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**ABORTION AND SAFE HAVEN LAWS**

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Notwithstanding the assertions of the State of Mississippi, of one amicus, and of Justice Amy Coney Barrett in *Dobbs v. Jackson Women’s Health Organization*,<sup>1</sup> abortion laws and safe haven laws are oil and vinegar. Not only do they not mix, but safe haven laws in some ways support the continuing validity of the balance on individual privacy interests and legitimate governmental interests struck in the *Roe v. Wade* decision on abortion. Both abortion availability laws and safe haven laws advance the interests of women who choose not to parent children within their existing family structures. But safe haven laws, though (perhaps) unlike the Mississippi abortion law, very clearly run contrary to settled U.S. Supreme Court precedents, as they infringe upon the parental interests of existing and expecting childcare parents.

In 2018, Mississippi enacted the Gestational Age Act.<sup>2</sup> The Act prohibits a person from performing an abortion on a woman who is more than fifteen weeks pregnant.<sup>3</sup> The Act contains two exceptions. The first allows a person to perform an abortion on a woman more than fifteen weeks pregnant if there is a “medical emergency.”<sup>4</sup> The second allows a person to perform an abortion on a woman more than fifteen weeks pregnant where there is a “severe fetal abnormality.”<sup>5</sup> A physician who “intentionally or

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1. *Dobbs v. Jackson Women’s Health Org.*, No. 19-1392 (argued Dec. 1, 2021).

2. MISS. CODE ANN. § 41-41-191.

3. *Id.* § 41-41-2(c).

4. *Id.* § 41-41-4(a).

5. *Id.*

knowingly” violates the abortion limits in the Act is subject to license suspension or revocation.<sup>6</sup>

In defending the Act, which was stricken by two lower federal courts<sup>7</sup> under *Roe v. Wade*, the Mississippi Health Officer within the Department of Health, in seeking U.S. Supreme Court review, argued that “modern options regarding and views about childbearing have dulled concerns on which *Roe* rested” in that no longer would unwanted children force upon women “a distressful life and future.”<sup>8</sup> Women today, he opined, are better able “to pursue both career success and a rich family life.”<sup>9</sup> He suggested that “safe haven laws” give “women bearing unwanted children the option” of leaving their newborns “directly in the care of the state” until there are adoptions.<sup>10</sup> A supporting amicus brief similarly asserted that the existence of safe haven laws, operating in “every state,” completely “eliminates any legal need . . . for an actual abortion to eliminate the burdens of unwanted children.”<sup>11</sup>

Justice Barrett found merit in these pleas. At oral argument, she opined that *Roe* “emphasized the burdens of parenting.”<sup>12</sup> In response to the argument that “forced motherhood would hinder women’s access to the workplace and to equal opportunities,” Justice Barrett asked “why don’t safe haven laws take care of that problem?”<sup>13</sup>

So what’s in the Mississippi safe haven law, why is it not problematic for those favoring *Roe*, and why doesn’t it mix with the Mississippi abortion law? The Mississippi safe haven law, titled “Baby Drop-Off Law,” provides that an “emergency

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6. *Id.* § 41-41-6(a). False reports of abortions can subject physicians to civil penalties or fines. *Id.* § 41-41-6(b).

7. *Jackson Women’s Health Org. v. Dobbs*, 945 F.3d 265 (5th Cir. 2019); *Jackson Women’s Health Org. v. Currier*, 349 F. Supp. 3d 536 (S.D. Miss. 2018).

8. Brief for Petitioners at 29, *Dobbs v. Jackson Women’s Health Org.*, (No. 19-1392), 2021 WL 3145936 (July 22, 2021) [hereinafter *Dobbs* Petition].

9. *Dobbs* Petition at 29.

10. *Dobbs* Petition at 29.

11. Brief of Amici Curiae 375 Women Injured By Second and Third Trimester Late Term Abortions and Melinda Thybault, Individually and Acting On Behalf of 336,214 Signers of the Moral Outcry Petition, in Support of Petitioners at 16, *Dobbs v. Jackson Women’s Health Org.*, (No. 19-1392), 2020 WL 4227871, at \*16 (July 23, 2020).

12. Mark Joseph Stern, *During Arguments Over the Fate of Roe, Kavanaugh and Barrett Finally Showed Their Cards*, SLATE (Dec 1, 2021), <https://slate.com/news-and-politics/2021/12/dobbs-supreme-court-abortion-kavanaugh-barrett.html>.

