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(A Feminist Proposal)

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Ever since the draft *Dobbs* opinion was leaked, if not before, feminists have been mourning the loss of the right to abortion. As we should. Forced pregnancy and childbirth are widely recognized as violations of human rights.[1] But it's time to start looking at the bright side—how *Dobbs* can be used for the feminist cause. Specifically, *Dobbs* provides the tools to confer equal parenting rights on all persons regardless of sex, a right that women have too often denied to men. Although no one should be forced to give birth, a person who becomes pregnant and chooses to carry to term (or, under current circumstances, is compelled to do so) cannot be allowed to hoard the products of this reproductive process. As *Dobbs* recognized, people with the ability to become pregnant have control over "the domestic supply of infants," and people who can't become pregnant have the right to a share of that reproductive capacity.[2]

Unfortunately, as women have increasingly gained economic independence from men, they have increasingly tended to "exploit their natural procreative advantages."[3] Historically, this exploitation has occurred most

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1. *Women's Caucus for Gender Justice* in the International Criminal Court, War Crimes, The Crime of Forced Pregnancy, Recommendations and Commentaries to the December Preparatory Committee Meeting, pp. 1-2, 5 (Dec. 1-12, 1997).

2. Dobbs v. Jackson Women's Health Org., 142 S.Ct. 2228, 2259, fn. 46 (2022).

3. Marjorie Maguire Shultz, *Reproductive Technology and Intent-Based Parenthood: An Opportunity for Gender Neutrality*, 1990 WISC. L. REV. 297, 307.

frequently in the context of heterosexual relationships, where "accidental procreation" is most common (and will become all the more so, after *Dobbs*).[4] For example, in the familiar case of *Lehr v. Robertson*, Lorraine Robertson inexplicably snuck out of the hospital after giving birth and succeeded in hiding herself and the child from Jonathan Lehr for more than two years.[5] We might wonder at this behavior. In so many other cases, we see women begging their male partners to "help out" in raising a child, or at least to pay child support. What possible reason could Lorraine have had for refusing the help Jonathan was offering? We needn't wonder, however. Better to assume, as Jonathan's lawyer insinuated, that she was mentally unstable or, as the South Carolina Supreme Court declared in a similar case, that her behavior could be put down to feminine "whim."[6]

The Supreme Court denied Jonathan Lehr's bid for parental rights, but state courts have stepped in where the *Lehr* Court feared to tread. In a string of feminist victories, courts have stripped women of exclusive control over the supply of children within their domestic relationships. They have held, contra *Lehr*, that a genetic father has an automatic right to "grasp the opportunity" to turn his genetic paternity into legal paternity, regardless of the wishes of the birth mother.[7] In a California case, a man claimed parental rights to a child he had never met since the child's mother had broken up with him early in her pregnancy. The California Supreme Court declared that it would be "improper to make the father's rights contingent on the mother's wishes."[8] Obviously, the man who ejaculated nine months ago is equivalent, in constitutional terms, to the woman who spent those nine months pregnant and just gave birth. It is black-letter equal protection

4. *See generally* Kerry Abrams & Peter Brooks, *Marriage as a Message: Same-Sex Couples and the Rhetoric of Accidental Procreation*, 21 YALE J.L. & HUMANS. 1 (2009).

5. 463 U.S. 248 (1983).

6. Mary Burbach & Mary Ann Lamanna, *The Moral Mother: Motherhood Discourse in Biological Father and Third Party Cases*, 2 J.L. & FAM. STUDS. 153, 172 (2000) (quoting the Supreme Court of South Carolina); *cf.* Roe v. Wade, 410 U.S. 179, 763 (1973) (White, J., dissenting) (accusing the majority of deferring to "the convenience, whim, or caprice of the pregnant woman"). *But see* Serena Mayeri, *Foundling Fathers: (Non-)Marriage and Parental Rights in the Age of Equality*, 125 YALE L.J 2292, 2363 (2016) (reporting that Lorraine was a "troubled teenage girl" whom Jonathan's mother took "under her wing," after which "Jonathan and Lorraine became intimately involved"); *cf.* Katherine K. Baker, *Equality, Gestational Erasure, and the Constitutional Law of Parenthood*, 35 J. AM. ACAD. MATRIMONIAL LAWYERS 1, 25 (2022) (noting that granting parental rights to Jonathan would have trapped Lorraine into "raising her child in the context of adult relationships that were at best extremely difficult and at worst incestuous").

