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The Rules of Maternity

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THE RULES OF MATERNITY

DARA E. PURVIS*

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A diverse body of laws and regulations speaking to reproductive rights, healthcare, criminal punishment of drug use, termination of parental rights, and more creates the rules of maternity. These rules are guidance provided both obliquely and explicitly by the law's coercive power telling women both how to and who should mother. Rule 1 begins in pregnancy, with the message that "your body is your child's vessel." During pregnancy, women are counselled that doctor

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knows best. *After the child's birth, the mother remains responsible for the people who enter a child's life, leading to rule 3: "mothers must always protect." Rule 4 provides examples of the tightropes that mothers must walk: be nurturing, but not too nurturing; breastfeed, but not for too long; be protective, but not overprotective. "Good motherhood is a narrow road." Finally, the rules create an aspirational maternity, specifying that "only some women need apply" for motherhood. Becoming a mother means accepting responsibility for another person but need not remove autonomy entirely. The rules of maternity must be rewritten, from borders limiting the choices of individual mothers to principles respecting their autonomy.*

INTRODUCTION

Motherhood is all about judgment. Sometimes the judgment is external and positive, as motherhood is a respected status that is customarily rewarded with praise.¹ Sometimes the judgment is internal and empowered, as mothers themselves exercise judgment as to when to become a mother, how to become a mother, where to give birth, what parenting philosophy to follow (if any), and what kind of parent to be.

External judgment of mothers, however, can also be negative. The Centers for Disease Control (CDC), for example, recently issued an infographic advising all women that if there was a risk that they "could get pregnant," they should abstain from alcohol entirely lest they become pregnant accidentally and harm the fetus.² Examples abound of pregnant women and mothers facing social judgment for their parenting decisions: ordering wine or a caffeinated beverage while visibly pregnant,³ carrying an infant in a sling,⁴ or buying children a Happy Meal at McDonald's.⁵

1. See April L. Cherry, *Nurturing in the Service of White Culture: Racial Subordination, Gestational Surrogacy, and the Ideology of Motherhood*, 10 TEX. J. WOMEN & L. 83, 103–06 (2001) (comparing positive perceptions of married mothers with negative views of unmarried mothers).

2. *Alcohol and Pregnancy*, CTR. FOR DISEASE CONTROL & PREVENTION, <http://www.cdc.gov/vitalsigns/fasd/index.html> (last accessed Jan. 18, 2017).

3. See Kim H. Pearson, *Chemical Kids*, 24 TEX. J. WOMEN GENDER & L. 67, 92 (2014).

4. See Chris Gottlieb, *Reflections on Judging Mothering*, 39 U. BALT. L. REV. 371, 371 (2010).

5. See Cynthia Godsoe, *Parsing Parenthood*, 17 LEWIS & CLARK L. REV. 113, 139 (2013).

Individual interactions with strangers are undoubtedly annoying,⁶ but can largely be dismissed and ignored. Mothers operate within an often invisible framework of legal regulation, however, that they ignore at their peril. Both social and legal assessments of motherhood arise from perceptions of ideal parenting and create a particularly pernicious type of regulatory power: “non-authoritarian, non-conspiratorial, and . . . non-orchestrated.”⁷ This article uncovers how the non-orchestrated legal regulation of mothers has molded a specific and narrow vision of what and who mothers should be.⁸ Some of the regulation merely encourages choices that legislatures or judges believe to be best. Much of it punishes the “wrong” choices. The effect of such regulation is twofold: as a direct effect, it hems in acceptable motherhood tighter and tighter. The implicit message is broader, and fundamentally undermines the autonomy of mothers.

A particularly disturbing aspect of the legal regulation of motherhood is that it seems to operate piecemeal, focusing on one specific problematic action at a time or working within a single area of law. Moreover, such piecemeal regulations operate underneath a cultural veneer of celebration of motherhood and maternity, making the negative and even punitive regulations even harder to see. The individual limitations may appear unobjectionable when considered one by one, motivated by concern for children’s wellbeing and only affecting so-called “bad” mothers. Good mothers, and people who support good mothering, need not look deeper at such limitations, as the regulations should not affect them.

It is critically important, however, to canvass such limitations on maternal choice in order to reveal that although the law’s regulation of motherhood has not consciously been built up with the desire to

6. In the age of social media, however, there is always the risk that such encounters draw wider attention. See, e.g., Rebecca Schuman, *I Am Terrified of Taking My Child Literally Anywhere*, SLATE.COM (July 25, 2015), http://www.slate.com/articles/life/family/2015/07/crying_toddler_in_maine_diner_i_m_afraid_my_parenting_could_go_viral_too.html (“In three weeks, my daughter and I will make our first journey on an airplane. I already want to die. I’m not afraid of the judgmental stares or grumbling I am sure to get. What I’m afraid of is that my inevitable display of poor parenting will end up online forever—subject to ignominy, incessant debate, and posterity.”).

7. SUSAN BORDO, UNBEARABLE WEIGHT 26 (1993).

8. Fathers also face legal and social policing of their parenthood, but in a way markedly different, as will be discussed further below, than regulation of maternity. See Kimberly M. Mutcherson, *Making Mommies: Law, Pre-Implantation Genetic Diagnosis, and the Complications of Pre-Motherhood*, 18 COLUM. J. GENDER & L. 313, 334–35 (2008).

oppress women, the cumulative effect of the law is oppressive nonetheless.⁹ Such restrictions undermine women's autonomy throughout their lives, but particularly at the moment that women become responsible for another life. The cumulative weight of legal limitations placed upon mothers violate their agency, autonomy, and dignity.¹⁰

This article chronicles the rules of maternity; the guidance provided both obliquely and explicitly by the law's coercive power to tell women how to mother and who can mother. The rules are not entirely discrete; at times they overlap and can regulate the same behavior simultaneously. By beginning to parse the overall structure of the law's regulation of maternity, however, the scale of control becomes apparent.

The article first provides a theoretical grounding as to the autonomy of mothers. Autonomy is often viewed as entirely individualistic, which has been a source of criticism by feminist legal scholars and potentially conflicts with the fundamentally nonindividualistic responsibilities inherent in motherhood. Principles drawn from relational autonomy and agency theory point towards a middle ground, respecting mothers' individual decisionmaking within relatively broad limits. Such an approach not only benefits mothers and children, but also has been implicitly supported by the Supreme Court in the context of the constitutional rights of parenthood.¹¹

The article then moves to the specific rules of maternity. The first rule begins in pregnancy, with the message that "*your body is your child's vessel.*" Every choice that a pregnant woman makes becomes a source of potential harm to her child, and thus of potential punishment through both civil and criminal law. The second rule explains one way women should attempt to avoid such liability, by following the maxim that "*doctor knows best.*" To question medical authority or have preferences other than following doctor's orders is to needlessly risk the health of a pregnancy or a child, and is evidence of bad mothering. After the child's birth, the mother remains responsible for the people who enter a child's life, leading to the third rule: "*mothers must always protect.*" Rule four provides examples of the tightropes that mothers must walk: be

9. See Robin West, *Jurisprudence and Gender*, 55 U. CHI. L. REV. 1, 47 (1988).

10. See Maxine Eichner, *Families, Human Dignity, and State Support for Caretaking: Why the United States' Failure to Ameliorate the Work-Family Conflict is a Dereliction of the Government's Basic Responsibilities*, 88 N.C. L. REV. 1593, 1617 (2010).

11. See *Troxel v. Granville*, 530 U.S. 57 (2000).

nurturing, but not too nurturing; breastfeed, but not for too long; be protective, but not overprotective. “*Good motherhood is a narrow road.*” Finally, the rules of maternity create an aspirational maternity, one that excludes women deemed undesirable as mothers because of class, race, past actions, and so on. The fifth rule specifies that “*only some women need apply*” for motherhood; women who have already been judged as bad mothers should not be legally permitted to reproduce.

Having canvassed existing regulations of mothers, the conclusion returns to the lessons from agency and relational autonomy in order to point towards needed reforms. The rules of maternity must be fundamentally changed from borders limiting the choices of individual mothers to principles respecting those mothers’ autonomy.

I. AUTONOMY WITHIN MOTHERHOOD

Although the choices of all parents can be second-guessed, and the behavior of both mothers and fathers is often criticized, mothers face particularly searching scrutiny. This begins in pregnancy, first in the doctor’s office when pregnant women enter what Kathryn Morgan aptly called “legitimate range for medical surveillance.”¹² The scrutiny then widens, as a pregnancy becomes clearly visible and members of the public are immediately alerted to the woman’s status as they observe her behavior.¹³ Fathers-to-be (and nonpregnant mothers-to-be) obviously lack the immediate visual clue to their impending parentage. As will be discussed below, fathers can engage in behavior that risks the health of the fetus or eventual child just as pregnant women can, yet their behavior is not scrutinized in the same way.¹⁴ Once a child is born, the mother’s choices such as the food she eats no longer impact her child in the same way, yet social expectations regarding mothers as primary caregivers extend the heightened surveillance of her behavior as a parent. As the rules of maternity demonstrate, moreover, legal

12. Kathryn Pauly Morgan, *Contested Bodies, Contested Knowledges: Women, Health, and the Politics of Medicalization*, in *THE POLITICS OF WOMEN’S HEALTH* 83, 93 (1998) (emphasis omitted).

13. *Id.* at 94–95.

14. See Pamela Laufer-Ukeles, *Reproductive Choices and Informed Consent: Fetal Interests, Women’s Identity, and Relational Autonomy*, 37 *AM. J.L. & MED.* 567, 590 (2011).

regulation focuses on her behavior rather than impacts of a father's parenting.¹⁵

The rules of maternity operate upon women at two levels. The first is the direct regulation of women's behavior; restricting their choices through prohibitions or coercion and punishing them for making the wrong decision. The second level is more insidious: by limiting mothers' choices so clearly and across so many types of decisions, the rules express distrust in mothers' capacity. The implication of such regulation is that mothers cannot be trusted to make responsible decisions concerning the upbringing of their own children. Mothers cannot be trusted with autonomy.

Autonomy can be defined many ways, but a shorthand rule of thumb is "self-determination."¹⁶ Leigh Goodmark summarized, "autonomy is constituted of the independence to deliberate and make choices free from manipulation by others and the capacity to make reasoned decisions about how to live one's life."¹⁷ Goodmark's focus on living *one's* life introduces a common reason why some feminist scholars have criticized the concept of autonomy as excessively individualistic.¹⁸ If autonomy is defined as making choices driven by individual preferences, familial and social relationships with other people can be jettisoned as irrelevant to autonomous action.¹⁹ Faith in the power of individual decisionmaking implicitly denies that political and social pressure help to form what people view as their own preferences.²⁰ Such a focus on individualism also arguably genders autonomy as male, as described by Marilyn Friedman:

Besides connecting autonomy to reason, popular Western culture has also associated autonomy with other masculine-

15. Indeed, as Nancy Dowd has notably argued, the legal regulation of fathers operates to push them away from hands-on caregiving parental roles entirely, rather than specify appropriate caregiving practices. See Nancy E. Dowd, *Rethinking Fatherhood*, 48 FLA. L. REV. 523, 526–30 (1996); see also Nancy E. Dowd, *Sperm, Testosterone, Masculinities and Fatherhood*, 13 NEV. L.J. 438, 455 (2013); Nancy E. Dowd, *Fatherhood and Equality: Reconfiguring Masculinities*, 45 SUFFOLK U. L. REV. 1047 (2012).

16. MARILYN FRIEDMAN, *AUTONOMY, GENDER, POLITICS* 4 (2003); Catriona Mackenzie & Natalie Stoljar, *Introduction: Autonomy Refigured*, in *RELATIONAL AUTONOMY* 3, 5 (Catriona Mackenzie & Natalie Stoljar eds., 2000).

17. Leigh Goodmark, *Autonomy Feminism: An Anti-Essentialist Critique of Mandatory Interventions in Domestic Violence Cases*, 37 FLA. ST. U. L. REV. 1, 22 (2009).

