

## PREGNANT PEOPLE?

*Jessica Clarke\**

*In their article Unsexing Pregnancy, David Fontana and Naomi Schoenbaum undertake the important project of disentangling the social aspects of pregnancy from those that relate to a pregnant woman's body. They argue that the law should stop treating the types of work either parent can do—such as purchasing a carseat, finding a pediatrician, or choosing a daycare—as exclusively the domain of the pregnant woman. The project's primary aim is to undermine legal rules that assume a gendered division of labor in which men are breadwinners and women are caretakers. But Fontana and Schoenbaum argue their project will also have benefits in terms of equality for expectant LGBTQ parents. To further this project, this Response asks what unsexing pregnancy might look like for different types of pregnant people: (1) pregnant individuals who do not identify as women, (2) expectant couples in which one partner is pregnant, (3) expectant parents engaging a surrogate or pursuing adoption, and (4) pregnant people who rely on networks of family and friends for support and caregiving. It argues that, in each of these contexts, the extension of pregnancy benefits raises a unique set of questions. But across all of these contexts, it will take more than simply making existing pregnancy rules gender neutral to achieve equality.*

## INTRODUCTION

In *Unsexing Pregnancy*, David Fontana and Naomi Schoenbaum make a compelling case against laws premised on the assumption that the caregiving tasks associated with pregnancy should be assigned exclusively to the pregnant woman.<sup>1</sup> They argue that pregnancy requires labor in addition to that entailed in childbirth, gestation, and related changes to the pregnant body. Pregnancy also entails forms of labor that are relational, social, and economic, such as arranging doctor's appointments, researching the options for giving birth, and preparing financially and emotionally for the arrival of the child.<sup>2</sup>

---

\* Professor of Law, Vanderbilt Law School. Thanks to Neha Jain and Jennifer Bennett Shinall for their helpful feedback on earlier drafts of this Response.

1. David Fontana & Naomi Schoenbaum, *Unsexing Pregnancy*, 119 Colum. L. Rev. 309 (2019).

2. See *id.* at 326–32.

*Unsexed Pregnancy* makes a meaningful contribution to scholarship on workplace accommodations for pregnancy<sup>3</sup> by offering an important and useful distinction between carework that is “tied to the physical fact of gestation” and carework that is not.<sup>4</sup> Laws governing family leave and health insurance recognize, at least superficially, that mothers are not the only people with caregiving responsibilities after a child is born. But the law often takes for granted that only prospective mothers engage in carework during pregnancy. *Unsexed Pregnancy* explains how the assumption that women are solely responsible for pregnancy is significant, in that divisions of labor that begin during pregnancy are likely to persist. As scholarship on the allocation of administrative tasks in households has demonstrated, initial assignments of tasks often turn out to be “sticky,”<sup>5</sup> so women tasked with caregiving responsibilities during pregnancy are likely to retain those responsibilities after the child’s birth. These sticky assignments reinforce the gendered division of labor in which men are the presumptive breadwinners and women the presumptive caretakers.

The article therefore argues for heightened constitutional scrutiny of laws that classify by sex during pregnancy.<sup>6</sup> In a line of equal protection cases beginning in the 1970s, the Supreme Court struck down laws that distinguished between the sexes in ways that reflected and reinforced stereotypes about men’s roles as providers and women’s roles as caretakers.<sup>7</sup> Prospective fathers might use this line of cases to challenge workplace accommodation rules that only provide benefits to pregnant women based on the assumption that women should do all the

---

3. In accord with Fontana and Schoenbaum’s article, this Response will pertain primarily to those rules that require workplace accommodations for pregnancy: the Family and Medical Leave Act (FMLA), those provisions of the Patient Protection and Affordable Care Act (ACA) pertaining to insurance coverage for pregnancy, and Title VII of the Civil Rights Act of 1964, as amended by the Pregnancy Discrimination Act of 1978. Health care is a workplace issue because of the number of Americans with employer-sponsored health insurance.

This Response will not ask what unsexed pregnancy might look like with respect to Medicaid or other forms of public assistance, although it is important to note that the project of extending those benefits beyond pregnant women might have troubling implications. See, e.g., Khiara Bridges, *The Poverty of Privacy Rights* 5, 34 (2017) (explaining how state Medicaid programs subject pregnant women seeking prenatal care “to invasions of privacy that we might understand as demonstrations of the danger of government power without limits,” but noting that the author’s ethnographic research did not extend to fathers).

While *Unsexed Pregnancy* discusses equal protection cases related to family, criminal, and immigration law, it does not develop the impact that its argument might have on these doctrines, so I will leave consideration of those issues for another day.

4. Fontana & Schoenbaum, *supra* note 1, at 313.

5. *Id.*; see also Elizabeth F. Emens, Admin, 103 *Geo. L.J.* 1409, 1414 (2015) (“Moreover, admin produces distributional inequities not only for women, but also for people of many stripes; because admin is ‘sticky,’ it tends to stay where it lands.”).

6. Fontana & Schoenbaum, *supra* note 1, at 314, 354.

7. See *id.* at 318–20.

work to prepare for the birth of a child.<sup>8</sup> The result would be invalidation of laws that are not “substantially related” to physical differences between expectant mothers and fathers.<sup>9</sup> For example, the authors argue that a law covering smoking cessation programs only for pregnant women would be invalid. Even though maternal smoking may be uniquely harmful to a fetus, “[s]ome studies show that paternal smoking has a substantial fetal impact.”<sup>10</sup> The remedy would be to allow all expectant parents to take advantage of smoking cessation programs.<sup>11</sup> By contrast, there’s no reason someone who is not pregnant would need “[a] back support pillow designed for pregnancy.”<sup>12</sup> So a law that provides only pregnant individuals with insurance coverage to purchase such a pillow would be valid.<sup>13</sup>

*Unsexing Pregnancy* contributes to conversations about the gendered distribution of parental responsibilities by elucidating how that distribution begins during pregnancy.<sup>14</sup> The article’s project is to remake

---

8. While the Supreme Court held in 1974 that sex discrimination is distinct from pregnancy discrimination for purposes of equal protection analysis, *Geduldig v. Aiello*, 417 U.S. 484 (1974), Fontana and Schoenbaum argue that *Geduldig* “should be read not to mean that pregnancy discrimination *cannot* be sex discrimination but that pregnancy discrimination constitutes sex discrimination *only* when founded on sex stereotypes.” Fontana & Schoenbaum, *supra* note 1, at 355.

9. Fontana & Schoenbaum, *supra* note 1, at 355 (quoting *United States v. Virginia*, 518 U.S. 515, 524 (1996)). Under the Supreme Court’s sex equality jurisprudence, this is a strict test: “In practice, sex must serve as a ‘perfect proxy’ for the law’s objective.” *Id.* at 359 (quoting Mary Anne Case, “The Very Stereotype the Law Condemns”: Constitutional Sex Discrimination Law as a Quest for Perfect Proxies, 85 *Cornell L. Rev.* 1447, 1449 (2000)).

10. *Id.* at 361.

11. The remedy for sex discrimination could be “leveling up,” in other words, providing prospective fathers with the same higher level of protection as mothers, or “leveling down” and stripping pregnant workers of the extra protection. See *id.* at 362. Fontana and Schoenbaum generally advocate leveling up, because leveling down to eliminate pregnancy benefits altogether would disparately harm women’s workplace opportunities. *Id.* at 362–63. But see *id.* at 362 & n.321 (recognizing that the Supreme Court has held that whether to level up or down is to be determined based on the “legislature’s intent” (quoting *Sessions v. Morales-Santana*, 137 S. Ct. 1678, 1699 (2017))).

12. *Id.* at 360.

13. *Id.*

14. The primary objection the authors identify to their proposal is that it may invite intrusive participation by fathers in pregnancy, at the risk of the mother’s bodily autonomy. *Id.* at 363–68. But the authors argue that courts can distinguish rules extending prenatal benefits from those that would require pregnant women to involve prospective fathers in their decisionmaking. *Id.* at 364. In contexts in which paternal involvement implicates a mother’s bodily autonomy—such as the one-night stand who wants to attend an ultrasound appointment—health care privacy laws require the pregnant patient’s consent. *Id.* at 364 & n.331. The authors acknowledge that extending prenatal benefits to fathers could change the relationship dynamics within couples, giving fathers more leverage in disputes about the pregnancy. *Id.* at 365. But they argue that, on balance, extending pregnancy benefits would empower women because it would allow their partners to take on a larger share of the carework. *Id.* at 365–67.

workplace accommodation law so that it does not reflect or reinforce a traditional breadwinner–caretaker family structure. The article’s paradigm family—in other words, the family it imagines at the center of this project—is one anchored by a man and a woman who are both in the workforce and are expecting the birth of their first child.<sup>15</sup> Its normative vision is a feminist one that seeks to undo legal rules and social structures that dictate particular gender roles for each member of that couple. While the article is conscientious in discussing the implications of each of its arguments for prospective LGBTQ parents, those implications are not its primary focus.<sup>16</sup>

This Response asks what unsexing pregnancy might mean for families beyond the article’s paradigm example. It pushes the argument from *Unsexing Pregnancy* further by untangling four ways in which the law might unsex pregnancy: (1) for individuals; (2) for couples; (3) for surrogacy and adoption arrangements; and (4) for networked pregnancies,<sup>17</sup> in which a pregnant person relies on extended family, social circles, or public assistance rather than a partner. The aim of this Response is not to propose new legal rules; rather, it is to raise questions about how unsexing pregnancy might be a different project in the context of these different family forms. Normative considerations other than gender equity are at stake when pregnancy is unsexed in various contexts, including equality based on sexual orientation, gender identity, marital status, family form, race, and class. One theme that is apparent across these contexts is that social change will require more than simply redrafting the rules in sex-neutral terms; it will require affirmative efforts at equality and inclusion for all pregnant people.<sup>18</sup>

### I. PREGNANT PERSONS?

One way that the law might “unsex pregnancy” is for individuals: The law could see pregnancy not only as something that happens to women’s bodies, but also as a bodily condition experienced by people who do not identify as women. *Unsexing Pregnancy* notes at the outset that transgender men may become pregnant.<sup>19</sup> It points out that courts and

---

15. See *id.* at 313–14.

16. *Id.* at 313 (describing how the article “emphasizes the interlocking sex stereotypes of women’s and men’s respective roles in the family and at work that fuel gendered distributions of caregiving,” and “in doing so . . . also highlights the damaging consequences of the sexed pregnancy for other family configurations”).

