationships.

Conclusion

This extension of Purvis's focus on intent points to the vital role government plays in empowering women and men to avoid unintended pregnancy. The rate of unintended pregnancy in the United States is substantially higher than in other developed nations,²²

with rates highest among economically disadvantaged women.²³ A typical American woman wishing to have only two children must spend three decades avoiding the ten or more unintended pregnancies that would result absent effective contraception.²⁴ The Affordable Care Act as implemented by the Obama Administration took a vital step toward filling unmet need by including contraception among the health care provided at no additional cost under covered insurance plans. Notwithstanding the Supreme Court's 2014 *Hobby Lobby* decision allowing certain employers to act upon religious beliefs to deprive their employees of this valuable benefit,²⁵ most health plans will make available effective contraceptive methods that otherwise might not have been affordable. For example, the hormonal intrauterine device (IUD) is forty-five times more effective than oral contraceptives and ninety times more effective than condoms, based on typical use.²⁶ As the four Justices dissenting in *Hobby Lobby* noted, however, an IUD can cost up to a month's salary for an employee earning minimum wage and struggling to provide for a family.²⁷ Our nation accrues enormous benefits — including the avoidance of abortion disputes between women and expectational fathers — by assisting women and men in their efforts to time the birth of children for when they are best able to bear and care for them.

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