7. *Lehr*, 463 U.S. at 262. In some states, the father's rights are contingent on his at least offering to pay child support, but the mother has no right to refuse the offer. *See* Jennifer Hendricks, ESSENTIALLY A MOTHER: A FEMINIST APPROACH TO THE LAW OF PREGNANCY AND MOTHERHOOD at 94–99 (2023); Jessica Feinberg, *Parent Zero*, 55 UC DAVIS L. REV. 2271, 2276–294 (2022).

8. Adoption of Kelsey S., 823 P.2d 1216, 1220 (Cal. 1992).

doctrine that when nature confers a biological advantage (like the ability to become pregnant) on one group of people, the law is required to re-allocate that advantage to level the playing field.[9] In the cases leading up to *Lehr*, the Supreme Court had taken only a only half a step toward equalizing things for men. It allowed them to acquire parental rights, but only by investing substantial caretaking labor in the child.[10] The California Supreme Court recognized that caretaking labor, which is so insignificant that it can be delegated to hired help, is irrelevant to the essentially chattel-like regime that is constitutional parental rights. The court thereby elucidated the true basis for parental rights: the contribution of genes, which, conveniently, is identical for both sexes.[11]

Holdings like California's are especially important because the traditional system for ensuring men's access to children was marriage; all states still have some form of the marital presumption of paternity.[12] Today, however, it is more common and less stigmatized for children to be born outside of marriage.[13] We therefore need new mechanisms to prevent women from avoiding the marital duty to share reproductive output. The primary mechanism courts have adopted is to make parental rights a function of genes, so that mothers cannot deprive men like Jonathan Lehr of parental rights merely by denying them access to the child. The genetic definition of parenthood makes clear that a woman's consent to sex is also consent to the terms of the marital bargain as to any resulting child.

Speaking of consent, this genetic definition of parenthood has created a few problems in cases where a man becomes a genetic father through rape. Courts naturally granted such men parental rights under the genetic definition of parenthood.[14] Legislatures, however, have stepped in to ameliorate this harsh outcome, most notably in the federal Rape Survivors Child

9. *See, e.g.,* Geduldig v. Ailleo, 417 U.S. 484 (1974) (holding the opposite of the statement in the text), *reaffirmed in Dobbs*, 142 S.Ct. at 2245–46.

10. *See* Stanley v. Illinois, 405 U.S. 645 (1972); Quilloin v. Walcott, 434 U.S. 246 (1978); Caban v. Mohammed, 441 U.S. 380 (1979).

11. *See* W. Nicholson Price, Note, *Am I My Son? Human Clones and the Modern Family*, 11 COLUM. SCI. & TECH. L. REV. 119, 142–43 (2010) (discussing mitochondrial DNA, which comes only from the mother).

12. *See* Leslie Joan Harris, June Carbone, Lee Teitelbaum & Rachel Rebouché, FAMILY LAW at 843 (6th ed. 2018); UNIF. PARENTAGE ACT § 204 (2017).

13. Almost 40% of all births in the United States are to unmarried women. U.S. DEP'T. OF HEALTH & HUM. SERV., NAT'L. CTR. FOR HEALTH STATISTICS, *Unmarried Childbearing*, CDC (2023), https://www.cdc.gov/nchs/fastats/unmarried-childbearing.htm.

14. *See* Shauna Prewitt, *Giving Birth to a "Rapist's Child": A Discussion and Analysis of the Limited Legal Protections Afforded to Women Who Become Mothers through Rape*, 98 GEORGETOWN L.J. 827 (2010).