17. Cf. Melissa Murray, *The Networked Family: Reframing the Legal Understanding of Caregiving and Caregivers*, 94 *Va. L. Rev.* 385, 388 (2008) (discussing how “families rely on networks of nonparental caregivers in order to provide care”).

18. Cf. Darren Rosenblum, *Unsex Mothering: Toward a New Culture of Parenting*, 35 *Harv. J.L. & Gender* 57, 112–13 (2012) (distinguishing between laws that would unsex parenting in a “thin” and formal way from those that would do so in a “thick” and substantive way).

19. Fontana & Schoenbaum, *supra* note 1, at 311 n.4.

employers might interpret statutes that provide benefits only to “expectant mothers” in an overly literal way, refusing to grant accommodations to pregnant men who have changed their birth certificate sex designations to male.<sup>20</sup> Even if employers and courts are not so literal in their interpretations, transgender men are placed in the difficult position of having to make the inauthentic claim that they are “mothers” in order to receive benefits.<sup>21</sup> Thus, unsexing pregnancy would have benefits for pregnant transgender men.

Unsexing pregnancy for individuals is an urgent project for pregnant people who are not women and need access to reproductive health care. This includes not just transgender men but also pregnant people with intersex variations and who identify outside the gender binary. And while extending existing pregnancy benefits to all pregnant individuals—regardless of the sex designations on their identification documents or their gender identities—would be a step forward, meaningful change requires more comprehensive efforts to ensure all pregnant people receive appropriate and affirming health care.

The idea of unsexing pregnancy may have benefits for any number of pregnant individuals who, for various reasons, do not fall into the category of “expectant mothers.” To understand who might fall into this group, it may be useful to consider the distinction drawn by LGBTQ rights advocates between “sex” and “gender identity.”<sup>22</sup> “Sex” often refers to the male or female designation ascribed to an infant at birth, or “a combination of bodily characteristics including: chromosomes, hormones, internal and external reproductive organs, and secondary sex characteristics.”<sup>23</sup> By contrast, “gender identity” is “[a] person’s internal, deeply held sense of their gender,” as, for example, a man or a woman.<sup>24</sup> Sex and gender identity do not always correspond in conventional ways: “Transgender” is a term for a person whose gender identity does not match the one commonly associated with the sex assigned to them at birth.<sup>25</sup>

---

20. *Id.* at 338.

21. *Id.*

22. See, e.g., GLAAD, *GLAAD Media Reference Guide 10* (10th ed. 2016), <http://www.glaad.org/sites/default/files/GLAAD-Media-Reference-Guide-Tenth-Edition.pdf> [<https://perma.cc/2CL7-2HVM>]. By offering these categories, I do not mean to posit any universal or necessary distinction, or to suggest that these categories are relevant to any other particular legal controversies. See Jessica A. Clarke, *They, Them, and Theirs*, 132 *Harv. L. Rev.* 894, 905–10 (2019) (arguing that debates over the objectively correct definitions of sex, gender, and related concepts obscure the normative and political stakes of particular legal controversies).

23. GLAAD, *supra* note 22, at 10.

24. *Id.*

25. *Id.*

Neither sex nor gender identity are binary. Between 0.05 and 1.7% of infants have intersex variations:<sup>26</sup> “any of a range of sex characteristics that may not fit a doctor’s notions of binary ‘male’ or ‘female’ bodies.”<sup>27</sup> With respect to gender identity, in the 2015 U.S. Transgender Survey, the largest survey of transgender individuals to date, approximately one-third of respondents identified as “nonbinary” rather than as transgender men or transgender women.<sup>28</sup> Nonbinary is a term for a person who does not exclusively identify as a man or a woman.<sup>29</sup> Nonbinary people have a diverse array of gender identities, such as genderqueer, agender, or genderfluid.<sup>30</sup> They may use pronouns such as the singular “they” rather than “he” or “she.”<sup>31</sup> While it is difficult to estimate the total number of nonbinary people,<sup>32</sup> a 2018 survey found that thirty-five percent of people ages thirteen to twenty-one know a person who uses nonbinary pronouns.<sup>33</sup>

Unsexing pregnancy could work by highlighting intersex variation: how some pregnant people may have chromosomes, hormones, or anatomy that do not all meet medical definitions of “female.”<sup>34</sup> A tautological

26. Fact Sheet: Intersex, United Nations Free & Equal (May 2017), [https://unfe.org/system/unfe-65-Intersex\\_Factsheet\\_ENGLISH.pdf](https://unfe.org/system/unfe-65-Intersex_Factsheet_ENGLISH.pdf) [<https://perma.cc/L8YR-97MS>] (“[T]he upper estimate is similar to the number of red haired people.”). Some of these variations may not be visible at birth, while others become visible at puberty, and others are chromosomal variations that never become visible. *Id.*

27. Intersex Definitions, InterACT, <https://interactadvocates.org/intersex-definitions/> [[perma.cc/G5VK-MPXJ](https://perma.cc/G5VK-MPXJ)] (last visited Sept. 7, 2019); see also Katrina Karkazis, Rebecca Jordan-Young, Georgiann Davis & Silvia Campores, Out of Bounds? A Critique of the New Policies on Hyperandrogenism in Elite Female Athletes, *Am. J. Bioethics*, July 2012, at 3, 5–6 (“Sex is commonly thought to be straightforward, consisting of two clear categories of male and female. Yet there are at least six markers of sex—including chromosomes, gonads, hormones, secondary sex characteristics, external genitalia, and internal genitalia—and none of these are binary.”).

28. Sandy E. James, Jody L. Herman, Susan Rankin, Mara Keisling, Lisa Mottet & Ma’ayan Anafi, Nat’l Ctr. for Transgender Equal., *The Report of the 2015 U.S. Transgender Survey* 18, 45 (2016), <https://www.transequality.org/sites/default/files/docs/USTS-Full-Report-FINAL.PDF> [<https://perma.cc/7UQQ-GVLD>].

29. GLAAD, *supra* note 22, at 11.

30. See Clarke, *supra* note 22, at 905–10.

31. *Id.*

32. See *id.* at 899 & n.21 (estimating half a million people, roughly the population of Miami, identify as nonbinary, but noting that the figure may not reflect the growing number of people who do not identify exclusively as men or women).

33. Kim Parker, Nikki Graf & Ruth Igielnik, *Generation Z Looks a Lot Like Millennials on Key Social and Political Issues*, Pew Research Ctr. (Jan. 17, 2019), <http://www.pewsocialtrends.org/2019/01/17/generation-z-looks-a-lot-like-millennials-on-key-social-and-political-issues/> [<https://perma.cc/CZZ8-YA5D>].

34. See, e.g., Samantha A. Schoenhaus, Scott E. Lentz, Peter Saber, Malcom G. Munro & Seth Kivnick, Pregnancy in a Hermaphrodite with a Male-Predominant Mosaic Karyotype, 90 *Fertility & Sterility* 2016.e7, 2016.e7–e9 (2008) (on file with the *Columbia Law Review*) (discussing cases of pregnancy in individuals who had various traits, such as Y chromosomes or testicular tissue, that the physicians categorized as “male-predominant mosaic karyotype”).

argument could be made that all people who are pregnant are “female,” because the definition of “female” is having those sex characteristics that enable a person to become pregnant. But this is not the only medical definition of “female.”<sup>35</sup> Unsexing pregnancy might mean recognizing that some people who are pregnant may have intersex variations.<sup>36</sup> It might mean adopting “intersex-affirming” health care practices that protect patients with intersex variations from the unnecessary examinations, violations of privacy, discrimination, and harassment they sometimes experience when seeking reproductive health care.<sup>37</sup>

Alternatively, unsexing pregnancy could work by delinking gender identity from pregnancy, recognizing that not just women, but also transgender men and nonbinary people, become pregnant. While some transgender men and nonbinary people may seek surgical treatments that leave them incapable of pregnancy, not all do. In the 2015 U.S. Transgender Survey, only fourteen percent of transgender men and two percent of nonbinary individuals reported having had a hysterectomy.<sup>38</sup> Media coverage characterizes the “pregnant man” as a rare phenomenon, but a number of indicators suggest pregnant transgender men are not so unusual.<sup>39</sup> It is possible that fewer transgender men became pregnant in the past because many jurisdictions required surgeries,

---

35. See, e.g., Karkazis et al., *supra* note 27, at 5–6 (“There are many biological markers of sex but none is decisive: that is, none is actually present in *all* people labeled male or female.”); Schoenhaus et al., *supra* note 34, at 2016.e9 tbl.1 (discussing a case of “[p]regnancy in a woman with a Y chromosome”).

36. See, e.g., Hida Vilorio, *Born Both: An Intersex Life* 10 (2017) (discussing the author’s experience with pregnancy).

37. InterACT & Lambda Legal, *Providing Ethical and Compassionate Health Care to Intersex Patients* 8–9, 22–24 (2018), [https://www.lambdalegal.org/sites/default/files/publications/downloads/resource\\_20180731\\_hospital-policies-intersex.pdf](https://www.lambdalegal.org/sites/default/files/publications/downloads/resource_20180731_hospital-policies-intersex.pdf) [<https://perma.cc/U4AP-69VC>].

38. James et al., *supra* note 28, at 101 figs.7.12 & 7.13. The survey also reports that twenty-nine percent of transgender men and sixty-eight percent of nonbinary people did not wish to have the procedure or were unsure if they ever wished to. *Id.* There are a number of reasons transgender people do not pursue surgery, including that some are unable to afford it or to take the requisite time off from work, school, or caregiving obligations; some desire to maintain the capacity to reproduce; and for some, surgery is not necessary to treat gender dysphoria or affirm their gender identity. See, e.g., Lisa Mottet, *Modernizing State Vital Statistics Statutes and Policies to Ensure Accurate Gender Markers on Birth Certificates: A Good Government Approach to Recognizing the Lives of Transgender People*, 19 *Mich. J. Gender & L.* 373, 407–09 (2013).