18. FRIEDMAN, *supra* note 16, at 81.

19. See *id.*

20. Mackenzie & Stoljar, *supra* note 16, at 10–11.

defined traits, for example, independence and outspokenness. Traits popularly regarded as feminine, by contrast, have no distinctive connection to autonomy—social interactiveness, for example. Thus popular gender stereotypes have associated autonomy with men but not with women; these stereotypes might invidiously infect philosophical thinking about autonomy.²¹

To the extent that autonomy focuses on free individual choices, there is an obvious dissonance with mothering (and parenting more generally).²² Although parents—or more specifically, fathers—have historically had considerable freedom to make decisions controlling their children, significantly greater constraints are imposed today.²³ Children are themselves rights-holders, and the state has an interest in protecting both children and future children during pregnancy.²⁴

Recognizing that a strict sense of autonomy may conflict with the interdependent obligations of motherhood,²⁵ several approaches enrich autonomy by acknowledging the realities of personal and familial obligation. One option is to focus on the procedure of decisionmaking rather than any ideal of “substantive independence.”²⁶ Procedural autonomy asks whether “the process of formation of the preference or decision has satisfied certain standards of critical reflection. Once a preference or decision has passed such formal or procedural tests, it is autonomous, no matter what its content.”²⁷ Thus, even a mother’s choice to sublimate all of her individual preferences in favor of serving a child’s best interests

21. Marilyn Friedman, *Autonomy, Social Disruption, and Women*, in RELATIONAL AUTONOMY, *supra* note 16, at 38–39; see also Katharine T. Bartlett, *Feminist Legal Scholarship: A History Through the Lens of the California Law Review*, 100 CALIF. L. REV. 381, 398–99 (2012).

22. For example, Jody Madeira has highlighted the inconsistent treatment of women’s decisionmaking autonomy in the context of reproduction, comparing what she terms “emotional paternalism” as applied against women seeking abortions and women seeking fertility treatments. See Jody Lyneé Madeira, *Woman Scorned?: Resurrecting Infertile Women’s Decision-Making Autonomy*, 71 MD. L. REV. 339, 408 (2012).

23. See Pamela Laufer-Ukeles, *The Case Against Separating the Care from the Caregiver: Reuniting Caregivers’ Rights and Children’s Rights*, 15 NEV. L.J. 236, 246–47 (2014).

24. See Laufer-Ukeles, *supra* note 14, at 570.

25. Cf. GRACE CLEMENT, CARE, AUTONOMY, AND JUSTICE 35 (1996).

26. Natalie Stoljar, *Autonomy and the Feminist Intuition*, in RELATIONAL AUTONOMY, *supra* note 16, at 94.

27. *Id.*

could be viewed as autonomous as long as she consciously decided to do so. Natalie Stoljar questions such an account of autonomy as drawing the skepticism of “the feminist intuition, which claims that preferences influenced by oppressive norms of femininity cannot be autonomous.”²⁸ Such feminist intuition would be similarly suspicious of procedural autonomy operating within the rules of maternity. Legal regulation of motherhood embodies an oppressive norm of acceptable maternal behavior, constraining free choice well past the point that procedural autonomy within its limits is true autonomy.

A second complication to traditional masculine autonomy holds more promise. Relational autonomy aims to reconcile individualistic self-determination with expectations and pressures of social networks.²⁹ The individual cannot be defined or understood without acknowledging the impact of “relationships with doctors, family, fetus, friends, community, and society at large.”³⁰ This means that relational autonomy exists in a “gray area[] between full individualistic autonomy and complete coercion.”³¹ Pamela Laufer-Ukeles describes how such an approach acknowledges the confluence of individual preferences alongside potential coercion:

Expecting and potential mothers may consent to medical procedures because of their strong interests in having children, because of their trust in doctors, or because they want to do everything they can to preserve the health and viability of their expected or future children. . . . Similar pressures apply to women who want to choose an abortion, want to choose a birthing method not recommended by a doctor, or want to refuse a screening procedure advanced by their doctor. Although women may resist this pressure, this dynamic may create a consensual choice that in reality is not welcome, but rather is fraught with doubt and concern. It can be difficult for women to find their own voices when a third party is heavily channeling the interests of the fetus or

28. *Id.* at 95 (emphasis omitted).

29. Pamela Laufer-Ukeles, *Mothering for Money: Regulating Commercial Intimacy*, 88 IND. L.J. 1223, 1249 (2013); see also Jody Lyneé Madeira, *Aborted Emotions: Regret, Relationality, and Regulation*, 21 MICH. J. GENDER & L. 1, 13 (2014); Jennifer Nedelsky, *Reconceiving Autonomy: Sources, Thoughts and Possibilities*, 1 YALE J.L. & FEMINISM 7 (1989).

30. Laufer-Ukeles, *supra* note 14, at 610; see also Marilyn Friedman, *Relational Autonomy and Individuality*, 63 U. TORONTO L.J. 327, 328 (2013).

31. Laufer-Ukeles, *supra* note 29, at 1249–50.

the state. The environment in which women make these choices must be taken into account.³²

Classical analysis of autonomy might conclude that it is simply impossible to promote autonomous decisionmaking in the context of pregnancy and parenthood. Legal protections for the fetus or child, in such a view, forestall a mother's autonomy entirely. Relational autonomy recognizes the coercive pressure present as women become mothers, preventing the classical liberal definition of autonomy from operating, but asks how to best promote individual decisionmaking in the midst of legal and social pressures.³³ Both procedural and relational autonomy recognize these pressures, but where procedural autonomy recognizes the power (even if limited) of an individual mother, relational autonomy strives to balance respecting subjective preferences and working to counteract the external pressures affecting those preferences. Even in the context of mothering and parenting, therefore, some amount of autonomy is both possible and beneficial.³⁴ Mothers do not cease to be individuals with the desire to express their preferences.³⁵ Recognizing such preferences respects the decisionmaking capacity of mothers, a respect that has been historically denied to women and other marginalized groups.³⁶

In order to balance the autonomy and interdependence of mothers, the law should utilize a model of relational autonomy that might also be termed agency. Agency means that an individual is free to exercise "reasonable choice," even if the choice is from a limited set of possible options.³⁷ The state remains free, therefore, to specify borders to parental authority, such as prohibiting actions that rise to the level of abuse or neglect.³⁸ Within such boundaries, however, a mother should be free to make decisions relating to her

32. Laufer-Ukeles, *supra* note 14, at 613.

33. See Nedelsky, *supra* note 29, at 7.

34. See Margaret F. Brinig, Troxel *and the Limits of Community*, 32 RUTGERS L.J. 733, 757 (2001).

35. See Katharine K. Baker, *Property Rules Meet Feminist Needs: Respecting Autonomy by Valuing Connection*, 59 OHIO ST. L.J. 1523, 1527 (1998) ("[T]he law freely interferes with the vertical relationship between a parent and child. This interference often quashes a woman's potential to assert herself as an individual.").

36. See FRIEDMAN, *supra* note 16, at 73.

37. Susan Sherwin, *A Relational Approach to Autonomy in Health Care*, in THE POLITICS OF WOMEN'S HEALTH, *supra* note 12, at 19, 32; see also Kathryn Abrams, *From Autonomy to Agency: Feminist Perspectives on Self-Direction*, 40 WM. & MARY L. REV. 805, 823-24 (1999).

38. See Laufer-Ukeles, *supra* note 24, at 572.

pregnancy or parenting free from coercion and manipulation.³⁹ The law should not simply permit but affirmatively promote her free decisionmaking.⁴⁰

Such a perspective has been underscored by the Supreme Court. In *Troxel v. Granville*, the Court held that a Washington statute that allowed “[a]ny person” to request visitation rights with a child, to be granted “when visitation may serve the best interest of the child,” violated the constitutional rights of Washington parents.⁴¹ Justice O’Connor, writing for the Court, reasoned that the statute “directly contravened the traditional presumption that a fit parent will act in the best interest of his or her child.”⁴² The Court held that this violated the respondent mother’s fundamental constitutional rights as a parent and that courts should give “at least some special weight” to the decisions of a fit mother regarding the upbringing of her child.⁴³

Furthermore, the Court has more recently acknowledged a close interaction between principles of liberty and equality. Justice Kennedy wrote in *Obergefell v. Hodges*, “Rights implicit in liberty and rights secured by equal protection may . . . in some instances . . . be instructive as to the meaning and reach of the other.”⁴⁴ This interaction is crucial to understanding the harm of the rules of maternity. They operate as a limitation upon the free choices of women, constraining their autonomy in deciding how to parent. The cumulative effect, however, is to undermine the role of women in broader society. Women have long faced formal and informal barriers to entering the workplace, as well as Joan Williams’s “maternal wall” if they attempt to be both an employee outside the home and a caregiver inside of it.⁴⁵ The rules of maternity then tell women that their judgment cannot be trusted inside the home either. Distrust of women’s decisionmaking in all spheres of their lives weakens their equality alongside their autonomy. Justice

39. See FRIEDMAN, *supra* note 16, at 14.

40. Laufer-Ukeles, *supra* note 29, at 1250.

41. 530 U.S. 57, 61 (2000) (quoting Wash. Rev. Code § 26.10.160(3) (1994)); see also Dara E. Purvis, *The Origin of Parental Rights: Labor, Intent, and Fathers*, 41 FLA. ST. U. L. REV. 645, 649–50 (2014).

42. *Troxel*, 530 U.S. at 69.

43. *Id.* at 70.

44. 135 S. Ct. 2584, 2603 (2015).

45. See Joan C. Williams & Elizabeth S. Westfall, *Deconstructing the Maternal Wall: Strategies for Vindicating the Civil Rights of “Carers” in the Workplace*, 13 DUKE J. GENDER L. & POL’Y 31 (2006); Joan C. Williams, *Beyond the Glass Ceiling: The Maternal Wall As A Barrier to Gender Equality*, 26 T. JEFFERSON L. REV. 1 (2003).

Kennedy wrote that the interrelation of liberty and equality “furthers our understanding of what freedom is and must become”⁴⁶ in the context of the right to marry. That same interrelation furthers our understanding in the context of motherhood.

This principle of deferring to a mother’s autonomy was articulated in the context of a constitutional challenge but can easily be applied by legislatures voting on new regulations of mothers’ choices and courts deciding whether existing statutes should be applied more broadly. Absent allegations that a mother is unfit, she should be free to make parenting decisions within relatively broad boundaries, even if a lawmaker or judge or bystander would do things differently themselves.⁴⁷

Many bystanders, judges, lawmakers, and even readers may believe that *Troxel’s* respect for relational autonomy and agency by mothers exists today and that current regulation simply outlines the borders of fit parenthood. The next section begins analysis of the rules of maternity and will show that today’s rules constrict modern motherhood into an impossibly narrow sphere.

II. RULE 1: YOUR BODY IS YOUR CHILD’S VESSEL

As soon as pregnancy begins, the pregnant woman is viewed as a mother.⁴⁸ Obviously she is not yet a mother in the literal sense of the word, and does not have legal rights as a mother to an identifiable child, but society in many ways sees mothers-to-be as mothers in all but the technical sense.⁴⁹ Women themselves often begin to identify as mothers during pregnancy, but the label is applied indiscriminately. For example, Justice Kennedy famously described a woman who made the decision *not* to become a mother by terminating her pregnancy as a mother, perhaps the clearest example of a woman who would not describe herself with the term.⁵⁰

46. *Id.*

47. See the Conclusion at 87 for discussion of what those “broad boundaries” to parental choice should be.

48. See Carol Sanger, *Infant Safe Haven Laws: Legislating in the Culture of Life*, 106 COLUM. L. REV. 753, 812 (2006) (“But motherhood takes on added meaning in the culture of life. . . . Its foundational precept—that life begins at conception—extends maternal obligation backwards in time to include pregnancy at any stage.”).

49. Of course, a mother-to-be is seen as a mother only if she herself is pregnant. Nonpregnant prospective mothers, such as women whose female spouse or partner carries the pregnancy or women who utilize surrogates to bring the pregnancy to term, are treated as more akin to fathers-to-be: involved, but not committed entirely yet.

50. *Gonzales v. Carhart*, 550 U.S. 124, 159 (2007) (“It is self-evident that a

Some of this recognition of pregnant women as already mothers is not problematic. Many expectant women welcome the name of their new role. A pregnant woman is perceived to already be bonding with the fetus, to be vested with the mothers' instincts and intuitions that will allow her to easily assume her caregiving role, and to be the protective "mama bear."⁵¹

Much of the attention given to a pregnant woman, however, is negative. Pregnant women are the subject of constant attention and criticism if they engage in any activities that might jeopardize their future child. Eating sushi,⁵² drinking coffee,⁵³ lifting heavy packages, exercising,⁵⁴ cleaning cat litter boxes,⁵⁵ drinking alcohol,⁵⁶ and any number of other potentially hazardous activities justify passers-by in intervening and instructing the pregnant woman in what she should do differently.

It is not just society, however, that views the pregnant woman's role to have shifted. The law also places heightened expectations and regulations on her behavior based upon the expectation that from the moment that pregnancy begins, her primary concern is for the wellbeing of the fetus. Her body no longer belongs to her: it is a vessel for her future child.