Custody Act (RSCCA).[15] The RSCCA uses small grants to encourage states to pass laws allowing rape victims to go to court to terminate the genetic rights of their rapists. All they have to do is prove by clear and convincing evidence that they were raped and that the rape led to the conception of the child. Of course, a woman who becomes pregnant through consensual sex can't evade her consent to co-parent (implicit in her consent to sex) merely because the genetic father raped her *on a different occasion*.[16] The RSCCA thus makes clear that a man is entitled to a share of gestational capacity only on the basis of a consensual sexual encounter, not on the basis of force that can be proven in court. In other words, sharing your gestational capacity is now not just the price of marriage but also the price of voluntary heterosexual intercourse.

Despite these advances in giving men equal access to and power over children, the law has continued to treat men as second-class citizens before their children are born. Courts and commenters have observed that denying legal rights to men forces them to resort to extra-legal means for claiming their rights over their children-to-be.[17] If pregnant women have no legal obligation to inform men of their biological parenthood and offer them access to the child, then men will use stalking and other self-help to secure their rights.[18] Men's stalking behavior is simply the way of the world, about which nothing can be done,[19] but we can do something about women's unfair reproductive advantage. In recent years, we have at last seen feminist proposals to redress the biological imbalance. For example, women could be required to make appropriate reports about their reproductive status to any men they've had sex with. Feminists have also championed the creation of

15. 34 U.S.C. §§ 21301–08. *See generally* Jennifer S. Hendricks, *The Wages of Genetic Entitlement: The Good, the Bad, and the Ugly in the Rape Survivor Child Custody Act*, 112 NW. U. L. REV. 75 (2018).

16. *See* RSCCA, 34 U.S.C. § 21303 (specifying that the termination of parental rights required for a state's grant eligibility is contingent upon the child having been conceived through rape).

17. *See, e.g.,* Robert O. v. Russell K., 604 N.E. 99, 106 (N.Y. 1992) (Titone, J., concurring) ("A rule that requires men to foist continued contact on women with whom they are no longer involved overlooks women's interest in preserving their own privacy after the relationship has been terminated."); Michael Higdon, *Marginalized Fathers and Demonized Mothers: A Feminist Look at the Reproductive Freedom of Unmarried Men*, 66 ALA. L. REV. 507, 539 (2015) ("In order to protect their reproductive freedom, then, men are being encouraged to resort to stalking."); Jeffrey Parness, *Systematically Screwing Dads: Out of Control Paternity Schemes*, 54 WAYNE L. REV. 641, 658 (2008) ("Thus, it seems that stalking former lovers and bedmates is invited.").

18. *See* sources cited *supra* note 17.

19. *See, e.g.,* Castle Rock v. Gonzales, 545 U.S. 748 (2005) (holding that the state has no constitutional duty to protect women and children from violent men who have specifically targeted them to the point where the state itself has issued a protection order).

a national "putative father" registry for tracking any fugitive fetuses to which men believe they are entitled.[20]

Although these sorts of reforms help protect men's rights to the children their ex-lovers bear, none of them addresses the problem of women denying men *the experiences* of pregnancy and childbirth themselves. Due to the near-complete adoption of the feminist agenda as public policy, pregnancy triggers a slew of special privileges and benefits, from time off work for shopping trips to state-mandated vaginal ultrasounds. Even before *Dobbs*, a few feminists were facing the question: how can we give these pregnancy benefits to men who aren't pregnant?[21] Their efforts were constrained by the general consensus that doctrines of bodily autonomy protected a pregnant woman's control over her pregnancy, even beyond deciding whether to abort. *Dobbs* swept those doctrines away—which, again, is a terrible tragedy—making it possible to truly neutralize the idea that the "happenstance"[22] of the fetus's containment within someone who also happens to be a person has any significance when it comes to the moral and legal rights of the father.