39. See Alexis D. Light, Juno Obedin-Maliver, Jae M. Sevelius & Jennifer L. Kerns, *Transgender Men Who Experienced Pregnancy After Female-to-Male Gender Transitioning*, 124 *Obstetrics & Gynecology* 1120, 1120 (2014) (reporting on the results of a study conducted in 2013 surveying forty-one transgender men who had experienced pregnancy); Juno Obedin-Maliver & Harvey J. Makadon, *Transgender Men and Pregnancy*, 9 *Obstetric Med.* 4, 4 (2016) (“[N]ews reports, documentaries, social media list-serves and video-sharing sites, guidebooks, fact sheets, and . . . lists of health service provider[s] with experience supporting transgender individuals in pregnancy and birth, suggest numbers of transgender individuals . . . seeking family planning, fertility, and pregnancy services could certainly be quite large.”).

which often resulted in sterilization, as a condition of legal recognition.<sup>40</sup> States are now moving away from surgical requirements as prerequisites to changing the gender marker on identification documents.<sup>41</sup> In addition to transgender men, nonbinary individuals are increasingly reporting on their experiences being pregnant.<sup>42</sup> Pregnancies among people who are not women may increase as more people transition at younger ages and transgender and nonbinary identities become more socially understood.<sup>43</sup>

Policymakers, legal reformers, health care providers, and employers who seek to be more inclusive of transgender, nonbinary, and intersex identities and variations ought to take seriously the idea of formally disentangling binary concepts of “sex” and “gender identity” from pregnancy. As ACLU lawyer Chase Strangio has argued, the simplistic assumption that cisgender<sup>44</sup> women are the only people who can become pregnant is “literally killing trans people.”<sup>45</sup> For example, transgender men may not have access to proper obstetric or gynecological care due to discrimination by health care providers<sup>46</sup> and bureaucratic barriers, such as insurance companies that deny coverage for gynecological care if a

---

40. See, e.g., Mottet, *supra* note 38, at 406, 424 & n.206.

41. For information on the laws of every state, see ID Documents Center, Nat’l Ctr. for Transgender Equal., <https://transequality.org/documents> [<https://perma.cc/BJQ3-4CRV>] (last updated July 2019).

42. See, e.g., Jesi Taylor Cruz, *Finding Community During Pregnancy as a Black Non-Binary Femme*, *The Establishment* (Feb. 4, 2019), <https://theestablishment.co/finding-community-during-pregnancy-as-a-black-non-binary-femme/> [<https://perma.cc/F83T-R38N>]; Rory Mickelson, *I’m Pregnant, but I’m Not a Woman*, *Advocate* (Nov. 13, 2018), <https://www.advocate.com/commentary/2018/11/13/im-pregnant-im-not-woman> [<https://perma.cc/NR7R-B4TL>]; s.e. smith, *For Nonbinary Parents, Giving Birth Can Be Especially Fraught*, *Rewire.News* (Jan. 25, 2018), <https://rewire.news/article/2018/01/25/nonbinary-parents-giving-birth-can-especially-fraught/> [<https://perma.cc/4FC5-UK4L>]; cf. *A Womb of Their Own* (Serious Play Films 2016) (documenting the experiences of six masculine-identified pregnant people).

43. Cf. Alexis Hoffkling, Juno Obedin-Maliver & Jae Sevelius, *From Erasure to Opportunity: A Qualitative Study of the Experiences of Transgender Men Around Pregnancy and Recommendations for Providers*, *BMC Pregnancy & Childbirth*, Nov. 2017, at 7, 18 (speculating that the perception of an increasing number of pregnant transgender men “likely represents a true shift, perhaps driven by cultural changes making non-binary transition more legible, increasing legibility of being pregnant and male, and possibly by increasing numbers of people transitioning younger in life”).

44. “Cisgender” is a term that means a person whose gender identity matches the one commonly associated with the sex assigned to them at birth.

45. Chase Strangio, *Can Reproductive Trans Bodies Exist?*, 19 *CUNY L. Rev.* 223, 241 (2016).

46. See, e.g., *id.* at 242 (discussing data that “confirm[] that transgender people experience extreme discrimination in health care settings causing them to delay or avoid receiving care”); Cécile A. Unger, *Care of the Transgender Patient: A Survey of Gynecologists’ Current Knowledge and Practice*, 24 *J. Women’s Health* 114, 116 (2015) (“[I]ssues of gender identity remain either misunderstood or not well understood by physicians.”).



patient's sex is coded as "male" in their records.<sup>47</sup> Failure to receive gynecological care such as routine Pap smears leaves transgender men and nonbinary people at higher risk of death from conditions such as cervical cancer.<sup>48</sup> In one case, a transgender man whose boyfriend brought him to an emergency room due to abdominal pain was triaged as "nonurgent" because a nurse failed to take the possibility of pregnancy seriously, despite being informed the patient was a transgender man who had received a positive result on a home pregnancy test.<sup>49</sup> After several hours of delay, a physician realized the man's condition was urgent and he needed an "emergency caesarian delivery."<sup>50</sup> The baby was stillborn.<sup>51</sup> Even though the patient "had not planned or expected the pregnancy, he was heartbroken at the loss of his baby and had a major depressive episode."<sup>52</sup>

Pregnancy can present unique challenges for transgender people because of "anti-transgender stigma, strongly gendered norms around pregnancy, institutional structures that do not recognize the possibility of a transgender man becoming pregnant, and lack of research and available information for providers or patients."<sup>53</sup> Transgender men have a range of experiences during pregnancy.<sup>54</sup> For some, pregnancy can trigger gender dysphoria<sup>55</sup> as they are forced to confront social attitudes and expectations about pregnancy as a woman's experience.<sup>56</sup> One man said about his pregnancy: "I looked at it as something to endure to have

---

47. Hoffkling et al., *supra* note 43, at 13 (finding that men who need gynecological or obstetric care "often faced challenges with booking or billing for those services, because of how computer and filing systems were managed"); Strangio, *supra* note 45, at 242.

48. In the U.S. Transgender Survey, only twenty-seven percent of transgender respondents who were assigned female at birth reported having Pap smears in the past year, compared with forty-three percent of the general population. James et al., *supra* note 28, at 102. In one survey of generalist OBGYNs, approximately eleven percent of respondents stated they refused to perform Pap smears on transgender men. Unger, *supra* note 46, at 114.

49. Daphna Stroumsa, Elizabeth F.S. Roberts, Hadrian Kinnear & Lisa Harris, *The Power and Limits of Classification—A 32-Year-Old Man with Abdominal Pain*, 380 *New Eng. J. Med.* 1885, 1885, 1887 (2019) ("Having no clear classificatory framework for making sense of a patient like Sam, the nurse deployed implicit assumptions about who can be pregnant, attributed his high blood pressure to untreated chronic hypertension, and classified his case as nonurgent.").

50. *Id.* at 1886.

51. *Id.* The researchers concluded that the patient would have received an earlier evaluation if he had been a cisgender woman, and "[e]arlier evaluation might have resulted in detection of the cord prolapse in time to prevent fetal death." *Id.* at 1887.

52. *Id.* at 1888.

53. Hoffkling et al., *supra* note 43, at 8.

54. *Id.*

55. "Gender dysphoria" is a form of "clinically significant distress or impairment in social, occupational, or other important areas of functioning" experienced by some transgender people. Am. Psychiatric Ass'n, *Diagnostic and Statistical Manual of Mental Disorders* 451–53 (5th ed. 2013).

56. See Smith, *supra* note 42.

a child.”<sup>57</sup> One qualitative study concluded that “[l]oneliness was the overarching theme.”<sup>58</sup> In another study, a pregnant man said he felt isolated because of the sense that he “was the only one.”<sup>59</sup> Another went so far as to avoid leaving his home because he was “fearful that out on the street, the sight of a pregnant man would invite trouble.”<sup>60</sup> Some research suggests transgender men face a high risk of postpartum depression.<sup>61</sup> Transgender men may also face challenges in deciding how to sequence their “surgical, medical, and social transitions relative to pregnancy.”<sup>62</sup>

Health care and pregnancy services providers often lack competency in providing care for pregnant people who are not women.<sup>63</sup> Pregnant transgender patients may face exclusion; for example, one transgender man reported that he was denied lactation coaching.<sup>64</sup> They may be harassed; one man reported that health care providers told him that “Child Protection Services was alerted to the fact a ‘tranny’ had a baby.”<sup>65</sup> Like some patients with intersex variations,<sup>66</sup> transgender patients report receiv-

57. Light et al., *supra* note 39, at 1123 (internal quotation marks omitted).

58. Simon Adriane Ellis, Danuta M. Wojnar & Maria Pettinato, Conception, Pregnancy, and Birth Experiences of Male and Gender Variant Gestational Parents: It’s How We Could Have a Family, 60 *J. Midwifery & Women’s Health* 62, 63 (2014).

59. Light et al., *supra* note 39, at 1123 (internal quotation marks omitted).

60. Denise Grady, A Family in Transition, *N.Y. Times* (June 16, 2018), <https://www.nytimes.com/2018/06/16/health/transgender-baby.html> (on file with the *Columbia Law Review*).

61. See Light et al., *supra* note 39, at 1126.

62. Hoffkling et al., *supra* note 43, at 15. Some report the need for “[h]onest advice on fertility options” and some report that they “felt misled” with respect to the “effects of testosterone—wrongly believing it is an effective contraceptive, or necessarily causes infertility.” Sally Hines, Ruth Pearce, Carla Pfeffer, Damien Riggs, Elisabetta Ruspini & Francis Ray White, *Trans Pregnancy: Implications for Policy and Practice*, Univ. of Leeds, <https://transpregnancy.leeds.ac.uk/wp-content/uploads/sites/70/2018/11/Trans-Pregnancy-poster.jpg> [<https://perma.cc/8FL7-DV2V>] (last visited July 30, 2019) (presenting initial findings of the Trans Pregnancy research project, based on semistructured qualitative interviews of fifty trans men and nonbinary people who were assigned female at birth); see also Julie Compton, *Trans Dads Tell Doctors: ‘You Can Be a Man and Have a Baby,’* *NBC News* (May 19, 2019), <https://www.nbcnews.com/feature/nbc-out/trans-dads-tell-doctors-you-can-be-man-have-baby-n1006906> [<https://perma.cc/SM2W-JY7N>] (last updated May 20, 2019) (reporting on examples of “misinformation and discouragement transgender men say they face from the medical establishment when they decide to get pregnant—a problem advocates and experts blame on a lack of training and research around transgender health care, as well as doctors’ biases”).