Such expectations are manifested in the law in two ways. First, a woman who takes actions that might harm her future child must be punished for acting contrary to her protective maternal role. Thus, women who engage in risky behavior have committed a blameworthy and sanctionable act that should be punished as actually harming the child she "should" be acting to protect. Second, when a woman is

mother who comes to regret her choice to abort must struggle with grief . . .").

51. Naomi Mezey & Cornelia T.L. Pillard, *Against the New Maternalism*, 18 MICH. J. GENDER & L. 229, 252 (2012) (quoting Hanna Rosin, *Is the Tea Party a Feminist Movement?*, SLATE (May 12, 2010, 12:03 PM), <http://www.slate.com/id/2253645>).

52. See, e.g., Sydney Lupkin, *Sorry, Pregnant Women, You Still Can't Eat Sushi*, ABCNEWS.COM (Jan. 23, 2015), <http://abcnews.go.com/Health/pregnant-women-study-carte-blanche-eat-sushi/story?id=28433617>.

53. See, e.g., Lyz Lenz, *Your Pregnancy or Theirs? How Advice Can Heighten Pregnancy Stress*, BABBLE.COM, <http://www.babble.com/pregnancy/body-pregnancy-stress-anxiety-advice-moms-to-be/> (last visited Jan. 29, 2017).

54. See, e.g., Tracie Snowden, *Pregnant Woman Under Fire for Rigorous Workout Routine*, KSL.COM (Oct. 10, 2013), <http://www.ksl.com/?sid=27198127>.

55. See, e.g., Diane Taylor, *The Pregnancy Police Are Watching You*, THE GUARDIAN (Sept. 4, 2006), <http://www.theguardian.com/society/2006/sep/04/health.medicine.andhealth1>.

56. See, e.g., Julia Moskin, *The Weighty Responsibility of Drinking for Two*, N.Y. TIMES.COM (Nov. 29, 2006), <http://www.nytimes.com/2006/11/29/dining/29preg.html?n=Top%2FNews%2FScience%2FTopics%2FChemicals>.

in the process of making a decision that does not properly subordinate her own interests to the interest of her future child, the state is asked to step in and assert control over the fetus in order to protect it, even when that necessarily means that the state is also asserting control over the pregnant woman.⁵⁷

A. Drug Use During Pregnancy

One of the most dramatic examples of the consequences faced by pregnant women is drug use during pregnancy. A relatively small minority of pregnant women use illegal drugs,⁵⁸ and Linda Fentiman has argued that criminal prosecutions of such women have become “markedly more aggressive” in recent years.⁵⁹ Pregnant women have faced both criminal prosecution and civil actions alleging abuse or neglect based upon their use of drugs while pregnant. Such charges are controversial, yet prosecutors continue to file them.

A notorious example took place in 2003, when a woman named Regina McKnight was convicted in South Carolina of homicide by child abuse due to her use of crack cocaine while pregnant.⁶⁰ Rennie Gibbs, sixteen years old at the time, was indicted in 2006 for depraved heart murder on the theory that her cocaine use while pregnant caused her stillbirth at 36 weeks.⁶¹ Several medical experts who reviewed Gibbs’s files, however, noted that the presence of cocaine was so low as to not show up at all in the stillborn baby’s blood and that a more likely cause of the stillbirth was that the

57. In some circumstances, obviously, the state’s interest in fetal protection might work to protect the pregnant woman, such as if an employer was required to accommodate a pregnant employee’s temporary differential employment capabilities. See generally Deborah Dinner, *Strange Bedfellows at Work: Neomaternalism in the Making of Sex Discrimination Law*, 91 WASH. U. L. REV. 453 (2014). Such regulation arguably affects the pregnant woman’s decisions in a way that affects her relational autonomy but falls outside the scope of this article.

58. See Linda C. Fentiman, *Pursuing the Perfect Mother: Why America’s Criminalization of Maternal Substance Abuse Is Not the Answer—A Comparative Legal Analysis*, 15 MICH. J. GENDER & L. 389, 395 (2009).

59. *Id.* at 392.

60. *State v. McKnight*, 576 S.E.2d 168, 171 (S.C. 2003); see also Shalini Bhargava, Note, *Challenging Punishment and Privatization: A Response to the Conviction of Regina McKnight*, 39 HARV. C.R.-C.L. L. REV. 513, 513–14 (2004); Dana Page, Note, *The Homicide by Child Abuse Conviction of Regina McKnight*, 46 HOW. L.J. 363, 365–69 (2003);

61. Seema Mohapatra, *Unshackling Addiction: A Public Health Approach to Drug Use During Pregnancy*, 26 WIS. J.L. GENDER & SOC’Y 241, 242 (2011).; see also Michele Goodwin, *Fetal Protection Laws: Moral Panic and the New Constitutional Battlefield*, 102 CALIF. L. REV. 781, 808–12 (2014).

umbilical cord was wrapped around the baby's neck.⁶² After a judge eventually dismissed the charges in 2014, the prosecutor initially indicated that he would re-charge Gibbs with manslaughter.⁶³

Drug use during pregnancy is often discovered at birth, meaning a newborn baby tests positive for an illegal drug (known as "positive toxicology"). Beginning in the 1970s, a few states attempted to apply standard laws against child abuse to such women, even though the actions in question took place before the child's birth. For example, in 1977 a woman in California was indicted for felony child endangerment after giving birth to twins who tested positive for heroin.⁶⁴ The California court of appeals, however, held that the child endangerment law did not apply to fetuses and thus could not be applied to drug use during pregnancy.⁶⁵ Such logic became widespread as courts generally refused to apply general statutes prohibiting child abuse or neglect to fetuses in utero.⁶⁶

This did not prevent, however, more creative applications of other child protection statutes. For example, multiple prosecutors have interpreted statutes criminalizing giving drugs to a minor very literally to refer to the umbilical cord, although judges have been more skeptical of such reasoning. In 1991, a Florida woman gave birth to a baby with positive toxicology and was charged with delivering drugs to her child on the theory that in the moments after the child's birth before the umbilical cord was cut, the mother transferred the drugs in her own bloodstream to her child.⁶⁷ Florida's supreme court rejected such application of the statute.⁶⁸ The following year the Georgia court of appeals similarly reasoned that drug delivery statutes prohibit transferring drugs *outside* of the bodies of the two people in question and rejected prosecution of a

62. Jessica Mason Pieklo, *Murder Charges Dismissed in Mississippi Stillbirth Case*, REWIRE.COM (Apr. 4, 2014), <https://rewire.news/article/2014/04/04/murder-charges-dismissed-mississippi-stillbirth-case/>.

63. Sarah Fowler, *Judge Dismisses Rennie Gibbs' Depraved Heart Murder Case*, THE DISPATCH (Apr. 3, 2014), <http://www.cdispatch.com/news/article.asp?aid=32344#.Uz2kxLXl3z0.face-book>.

64. *Reyes v. Superior Court*, 75 Cal. App. 3d 214 (1977).

65. *Id.* at 219.

66. See Krista Stone-Manista, *Protecting Pregnant Women: A Guide to Successfully Challenging Criminal Child Abuse Prosecutions of Pregnant Drug Addicts*, 99 J. CRIM. L. & CRIMINOLOGY 823, 838 (2009).

67. See Mohapatra, *supra* note 61, at 248.

68. *Johnson v. State*, 602 So. 2d 1288, 1289 (Fla. 1992).

mother based on drug transfer through the umbilical cord.⁶⁹ Nevada's supreme court reached the same result two years later.⁷⁰

Modern expansions of child protection statutes have been more successful. One approach arose in the wake of laws targeting methamphetamine labs operating near children. Alabama passed a statute criminalizing chemical endangerment of a child in 2006, intended to punish not only actually giving drugs to a child, but also "exposing a child to an environment" in which the child came in contact with drugs.⁷¹ Prosecutors in Alabama began applying the statute to pregnant women on the logic that the uterus could be considered an environment in which the child was exposed to drugs.⁷² In one case, Amanda Kimbrough gave birth after only twenty six weeks of pregnancy to a child who lived for twenty minutes and died as a result of "acute methamphetamine intoxication."⁷³ Kimbrough was charged with chemical endangerment of a child, pleaded guilty, and was sentenced to ten years in prison.⁷⁴ Another woman named Hope Ankrom gave birth six weeks prematurely to a baby in perfect health other than a positive drug test for cocaine.⁷⁵ She also was charged with chemical endangerment of a child, pleaded guilty, and was given a suspended three year sentence.⁷⁶ These women are examples of a surprisingly common prosecution, as a recent report found almost 500 prosecutions of pregnant women in Alabama under the chemical endangerment law since 2006.⁷⁷

Another creative method of restraining pregnant women under existing law is using a woman's pregnancy as justification for a harsher sentence, imposed as a way of preventing her from continuing behavior the court regards as unsafe. The first example occurred in 1988, when a judge in the District of Columbia was faced with Brenda Vaughn, charged with second-degree theft after forging

69. State v. Luster, 419 S.E.2d 32, 34 (Ga. Ct. App. 1992).

70. Sheriff v. Encoe, 885 P.2d 596, 599 (Nev. 1994).

71. ALA. CODE § 26-15-3.2 (2016).

72. Adam Nossiter, *In Alabama, a Crackdown on Pregnant Drug Users*, N.Y. TIMES.COM (Mar. 15, 2008), <http://www.nytimes.com/2008/03/15/us/15mothers.html>.

73. Kathleen Adams, *Chemical Endangerment of a Fetus: Societal Protection of the Defenseless or Unconstitutional Invasion of Women's Rights?*, 65 ALA. L. REV. 1353, 1360-61 (2014).

74. *Id.*

75. Ankrom v. State, 152 So. 3d 373 (Ala. Crim. App. 2011).

76. *Id.* at 375; see also Fentiman, *supra* note 58, at 407-08.

77. Nina Martin & Amy Yurkanin, *Special Report: Alabama Leads Nation in Turning Pregnant Women Into Felons*, AL.COM (Sept. 23, 2015), http://www.al.com/news/index.ssf/2015/09/when_the_womb_is_a_crime_scene.html.

checks.⁷⁸ The judge acknowledged that as a first-time offender, Vaughn would typically be sentenced to probation.⁷⁹ Because she was six months pregnant and had tested positive for cocaine, however, the judge wanted “to be sure she would not be released until her pregnancy was concluded . . . because of concern for the unborn child,” and instead sentenced her to six months in jail.⁸⁰ More recently, Simonne Ikerd was sentenced in 1998 to five years of probation but did not comply with the terms of her probation and was rearrested.⁸¹ At her sentencing hearing for probation violation—almost five years after her probation began—she was eleven weeks pregnant and admitted that she was still receiving methadone treatment for drug addiction.⁸² The judge sentenced her to prison, explicitly tying her sentence to her pregnancy.⁸³ As April Cherry summarized,

The judge stated that he sentenced her to prison for the duration of her pregnancy, “[n]ot because we want to punish her, but because we want to save the baby.” The trial transcripts further indicate that the sole purpose of Ikerd’s incarceration was to protect the health of her fetus. For example, the judge indicated that he would reconsider the sentence when the baby was born or if Ikerd terminated her pregnancy. In addition, the trial judge told the defendant’s attorney, “if she loses the baby, if there is a problem, and she has the baby, I’ll consider . . . any application that you wish to make at that time.”⁸⁴

Ikerd’s sentence was reversed on appeal, albeit not until after Ikerd gave birth to a healthy baby and was released from prison.⁸⁵ One year later, seven-months pregnant Kari Parsons, on probation following a shoplifting conviction, violated her probation by testing positive for drugs.⁸⁶ A Maryland judge sentenced her to jail,

78. April L. Cherry, *The Detention, Confinement, and Incarceration of Pregnant Women for the Benefit of Fetal Health*, 16 COLUM. J. GENDER & L. 147, 172 (2007).

79. *Id.*

80. *Id.* at 172–73 (quoting *U.S. v. Vaughn*, DAILY WASH. LAW REP., March 7, 1989, at 441 (D.C. Super. Ct. Aug. 23, 1988)).

81. *Id.*

82. *Id.*; *State v. Ikerd*, 850 A.2d 516, 518 (N.J. Super. Ct. App. Div. 2004).

83. *Ikerd*, 850 A.2d at 519–20.

84. *Cherry*, *supra* note 75, at 173–74.

85. *Ikerd*, 850 A.2d at 520.