13. *Id.*

medical services provider . . . shall take possession of a child who is seven (7) days old or younger if the child is voluntarily delivered to the provider by the child's parent and the parent did not express an interest to return for the child."<sup>14</sup> The surrendering parent is "not required to provide any information pertaining to his or her identity."<sup>15</sup> An emergency medical services provider includes "a licensed hospital . . . which operates an emergency department, an adoption agency duly licensed . . . or fire station or mobile ambulance."<sup>16</sup>

Safe haven laws were criticized by *Roe* supporters long before the argument in *Dobbs*. The seminal critique was by Professor Carol Sanger who argued that safe haven laws are best understood "within a larger political culture," a "culture of life," that works "subtly to promote the political goal of the culture of life: the reversal of *Roe v. Wade*."<sup>17</sup> Safe haven laws do so, she maintained, by "connecting infant life to unborn life and infanticide to abortion,"<sup>18</sup> leading these laws to be primarily "cultural" rather than "criminological."<sup>19</sup> These laws, she also concluded, have "little impact on the phenomenon of infant abandonment."<sup>20</sup>

As well, I earlier urged that safe haven laws, within a larger political culture, "significantly promote" the culture of motherhood, that is, "the unconditional respect for the relatively exclusive maternal decision-making about newborns, regardless of children's best interests, of any legal paternity interests, and of strong social policy favoring two parents for each child born as a result of consensual sex."<sup>21</sup>

The policies on decisionmaking by women on potential human life in abortion settings and on newborns in safe haven

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14. MISS. CODE ANN. § 43-15-201(1). The Department of Human Services then takes "care, control and custody" of the child. *Id.* § 43-15-203(2).

15. *Id.* § 43-15-201(2) (no inquiry on identity can be made and any knowledge of identity shall be kept "confidential"). The child must, however, be unharmed. *Id.* § 43-15-205.

16. *Id.* § 43-15-207 (private physicians and private dentists are not included).

17. Carol Sanger, *Infant Safe Haven Laws: Legislating in the Culture of Life*, 106 COLUM. L. REV. 753, 753 (2006) [hereinafter Sanger]. Professor Sanger notes that the "culture of life" was described by Pope John Paul II as the "unconditional respect for the right to life of every innocent person-from conception to natural death." Sanger at 801 n.300.

18. Sanger, at 753.

19. *Id.*

20. *Id.*

21. Jeffrey A. Parness, *Lost Paternity in the Culture of Motherhood: A Different View of Safe Haven Laws*, 42 VAL. L. REV. 81, 97 (2007).

settings are lumped together in order to create the appearance of unity “in good purpose,” even though “there are strong differences.”<sup>22</sup> Namely, decisions not to bear children are (within ever shrinking limits) for women, but decisions not to parent current children are for all existing and expecting legal parents.

Unfortunately, these differences in individual privacy interests frequently go unrecognized in safe haven laws. Yet, recognitions in safe haven settings of existing legal parents other than birth mothers, and of expecting legal parents, are constitutionally compelled.<sup>23</sup>

In safe haven settings, beyond birth mothers there are often other existing childcare parents at the time of birth, as well as expecting childcare parents at the time of birth.<sup>24</sup> Other existing childcare parents of newborns include the spouses (men or women) of those who bore the children.<sup>25</sup> While spousal parent presumptions are sometimes rebuttable,<sup>26</sup> such rebuttals should not include a birth mother’s use of a safe haven law.<sup>27</sup> As well, other existing childcare parents of newborns include those men or women who signed (prebirth or at birth) voluntary parentage acknowledgments,<sup>28</sup> which typically require “full faith and

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22. Sanger at 805-806.

23. As to existing legal parents, see, e.g., *E.N. v. T.R.*, 255 A.3d 1 (Md. 2021) (each legal parent must consent to a third-party de facto parent relationship unless the nonconsenting parent is unfit or exceptional circumstances exist) and *Martin v. MacMahan*, 264 A.3d 1224, 1235 (Me. 2022) (similar holding, relying on *E.N.* and opining that to “hold otherwise would potentially allow the unilateral actions of one legal parent to cause an unconstitutional dilution of another legal parent’s rights”).

24. Childcare interests include the “fundamental right of parents to make decisions concerning the care, custody, and control of their children.” *Troxel v. Granville*, 530 U.S. 57, 66 (2000). Who constitute existing and expecting parents having such interests have been chiefly left to state lawmakers by the U.S. Supreme Court and by Congress. See Jeffrey A. Parness, *Federal Constitutional Childcare Parents*, 90 ST. JOHN’S L. REV. 965 (2016).

25. See, e.g., Mark Strasser, *Presuming Parentage*, 25 TEX. J. WOMEN, GENDER AND L. 57 (2015) (reviewing varying state approaches).

26. See, e.g., Jessica Feinberg, *Restructuring Rebuttal of the Martial Presumption for the Modern Era*, 104 MINN. L. REV. 243 (2019) (renewing and critiquing current laws).