63. Hoffkling et al., *supra* note 43, at 12–13.

64. *Id.* at 12.

65. Light et al., *supra* note 39, at 1124 (internal quotation marks omitted) (quoting a survey participant); see also Hoffkling et al., *supra* note 43, at 17 (“Participants were misgendered, laughed at, and told they could not make gooder parents.”).

66. See InterACT & Lambda Legal, *supra* note 37, at 8–9, 22–24 (“Historically common, the unnecessary examination and exhibition of intersex people’s bodies as medical ‘curiosities’ has been described as deeply shaming and traumatizing by intersex individuals for decades.”).

ing “seemingly unnecessary physical exams—especially pelvic exams.”<sup>67</sup> Or they may be ignored. One transgender man reported that “many OB/GYN spaces ‘feel like they only cater to women giving birth . . . and that made me feel alienated.’”<sup>68</sup> A woman who attended birthing classes with her pregnant nonbinary spouse described her discomfort with the “constant use of ‘mamas,’ ‘moms,’ and ‘ladies’ to refer to the pregnant people in the room.”<sup>69</sup> She explained: “My partner’s the one giving birth, but I’m the one who will go by ‘Mom’ when our kid is born.”<sup>70</sup>

As a result of mistreatment, some transgender men and nonbinary people avoid obstetric care or fail to disclose relevant information to medical professionals.<sup>71</sup> Those who can afford to may seek out midwives or doulas who market themselves as “trans-friendly.”<sup>72</sup> One nonbinary person, Zoë Williams, “chose a home birth, in part to have access to care providers they could educate about their needs.”<sup>73</sup> While pregnant individuals have the right to make medically informed decisions about where to give birth, there is some evidence that home births are associated with increased risks of infant deaths and seizures.<sup>74</sup> Discrimination should be eliminated so that it does not dictate this decision. Other transgender men and nonbinary people choose hospital births and keep their gender identities a secret from providers. For example, Peregrin Winkle, one nonbinary person, “said they ‘gritted [their] teeth and dealt with the misgendering silently’” during a hospital birth.<sup>75</sup> “Race, class, and geography” can further complicate whether nonbinary people can find gender-affirming obstetric care.<sup>76</sup>

As Fontana and Schoenbaum argue, laws, rules, and policies can be revised to change references to “wom[e]n affected by pregnancy” or

67. Hoffkling et al., *supra* note 43, at 12.

68. *Id.* at 13.

69. Tori Truscheit, All the Things I Worry About as My Nonbinary Partner Prepares to Give Birth, *The Cut* (Dec. 12, 2017), <https://www.thecut.com/2017/12/giving-birth-outside-the-gender-binary.html> [<https://perma.cc/8L83-4DF3>].

70. *Id.*

71. Hoffkling et al., *supra* note 43, at 8 (“Within healthcare settings, stigma leads to inadequate information on the part of providers, as well as individual mistreatment of patients. These, in turn, can lead transgender men to avoid seeking care or avoid disclosing medically relevant information.” (footnotes omitted)); smith, *supra* note 42 (discussing how pregnant nonbinary individuals may sometimes avoid hospitals).

72. See smith, *supra* note 42.

73. *Id.*; see also Light et al., *supra* note 39, at 1126 (reporting that transgender men surveyed about pregnancy “used nonphysician providers and nonhospital birth locations more frequently than the general public”).

74. See The Am. Coll. of Obstetricians & Gynecologists Comm. on Obstetric Practice, Committee Opinion Number 697, at 1 (2017), <https://www.acog.org/-/media/Committee-Opinions/Committee-on-Obstetric-Practice/co697.pdf> [<https://perma.cc/WBN9-PNTY>] (noting that planned home birth is associated with a “twofold increased risk of perinatal death . . . and a threefold increased risk of neonatal seizures”).

75. smith, *supra* note 42.

76. *Id.*

“expectant mother[s]” to sex-neutral terms for pregnant individuals.<sup>77</sup> Semantic changes would have expressive value in making clear that all pregnant people deserve inclusion. These changes would avoid unnecessary arguments about, for example, whether a pregnant father or non-binary parent qualifies for benefits reserved for “pregnant mothers.” Moreover, extending benefits to all pregnant individuals does not implicate the autonomy of the pregnant person in the way that extending the concept of pregnancy to a partner who is not gestating a child might.<sup>78</sup>

There are potential downsides to this form of gender neutrality. One potential downside is that it might require some unconventional grammar. Policies that refer to “she” or “her” might need creative revisions. But such grammatical challenges are not insurmountable. The proposed Pregnant Workers Fairness Act avoids gendered references by referring to “workers,” “employees,” or “applicants,” rather than mothers.<sup>79</sup> More importantly, rules of grammar should not trump considerations of inclusion.<sup>80</sup>

A second potential downside is that this move might throw a wrench in the formalistic legal argument that protection against pregnancy discrimination is required to ensure equality for the class of “women,” because “only women can become pregnant.”<sup>81</sup> But as Fontana and Schoenbaum argue, the Supreme Court has rejected the formalistic equation of women with pregnancy, while leaving the door open to the argument that rules that classify based on pregnancy might be constitutionally suspect if they are pretexts for sex discrimination.<sup>82</sup> Moreover, as I have argued elsewhere, the formalistic legal argument is not doing the persuasive work in debates over pregnancy discrimination.<sup>83</sup> Additionally, the formalistic argument has risks for feminists: “If the law defines women as a class by their capacity to become pregnant,

---

77. Fontana & Schoenbaum, *supra* note 1, at 360 (internal quotation marks omitted) (first quoting 42 U.S.C. § 2000e(k) (2012); then quoting 29 C.F.R. § 825.120(a)(4) (2018)); see also Clarke, *supra* note 22, at 954–55 (advocating that rules related to pregnancy be decoupled from gender identity).

78. See *supra* note 14 (discussing this objection to Fontana and Schoenbaum’s proposal).

79. Pregnant Workers Fairness Act, H.R. 2417, 115th Cong. §§ 2, 7 (2017).

80. See, e.g., Robin Dembroff & Daniel Wodak, *The Problem with Pronouns*, *Philosopher: Featured Philosophers* (June 23, 2017), <https://politicalphilosopher.net/2017/06/23/featured-philosophers-robin-dembroff-daniel-wodak/> [<https://perma.cc/4PN6-NEUU>] (“[A] moral *should* clearly defeats any grammatical *should*.”).

81. See Strangio, *supra* note 45, at 229–31 (quoting *Geduldig v. Aiello*, 417 U.S. 484, 496 n.20 (1974) in its discussion of this argument).

82. Fontana & Schoenbaum, *supra* note 1, at 314 & n.14 (discussing *Gen. Elec. Co. v. Gilbert*, 429 U.S. 125 (1976) and *Geduldig*, 417 U.S. 484).

83. Clarke, *supra* note 22, at 955–56. Formalistic arguments are less persuasive than “more substantive arguments linking pregnancy discrimination to sex: for example, that in practice, discrimination based on pregnancy drives women’s inequality, that it is based on the assumption that all workers meet a traditionally male norm, or that it is a thinly veiled attempt to exclude women from the workplace.” *Id.* (footnotes omitted).

then this capacity appears to be a legitimate basis for discrimination against women.”<sup>84</sup>

Making pregnancy benefits gender neutral is a starting point for transgender and nonbinary patients and those with intersex variations. But it will not “unsex” pregnancy for these individuals in a meaningful way. Broader strategies for change are required to ensure that all pregnant people receive appropriate medical care and experience pregnancy without harassment or discrimination.<sup>85</sup> Courts should interpret existing prohibitions on sex discrimination in health care to forbid discrimination against transgender patients,<sup>86</sup> and legislatures should act to correct those courts that fail to do so.<sup>87</sup> Sterilizing surgeries should never be a precondition for changing the sex or gender designations on official identity documents and records.<sup>88</sup> Health care providers should ensure that medical records include information related to sex assigned at birth and gender identity, allow changes to information on gender identity without friction, and maintain patient privacy.<sup>89</sup> Training, research, education, and institutional commitments are required to eliminate discrimination, harassment, and neglect—ensuring that all pregnant people

---

84. *Id.* at 956 (citing Cary Franklin, *Biological Warfare: Constitutional Conflict over “Inherent Differences” Between the Sexes*, 2017 *Sup. Ct. Rev.* 169, 180 (2017)).

85. See generally InterACT & Lambda Legal, *supra* note 37 (making recommendations with respect to care for patients with intersex variations); Nat’l LGBT Health Educ. Ctr., *Providing Affirmative Care for Patients with Non-Binary Gender Identities* 9, 12–13 (2017), <https://www.lgbthealtheducation.org/wp-content/uploads/2017/02/Providing-Affirmative-Care-for-People-with-Non-Binary-Gender-Identities.pdf> [<https://perma.cc/4P3K-V2FQ>] (explaining why “cultural competency around non-binary gender identities” is essential to improve health outcomes and sharing best practices for providing care to non-binary people).

86. See Clarke, *supra* note 22, at 987–90 (discussing controversies over whether discrimination against transgender patients violates the nondiscrimination provisions of the Affordable Care Act). At the time of this writing, the Trump Administration has proposed a rollback of regulations interpreting the ACA to require nondiscrimination on the basis of gender identity. See *Nondiscrimination in Health and Health Education Programs or Activities*, 84 *Fed. Reg.* 27,846, 27,847, 27,857 (proposed June 14, 2019) (to be codified at 45 C.F.R. pt. 92) (proposing to “repeal the definition of ‘on the basis of sex’” that prevents discrimination based on gender identity). A case regarding whether discrimination against a transgender employee is a type of “sex” discrimination prohibited by federal law is also pending before the Supreme Court. *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560 (6th Cir. 2018), cert. granted, 139 S. Ct. 1599 (2019).