86. Julie B. Ehrlich, *Breaking the Law by Giving Birth: The War on Drugs, the War on Reproductive Rights, and the War on Women*, 32 N.Y.U. REV. L. & SOC.

explaining that he was concerned for the wellbeing of her fetus.⁸⁷ Ironically, Parsons then delivered her baby alone in a jail cell after guards failed to seek medical help when she went into labor.⁸⁸ Three states authorize civil commitment of pregnant women in order to prevent drug or alcohol abuse.⁸⁹

It is noteworthy that the examples above include prosecutions that began both before and after the child's birth or the loss of a pregnancy. Sixteen states prohibit drug use during pregnancy as either child abuse or child neglect.⁹⁰ A few states specifically authorize or mandate drug testing of laboring women and newborns, and federal law requires that states mandate that health care providers notify child protective services if an infant has been exposed to drugs before birth in order to be eligible for federal funding.⁹¹ Wendy Bach has explained that even without specific authorization, hospitals often perform drug tests on both the baby and woman's blood without the woman's consent.⁹² What test result is defined as a positive—both the presence of a problematic substance and whether the test must be of the new mother or the baby—is generally left up to individual hospitals, resulting in considerable variation.⁹³ If a newborn baby tests positive for drugs, the mother may be prosecuted under child abuse or neglect statutes.⁹⁴ In recent years, state legislatures have passed statutes specifically targeting such mothers, such as Tennessee's "fetal

CHANGE 381, 390 (2008).

87. *Id.*

88. *Id.*

89. See Andrew J. Weisberg & Frank E. Vandervort, *A Liberal Dilemma: Respecting Autonomy While Also Protecting Inchoate Children from Prenatal Substance Abuse*, 24 WM. & MARY BILL RTS. J. 659, 696 (2016) (Those three states are Minnesota, South Dakota, and Wisconsin.).

90. Kathryn A. Kellett, *Miscarriage of Justice: Prenatal Substance Abusers Need Treatment, Not Confinement Under Chemical Endangerment Laws*, 40 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 455, 459 (2014).

91. Keeping Children and Families Safe Act of 2003, PUB. L. NO. 108-36, 117 Stat 800.

92. Wendy A. Bach, *The Hyperregulatory State: Women, Race, Poverty, and Support*, 25 YALE J.L. & FEMINISM 317, 345 (2014).

93. For example, one Pennsylvania hospital used such a low threshold that a woman's newborn was taken away from her for five days based on a positive drug test triggered by the mother eating a poppyseed bagel on her way to the hospital to give birth. Russell Goldman, *Mother Settles Suit Over Poppy Bagel Drug Test*, ABCNEWS.COM (July 3, 2013), <http://abcnews.go.com/US/mother-settles-suit-popyy-bagel-drug-test/story?id=19567956>.

94. See, e.g., *Whitner v. State*, 492 S.E.2d 777, 780 (S.C. 1997) (holding that the term "child" in South Carolina's child abuse and endangerment statute included a viable fetus who tested positive for cocaine after birth).

assault” law.⁹⁵ In such cases, the prosecution is based directly on the baby’s drug test results.

Women have also been prosecuted, however, for child abuse based on the use of drugs or alcohol solely before the baby’s birth, before doctors know whether the drugs or alcohol had any negative effect on the fetus. Typically in such cases, a pregnant woman seeks medical care for other health reasons—in one memorable example, after seeking help from a domestic violence organization for spousal abuse⁹⁶—and the hospital or doctor runs a drug or alcohol test on her blood.⁹⁷ In 2014, for example, a pregnant woman seeking to confirm her pregnancy who disclosed past drug use during the course of medical examinations was charged with child abuse under Wisconsin’s so-called “cocaine mom” law authorizing the state to detain pregnant women and appoint a guardian ad litem to represent the fetus in child protective proceedings.⁹⁸ A number of states legally require doctors and nurses to report pregnant women they suspect of drug use to law enforcement.⁹⁹ The baby may or may not test positive for drugs at birth and may or may not have any health issues due to the drug or alcohol use.¹⁰⁰ Moreover, women

95. 2014 TENN. PUB. ACTS 820; see Dawn Johnsen, *State Court Protection of Reproductive Rights: The Past, the Perils, and the Promise*, 29 COLUM. J. GENDER & L. 41, 49 (2015) (citing Katie McDonough, *First Woman Arrested Under State Law that Criminalizes Pregnancy Outcomes*, SALON (July 11, 2014), http://www.salon.com/2014/07/11/first_woman_arrested_under_tennessee_law_that_criminalizes_pregnancy_outcomes/).

96. Stone-Manista, *supra* note 66, at 829 (citing Renee I. Solomon, Note, *Future Fear: Prenatal Duties Imposed by Private Parties*, 17 AM. J.L. & MED. 411, 416 (1991)); *Woman Who Faced Charges Has Baby*, CHI. TRIB., June 17, 1990, at C22.

97. Stone-Manista, *supra* note 66, at 829–30 (citing Claudia Pinto, *Medical Officials Question Arrest of Pregnant Patient*, TENNESSEAN, Apr. 24, 2008).

98. See Jessica Mason Pieklo, *Pregnant Wisconsin Woman Jailed Under State’s “Personhood”-Like Law*, REWIRE.COM (Dec. 12, 2014), <http://rhrealitycheck.org/article/2014/12/12/pregnant-wisconsin-woman-jailed-states-personhood-like-law/>.

99. Ian Vandewalker, *Taking the Baby Before It’s Born: Termination of the Parental Rights of Women Who Use Illegal Drugs While Pregnant*, 32 N.Y.U. REV. L. & SOC. CHANGE 423, 431 (2008); see also Bach, *supra* note 92, at 350.

100. Notably, the Supreme Court held in 2001 that a program at a South Carolina hospital in which hospital staff directly reported suspected drug use by pregnant women to law enforcement violated the women’s Fourth Amendment rights. *Ferguson v. City of Charleston*, 532 U.S. 67 (2001). A key element of the Court’s reasoning was that the drug tests were performed with the “immediate objective” of gathering evidence for law enforcement purposes. *Id.* at 69. Hospital staff remain free, therefore, to report positive drug tests to law enforcement so long as the tests were not performed with an eye to criminal rather than medical concerns. See also Deborah Ahrens, *Incarcerated Childbirth and Broader “Birth Control”: Autonomy, Regulation, and the State*, 80 MO. L. REV. 1, 34 (2015); Bach,

who have used drugs or alcohol during pregnancy and are aware that doctors and nurses may report them to law enforcement may be less likely to seek any prenatal care for fear of legal sanction.¹⁰¹

Civil proceedings may also be triggered by drug use during pregnancy, such as the state taking custody of the child. Again, courts and prosecutors have wrestled with the timing of the drug use and under what statutes such proceedings may be commenced.

After the child's birth, it is clear that drug use while pregnant may justify civil actions taken against the mother. All states agree that use of drugs or alcohol while pregnant may trigger finding a child to be neglected, and can thus justify taking custody of the child or terminating the mother's parental rights.¹⁰² Sixteen states specify that drug use while pregnant is child abuse.¹⁰³

Before the child's birth, however, the picture is less clear. Some states and prosecutors have attempted to use child abuse and neglect statutes to punish or control pregnant women before birth of the child has taken place. Reception of such actions has varied. A majority of states allow pregnant women to be subjected to civil commitment orders in order to treat and prevent future drug abuse.¹⁰⁴ Some courts, however, have rejected such logic. In 1997, the Wisconsin Supreme Court rejected an attempt to require a pregnant woman to participate in a drug treatment program as the result of a child neglect proceeding, as the child in question was still a fetus.¹⁰⁵ The case began when the Wisconsin Department of Human Services petitioned the juvenile court, reasoning that the unborn child was in need of protection.¹⁰⁶ The argument was supported by the pregnant woman's doctor, who provided an affidavit stating that in his professional opinion, in the absence of intervention to prevent further drug use by the pregnant woman, the unborn child would suffer serious harm.¹⁰⁷ The juvenile court then

supra note 92, at 343–44.

101. See Adam J. Duso & John Stogner, *Re-Evaluating the Criminalization of In Utero Alcohol Exposure: A Harm-Reduction Approach*, 24 WM. & MARY BILL RTS. J. 621, 638–40 (2016).

102. Linda C. Fentiman, *The New "Fetal Protection": The Wrong Answer to the Crisis of Inadequate Health Care for Women and Children*, 84 DENV. U. L. REV. 537, 581 (2006).

103. See Adams, *supra* note 74, at 1355; Goodwin, *supra* note 61, at 795–96; Vandewalker, *supra* note 94, at 425.

104. Fentiman, *supra* note 99, at 566.

105. *State v. Kruzicki*, 561 N.W.2d 729, 739–40 (Wis. 1997); see also Fentiman, *supra* note 99, at 567.

106. *Kruzicki*, 561 N.W.2d at 732.

107. *Id.*

ordered the unborn child to be detained in a hospital, recognizing that this would “by necessity result in the detention of the unborn child’s mother.”¹⁰⁸ Similarly, in 2003, the Arkansas Supreme Court overturned an Arkansas trial court’s attempt to take a “child” into state custody before the child’s birth by incarcerating the pregnant woman.¹⁰⁹

More troublingly, there is some evidence that court rejection of such attempts may have little impact on future interventions. Lynn M. Paltrow, the Executive Director of National Advocates for Pregnant Women,¹¹⁰ co-authored a study in 2013 analyzing over four hundred examples of such interventions, and found that such

deprivations of liberty . . . occurred in spite of a lack of legislative authority, in defiance of numerous and significant appellate court decisions dismissing or overturning such actions, and contrary to the extraordinary consensus by public health organizations, medical groups, and experts that such actions undermine rather than further maternal, fetal, and child health.¹¹¹

Although alcohol is a legal substance, it is often lumped together with drugs and similarly used as a basis for both criminal and civil actions.¹¹² Alcohol consumption while pregnant may be incorporated in neglect or abuse assessments and in five states may justify orders placing pregnant women into alcoholism treatment in order to prevent them from drinking more alcohol.¹¹³ Other charges may also follow from alcohol consumption. For example, in 2013, a Tennessee woman was charged with driving under the influence and child endangerment based on drinking alcohol while she was pregnant and crashing her car.¹¹⁴ Alcohol is generally viewed, however, as less dangerous for the fetus, in the sense that while there is consensus

108. *Id.*; see also Cherry, *supra* note 75, at 163.

109. *Bennett v. Collier*, 95 S.W.3d 782, 785 (Ark. 2003); Fentiman, *supra* note 99, at 567; see also *People ex rel. H.*, 74 P.3d 494 (Colo. App. 2003) (rejecting a dependency or neglect proceeding brought on behalf of “Unborn Baby Boy H.”).

110. NATIONAL ADVOCATES FOR PREGNANT WOMEN, ABOUT US, http://www.advocatesforpregnantwomen.org/main/about_us/staff.php.

111. Lynn M. Paltrow & Jeanne Flavin, *Arrests of and Forced Interventions on Pregnant Women in the United States, 1973–2005: Implications for Women’s Legal Status and Public Health*, 38 J. HEALTH POL. POL’Y & L. 299, 320 (2013).

112. See Adams, *supra* note 74, at 1354, 1362.

113. Gaia Bernstein & Zvi Triger, *Over-Parenting*, 44 U.C. DAVIS L. REV. 1221, 1259 (2011).

114. Michele Goodwin, *The Pregnancy Penalty*, 26 HEALTH MATRIX 17, 24 (2016).

excessive use is dangerous for the pregnancy and can lead to such conditions such as fetal alcohol syndrome, it is less clear that occasional consumption is a hazard.¹¹⁵

Counterintuitively, drug use may occupy a similarly medical gray area. Running against most people's assumptions, it is not entirely clear that the use of illegal drugs while pregnant actually causes harm to the fetus. One reason is evidentiary, in the sense that it is rare that a pregnant woman uses only one illegal drug, so that tying causation to one substance (as opposed to other drugs, both legal and illegal, used during the pregnancy) is difficult to establish.¹¹⁶ Other factors unrelated to drug use may also play important roles. Expert witnesses before the South Carolina Supreme Court explained that cocaine use while pregnant may be "no more harmful to a fetus than nicotine use, poor nutrition, lack of prenatal care, or other conditions commonly associated with the urban poor."¹¹⁷ Another reason is potentially broader: fears as to the consequences of illegal drugs have not been proven to be accurate. In the 1980s, the media created near-hysteria over the prospect of large numbers of violent or disabled children exposed to crack cocaine in utero. Not only have such children not materialized, but research indicates that children whose mothers used crack cocaine while pregnant face few of the dangers and harms discussed.¹¹⁸

Despite this slightly muddied picture, drug use during pregnancy is one of the most commonly and severely punished actions, bringing the full weight of both criminal and civil law down upon the pregnant woman. The next section discusses a broader category reaching into a new area of law: risks during pregnancy as torts committed against the fetus.