Legal distinctions between pregnancy and other forms of "expecting" give undue importance to mere biological processes and undermine the equality of men within the family. As Professor Katherine Baker has admitted, "if equality norms should be used to override women's much greater biological investment in a newborn child, then it is not altogether clear why equality norms should not be used to give genetic progenitors equal rights to a child before it is born."[23] Nonetheless, the pre-*Dobbs* Supreme Court staked out a radical regime of "sexed pregnancy" that it used to exclude non-gestating fathers from any role in the abortion decision.[24] The Court imported the public question of whether the *state* could control a woman's pregnancy into the domestic realm of *family* decision-making. For example, in *Planned Parenthood v. Danforth*, the Supreme Court held that because the state lacked the power to prohibit abortion, it could not "delegate" such

20. *See* Shari Motro, *The Price of Pleasure*, 104 NW. U.L. REV. 917, 958–59 (2010); Mary Beck, *Toward a National Putative Father Registry Database*, 25 HARV. J.L. & PUB. POL'Y 1031 (2002).

21. *See* David Fontana & Naomi Schoenbaum, *Unsexing Pregnancy*, 119 COLUM. L. REV. 309 (2019).

22. Reva Siegel, *Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 STAN. L. REV. 261, 332 (1992) (describing how *Roe v. Wade* treated the fact that abortion bans restrict women's autonomy as "a mere happenstance of nature," as if the existence of the fetus inside of another person was some cosmic coincidence); *see also* Perry-Rogers v. Fasano, 715 N.Y.S.2d 19 (N.Y. App. Div. 2000) (an involuntary surrogacy case in which the court referred to the "happenstance" of Donna Fasano's "nominal parenthood" over a baby she had given birth to after a fertility clinic mixed up the vials of genetic material).

23. Katharine Baker, *The DNA Default and Its Discontents: Establishing Modern Parenthood*, 96 BOS. UNIV. L. REV. 2037, 2060 (2016) (nonetheless arguing against this outcome).

24. Fontana & Schoenbaum, *supra* note 14, at 313.

power to a pregnant woman's husband.[25] This reasoning is obviously flawed. Parental rights are based on natural law and flow to both parents. They aren't "delegated" from power held by the state: "[t]he child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations."[26] *Danforth*'s delegation argument was inconsistent with family law's entire regime of parental rights and child custody.

After *Danforth*, lower courts went further and extrapolated from the pregnant woman's control over the abortion decision to her complete dominion over the pregnancy and even childbirth itself. For example, in recent years, men in Tennessee and New Jersey sued their ex-girlfriends because they feared the women would bar them from the delivery room when their children were born.[27] The trial courts in both cases extrapolated from the *Roe/Casey* regime that a woman could, in fact, deprive a man of this crucial first moment of parenting. In doing so, the courts again failed to distinguish between the *state's* interest in fetal life and a *co-parent's* interest. The *Dobbs* court's reference to a "domestic supply of infants" was troubling when understood in the context of racist panics about declining white birth rates and the immigrant hordes.[28] But it has a much different, legitimate meaning if we use "domestic" to refer to the traditional sharing of reproductive capacity within intimate relationships.

And crucially, *Dobbs* held as follows:

> A law regulating abortion, *like other health and welfare laws*, is entitled to a strong presumption of validity. It must be sustained if there is a rational basis on which the legislature could have thought that it would serve legitimate state interests. These legitimate interests include respect for and preservation of prenatal life at all stages of development, [citing *Gonzales v. Carhart*, 550 U.S. 124 (2007)]; the protection of maternal health and safety; the elimination of particularly gruesome or barbaric medical procedures; the preservation of the integrity of the medical profession; the mitigation of fetal pain; and the prevention of discrimination on the basis of race, sex, or disability.

25. Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52 (1976).

26. Pierce v. Society of Sisters, 268 U.S. 510, 535 (1925). If you can't figure out what's wrong with the argument about *Danforth* in the text, please see Jennifer Hendricks, *Being Pregnant in Someone Else's Body* (in progress).

27. Plotnick v. DeLuccia, 85 A.3d 1039 (N.J. Super. Ct. Ch. Div. 2013); Eyder Peralta, *New Jersey Judge Rules Women Can Keep Fathers Out of Delivery Room*, NPR (Mar. 12, 2014); Kim St. Onge, *Father Suing Mother to be Present at Birth of Their Child*, WSMV (July 18, 2018).