87. See, e.g., Cal. Health & Safety Code § 1365.5(e) (2019) (clarifying that prohibited health care discrimination on the basis of “sex” includes gender identity and gender expression). The Equality Act, a bill passed by the House in 2019, would forbid discrimination on the basis of sex and gender identity in health care nationwide. *Equality Act*, H.R. 5, 116th Cong. (2019).

88. See Mottet, *supra* note 38, at 406 (quoting Press Release, World Prof’l Ass’n for Transgender Health, *Identity Recognition Statement* (June 16, 2010) (on file with the *Columbia Law Review*)).

89. See Nat’l LGBT Health Educ. Ctr., *supra* note 85, at 7; Obedin-Maliver & Makadon, *supra* note 39, at 6–7; Stroumsa et al., *supra* note 49, at 1887–88.

receive care that affirms their gender identities and is grounded in “compassion and respect.”<sup>90</sup>

## II. PREGNANT COUPLES?

Fontana and Schoenbaum’s article focuses on unsexing pregnancy not for individuals but for couples—two expectant parents, generally a mother and a father—in which the mother does a disproportionate share of the work of preparing for the baby’s arrival. The examples of unfair treatment of pregnant and nonpregnant parents in *Unsexing Pregnancy* are of two types: medical conditions and family responsibilities. By “medical conditions,” I mean the law’s failure to recognize the health impacts of pregnancy on the nonpregnant parent. By “family responsibilities,” I mean the law’s failure to recognize that much of the carework that goes into planning for the arrival of a child can be done by the nonpregnant parent. The extension of workplace accommodation law in the medical and family contexts raises different questions. With respect to medical conditions, the question is whether the unfairness lies in excluding fathers, or whether it lies in excluding anyone suffering from an incapacitating health condition. With respect to family responsibilities, the question is how expanding the law’s meager accommodations for pregnant mothers to expectant fathers might have any significant effect on the distribution of carework between parents.

### A. *Medical Conditions*

*Unsexing Pregnancy* describes a number of ways that pregnancy can affect the health of the nonpregnant parent, such as couvade syndrome, in which “pregnancy symptoms such as nausea, weight gain, mood swings and bloating occur in men,” and antenatal depression, which may occur in ten percent of expectant fathers.<sup>91</sup> Under the Family and Medical Leave Act (FMLA), a pregnant person can take leave for “[a]ny period of incapacity due to pregnancy,” while a nonpregnant partner must have a “serious” health condition.<sup>92</sup> Thus, a prospective father’s antenatal depression would have to meet a higher bar than a mother’s for the father

---

90. Light et al., *supra* note 39, at 1124 (noting that many transgender men surveyed about pregnancy “called for better treatment from the health care system through acknowledging the unique identities of pregnant transgender men and grounding health care provider-patient interactions in compassion and respect”); see also Hoffkling et al., *supra* note 43, at 8; Obedin-Maliver & Makadon, *supra* note 39, at 6–7.

91. Fontana & Schoenbaum, *supra* note 1, at 337 n.170 (quoting Katherine E. Wynne-Edwards, *Why Do Some Men Experience Pregnancy Symptoms Such as Vomiting and Nausea when Their Wives Are Pregnant?*, *Sci. Am.* (June 28, 2004), <https://www.scientificamerican.com/article/why-do-some-men-experienc> [<https://perma.cc/C7PX-FAAY>]).

92. *Id.* at 337 & n.169 (quoting 29 C.F.R. § 825.102 (2018)). Additionally, some state laws require reasonable accommodations for conditions related to pregnancy, but not for nonpregnant parents. *Id.* at 339.

to qualify for leave. Fontana and Schoenbaum advocate “leveling up” to extend benefits to both parents, rather than “leveling down” to end benefits for everyone.<sup>93</sup> Accordingly, any expectant parent incapacitated by antenatal depression should be permitted leave.

This example raises questions, however, about why those health conditions that affect expectant parents should be treated with exceptional solicitude by employment law. There are many types of incapacitating depression that are not antenatal. Consider a worker who suffers from incapacitating depression because they are caring for an older child with a serious illness. What message does the law send if it reserves the most favorable treatment only for those health conditions related to unborn children? Or what if the employee with depression is caring for an elderly parent with dementia?<sup>94</sup> Why should an expectant couple benefit from a more lenient standard? The disparate impact of childcare on women cannot be the answer, as the majority of unpaid eldercare providers are women.<sup>95</sup> To go further, why does the workplace fail to offer sick leaves or accommodations for any “incapacity” that results from mental illness, whether connected to caregiving or not? What principle justifies drawing a line at pregnancy?<sup>96</sup> The purpose of this Response is not to offer an argument about where the line should be drawn, but rather, to point out that there are important questions about why accommodations for medical conditions should be limited to expectant parents.

#### B. *Family Responsibilities*

Fontana and Schoenbaum’s main focus is not the medical conditions that accompany pregnancy; rather, it’s the family responsibilities. They are concerned that the carework associated with pregnancy is only accommodated or remunerated if taken on by the pregnant parent. One value

---

93. See *supra* note 11.

94. See, e.g., Martin Pinguat & Silvia Sørensen, Differences Between Caregivers and Noncaregivers in Psychological Health and Physical Health: A Meta-Analysis, 18 *Psychol. & Aging* 250, 250 (2003) (discussing studies showing that caregivers, particular those caring for a person with dementia, report more negative mental and physical health).

95. See, e.g., AARP & Nat’l All. for Caregiving, *Caregiving in the U.S.* 17 (2015) (surveying 1,248 unpaid caregivers, and finding that sixty-six percent of caregivers for adults over fifty were women); Liz O’Donnell, *The Crisis Facing America’s Working Daughters*, *Atlantic* (Feb. 9, 2016), <https://www.theatlantic.com/business/archive/2016/02/working-daughters-eldercare/459249/> [<https://perma.cc/Y2JR-884U>].

96. The principle might be related to what Katherine Franke has called “repronormativity”: the view that childbearing should be “incentivized and subsidized” rather than other socially valuable forms of caregiving or cultural production. Katherine M. Franke, *Theorizing Yes: An Essay on Feminism, Law, and Desire*, 101 *Colum. L. Rev.* 181, 184 (2001). There are reasons to be skeptical of repronormative policy justifications. For example, the argument that the United States must encourage births to replace its population overlooks the fact that this end can be achieved through immigration policy. Mary Anne Case, *How High the Apple Pie? A Few Troubling Questions About Where, Why, and How the Burden of Care for Children Should Be Shifted*, 76 *Chi.-Kent L. Rev.* 1753, 1773–74 (2001).

of the article is that it offers a lengthy catalogue of all the types of carework that go into pregnancy, especially for first-time parents, from purchasing diapers, to learning how to care for a newborn, to finding a pediatrician.<sup>97</sup> This is a useful project in itself, because these forms of work—most often done by women—are too infrequently accounted for. But there is a striking mismatch between the length of the to-do list for expectant parents and the set of legal rules that might support them. The default position of U.S. law is that the costs of all carework are properly borne by the private family, rather than by employers or the public.<sup>98</sup> It is therefore unlikely that expanding the few exceptional legal rules that support pregnancy to fathers will have significant effects on parental behavior.

Pregnant women on the lower rungs of the socioeconomic ladder are more likely to experience adverse employment consequences as a result of pregnancy.<sup>99</sup> It is for these workers that existing legal protections for pregnancy are the least useful. *Unsexing Pregnancy* points out that the FMLA provides only mothers with leave for prenatal care, even though that category of care could include work fathers might do too, such as “attending appointments” and “obtaining essential knowledge about how to care for a newborn.”<sup>100</sup> But the FMLA provides only a total of twelve weeks of leave per year to any one employee, for any covered purpose, whether prenatal or postnatal, and whether related to the birth of a child or not.<sup>101</sup> And that leave is unpaid, meaning it can only be taken by a worker who can afford to lose the income.<sup>102</sup> A couple may calculate they can only afford to lose one income, not two.<sup>103</sup> Even if the pregnant person’s presence is not required for prenatal care activities, a couple

---

97. Fontana & Schoenbaum, *supra* note 1, at 327–30 (describing these forms of carework as investments in physical, human, and social capital).

98. See generally Martha Albertson Fineman, *The Neutered Mother, The Sexual Family and Other Twentieth Century Tragedies* 1 (1995) (critiquing the privatization of dependency).

99. Jennifer Bennett Shinall, *The Pregnancy Penalty*, 103 *Minn. L. Rev.* 749, 817 (2018) (“Regardless of how disadvantaged status is defined—through educational level or household income level—pregnant women in the labor market who fall on the low end of the distribution face employment gaps that are many times higher than pregnant women with advantaged socioeconomic status.”).

100. Fontana & Schoenbaum, *supra* note 1, at 336 (discussing 29 C.F.R. § 825.120(a)(4) (2018)).

101. 29 U.S.C. § 2612(a)(1) (2012). This is just one of the many limitations of the FMLA. Additionally, the FMLA does not apply to employers with fewer than fifty employees. *Id.* § 2611(4)(A). It does not apply unless the employee has been with the employer for at least one year and has worked at least 1250 hours in the year prior to the leave. *Id.* § 2611(2)(A). By one estimate, forty percent of the workforce is outside the FMLA’s coverage. Joan C. Williams, *Reshaping the Work-Family Debate: Why Men and Class Matter* 8 (2010).

102. 29 U.S.C. § 2612(c). Some states and localities require paid leave, but these laws “remain rare.” Shinall, *supra* note 99, at 809–10.