B. Risks during Pregnancy as Torts

Other types of arguably dangerous or negligent behavior have occasionally become the basis of tort suits brought against the mother for actions taken while she was pregnant, with mixed results. Such suits are generally brought by the father on behalf of the child.¹¹⁹ Linda Fentiman chronicled six such lawsuits, which

115. See EMILY OSTER, *EXPECTING BETTER* 39 (2013); Duso & Stogner, *supra* note 101, at 624–26.

116. Kira Proehl, *Pregnancy Crimes: New Worries to Expect When You're Expecting*, 53 SANTA CLARA L. REV. 661, 685 (2013).

117. *McKnight v. State*, 661 S.E.2d 354, 358 fn.2 (S.C. 2008).

118. Proehl, *supra* note 109, at 685–86.

119. The focus of this paper is on legal sanctions placed upon the pregnant

present an even split of whether courts allowed such claims to go forward.¹²⁰ In three cases, courts rejected the arguments, largely because the court saw no limit to the broad range of conduct to which such actions could be applied. As one Massachusetts court explained,

[D]uring the period of gestation, almost all aspects of a woman's life may have an impact, for better or for worse, on her developing fetus. A fetus can be injured not only by physical force, but by the mother's exposure, unwitting or intentional, to chemicals and other substances, both dangerous and nondangerous, at home or in the workplace, or by the mother's voluntary ingestion of drugs, alcohol, or tobacco. A pregnant woman may place her fetus in danger by engaging in activities involving a risk of physical harm or by engaging in activities, such as most sports, that are generally not considered to be perilous. A pregnant woman may jeopardize the health of her fetus by taking medication (prescription or over-the-counter) or, in other cases, by not taking medication. She also may endanger the well-being of her fetus by not following her physician's advice with respect to prenatal care or by exercising her constitutional right not to receive medical treatment.

Recognizing a pregnant woman's legal duty of care in negligence to her unborn child would present an almost unlimited number of circumstances that would likely give rise to litigation.¹²¹

The other two cases—one involving a car accident while the pregnant woman was driving,¹²² the other involving use of alcohol

woman for her conduct, but it is worth noting the conflicting tort law relating to medical care for a pregnant woman in the process of delivery and the child to whom she gives birth. Jamie Abrams has incisively argued that “childbirth litigation today is framed around a fore-grounded fetal harms focus and a back-grounded maternal harms focus, . . . [which is] threatening to the interests of birthing women as patients and putative plaintiffs in the tort system.” Jamie R. Abrams, *Distorted and Diminished Tort Claims for Women*, 34 CARDOZO L. REV. 1955, 1975 (2013).

120. Fentiman, *supra* note 58, at 412–16; Linda C. Fentiman, *Are Mothers Hazardous to Their Children's Health?: Law, Culture, and the Framing of Risk*, 21 VA. J. SOC. POL'Y & L. 295, 323 (2014).

121. *Remy v. MacDonald*, 801 N.E.2d 260, 263 (Mass. 2004) (internal citation omitted).

122. *Stallman v. Youngquist*, 531 N.E.2d 355 (Ill. 1988).

and drugs while pregnant¹²³—similarly rebuffed later tort suits with comparable logic, concerned that if a pregnant woman was deemed to have a cognizable legal duty of care to her fetus, it would be difficult to define or limit that duty.¹²⁴

By contrast, three courts allowed tort suits against a mother for her conduct while pregnant to proceed. Two of the cases involved claims relating to insurance payments, which might have complicated the perceived equities of the lawsuit. One court held that a pregnant woman whose child was born with brain damage after she was hit by a car while crossing the street was “required to act with . . . the same standard of care as that required of her once the child is born.”¹²⁵ Another court simply held in the context of a negligent driving claim that courts need not “den[y] compensation for such injury merely because of the identity of the tortfeasor.”¹²⁶ In the oldest case, a 1980 suit filed in Michigan, the court attempted to cabin such claims by specifying that if the woman’s conduct in taking Tetracycline that apparently led to her child’s discolored teeth was a “reasonable exercise of parental discretion,” then her actions would be immune from tort suits.¹²⁷

A handful of examples obviously does not indicate any widespread policing of pregnant women through tort law, but as other justifications for regulation become more common, tort suits may become a more common method of financially punishing mothers for choices made during their pregnancy.¹²⁸ The rules of maternity not only police mothers, but also help to define what is a reasonable or responsible choice. The full ambit of the rules of maternity thus may affect what is viewed as a reasonable exercise of parental discretion and indirectly expand potential tort suits.

123. *Chenault v. Huie*, 989 S.W.2d 474, 476 (Tex. Ct. App. 1999) (stating that while “the law wisely no longer treats a fetus as only a part of the mother, the law would ignore the equally important physical realities of pregnancy if it treated the fetus as an individual entirely separate from his mother.”) (emphasis omitted).

124. *Id.* at 477–78; *Stallman*, 531 N.E.2d at 361.

125. *Bonte v. Bonte*, 616 A.2d 464, 464, 466 (N.H. 1992).

126. *Nat’l Cas. Co. v. N. Trust Bank of Fla.*, 807 So. 2d 86, 87 (Fla. Dist. Ct. App. 2001).

127. *Grodin v. Grodin*, 301 N.W.2d 869, 871 (Mich. Ct. App. 1980) (emphasis omitted) (quoting *Plumley v. Klein*, 199 N.W.2d 169 (Mich. 1972)).

128. The logic of punishing reckless behavior by pregnant women may be generally exported into criminal law. A pregnant woman in New York who caused a car accident, for example, was recently convicted of manslaughter for the loss of her 34-week old fetus, although the conviction was overturned on appeal. See *People v. Jorgensen*, 41 N.E. 778, 779–80 (N.Y. 2015).

Thus far, the potential harms to the pregnant woman as vessel for the fetus have not risen to the level of ending her life and the fetus's along with her. The next section addresses what happens if a pregnant woman attempts to end her own life.

C. *Self-harm as Child Abuse*

A particularly complicated example of how a pregnant woman's body is legally viewed as the vessel for her child is unsuccessful suicide attempts by pregnant women. In the 1990s, Deborah Zimmerman was taken to the hospital after becoming extremely intoxicated in a bar. After she declared to a nurse that she planned to drink both herself and her fetus to death, she consented to an emergency c-section and gave birth to a baby who tested positive for alcohol and exhibited symptoms of fetal alcohol syndrome.¹²⁹ Obviously her actions might have given rise to legal actions discussed above such as child abuse or potential termination of her parental status due to her alcohol abuse. Instead, Zimmerman was charged with attempted first degree homicide for trying to kill her child.¹³⁰ The court of appeals rejected the charge, explaining that using such logic, "a woman could risk criminal charges for any perceived self-destructive behavior during her pregnancy that may result in injuries to her unborn child."¹³¹ This rejection, however, did not end such prosecutions. More recently, a woman in Iowa was arrested after she sought treatment in the hospital after falling down a flight of stairs at home, when hospital employees believed she may have fallen down the stairs intentionally.¹³²

Finally, a woman named Beibei Shuai attempted suicide by eating rat poison after her boyfriend broke up with her.¹³³ She was eight months pregnant at the time, and although she gave birth by emergency c-section, the baby died two days later.¹³⁴ Shuai, who was herself hospitalized not only for the effects of the poison but also for psychiatric treatment, was then charged with murder and attempted

129. *State v. Deborah J.Z.*, 596 N.W.2d 490, 491–92 (Wis. Ct. App. 1999).

130. *Id.* at 491.

131. *Id.* at 494.

132. *Goodwin*, *supra* note 61, at 806–08. (Prosecutors dropped the case three weeks later.)

133. Andrew S. Murphy, *A Survey of State Fetal Homicide Laws and Their Potential Applicability to Pregnant Women Who Harm Their Own Fetuses*, 89 *IND. L.J.* 847, 854 (2014).

134. *Id.* at 855.

feticide.¹³⁵ Shuai's attorney filed a motion to dismiss the charges, which was denied by both the trial court and the Indiana Court of Appeals.¹³⁶ After the trial court later made evidentiary rulings that weakened the state's case as to the link between the rat poison and the baby's injuries, however, Shuai agreed to a plea deal under which she pleaded guilty to misdemeanor criminal recklessness and was sentenced to time served.¹³⁷

D. Keeping the Vessel Alive

In extreme contexts, courts have even dispensed with the mother's consent and treated her near-lifeless body as a literal incubator for the pregnancy. Most states have statutes prohibiting hospitals from removing a pregnant woman from life support in order to keep the pregnant woman's body functioning long enough to be delivered of a viable baby.¹³⁸ Many states do not allow a proxy decisionmaker to remove life support if she is pregnant when she becomes incapacitated.¹³⁹ Some states also specify that statutory decisionmakers—the default person with power to make medical decisions for an incapacitated person, usually a spouse, parent, or adult child—cannot direct a hospital to remove life support from a pregnant woman.¹⁴⁰ Most states even refuse to enforce the woman's wishes not to be placed on life support expressed in a written advance directive or living will if she is pregnant, with some variation depending on whether the fetus is viable and the likelihood that the fetus can develop to viability if life support is continued.¹⁴¹

A number of women over the last few decades have been kept on life support in order to continue a pregnancy to term. Sometimes the

135. *Shuai v. State*, 966 N.E.2d 619, 622–23 (Ind. Ct. App. 2012); see also Proehl, *supra* note 109, at 671–73; Jennifer Block, *Jailed for a Suicide Attempt*, THE DAILY BEAST (Apr. 12, 2011), <http://www.thedailybeast.com/articles/2011/04/13/jennifer-block-on-bei-bei-shuais-feticide-ordeal.html>.

136. *Shuai*, 966 N.E.2d at 621–23.

137. See April L. Cherry, *Shifting Our Focus from Retribution to Social Justice: An Alternative Vision for the Treatment of Pregnant Women Who Harm Their Fetuses*, 28 J.L. & HEALTH 6, 12 (2015).

138. See Katherine A. Taylor, *Compelling Pregnancy at Death's Door*, 7 COLUM. J. GENDER & L. 85, 87 (1997).

139. *Id.* at 100.

140. *Id.* at 102.

141. See Wendy Adele Humphrey, "But I'm Brain-Dead and Pregnant": *Advance Directive Pregnancy Exclusions and End-of-Life Wishes*, 21 WM. & MARY J. WOMEN & L. 669, 676 (2015); Kristeena L. Johnson, *Forcing Life on the Dead: Why the Pregnancy Exemption Clause of the Kentucky Living Will Directive Act Is Unconstitutional*, 100 KY. L.J. 209, 210–11 (2012).

woman's wishes were unclear—in 1996, a twenty-nine year old woman who had been in a coma for ten years was raped by a worker in the nursing home and became pregnant.¹⁴² Her family decided to continue the pregnancy, and the grandmother was awarded guardianship of the child.¹⁴³ In other examples, the medical dispute amplifies existing family conflict, as when Donna Piazzzi's husband wished for her to be taken off life support, but the undisputed genetic father of her sixteen-week fetus successfully petitioned for a court order to keep Piazzzi on life support until the fetus was viable.¹⁴⁴ In another case, the genetic father successfully sought an order keeping his seventeen-week pregnant common law wife on life support against the wishes of her mother.¹⁴⁵ In other cases, all surrogate decisionmakers agree that the pregnant woman would not have wished to be kept on life support, as in the case of Marlise Muñoz, kept on life support for two months in the hopes of bringing her fourteen-week pregnancy to term.¹⁴⁶ A few women have attempted to challenge such statutes through requests for declaratory judgments, but courts have dismissed the claims as hypothetical, given that the plaintiffs were not on life support when they filed the lawsuits.¹⁴⁷

The first rule of maternity is problematically strong in that it is difficult to limit. It is hard to see where such a strong focus on the health of a fetus as opposed to the agency of a pregnant woman should stop. If every action taken by a pregnant woman has an effect on her eventual child's health, then every move she makes could in theory trigger legal liability. Taken to its extreme, all sorts of conditions not under a woman's control such as age or disease affect the health of the pregnancy she carries, and could correspondingly generate liability for "extreme indifference to human life," as the South Carolina Supreme Court used in the context of Regina

142. Taylor, *supra* note 138, at 148.

143. *Id.*

144. Univ. Health Servs. Inc. v. Piazzzi, No. CV86-RCCV-464 (Ga. Super. Ct. Aug. 4, 1986); see also Humphrey, *supra* note 141, at 689–91; James M. Jordan III, *Incubating for the State: The Precarious Autonomy of Persistently Vegetative and Brain-Dead Pregnant Women*, 22 GA. L. REV. 1103, 1108–12 (1988).

145. Emma Murphy Sisti, *Die Free or Live: The Constitutionality of New Hampshire's Living Will Pregnancy Exception*, 30 VT. L. REV. 143, 143 (2005).