28. Jason Wilson and Aaron Flanagan, *The Racist 'Great Replacement' Conspiracy Theory Explained*, S. POVERTY L. CTR. (May 17, 2022), https://www.splcenter.org/hatewatch/2022/05/17/racist-great-replacement-conspiracy-theory-explained?gclid=Cj0KCQjwy4KqBhD0ARIsAEbCt6jvddsaaFOc1s_XcrvHYZWqdlb9PiS325kubzAqapVRN47TKTsLKSoaAqrDEALw_wcB.

> [citing *Gonzales*, *Roe*, and *Washington v. Glucksberg*, 521 U.S. 702 (1997)].[29]

This paragraph opens up the possibility of complete sex equality in parental rights, including during pregnancy. Although the Supreme Court here referred to laws "regulating abortion," the same logic applies to any regulation of pregnancy. In this paragraph and throughout the *Dobbs* opinion, the Court indicated that the state's power does not depend on the uniqueness of the state's interest in preserving fetal life. As David Fontana and Naomi Schoenbaum pointed out even before *Dobbs*, the state has many other interests—including the interest in sex equality that the quoted paragraph expressly names.[30] Specifically, the state has an interest in promoting sex equality *in parenting*. That means an interest in ensuring that men receive the benefit of their fair share of the reproductive labor of pregnancy and childbirth. And that in turn means an equal right of participation *in* the pregnancy and childbirth.

With that equality goal in mind, *Dobbs* removes any barriers that *Roe* and *Casey* may have erected to giving men full participation rights in pregnancy. For example, the Supreme Court has previously noted that the only important difference between biological motherhood and biological fatherhood is the mother's necessary "presence at the birth."[31] Nature may compel the mother's presence, but the law can make things equal by ensuring that the father has the same right to be present and witness the birth. The same goes for things like pre-natal ultrasounds, which are important bonding opportunities that have too often been classified as medical care as a pretext for excluding the father at the mother's whim. Under *Dobbs*, the state can compel a pregnant (or recently pregnant)[32] woman to allow the genetic father to participate in the process of pregnancy in any way that the state rationally believes will contribute to his feeling like a more valued parent.

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The question of sharing gestational capacity also arises in disputes over surrogacy contracts. Most surrogacy contracts proceed as planned and end with the surrogate handing over the contracting couple's baby. In a few

29. *Dobbs*, 142 S.Ct. at 2284 (emphasis added).

30. The *Dobbs* Court was probably referring most immediately to "reason-based" abortion bans, but the two interests in sex equality (an interest in banning sex-discriminatory abortions and an interest in promoting equal roles for parents) are analytically the same. *See generally* Melissa Murray, *Race-ing* Roe*: Reproductive Justice, Racial Justice, and the Battle for* Roe v. Wade, 134 HARV. L. REV. 2025 (2021).

31. Nguyen v. INS, 533 U.S. 53 (2001).

32. *See* Naomi Schoenbaum, *Unsexing Breastfeeding*, 107 MINN. L. REV. 139 (2022).

cases, however, surrogates resist their contractual obligations. As with Lorraine Robertson, these women's actions are fundamentally inexplicable because they are based on emotion, if not emotional instability. Surrogates, as the California Supreme Court has told us, do not change their *minds*; they change their *hearts*.[33] And matters of the heart have no place in law.[34] In an Iowa case, a white couple hired a black woman to be their surrogate.[35] Various disputes arose over the course of the pregnancy, and the white woman explained to the surrogate that, because she was being paid, she had to obey the white couple's instructions on everything related to the pregnancy; she should only be saying "yes, ma'am."[36] The white woman also called the surrogate the n-word in an email, and the white husband used racial slurs in talking about the surrogate's husband on Facebook.[37] Understandably upset, the surrogate refused to hand over the baby. The Iowa Supreme Court, however, correctly treated those emotionally-charged interactions as irrelevant to the bottom line.[38] Contract law has no room for altering the terms of a contract merely because someone got upset.