103. See, e.g., Ann O’Leary, *How Family Leave Laws Left Out Low-Income Workers*, 28 *Berkeley J. Emp. & Lab. L.* 1, 45–46 (2007).



may calculate that the woman should take the leave because male partners tend to earn more.<sup>104</sup> And even in those places where paid leave is available, many workers do not take it because of fear of retaliation from their employers.<sup>105</sup>

Expanding the law to fathers in elite jobs is unlikely to have much effect either. Elite jobs often give workers flexibility in scheduling as a perk, so these workers do not need to invoke the FMLA if they wish to take a break to engage in prenatal carework.<sup>106</sup> Another example from *Unsexing Pregnancy*—allowable expenditures under Flexible Spending Accounts for childbirth, breastfeeding, or strength-training courses for pregnant persons but not for their partners<sup>107</sup>—is only likely to assist individuals in high tax brackets who likely could have afforded those expenses with their post-tax dollars anyway.<sup>108</sup>

Moreover, empirical research gives reasons to be skeptical about whether expanding the meager protections offered to pregnant mothers will motivate prospective fathers to engage in more prebirth carework. Even when gender-neutral parental leaves are available, men do not take full advantage of them, for reasons that include social stigma and financial pressures.<sup>109</sup> Extending job-protected FMLA leave to expectant fathers attending prenatal doctors' appointments will not break down the social stigmas or practical calculations that cause fathers to engage in less carework.<sup>110</sup> Experience with paid leave programs internationally and in

104. See, e.g., Joanna L. Grossman, *Job Security Without Equality: The Family and Medical Leave Act of 1993*, 15 Wash. U. J.L. & Pol'y 17, 38 (2004) (“[T]o the extent available parental leave is unpaid, there exists a clear incentive for a couple to prefer maternal leave over paternal leave, given the likelihood that a husband out-earns his wife.”).

105. See, e.g., Eileen Appelbaum & Ruth Milkman, *Leaves that Pay: Employer and Worker Experiences with Paid Family Leave in California* 28 tbl.8 (2011), <http://cepr.net/documents/publications/paid-family-leave-1-2011.pdf> [<https://perma.cc/PGG8-MC9W>]; Catherine Albiston & Lindsey Trimble O'Connor, *Just Leave*, 39 Harv. J.L. & Gender 1, 39–40 (2016) (surveying workers about their reasons for not taking advantage of California's paid family leave).

106. Albiston & O'Connor, *supra* note 105, at 62.

107. Fontana & Schoenbaum, *supra* note 1, at 341 & n.194.

108. Leigh Osofsky, *Who's Naughty and Who's Nice? Frictions, Screening, and Tax Law Design*, 61 Buff. L. Rev. 1057, 1109 (2013) (“Researchers have found that highly educated and high income taxpayers are the primary users of flexible spending accounts and that being in a higher marginal tax bracket is strongly associated with increased participation in flexible spending accounts.”).

109. See, e.g., Albiston & O'Connor, *supra* note 105, at 40–45; Shinall, *supra* note 99, at 826–27.

110. The FMLA allows a nonpregnant spouse to take leave only if that leave is “needed to care” for their pregnant spouse. 29 C.F.R. § 825.120(a)(5) (2019). Whether a father who was fired for attending a prenatal appointment might have a winning sex discrimination claim would depend on the circumstances. Compare Joan C. Williams & Stephanie Bornstein, *The Evolution of “FReD”: Family Responsibilities Discrimination and Developments in the Law of Stereotyping and Implicit Bias*, 59 Hastings L.J. 1311, 1320–21 (2008) (discussing sex discrimination cases in which men successfully prevail

U.S. states suggests that the way to reduce gender disparities with family leave law is to offer high rates of wage replacement and provide “use it or lose it” leave to each parent: “For example, if the mother alone takes family leave, the family might only get four weeks of paid leave, but that time would double if the father also takes leave.”<sup>111</sup>

*Unsexed Pregnancy* does not make the claim that equal protection challenges to existing pregnancy protections that exclude expectant fathers will cause significant shifts in behavior; it emphasizes instead the “powerful messages” that the law can send in promoting carework by fathers during pregnancy.<sup>112</sup> By this the authors mean the law could make the idea that fathers should participate in pregnancy less “off-the-wall.”<sup>113</sup> The idea of unsexed pregnancy for couples may have more promise as a public policy idea or social movement concept than as a litigation strategy. In terms of public policy, the ideas advanced in *Unsexed Pregnancy* might inform new legislation that provides more generous workplace protections for pregnancy.<sup>114</sup> In terms of social movements, the article might inform how prospective parents consider dividing up their work during pregnancy, and how progressive employers decide whether to accommodate them.

But to achieve these impacts, the idea might need some rebranding. For one thing, “unsexed” is an unlikely slogan for a social movement.<sup>115</sup> The term requires translation to make sense to a popular audience.<sup>116</sup>

---

based on arguments that their employers applied gender stereotypes in penalizing them for engaging in carework), with Fontana & Schoenbaum, *supra* note 1, at 340 (pointing out that an employer might argue it was not engaged in sex discrimination in treating expectant mothers and fathers differently because it was only required to accommodate expectant mothers under the FMLA).

111. Shinall, *supra* note 99, at 828.

112. Fontana & Schoenbaum, *supra* note 1, at 347.

113. See *id.* at 346.

114. For example, the proposed FAMILY Act, a federal law that would provide paid family and medical leave, borrows its definitions of “qualified caregiving” from the FMLA, rather than expanding those definitions in the way that the article would suggest. Family and Medical Insurance Leave Act, H.R. 1185, 116th Cong. § 3(6) (2019).

115. To the extent it is familiar at all, the term “unsex” is perhaps most well-known from Shakespeare, where it has a disturbing connotation: Lady MacBeth implored the spirits to “unsex” her so that she might commit heinous crimes contrary to her “maternal instinct.” Marjorie Garber, *Shakespeare After All* 713–14 (2005). Disparaging the maternal, Lady MacBeth taunts her husband as “too full of ‘the milk of human kindness’ to take the nearest way to the throne—murder.” *Id.* at 714.

Moreover, “sex” has the dual meaning of (1) pertaining to male–female and (2) pertaining to sexuality, and slippages between the two meanings are rampant. See Janet Halley, *Split Decisions: How and Why to Take a Break from Feminism* 24 (2006). But see Rosenblum, *supra* note 18, at 83–84 (using the term “unsex” deliberately despite the slippage between the two understandings).

116. A *Washington Post* column on Fontana and Schoenbaum’s article put the term “unsex” in scare quotes and spent its first paragraphs explaining what the authors meant by it. Christine Emba, *It’s Time to ‘Unsex’ Pregnancy*, *Wash. Post* (Apr. 3, 2019), <https://www.washingtonpost.com/opinions/its-time-to-unsex-pregnancy/2019/04/03/5e876188->

For another, the idea of the “pregnant couple” engenders biting resistance from those concerned that heterosexual, cisgender men are appropriating the experience of pregnancy from their partners or drawing false equivalences between their own experiences and pregnancy.<sup>117</sup> Many social conservatives have long cherished the idea of pregnancy as a special experience for women, and those who subscribe to traditional gender roles are unlikely to be enthusiastic about a project aimed at loosening them.<sup>118</sup> On the left, millennials are particularly critical of appropriation by dominant groups of the experiences and identities of subordinate group members.<sup>119</sup> Their concern is that reconceptualizing pregnancy as a two-person experience trivializes the impacts and risks of gestation and childbirth for the body of the person carrying the child and obscures the way that pregnancy has long been a justification for the oppression of women.<sup>120</sup> Fontana and Schoenbaum are careful not to falsely equate the experiences of nonpregnant partners with those of pregnant ones; their project is to expose the carework involved in pregnancy and distribute it more fairly. Rather than unbounding the concept of pregnancy, this idea may have more political potential if characterized as recognizing that nonpregnant prospective parents can also experience the joys and travails of expecting a child.

Thus, unsexing pregnancy for couples raises questions about whether pregnancy benefits should be conceptualized as related to health care needs or family responsibilities. If the FMLA should “level up” to cover incapacitating health conditions when they afflict either expectant parent, why not level up even more to cover incapacitating health condi-

---

564e-11e9-9136-f8e636f1f6df\_story.html?utm\_term=.4e13a690b318 [https://perma.cc/2E8V-GSDU].

117. Consider the following joke from a late-night talk show:

Hello, I’m Mila Kunis with a very special message for all you soon-to-be fathers: Stop saying, “We’re pregnant.” You’re not pregnant. Do you have to squeeze a watermelon sized person out of your lady hole? No. Are you crying alone in your car listening to a stupid Bette Midler song? No. When you wake up and throw up is it because you’re nurturing a human life? No. It’s because you had too many shots of tequila. Do you know how many shots of tequila we had? None. Because we can’t have shots of tequila. We can’t have anything! Because we’ve got your little love goblin growing inside of us.

Jimmy Kimmel Live, Mila Kunis Against Men Saying “We Are Pregnant,” YouTube (June 10, 2014), <https://www.youtube.com/watch?v=onDCvHtHsKY> (on file with the *Columbia Law Review*).

118. See, e.g., Emba, *supra* note 116 (“‘Unsexing Pregnancy’ is a phrase guaranteed to strike fear into the hearts of social conservatives everywhere. Yet—for now, at least—it doesn’t refer to robot wombs, a ban on gender reveal parties or Shulamith Firestone-esque radical feminist propositions.”).

119. See, e.g., Tracy Moore, Mila Kunis Is Right: Dudes, Stop Saying ‘We’re Pregnant,’ Jezebel (June 13, 2014), <https://jezebel.com/mila-kunis-is-right-dudes-stop-saying-were-pregnant-1590564625> [https://perma.cc/TNV3-9V5M].

120. See *id.*

tions for all parents, all caregivers, or all workers? With respect to the distribution of carework in the family, the question is how constitutional litigation extending the meager set of existing pregnancy benefits to nonpregnant partners could change the incentives that cause pregnant people to take on the lion's share of these responsibilities. It will take more than minor tweaks to the FMLA to unsex pregnancy for couples in a meaningful way.

### III. PREGNANT THREESOMES?

A third sense in which the law might unsex pregnancy is for groups of three: couples seeking a surrogate or adoption arrangement.<sup>121</sup> Fontana and Schoenbaum argue that laws that cover only “expectant mothers” have anomalous results with respect to various types of couples engaging a surrogate. These rules fail to cover “gay men who have engaged a surrogate,” since both men are expectant fathers, not mothers.<sup>122</sup> But the term “expectant mother” might protect the woman in a man–woman couple that has engaged a surrogate, even though she herself is not pregnant.<sup>123</sup> It might even cover both partners in a woman–woman couple, whether or not either one is pregnant.<sup>124</sup> Fontana and Schoenbaum argue that these results offend the principle of *Obergefell v. Hodges*:<sup>125</sup> that different- and same-sex parents should be treated equally.<sup>126</sup> The only possible policy rationale for such anomalous results would be the association of women with carework.<sup>127</sup> Moreover, if the term “expectant mother” means intended mother, it might *not* cover a surrogate or a pregnant person who plans to place the child for adoption.