146. See Humphrey, *supra* note 141, at 669–70; Goodwin, *supra* note 61, at 814–15.

147. See, e.g., Gabrynowicz v. Heitkamp, 904 F. Supp. 1061 (D.N.D. 1995); DiNino v. State, 684 P.2d 1297 (Wash. 1984) (en banc); see also Fentiman, *supra* note 102, at 565–66.

McKnight's conviction for using crack cocaine while pregnant.¹⁴⁸ Even the method of conception could be treated as a potentially risky choice, as the potential dangers to pregnancies begun through assisted reproductive technologies can be compared to the potential dangers of drug and alcohol use while pregnant.¹⁴⁹

Such comparisons may seem ludicrous, but it is not difficult to imagine at least a few steps down a slippery slope.¹⁵⁰ In 2013, three doctors published an article in the *Journal of Legal Medicine* raising the possibility of prosecuting women for being too obese during their pregnancy. The physicians argued:

The mounting evidence of fetal harm, infant mortality, complications during childbirth, and the escalating health care costs associated with obese parturients, demands that the health care system consider alternative solutions to this growing problem. Given the willingness of our legal system to hold parturients accountable for ramifications of drug and alcohol use, it does not appear that extending fetal protection to include obesity-associated complications is an unreasonable direction of the laws governing maternal-fetal medicine.¹⁵¹

In 1986, Dawn Johnsen wrote of the prospect that a woman could be "held liable for any behavior during her pregnancy having potentially adverse effects on her fetus, including failing to eat properly"¹⁵² Recent years are proving her correct.

The women punished by such judgment of their choices, moreover, do not reflect the characteristics of all pregnant women generally. As Dorothy Roberts famously wrote in the *Harvard Law Review*, women of color who use drugs while pregnant are disproportionately targeted for state coercion and punishment.¹⁵³

148. See Proehl, *supra* note 116, at 667–68, 683–84.

149. See Fentiman, *supra* note 117, at 397–98.

150. See Deborah M. Santello, *Maternal Tort Liability for Prenatal Injuries*, 22 SUFFOLK U. L. REV. 747, 764–70 (1988) (listing potential teratogenic harms to fetus caused by mother, including infectious diseases and sexually transmitted infection).

151. Christopher M. Burkle, Hugh M. Smith, & Katherine W. Arendt, *Punishing Maternal Behavior: Potential Legal Consequences for Obesity-Associated Poor Fetal Outcome in the United States*, 34 J. LEGAL MED. 251, 270 (2013).

152. Dawn E. Johnsen, *The Creation of Fetal Rights: Conflicts with Women's Constitutional Rights to Liberty, Privacy, and Equal Protection*, 95 YALE L.J. 599, 606–07 (1986) (outlining constitutional limits to expanding the rights of a fetus).

153. Dorothy E. Roberts, *Punishing Drug Addicts Who Have Babies: Women of Color, Equality, and the Right of Privacy*, 104 HARV. L. REV. 1419 (1991).

Nancy Ehrenreich has similarly explained how the same actions by different types of new mothers are viewed very differently. In the context of women who gave birth without medical assistance and lost the baby during or shortly after birth, young white women were often viewed as having made terrible mistakes, whereas “older white women, low-income white women, and all women of color were perceived as bad girls and sentenced accordingly. The discourse surrounding these women depicted them as willfully refusing to give birth in the hospital as they ‘should’ have.”¹⁵⁴

The judgment placed upon the “right” kind of pregnant woman and “right” kind of mother is heightened when one considers the role of the father. Men who suffer from alcoholism or drug addiction father babies with higher risks of harms such as low birth weight and birth defects.¹⁵⁵ Men can be exposed to dangerous chemicals in the workplace that have similar ill effects on their children and can engage in all sorts of conduct in the presence of a pregnant woman, such as smoking, that harms the developing fetus.¹⁵⁶ Yet a man’s choices that may affect his future children are rarely socially criticized, let alone legally punished.

Instead, only the woman’s behavior is policed and regulated with the force of law. It is only pregnant women who are told that their paramount concern during pregnancy should be how each choice may affect the fetus, even though partners, other family members, and employers may also affect the health of the fetus through other environmental factors. The first lesson of motherhood learned during pregnancy is that the pregnant woman alone must make choices to protect her future child. The next rule specifies that the woman should not make such choices independently, but instead should defer to the judgments of others.

III. RULE 2: DOCTOR KNOWS BEST

Pregnant women seek advice regarding healthy behaviors from many sources: friends who have gone through pregnancy, family members, their own mothers, books, and the internet. One source of guidance, however, is promoted above all others by the law: doctors. The second rule of maternity tells pregnant women that doctor

154. Nancy Ehrenreich, *The Colonization of the Womb*, 43 DUKE L.J. 492, 518 (1993).

155. Ehrlich, *supra* note 82, at 389–90.

156. See Fentiman, *supra* note 120, at 302–03; Jane C. Murphy, *Legal Images of Motherhood: Conflicting Definitions from Welfare “Reform,” Family, and Criminal Law*, 83 CORNELL L. REV. 688, 715 (1998).

knows best. To go against a doctor's advice—even though medical opinions are diverse and often disagree—is to negligently or recklessly risk harm to the child and consequently expose the mother to legal liability. Pregnant women who refuse medical treatment, fail to comply with medical orders, or reject a doctor's advice as to medical care may be subjected to coercive or punitive action by the state. Commentators noted a wave of more aggressive enforcement of following doctors' advice in the late 1990s, and we may now be in the midst of another upward cycle.¹⁵⁷

The most direct conflict that the state may resolve through a court order occurs when a pregnant woman refuses treatment her doctor believes is necessary. Although there is a general right to refuse medical care,¹⁵⁸ the presence of a fetus, particularly a viable fetus, introduces complexities that have justified orders mandating care in a number of jurisdictions.¹⁵⁹ Sometimes the conflict between doctor and pregnant woman is stark. For example, a Massachusetts woman named Rebecca Corneau was under investigation, along with several other members of her religious community called "The Body," for allegedly failing to provide any medical assistance to her son Jeremiah at birth, leading to the baby's death by choking.¹⁶⁰ While law enforcement investigated The Body members, eventually convincing one to lead them to the buried bodies of Jeremiah and another infant who had been starved to death, it became increasingly apparent that Corneau was pregnant again. A family court ordered Corneau incarcerated so that she could receive medical care in a prison hospital. Corneau did not appeal the order and was placed in jail until she gave birth, at which point the court terminated her parental rights.¹⁶¹

157. Fentiman, *supra* note 58, at 400.

158. *Cruzan v. Director, Mo. Dep't of Health*, 497 U.S. 261 (1990).

159. See Rona Kaufman Kitchen, *Holistic Pregnancy: Rejecting the Theory of the Adversarial Mother*, 26 HASTINGS WOMEN'S L.J. 207, 209 (2015) ("The great tragedy is that this adversarial view is becoming the dominant legal paradigm for all pregnancies.").

160. Michele Nicolosi, *Forced Prenatal Care*, SALON.com (Sept. 15, 2000), http://www.salon.com/2000/09/15/forced_prenatal/.

161. See Fentiman, *supra* note 102, at 567–68. Corneau's reproductive status continued to catch the attention of the family court. The following year, Corneau appeared visibly pregnant at a custody hearing for her youngest child held eleventh months after she gave birth in prison. David Linton, *Rebecca Corneau Expecting New Child*, THE SUN CHRON. (Sept. 13, 2001), http://www.thesunchronicle.com/rebecca-corneau-expecting-new-child/article_9584fe87-e0c1-5e6f-82bf-f66382ecef2b.html.

When the authorities began investigating whether she was pregnant again, Corneau and her husband claimed that she had suffered a miscarriage the following month. Law enforcement did not believe this claim, particularly since Jeremiah's birth and

Other conflicts arise over specific medical recommendations or orders, as opposed to blanket refusals of all health care. One common site of disagreement is blood transfusions, generally refused by Jehovah's Witnesses, among others. As early as the 1960s, hospitals successfully sought court orders allowing them to give blood transfusions to pregnant women in the interest of protecting the fetus.¹⁶² Such orders have been issued even when the fetus has not reached viability, reasoning that even a nonviable fetus's interests as a potential life are more significant than the pregnant woman's right to refuse medical care.¹⁶³ In a 1985 case in New York that arose in the context of a woman who consented to a c-section but not to blood transfusions, the court even ordered that the hospital could give blood transfusions to the woman after the c-section was finished, as such transfusions might be required to complete the procedure successfully.¹⁶⁴

A frequent site of disagreement between pregnant women and medical and legal authorities is the method of giving birth. Many commentators have described birth as increasingly medicalized in recent years¹⁶⁵ and correspondingly increasingly controlled by doctors rather than the laboring mother.¹⁶⁶ Only about one percent of pregnant women give birth either at home or in a birth center housed outside of a hospital, where midwives rather than doctors supervise labor.¹⁶⁷ Courts have routinely rejected arguments that

death were never reported, and the two parents were incarcerated for contempt of court for failing to either produce the baby to which Corneau gave birth or provide information about where they disposed of the miscarried fetus. *Jailed Parents Told to Show Baby*, ABCNEWS.COM (Feb. 14, 2001), <http://abcnews.go.com/GMA/story?id=126346>.

162. See *Raleigh Fitkin-Paul Morgan Mem'l Hosp. v. Anderson*, 201 A.2d 537, 538 (N.J. 1964).

163. *In re Jamaica Hosp.*, 491 N.Y.S.2d 898, 900 (Sup. Ct. 1985); see also Julie B. Murphy, *Competing Interests: When a Pregnant Woman Refuses to Consent to Medical Treatment Beneficial to Her Fetus*, 35 SUFFOLK U. L. REV. 189, 201 (2001).

164. *Crouse Irving Mem'l Hosp., Inc. v. Paddock*, 485 N.Y.S.2d 443, 445 (N.Y. Sup. Ct. 1985); see also Murphy, *supra* note 163, at 201.

165. See, e.g., Jamie R. Abrams, *From "Barbarity" to Regularity: A Case Study of "Unnecesarean" Malpractice Claims*, 63 S.C. L. REV. 191, 225-28 (2011); Sylvia A. Law, *Childbirth: An Opportunity for Choice That Should Be Supported*, 32 N.Y.U. REV. L. & SOC. CHANGE 345 (2008).

166. Ehrenreich, *supra* note 154, at 536.

167. Anna Hickman, Note, *Born (Not So) Free: Legal Limits on the Practice of Unassisted Childbirth or Freebirthing in the United States*, 94 MINN. L. REV. 1651, 1654 (2010).

women have a right to midwifery rather than a doctor's management of the birthing process.¹⁶⁸

Medicalization is often criticized in the context of c-sections, once used as a last-ditch extreme attempt to save the life of a baby when the pregnant mother had already died.¹⁶⁹ As Nancy Ehrenreich argued,

Protecting a fetus often entails imposing certain risks on the woman carrying it; a Cesarean section, for example, is at least twice as likely as a vaginal birth to result in the death of the mother. Yet this risk becomes irrelevant if the cultural norm already prescribes that she be willing to sacrifice anything and everything for her children (born or unborn).¹⁷⁰

Not only are women pressured and sometimes coerced by their doctors to deliver by c-section, particularly if past deliveries were also by c-section, but the state has repeatedly either punished women for refusing to have a c-section if the baby is arguably harmed by that decision, or actually ordered women to undergo the procedure.¹⁷¹

About ten years ago, Melissa Rowland initially refused to schedule a c-section to deliver her twins.¹⁷² A few days later she consented, but one twin was stillborn.¹⁷³ An autopsy of the stillborn child indicated that he had died two days before Rowland gave

168. See Joanne Rouse, *Indiana's Midwifery Statute and the Legal Barriers That Will Render It Unworkable*, 48 IND. L. REV. 663, 675–82 (2015); Rachel A. D. Marquardt, *Balancing Babies, Birth, and Belief: A Legal Argument Against Planned Homebirth*, 16 J. GENDER RACE & JUST. 607, 619–20 (2013); Rebecca A. Spence, *Abandoning Women to Their Rights: What Happens When Feminist Jurisprudence Ignores Birthing Rights*, 19 CARDOZO J.L. & GENDER 75, 93–94 (2012).

169. See Erin P. Davenport, *Court Ordered Cesarean Sections: Why Courts Should Not Be Allowed to Use a Balancing Test*, 18 DUKE J. GENDER L. & POL'Y 79, 80 (2010).