27. See, e.g., Uniform Parentage Act § 608 (2017) (proposing time limits on challenges and the relevance of genetic ties, same residence and holding out child as one’s own); Uniform Parentage Act § 608 (2000) (focus on genetic ties and equity).

28. Proposed uniform laws and actual state laws on voluntary parentage acknowledgments are reviewed in Jeffrey A. Parness, *The Constitutional Limits on Custodial and Support Parentage by Consent*, 56 IDAHO L. REV. 421, 433–438 (2020).

credit.”<sup>29</sup> Further, existing childcare parents of newborns include those with prebirth court orders on gestational surrogacy parentage that take effect at birth<sup>30</sup> Safe haven schemes effectively permit the involuntary losses of parental childcare interests without cause, clearly contrary to the established safeguards on terminations of parental rights.<sup>31</sup>

Expecting childcare parents of newborns include the biological fathers of children born of consensual sex to unwed mothers. As to these fathers the U.S. Supreme Court said in *Lehr v. Robertson*:

The significance of the biological connection is that it offers the natural father an opportunity that no other male possesses to develop a relationship with his offspring. If he grasps that opportunity and accepts some measure of responsibility for the child’s future, he may enjoy the blessings of the parent-child relationship and make uniquely valuable contributions to the child’s development. If he fails to do so, the Federal Constitution will not automatically compel a state to listen to his opinion of where the child’s best interests lie.<sup>32</sup>

The Court went on to recognize that a state may enact a “special statutory scheme to protect the unmarried father’s intent in assuming a responsible role in the future of his child.”<sup>33</sup>

But it cautioned that if such a scheme were “likely to omit many responsible fathers” and if receipt of notice of state efforts to eliminate such an interest could proceed without “notice” to, and were “beyond the control of an interested putative father, it might be thought procedurally inadequate.”<sup>34</sup> Beyond the

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29. 42 U.S.C. § 666(a)(11) (state participating in federal welfare subsidy program must give full faith and credit to a determination of parentage “established through voluntary acknowledgment”).

30. *See, e.g.*, Uniform Parentage Act § 811(b) (2017), implemented in WASH. REV. CODE § 26-26A-750(2).

31. *See, e.g.*, *Santosky v. Kramer*, 455 U.S. 745, 768 (1982) (need for “clear and convincing evidence” of parental unfitness); *M.L.B. v. S.L.J.*, 519 U.S. 102, 128 (1996) (state may not condition an appeal of a parental rights termination order on an indigent’s petitioner’s failure to pay in advance appellate record preparation fees).

32. *Lehr v. Robertson*, 463 U.S. 248, 262 (1983).

33. *Id.* at 263.

34. *Id.* at 264.

unmarried fathers in *Lehr*,<sup>35</sup> expecting childcare parents of future or current newborns include those with contractual, and perhaps court-recognized, interests in children born to gestational surrogates.<sup>36</sup> Safe haven schemes, in Mississippi and in other states, omit under *Lehr* many “responsible”<sup>37</sup> expecting childcare parents who have constitutional or contractual interests in the children left with the state by birth mothers.

Safe haven laws, including the Mississippi “Baby Drop-Off Law,” cannot support state limits on abortion access. They do not “take care” of the “problem” of hindering “women’s access to the workplace and to equal opportunities.”<sup>38</sup> Safe haven laws cannot be used to legitimate a law significantly (or wholly) denying many women opportunities to choose not to parent a child because safe haven laws themselves unconstitutionally deny many existing and expecting childcare parents, men and women, their choices to parent children. The unconstitutionality of one law cannot be overlooked in assessing the constitutionality of another law.

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35. These fathers only include those who conceived children with unmarried women. The Court later determined biological fathers need not be given parental opportunity interests under *Lehr* in children born of sex to women who were married to others. *See* Michael H. v. Gerald D., 491 U.S. 110, 129–130 (1989) (“It is a question of legislative policy and not constitutional law whether California will allow the presumed parenthood of a couple desiring to retain a child conceived within and born into their marriage to be rebutted.”). Some states, via their state constitutions, do recognize such parental opportunity interests. *See, e.g.*, In Interest of J.W.T., 872 S.W.2d 189 (Tex. 1994); Callender v. Skiles, 591 N.W.2d 182 (Iowa 1999).

36. Under the 2017 Uniform Parentage Act, at § 811, existing and expecting parents of children born or to be born to gestational surrogates can have judicial declarations recognizing their childcare interests. *See, e.g.*, WASH. REV. CODE § 26.26A.700 (2021); VT. STAT. ANN. tit. 15C § 801 (2022).

37. The Court’s analysis in *Lehr* was especially concerned with providing “responsible” natural birth fathers with an opportunity to parent their biological children. *See generally Lehr*, 463 U.S. 248.

38. *See supra* note 12.