This emerging law of surrogacy could serve as a model for the law of parenthood in general. The determination of parental rights should be understood as an allocation of scarce reproductive capacity, to be governed by sex-neutral principles like contract law and genetic parenthood.[39] Sex neutrality, of course, requires ignoring the aspects of reproduction that are specific to female biology, as it would be unfair to non-gestational parents to consider pregnancy and birth significant aspects of the creation of a new child. Moreover, the process of childbirth is an essentially animal function, qualitatively different from the meaningful, lifelong bond of a shared genetic heritage.[40] One of the purposes of contracts is to ensure and enforce the alienability of labor. A surrogate may *be* the means of production, but

33. Johnson v. Calvert, 851 P.2d 776, 782 (Cal. 1993) (describing the surrogate's "change of heart").

34. *See* Chaplinsky v. New Hampshire, 315 U.S. 568 (1942) (fighting words doctrine).

35. P.M. v. T.B., 907 N.W.2d 552 (Iowa 2018).

36. *Id*. at 527.

37. *Id*. at 527; see also Rachel Rebouché, *Contracting Pregnancy*, 105 IOWA L. REV. 1591, 1593 n. 7 (2020) (citing one of the appellate briefs).

38. *P.M.*, 907 N.W.2d at 530–44 (enforcing the surrogacy agreement based on general principles about reproductive contracts, without any consideration of the white couple's behavior).

39. *See generally* Debora L. Threedy, *Feminists and Contract Doctrine*, 32 IND. L. REV. 1247 (1999); Jennifer S. Hendricks, *Fathers and Feminism: The Case Against Genetic Entitlement*, 91 TULANE L. REV. 473 (2017).

40. *See* Dorothy Roberts, *Spiritual and Menial Motherhood*, 9 YALE. J. L. & FEM. 51 (1997); *cf*. SHULAMITH FIRESTONE, THE DIALECTIC OF SEX: THE CASE FOR FEMINIST REVOLUTION 227–28 (1970) (predicting that women could not be equal until the invention of artificial wombs to free women from the labor of gestation and birth).

having rented herself out for the duration of the pregnancy, the surrogate, like any other wage laborer, has no legal claim to her work product.

But disputes over who owns the child of a surrogacy contract are old news. The new, second-generation issue is control over the pregnancy: who decides what the surrogate eats, whether she has sex, whether she has an abortion, and a myriad of other questions from choosing the OB-GYN to whether the Iowa surrogate should have just been saying "yes, ma'am."[41] Once again, it's on the issue of control over the pregnancy where the *Dobbs* decision shines. Surprisingly, many feminists who support the enforceability of surrogacy contracts when it comes to handing over the baby have balked at enforcing the same contracts when it comes to the surrogate's behavior while on the job. They want the surrogate to retain authority over decisions about the pregnancy and her body. This approach sentimentalizes the surrogate as still, in some sense, a "mother," rather than a worker performing a job. The approach also rests on granting pregnant women bodily autonomy under *Roe* and *Casey*. *Dobbs* will allow states to resolve these contract disputes on a more "rational basis."

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I profess in the sincerity of my heart, that I have not the least personal interest in endeavoring to promote this necessary work of sex equality, having no other motive than the public good of my country, by advancing the constitutional vision of substantively equal outcomes regardless of sex, providing fathers to children, and easing the burden of women's second shift. I have no children, over which there could be any dispute of ownership; my only son being twenty-one years old, and myself past child-bearing.[42]

41. *See generally* Rebouché, *Contracting Pregnancy*, *supra* note 37.

42. *Cf.* Jonathan Swift, *A Modest Proposal, For Preventing the Children of Poor people in Ireland From Being a Burden on their Parents or the Country, and for Making them Beneficial to the Publick* (1729) (last paragraph) (proposing to ameliorate the Irish famine by allowing the poor to sell their children for the rich to eat); *see also* Elizabeth M. Landes & Richard A. Posner, *The Economics of the Baby Shortage*, 7 J. LEGAL STUD. 323 (1978) (similar, but without the cannibalism).

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