170. Ehrenreich, *supra* note 154, at 537; see also Farah Diaz-Tello, *When the Invisible Hand Wields A Scalpel: Maternity Care in the Market Economy*, 18 CUNY L. REV. 197, 203 (2015) (“The health risks of cesarean surgery are mostly borne by the birthing person, and largely deferred into subsequent pregnancies: with each cesarean, the risk of maternal morbidity increases significantly.”).

171. *But see In re Baby Boy Doe*, 632 N.E.2d 326 (Ill. Ct. App. 1994); *In re A.C.*, 573 A.2d 1235, 1246–47 (D.C. 1990); Bradley J. Glass, Note, *A Comparative Analysis of the Right of A Pregnant Woman to Refuse Medical Treatment for Herself and Her Viable Fetus: The United States and United Kingdom*, 11 IND. INT'L & COMP. L. REV. 507, 523 (2001).

172. Monica K. Miller, *Refusal to Undergo A Cesarean Section: A Woman's Right or A Criminal Act?*, 15 HEALTH MATRIX 383, 383 (2005).

173. Proehl, *supra* note 116, at 669.

birth.¹⁷⁴ Because the child died after her doctor told her she should have a c-section in the interest of her children, Rowland was charged with first-degree homicide and child endangerment and eventually pleaded guilty to two counts of child endangerment.¹⁷⁵

Other women have been directly ordered to undergo a c-section. The first prominent example occurred in Georgia in 1981 when Jessie Mae Jefferson was told she had a complete placenta previa thirty-nine weeks into her pregnancy.¹⁷⁶ Placenta previa, meaning that the placenta grows to cover the cervix, can be extremely dangerous for both the pregnant woman and the fetus she carries.¹⁷⁷ Jefferson was told that if she attempted to deliver vaginally, her baby would almost certainly die, and she faced even odds of surviving labor.¹⁷⁸ By contrast, both Jefferson and her child would almost definitely survive a c-section.¹⁷⁹ After Jefferson refused a c-section, the hospital asked for a court order that would authorize it to perform a c-section without her consent.¹⁸⁰ The court issued the order, as well as placed Jefferson's fetus in the temporary custody of the Georgia Department of Human Resources.¹⁸¹ Ironically, the order was rendered unnecessary when prior to the c-section, Jefferson's placenta shifted place and no longer covered her cervix, making a vaginal delivery safe.¹⁸²

Jefferson's case is obviously an example in which the state's argument for intervention is particularly strong, as there was good reason to believe that her refusal to deliver via c-section would result in the death of her baby. Similar orders, however, have been issued in contexts where the potential danger is much less stark. For example, in 1996 Laura Pemberton was at the center of an even more dramatic legal showdown.¹⁸³ Pemberton had given birth by c-section in 1995, after her own diagnosis of placenta previa.¹⁸⁴ Because her previous c-section had involved both vertical and horizontal incisions, when she became pregnant again, she could not

174. Miller, *supra* note 172, at 383.

175. *Id.* at 383–84.

176. Jefferson v. Griffin Spalding Cnty. Hosp. Auth., 274 S.E.2d 457, 458 (Ga. 1981).

177. *Id.*

178. *Id.*

179. *Id.*

180. *Id.*

181. Cherry, *supra* note 75, at 161.

182. Proehl, *supra* note 116, at 670; *see also* Cherry, *supra* note 805, at 160–61.

183. Paul Christopher Estaris Torio, *Nature Versus Suture: Why VBAC Should Still Be in Vogue*, 31 WOMEN'S RTS. L. REP. 487, 488 (2010).

184. *Id.* at 487

find a hospital willing to let her attempt a vaginal birth after c-section (VBAC), as the doctors were concerned by the small risk that her c-section scars could rupture.¹⁸⁵ Pemberton and her husband found a midwife willing to supervise her birth at home, and she went into labor naturally.¹⁸⁶ After two days of labor, however, she was dehydrated and went to a hospital for IV fluids.¹⁸⁷ Doctors at the hospital told her that she should deliver the child by c-section and if she refused to consent to the operation, she could not have the IV fluids.¹⁸⁸ Nurses at the hospital examined her and said there was no indication that the c-section scars on her uterus were in danger of rupturing, so Pemberton returned home.¹⁸⁹

The hospital, however, remained concerned for Pemberton's safety if she attempted to continue in labor and obtained a court order telling her to return to the hospital and deliver by c-section.¹⁹⁰ The order was enforced when law enforcement and paramedics went to Pemberton's home, restrained her on a stretcher, and removed her from her home to an ambulance.¹⁹¹ A judge came to the hospital and visited her exam room, where Pemberton attempted to argue that she should be allowed to progress through labor without surgical intervention (while still in labor and experiencing contractions).¹⁹² The judge refused and ordered the c-section to proceed.¹⁹³ Pemberton later sued the hospital, alleging that the hospital violated her right to privacy and due process, had falsely imprisoned her, and had acted negligently.¹⁹⁴ A district court rejected the claims in 1999, reasoning that "[w]hatever the scope of Ms. Pemberton's personal constitutional rights in this situation, they clearly did not outweigh the interests of the State of Florida in preserving the life of the

185. Notably, from the early 1980s until 1996, physicians encouraged women to try to deliver vaginally after a previous c-section. As of 2010 the American Congress of Obstetricians and Gynecologists gives a "cautious endorsement" to VBAC attempts, 60-80% of which will be successful. Diaz-Tello, *supra* note 159, at 204-07.

186. Torio, *supra* note 183, at 487-88.

187. *Id.* at 488.

188. *Id.*

189. *Id.*

190. *Id.*

191. *Id.*

192. *Id.*

193. *Id.*

194. *Pemberton v. Tallahassee Mem'l Reg'l Med. Ctr., Inc.*, 66 F. Supp. 2d 1247, 1249 (N.D. Fla. 1999).

unborn child.”¹⁹⁵ (That same year, Pemberton successfully gave birth to twins through a vaginal delivery while in hiding.¹⁹⁶)

The district court’s reasoning is characteristic of such disputes, finding that the state’s interest in the life of the fetus outweighs the pregnant mother’s autonomy right to control her own medical care and consent to surgery.¹⁹⁷ In some cases, the laboring mother has evaded the initial hospital seeking a court order, such as Amber Marlowe. In 2004, she left a hospital that successfully sought a court order giving doctors the authority to deliver Marlowe’s child by c-section, justified by the doctor’s concern that the baby might weigh up to thirteen pounds.¹⁹⁸ Marlowe went to another hospital and vaginally delivered an eleven-pound baby.¹⁹⁹ In 2009, Joy Szabo was told by her hospital that it had changed its policy regarding VBACS midway through her pregnancy, and despite having delivered her third child at that hospital as a VBAC delivery, she would have to consent to a c-section.²⁰⁰ She asked the hospital CEO what would happen if she arrived in labor and refused to consent, and was told the hospital would seek a court order forcing her to undergo the surgery.²⁰¹ Szabo moved over three hundred miles away and successfully delivered via VBAC in a different hospital.²⁰² Another woman whose doctor emailed her in 2013 threatening to call the police if she did not schedule a c-section sought legal assistance and public support and successfully convinced the doctor to back down.²⁰³ Despite legal and medical ethical support for the choices of the pregnant woman, however, the National Advocates for Pregnant Women (NAPW) reported half a dozen similar incidents in Florida alone.²⁰⁴

195. *Id.* at 1251.

196. Torio, *supra* note 183, at 489.

197. *See also In re Madyun*, 114 Daily Wash. Law Rptr. 2233, 2240 (D.C. Super. Ct. 1986).

198. Goodwin, *supra* note 61, at 817.

199. *Id.*

200. Diaz-Tello, *supra* note 159, at 217.

201. *Id.* at 218.

202. *Id.*

203. Letitia Stein, *USF Obstetrician Threatens to Call Police if Patient Doesn't Report for C-Section*, TAMPABAYTIMES.COM (Mar. 6, 2013), <http://www.tampabay.com/news/health/usf-obstetrician-threatens-to-call-police-if-patient-doesnt-report-for/2107387>.

204. *See* Jodi Jacobson, *Florida Hospital Demands Woman Undergo Forced C-Section*, RH REALITY CHECK (July 25, 2014), <http://rhrealitycheck.org/article/2014/07/25/florida-hospital-demands-woman-undergo-forced-c-section/>; *see also* Burton v. State, 49 So. 3d 263, 264 (Fla. Dist. Ct. App. 2010) (reversing a trial court order forcing a mother into the hospital to deliver by c-section, but issuing only after the c-

If such deliveries do not result in a healthy child, however, the woman risks legal sanction. In 2006, a woman's refusal to deliver by c-section was cited by a court that removed the child from her custody.²⁰⁵ There were other plausible reasons to find that the child was in danger—the hospital requested an emergency psychiatric consultation to assess her ability to consent to medical treatment²⁰⁶—but as Jessica Waters pointed out, the court's "explicit reliance on a woman's refusal to consent to a c-section as a basis for a child neglect finding was never directly addressed by a higher court," and thus never questioned or challenged.²⁰⁷

In all of these examples, the autonomy and choices of the pregnant woman are rejected. At heart, such rejections are motivated by a sense that the woman is being selfish and that her priorities are in the wrong order. For example, one commentator explained in reference to compelled c-sections that "[a] woman's interest in an aesthetically pleasing or emotionally satisfying birth should not be satisfied at the expense of the child's safety."²⁰⁸ Pregnant women are portrayed as irrational for not immediately deferring to medical expertise and behaving accordingly.²⁰⁹

This is not to say that all state interventions based upon medical opinions as to the wellbeing of fetus and mother should be suspect—as discussed above, the diagnosis of Jessie Mae Jefferson's complete placenta previa indicated severe danger. But many other examples indicate much lower risks, yet courts are often willing to completely defer to a single doctor's judgment while minimizing or disregarding the significance of the woman's preferences. Her agency is viewed by such courts as completely eliminated in favor of the fetus, or the fetus's interests as expressed by a single physician. Such a calculation is too simplistic.

Thus far, the rules of maternity have focused on pregnant women; what choices they make and how those choices should be guided. The next rule looks after birth, and tells mothers that they

section had taken place).

205. N.J. Div. of Youth & Family Servs. v. V.M., 974 A.2d 448 (N.J. Super. Ct. App. Div. 2009) (per curiam).

206. Jessica L. Waters, *In Whose Best Interest?* New Jersey Division of Youth and Family Services v. V.M. and B.G. and the Next Wave of Court-Controlled Pregnancies, 34 HARV. J. L. & GENDER 81, 85 (2011).

207. *Id.* at 82.

208. John A. Robertson, *Procreative Liberty and the Control of Conception, Pregnancy, and Childbirth*, 69 VA. L. REV. 405, 453 (1983).

209. See Marguerite A. Driessen, *Avoiding the Melissa Rowland Dilemma: Why Disobeying A Doctor Should Not Be A Crime*, 10 MICH. ST. U. J. MED. & L. 1, 32–34 (2006).

alone are still legally responsible for harms and risks that befall their child.

IV. RULE 3: MOTHERS MUST ALWAYS PROTECT

As the previous section discussed, a pregnant woman is expected to give up decisionmaking power over her own body in favor of the developing fetus. After she gives birth, the presumption evolves: she need not scrutinize threats to her body for fear of harming the fetus; instead her attention should shift to the externalized risks to her child. She is now responsible not only for her child's care but also for minimizing and ideally eliminating all the external sources of potential harm that her child might encounter. If she fails, she may be legally sanctioned, even if she did not directly hurt her child, because protection is her job. Melissa Murray describes "the prioritization of maternity over self-interest" as "at the very heart of our maternalist culture."²¹⁰ Harm to her child means that by definition she has been a bad mother.

The clearest example of a mother's responsibility to prevent harm to her child is in the context of abuse, generally abuse by the mother's romantic partner. Mothers are routinely held responsible for such abuse, even where the mother is also a victim of abuse or is otherwise vulnerable. The third rule of maternity tells mothers that they stand alone as their child's protector, and if they fail—for whatever reason—they are blameworthy in the eyes of the law.

A. Failure to Protect

In the absence of a special relationship between persons, there is no generalized duty to rescue. If you see a person in distress or being victimized as you walk down the street, you are legally free to ignore them even if you could have helped them.²¹¹ If you are a parent, however, and you see your child in peril, you have a duty to protect them—and if you do not at least attempt to rescue your child, you may be prosecuted for that failure.²¹²

This greatly widens the types of action and inaction that give rise to criminal liability. Most crimes having to do with harm to

210. Melissa Murray, *Panopti-Moms*, 4 CAL. L. REV. CIRCUIT 165, 174 (2013).

211. See Jennifer M. Collins et. al., *Punishing Family Status*, 88 B.U. L. REV. 1327, 1335 (2008).

212. See Geneva Brown, *When the Bough Breaks: Traumatic Paralysis—An Affirmative Defense for Battered Mothers*, 32 WM. MITCHELL L. REV. 189, 232 (2005).

another person specify a mental state, sometimes an intention, that must be present in order for the crime to be committed.²¹³ Suppose that Cagney strikes Lacey with her car, killing Lacey. If Cagney hates Lacey and purposefully drove at her in order to kill her, she committed first-degree murder. If Cagney was drunk and did not see Lacey until it was too late, she committed manslaughter, or perhaps second-degree murder if her conduct was particularly reckless. In both cases the act is the same, but the state must also prove Cagney's mental state, or *mens rea*, to convict her of the crime.