But what if workplace accommodation laws were neutral with respect to the gender identity of the pregnant individual, giving benefits to “gestational parents” or “pregnant persons” rather than “expectant mothers”? In that case, surrogates and pregnant individuals planning to place a child for adoption would be covered. However, no couple engaging a surrogate or seeking a child for adoption would be protected—whatever their sexual orientations or gender identities might be. Nonetheless,

---

121. It is also possible for single people to adopt or have a baby through a surrogate. Most of the issues discussed in this Part apply to these individuals as well. Surrogacy and adoption arrangements might unsex pregnancy in the sense of allowing people to become parents without coital reproduction. See Halley, *supra* note 115 (discussing the multiple meanings of the term “sex”).

122. Fontana & Schoenbaum, *supra* note 1, at 338.

123. *Id.*

124. *See id.*

125. 135 S. Ct. 2584 (2015).

126. Fontana & Schoenbaum, *supra* note 1, at 350 (“The constitutional mandate to equalize different- and same-sex parents in the period after birth presumably extends in substantial part to the period before birth as well.”).

127. *Id.* (“This reinforces the constitutionally suspect stereotype that caring is women’s work . . .”).

such rules would disadvantage couples consisting of two individuals who were both assigned male at birth, and are more likely to rely on surrogacy or adoption to become parents.<sup>128</sup> Different types of prebirth carework are involved in surrogacy and adoption arrangements, including, but not limited to: research on the medical options and legal constraints, engaging an agency, finding a clinic for in vitro fertilization, selecting an egg donor, establishing a relationship with the person who will be or is pregnant, negotiating legal agreements, and formalizing the adoption, among other things.<sup>129</sup>

Extending workplace accommodation laws to these forms of carework raises unique questions. Adoptive parents “may take FMLA leave before the actual placement or adoption of a child if an absence from work is required for the placement for adoption or foster care to proceed.”<sup>130</sup> Should the same accommodations be allowed for employees who seek to become parents by employing a surrogate?<sup>131</sup> Why allow “expectant mothers,” but not any parent adopting a newborn to take leave for the purpose of “obtaining essential knowledge about how to care for a newborn?”<sup>132</sup>

Other questions involve surrogates themselves. For example, should a person engaged in surrogacy for profit receive pregnancy accommodations from their employer?<sup>133</sup> One court has suggested the answer is yes. In *Gonzales v. Marriot International*, an hourly hotel employee gave birth to an infant pursuant to a gestational surrogacy agreement and then began to take breaks to express breast milk, first for the infant’s family and later to donate to a milk bank.<sup>134</sup> She alleged that after a few weeks, her employer told her she could no longer take lactation breaks because

---

128. See Michael Boucai, *Is Assisted Procreation an LGBT Right?*, 2016 *Wis. L. Rev.* 1065, 1089–93. Any couple without at least one partner who can gestate a child would be disadvantaged.

129. For thoughtful first-person narratives about these processes for becoming a parent, see, for example, Dan Savage, *The Kid: What Happened After My Boyfriend and I Decided to Go Get Pregnant* (1999) (open adoption); Darren Rosenblum et al., *Pregnant Man?: A Conversation*, 22 *Yale J.L. & Feminism* 207, 208–17 (2010) (surrogacy).

130. 29 C.F.R. § 825.121(a)(1) (2019). It specifies: “For example, the employee may be required to attend counseling sessions, appear in court, consult with his or her attorney or the doctor(s) representing the birth parent, submit to a physical examination, or travel to another country to complete an adoption.” *Id.* Although the birth parents may incur similar costs, they are not included in the regulation.

131. This is a genuine question worthy of further consideration; this short Response does not take a position on whether workplace leave policy should aim to incentivize adoption over surrogacy.

132. See *supra* note 100 and accompanying text.

133. One Flexible Spending Account administrator—Cigna—has concluded that costs incurred by prospective parents with respect to fertility treatments for “non-dependent surrogates” are not covered expenses. Patricia Stapleton & Daniel Skinner, *The Affordable Care Act and Assisted Reproductive Technology Use*, 34 *Pol. & Life Sci.* 71, 80 (2015).

134. 142 F. Supp. 3d 961, 965–66 (C.D. Cal. 2015).

she was not “feeding ‘a child at home.’”<sup>135</sup> The employee argued this was in violation of California law, which requires employers to reasonably accommodate lactation.<sup>136</sup> The court held: “[W]hether it is ‘reasonable’ to require an employer to accommodate an employee’s desire to express milk that she intends to donate or sell is a question of fact for the jury.”<sup>137</sup> This holding left it to the jury to decide whether surrogacy is distinguishable from the sorts of side businesses or philanthropic activities that employers are not required to accommodate. It is difficult to see how the principle of sex equality answers that question.<sup>138</sup> The rationale for accommodating surrogates might instead be to further the interests of the intended parents and the health and well-being of the future child.

This points to another question: What would it mean to put adoption and surrogacy arrangements on equal footing with more traditional methods of reproduction? According to one agency, the costs of surrogacy are between \$90,000 and \$130,000.<sup>139</sup> Health insurers are only required to cover artificial reproductive technologies (ART) in fourteen states,<sup>140</sup> and only for cases of “infertility”—a term generally defined without LGBTQ couples in mind.<sup>141</sup> Moreover, not all states allow surrogacy, and some restrict it to married or different-sex couples, meaning many prospective parents may have to travel to make surrogacy arrangements, which adds additional costs.<sup>142</sup> Due to these costs, people with access to ART are affluent and “largely white.”<sup>143</sup> Legal scholar Seema Mohapatra

---

135. *Id.* at 966 (quoting Complaint at 7, *Gonzales*, 142 F. Supp. 3d 961 (No. 15-3301), 2015 WL 3609313).

136. *Id.* at 974.

137. *Id.*

138. According to the *Gonzales* court, the fact that the plaintiff was not allowed lactation breaks, while other employees who were pumping breast milk to feed their own children were, could be a basis for a sex discrimination claim because the plaintiff was penalized for failing to conform with stereotypes about traditional motherhood. *Id.* at 983.

139. West Coast Surrogacy Costs & Fees, W. Coast Surrogacy, Inc., <https://www.westcoastsurrogacy.com/surrogate-program-for-intended-parents/surrogate-mother-cost> [<https://perma.cc/J6UM-FNVE>] (last visited July 31, 2019).

140. State Laws Related to Insurance Coverage for Infertility Treatment, National Conference of St. Legislatures, <http://www.ncsl.org/issues-research/health/insurance-coverage-for-infertility-laws.aspx> [<https://perma.cc/BLQ8-6H8Y>] (last updated June 12, 2018). Two additional states only require that insurers offer the coverage. *Id.*

141. See Seema Mohapatra, Assisted Reproduction Inequality and Marriage Equality, 92 *Chi.-Kent L. Rev.* 87, 98–99 (2017) (“[E]ven in those few states where insurance companies have to cover ART, the definitions of infertility often anticipate medical infertility—not infertility due to being in a same-sex relationship.”).

142. *Id.* at 99.

143. Aziza Ahmed, Race and Assisted Reproduction: Implications for Population Health, 86 *Fordham L. Rev.* 2801, 2806–07 (2018). Moreover, clinics tend to stock white donors and charge more for eggs from white donors, sending “[t]he social message . . . that the industry is primarily designed for white consumers.” Camille Gear Rich, Contracting Our Way to Inequality: Race, Reproductive Freedom and the Quest for the Perfect Child, *Minn. L. Rev.* (forthcoming) (manuscript at 14–15) (on file with the *Columbia Law Review*).

has argued that equality would require changes to these state laws, increased insurance coverage, and efforts to reduce health care costs.<sup>144</sup> Adoption is also expensive: One U.S. government source estimates that an adoption with a private agency may cost \$20,000 to \$45,000,<sup>145</sup> although costs may be lower for black children.<sup>146</sup> Americans who are not wealthy sometimes forgo adoption, or organize fundraisers in an effort to find the money.<sup>147</sup> There are a number of obstacles to adoption that reflect “irrational mistrust” of adoptive parents, including “an ‘intrusive’ and often ‘demeaning’ screening process, endless paperwork and ‘red tape,’ and confusing regulations that vary from one jurisdiction to another—all of which can be expensive to navigate.”<sup>148</sup> Legal scholar Michael Boucai has argued that leveling out these disadvantages would require “direct services to [potential adoptive parents], public education, government subsidies, and reform of the adoption process itself.”<sup>149</sup>

My purpose in this short Response is not to take any position on whether employers or public policy should attempt to equalize the costs of coital reproduction, surrogacy, and adoption for prospective parents. In addition to LGBTQ equality, this question implicates difficult issues related to race, class, the best interests of children, and the rights of parents. My aim instead is to ask what it would mean to “unsex pregnancy” in the context of couples in which neither partner can become pregnant themselves. In light of the many practical and financial barriers to adoption and surrogacy, litigation challenging sex classifications in pregnancy benefits is unlikely to offer much assistance to these prospective parents.

#### IV. NETWORKED PREGNANCIES?

Finally, rather than seeing pregnancy as the work of individuals, couples, or groups of three, the law might universalize the experience of pregnancy, seeing prebirth carework as requiring broad public support. This project might extend accommodations beyond the two-parent model to extended family members, friends, and public services that might assist pregnant individuals. It would require creative thinking about how

---

144. Mohapatra, *supra* note 141, at 103–04.

145. Child Welfare Info. Gateway, *Planning for Adoption: Knowing the Costs and Resources* 3 (2016), [https://www.childwelfare.gov/pubPDFs/s\\_costs.pdf](https://www.childwelfare.gov/pubPDFs/s_costs.pdf) [<https://perma.cc/GN45-C3AC>].

146. See, e.g., Michele Bratcher Goodwin, *Baby Markets*, in *Baby Markets: Money and the New Politics of Creating Families* 6 (Michele Bratcher Goodwin ed., 2010).

147. See, e.g., Claire Swinarski, *Why Is It So Expensive to Adopt a Child?*, *Wash. Post* (Nov. 28, 2016), [https://www.washingtonpost.com/news/parenting/wp/2016/11/28/why-is-it-so-expensive-to-adopt-a-child/?utm\\_term=.8bc37f91d06e](https://www.washingtonpost.com/news/parenting/wp/2016/11/28/why-is-it-so-expensive-to-adopt-a-child/?utm_term=.8bc37f91d06e) [<https://perma.cc/N8BU-89MA>] (discussing GoFundMe pages, garage sales, karaoke nights, and foundations that provide grant money).

148. Boucai, *supra* note 128, at 1112 (footnotes omitted).

149. *Id.* at 1113 (footnotes omitted).

to restructure the provision of health care and workplaces to offer better work–family balance for all.

Many pregnant people rely on networks of extended family and friends for support, rather than a parent partner.<sup>150</sup> This may be particularly true for families of color. Professor Melissa Murray explains that “[w]ithin the African-American community, for example, parents frequently share caregiving responsibilities and material resources with community members in an arrangement known colloquially as ‘other-mothering.’ In Latino communities, *compadres*—literally ‘co-parents’—play a central role in the child’s spiritual upbringing and often are expected to share the parents’ caregiving responsibilities.”<sup>151</sup> Yet workplace accommodation laws, like the FMLA, are “unrealistically focused on parenthood as the locus of caregiving.”<sup>152</sup>

One example of a pregnancy benefit discussed throughout the Fontana and Schoenbaum article is smoking cessation programs, which insurers must cover for pregnant women under the Affordable Care Act (ACA).<sup>153</sup> The article argues that these programs should be extended from pregnant persons to fathers, because second-hand smoke is also harmful to a fetus.<sup>154</sup> But what about pregnant people who live with family members other than an expectant father? If the reason for the smoking cessation program is the health of the fetus, then it would make sense to extend the program to anyone living in a household with a pregnant individual. Moreover, smoking is not just harmful to children; it is harmful to everyone. Thus, in 2014, the U.S. Departments of Health and Human Services, Labor, and Treasury issued a guidance clarifying that, under the ACA, private health insurance plans should cover tobacco cessation for everyone.<sup>155</sup>

Another example from *Unsexing Pregnancy* is FMLA leave for prenatal health care appointments. Fontana and Schoenbaum point out that the FMLA is limited in that only the “spouse” of the pregnant employee may take prenatal leave, and only if necessary “to care for a pregnant spouse.”<sup>156</sup> Unmarried expectant fathers may not take leave to

---

150. See e.g., Murray, *supra* note 17, at 393 (“In families headed by single parents, extended family and friends may informally take on a substantial caregiving role.”); Laura A. Rosenbury, *Friends with Benefits?*, 106 *Mich. L. Rev.* 189, 209 (2007) (explaining that some “people prefer to experience personal connection, and give and receive care, through friendship rather than family”).

151. Murray, *supra* note 17, at 391–92 (footnotes omitted).

152. *Id.* at 408.

153. See Fontana & Schoenbaum, *supra* note 1, at 360.

154. *Id.* at 360–61.

155. *Covering Tobacco Cessation as Preventive Service: Who Is Making the Decisions?*, Am. Lung Ass’n, <https://www.lung.org/assets/documents/tobacco/who-is-making-the-decisions.pdf> [https://perma.cc/LS66-XX4G] (last updated July 31, 2014).

156. Fontana & Schoenbaum, *supra* note 1, at 338 (discussing 29 C.F.R. § 825.120(a)(5) (2018)). This is by contrast to postpregnancy, where the FMLA defines



care for their pregnant partners. Fontana and Schoenbaum critique this provision “for denigrating the father’s role in pregnancy” and point out that “forty percent of births are to unmarried mothers.”<sup>157</sup> But what this provision denigrates is the unmarried father, rather than fathers in general. Whether this marital-status distinction is justified is a different question than whether to unsex pregnancy.<sup>158</sup> Moreover, extending FMLA leave during pregnancy from spouses to fathers would not help those pregnant persons who rely on networks for care rather than partners. Some scholars have suggested licensing and registration schemes that would permit parents to deputize family and friends as alternative caregivers in these circumstances, enabling those friends or family members to take FMLA-protected leave to assist pregnant individuals in need of support.<sup>159</sup> For pregnant people without private support networks, public programs might reduce the burdens of pregnancy by making prenatal health care faster, more convenient, and less intrusive,<sup>160</sup> and by directly providing necessary supplies when newborns leave the hospital.<sup>161</sup>

The prenatal care example raises larger questions about why FMLA leave is needed for anyone to take a few hours off to attend a doctor’s appointment. U.S. workplaces—in which workers must often put in long and unpredictable hours—imagine the ideal worker as one with no care-

---

parents broadly to include “those with day-to-day responsibilities to care for and financially support a child.” 29 C.F.R. § 825.113(c), (d)(3).

157. Fontana & Schoenbaum, *supra* note 1, at 338.

158. The law may presume that parents who are not married chose that arrangement precisely because they were not sure if they wished to provide care to one another or to coparent. Cf. June Carbone & Naomi Cahn, *Nonmarriage*, 76 *Md. L. Rev.* 55, 103 (2016) (“Even where disqualifying behavior such as domestic violence is not an issue, unmarried couples report that the instability in their lives that comes from insecure employment, unstable income, substance abuse, and involvement with the criminal justice system make them wary of the type of commitment marriage entails.”).

159. Laura Rosenbury has proposed a system that would permit individuals to assign certain benefits—such as those available under the FMLA—to a person who is not their spouse or partner. Rosenbury, *supra* note 150, at 230–31. Professor Murray has suggested “expanding the relationships contemplated by the FMLA—and other public and private benefit schemes—to include more than just the parent/child dyad.” Murray, *supra* note 17, at 451–52 (proposing an administrative scheme that would provide licensing for nonparental caregivers, with the consent of a child’s legal parents).

160. See Khiara M. Bridges, *Reproducing Race: An Ethnography of Pregnancy as a Site of Racialization* 50–51, 58, 68 (2011) (describing how prenatal coverage under Medicaid often requires a pregnant patient to endure “hideously long waiting periods,” to “meet with [a] coterie of professionals,” and to “detail intensely personal and intimate facts about her life” all before receiving a medical exam, conditions patients with private insurance are not subjected to).

161. See, e.g., Tal Trachtman Alroy, *New Jersey Gives Out Free Baby Boxes in Move to Lower Infant Mortality Rates*, CNN (Jan. 26, 2017), <https://www.cnn.com/2017/01/26/health/new-jersey-baby-boxes-safe-sleep/index.html> [<https://perma.cc/YDH3-ZYKQ>] (“Babies born in New Jersey this year will go home with a sturdy, safe box to sleep in and additional newborn essentials—all for free.”).

taking responsibilities at all.<sup>162</sup> An increasing number of low-wage jobs are temporary, contingent, and precarious, with unpredictable scheduling in which shifts are announced at the last minute, making it difficult for workers to juggle caregiving commitments.<sup>163</sup> Many workers lack access to paid sick days or vacation.<sup>164</sup> The type of flexibility that might allow a worker to take time off during the work day to attend a prenatal appointment without trouble is a perk of those jobs at the top end of the economy.<sup>165</sup>

In light of these circumstances, undermining the gendered division of labor that begins with pregnancy will require more than making existing benefits gender neutral and more than even unsexing pregnancy; it will require thoroughgoing efforts to reform workplace structures and cultures.<sup>166</sup>

### CONCLUSION

*Unsexed Pregnancy* asks important questions about why workplace accommodations law presumes that only expectant mothers experience pregnancy or engage in pregnancy-related carework. Removing references to “mothers” and “women” from pregnancy rules is an urgent project to ensure that pregnant people who do not identify as women have equal access to reproductive health care and workplace accommodations. It is also important to update workplace rules that unfairly assume men do not or should not engage in carework during pregnancy. The article’s insights prompt other important questions, such as whether public policy and workplace rules should treat coital reproduction, adoption, and surrogacy arrangements differently; whether accommodations for medical

---

162. See Albiston & O’Connor, *supra* note 105, at 7 (“[E]mployers continue to expect their workers to be as available and dedicated as the industrial-era male breadwinner with a stay-at-home wife, even when these employers no longer provide a family wage, secure employment, or even regular hours in return.”).

163. *Id.* at 2–4 (“The percentage of workers in the United States with variable schedules they do not control grew 74.2% between 1997 and 2004.”).

164. *Id.* at 4.

165. *Id.* at 62 (discussing how well-paid workers tend to receive discretionary accommodations more often than low-wage workers do).

166. Scholars have proposed a number of ideas. See, e.g., Williams, *supra* note 101, at 1–2 (“To match today’s workplace to today’s workforce, we need both public supports (subsidized child care, parental leave financed at a national level, national health insurance) and workers’ rights (mandated vacation time, proportional pay for part-time work, and the right to request a flexible schedule.”); Albiston & O’Connor, *supra* note 105, at 57–59 (proposing paid family leave and amendments to extend the coverage of the FMLA to all workers); Claudia Goldin, *A Grand Gender Convergence: Its Last Chapter*, 104 *Am. Econ. Rev.* 1091, 1092 (2014) (arguing for changes to the labor market to reduce the incentives of firms “to disproportionately reward individuals who worked long hours and who worked particular hours”); Vicki Schultz & Allison Hoffman, *The Need for a Reduced Workweek in the United States*, in *Precarious Work, Women, and the New Economy: The Challenge to Legal Norms* 131, 133 (Judy Fudge & Rosemary Owens eds., 2006).

conditions that affect pregnant as well as nonpregnant people should be extended to all expectant parents, all caregivers, or all people with the condition; how to restructure the workplace to be more humane for pregnant workers who rely on networks of friends and family for care and support; how to craft public policy solutions to support pregnant workers who lack private support networks; and how to reimagine the labor market in an era in which most families are no longer anchored by a female caretaker and male breadwinner. Unsexing pregnancy in a substantive sense will require more than revisions to existing rules to reflect gender neutrality; it will require new approaches that are attentive to the many differences among pregnant people and American families.