If a mother directly causes harm to her child, the state could likely prosecute her for murder, manslaughter, or child abuse. Moreover, if another person harmed her child but the mother helped, the state could still prosecute her for murder or child abuse as an aider or abettor so long as the state could prove that she had the required *mens rea*.²¹⁴ By contrast, failure-to-protect statutes exist because of an affirmative duty held by parents to protect their children from harm.²¹⁵ The failure to protect may thus sound in criminal, civil, or tort law and holds parents responsible for inaction.²¹⁶

Although all states have failure-to-protect laws, and the basic concept is the same, how the crime is framed varies from one state to another. Some states use the statute to establish culpability as an aider and abettor²¹⁷ or accomplice.²¹⁸ Failure to protect as a freestanding crime is often defined using terms such as "negligence, endangerment, abandonment, and condoning of abuse."²¹⁹ In such instances, being present for the harm, knowing of the harm, or being in a position that the parent should have known of the harm is sufficient to demonstrate failure to protect. The vast majority of the

213. See Michelle S. Jacobs, *Requiring Battered Women Die: Murder Liability for Mothers Under Failure to Protect Statutes*, 88 J. CRIM. L. & CRIMINOLOGY 579, 586–87 (1998).

214. See *id.* at 613.

215. See *id.* at 586–87.

216. See Sarah Rogerson, *Unintended and Unavoidable: The Failure to Protect Rule and its Consequences for Undocumented Parents and their Children*, 50 FAM. CT. REV. 580, 581 (2012).

217. Whitney Button, *What About Failure to Protect: Why Current Homicide Doctrine Falls Short of Holding Parents Who Fail to Protect Their Children Accountable*, 22 S. CAL. INTERDISC. L.J. 693, 697 (2013).

218. Lissa Griffin, "Which One of You Did It?" *Criminal Liability for "Causing or Allowing" the Death of a Child*, 15 IND. INT'L & COMP. L. REV. 89, 95 (2004).

219. Margo Lindauer, *Damned If You Do, Damned If You Don't: Why Multi-Court-Involved Battered Mothers Just Can't Win*, 20 AM. U. J. GENDER SOC. POL'Y & L. 797, 804–05 (2012) (internal quotation marks omitted).

time, the harm in question is domestic violence committed by another family member or sexual partner at the child.²²⁰

In theory, failure-to-protect statutes are neutral in that the statute applies to all parents, and represents a normative and policy statement that this article does not challenge: the relationship between parent and child is fundamentally different than the relationship between two strangers, and just as a parent has a duty to support his or her child, a parent cannot sit idly by while another person harms the child. In practice, however, failing to protect is really the mother's failure to protect her child. One dimension is descriptively literal: failure-to-protect laws are applied almost exclusively to mothers, reflecting the strength of a perception that it is mothers, not fathers, who must minimize risks to their children.²²¹ Second, failure-to-protect laws are applied against vulnerable women with little sympathy for context-specific reasons why a battered or immigrant mother might not prevent harm in the way that a prosecutor or judge would.

In the most straightforward sense, failure-to-protect laws are drafted as gender-neutral, yet applied only against mothers. Some discrepancy might be explained by the higher rates of custodial mothers as opposed to custodial fathers, but not the almost complete absence of fathers charged with a failure to protect their child.²²² This is particularly true given statistics that indicate that perpetrators of child abuse are more likely to be women than men: by raw numbers alone, parents witnessing abuse by their co-parent, and thus in the position to be charged with failure to protect, are *fathers*, and not mothers.²²³ Jeanne Fugate chronicled one advocate with sixteen years of experience, summarizing that "I have never seen a father charged with failure to protect when the mom is the abuser. Yet, in virtually every case where Dad is the abuser, we charge Mom with failure to protect."²²⁴ One judge explained his expectations as to an abused mother's conduct with vague references to natural instinct:

220. DEPARTMENT OF HEALTH & HUM. SRVS., ADMIN. FOR CHILDREN & FAMILIES, ADMINISTRATION ON CHILDREN, YOUTH, AND FAMILIES, CHILDREN'S BUREAU, CHILD MALTREATMENT 2014 65 (2016), available at <http://www.acf.hhs.gov/sites/default/files/cb/cm2014.pdf>.

221. See Mary E. Becker, *Double Binds Facing Mothers in Abusive Families: Social Support Systems, Custody Outcomes, and Liability for Acts of Others*, 2 U. CHI. L. SCH. ROUNDTABLE 13, 15 (1995).

222. Collins et. al., *supra* note 211, at 1378.

223. Child Maltreatment 2014, *supra* note 220, at 71.

224. Jeanne A. Fugate, *Who's Failing Whom? A Critical Look at Failure-to-Protect Laws*, 76 N.Y.U. L. REV. 272, 274 (2001).

[T]he Court finds that even animals protect their young. . . . Now, [the defendant] may have well been afraid of her husband. There were times when he was gone and even if she was afraid if she had the natural maternal instinct that any mother should have, that maternal instinct should have overcome her fear if she is to be a fit mother and she failed to do that.²²⁵

With such freighted expectations, any mother might be found guilty of failing to protect her child, no matter whether she herself was also victimized or was faced with difficult choices comparing the risks of different actions. By her presence alone, she is responsible for any harm coming to her child.²²⁶ Such mothers can receive the same sentence as the person who actively harmed the child, and often do.²²⁷ Michelle Jacobs summarized others' judgment of the mother: "A 'good' mother would never find herself in a situation where she was being abused, and even if she did, she would never 'allow' her children to be abused."²²⁸

B. Failure to Protect Both Yourself and Your Child

It is abused mothers who face some of the most problematic applications of failure to protect cases. In about half of abuse cases involving child protective services, violence is directed at both mother and child.²²⁹ The federal government knows this—the 2010 reauthorization of the Child Abuse Prevention and Treatment Act, a major piece of legislation affecting how states combat child abuse,

225. Tenn. Dep't of Human Servs. v. Tate, No. 01-A-01-9409-CV-00444, 1995 WL 138858 (Tenn. Ct. App. Mar. 31, 1995), *quoted in* Fugate, *supra* note 221, at 291.

226. See Brown, *supra* note 209, at 220.

227. Linda J. Panko, *Legal Backlash: The Expanding Liability of Women Who Fail to Protect Their Children from Their Male Partner's Abuse*, 6 HASTINGS WOMEN'S L.J. 67, 78–79 (1995).

228. Jacobs, *supra* note 210, at 599.

229. Evan Stark, *A Failure to Protect: Unravelling "The Battered Mother's Dilemma"*, 27 W. ST. U. L. REV. 29, 35 (2000); see also Alex Campbell, *Battered, Bereaved, and Behind Bars*, BuzzFeed.com, Oct. 2, 2014, ("[L]ooking back over the past decade, BuzzFeed News identified 28 mothers in 11 states sentenced to at least 10 years in prison for failing to prevent their partners from harming their children. In every one of these cases, there was evidence the mother herself had been battered by the man.").

made a similar finding that if either child abuse or domestic violence occurs in a home, over half the time both will be present.²³⁰

Even where the domestic violence is solely directed at the mother, she could still be convicted of failure to protect her child from exposure to violence.²³¹ The reasoning is that witnessing domestic violence harms children.²³² Studies have indicated behavioral, emotional, and cognitive problems are more common among children who have been exposed to domestic violence, and that the cumulative effect is magnified if the child is both a victim of domestic violence and a witness to violence against other family members.²³³ Other studies, however, cast doubt upon these conclusions, particularly if the study attempts to control for other correlative factors such as poverty, age, and race.²³⁴

In either case, whether the child witnesses domestic violence against his mother or is also a victim of violence himself, the logic perpetuated by the law is that the mother should leave her abuser and use whatever means necessary to prevent further contact between the abuser and her child. As many commentators have pointed out, this is an unrealistic expectation. Victims of abuse are often isolated from family and friends and lack financial resources to leave.²³⁵ Attempting to leave an abusive partner triggers an increase in the chances of violence, meaning that in order to leave, the mother is risking greater harm to herself and her child.²³⁶ Michelle Jacobs criticizes failure to protect laws for treating “women as autonomous actors unaffected by the interaction of power and control, domination and subordination, in the battering relationship, and therefore view[ing] them as completely capable of saving their children. Such a view ignores the complexity of mothers who are both victims and agents.”²³⁷ Finally, to the extent that punitive laws are meant to deter conduct, it seems questionable to assume that a victim of domestic violence would find her own legal liability the

230. Myrna S. Raeder, *Preserving Family Ties for Domestic Violence Survivors and Their Children by Invoking A Human Rights Approach to Avoid the Criminalization of Mothers Based on the Acts and Accusations of Their Batterers*, 17 J. GENDER RACE & JUST. 105, 111 (2014).

231. See Lindauer, *supra* note 216, at 804–05.

232. See Justine A. Dunlap, *Sometimes I Feel Like A Motherless Child: The Error of Pursuing Battered Mothers for Failure to Protect*, 50 LOY. L. REV. 565, 570–71 (2004).

233. *Id.* at 571.

234. Raeder, *supra* note 227, at 126–27.

235. See Lindauer, *supra* note 216, at 798–99.

236. See Dunlap, *supra* note 229232, at 573.

237. Jacobs, *supra* note 210, at 603.

turning point in a decision of whether to stay with her abuser.²³⁸ If such a mother is aware of failure to protect laws, they may in fact deter her from seeking legal help—if the abuse has been going on for some time, she is already guilty of failing to protect her children, and thus might predict that bringing her abuse to the attention of law enforcement will result in the state taking her child away from her.²³⁹

Advocates for abused mothers charged with failure to protect their child from their abuser have used Lenore Walker's description of "battered woman's syndrome," often now described as "battering and its effects," to argue why their client should not be held responsible for preventing her child's abuse.²⁴⁰ Battered woman's syndrome describes a cluster of characteristics often found in victims of domestic violence, including that they believe themselves to be responsible in some way for their abuse and they do not seek help to end the abuse.²⁴¹ The theory in an individual case is that the mother was incapable of protecting her child, either because the abuse against her was so violent that she was prevented from doing so, or because she was emotionally and psychologically disabled by battered woman's syndrome or a similar issue such as post-traumatic stress disorder.²⁴² Such defenses have been successful, but depend upon characterizing the mother as devoid of agency, and as one scholar described, the defenses "reinforce[] negative stereotypes about women's passivity and weakness."²⁴³

Another explanation, known as the "active survivor" theory, counters that victims of domestic violence respond, not with helplessness, but with attempts to protect themselves and their families.²⁴⁴ This view posits that such attempts have been unsuccessful, so the women try different strategies to minimize or otherwise reduce the abuse.²⁴⁵ Their strategies, however, can look to

238. See Fugate, *supra* note 221, at 290.

239. See Dunlap, *supra* note 229, at 573–74.

240. See generally LENORE E. WALKER ET. AL, *THE BATTERED WOMAN SYNDROME* (1979).

241. Brown, *supra* note 209, at 198.

242. *Id.*

243. Fugate, *supra* note 221, at 280; see also Marina Angel, *The Myth of the Battered Woman Syndrome*, 24 *TEMP. POL. & CIV. RTS. L. REV.* 301 (2015).

244. Kit Kinports, *So Much Activity, So Little Change: A Reply to the Critics of Battered Women's Self-Defense*, 23 *ST. LOUIS U. PUB. L. REV.* 155, 175–76 (2004).

245. See Christine A. Littleton, *Women's Experience and the Problem of Transition: Perspectives on Male Battering of Women*, 1989 *U. CHI. LEGAL F.* 23, 41–42 (citing LENORE E. WALKER, *THE BATTERED WOMAN SYNDROME*, xi (1979)).

an outside observer as failing to take sufficient steps to leave their abuser outright.²⁴⁶

Both a theory of battering and its effects, as well as the active survivor theory, therefore, are vulnerable to a criticism that the victim has not done enough to end the violence. Moreover, when the violence targets both mother and child, such defenses do little to counteract the underlying expectation that any good mother's maternal instinct will "overcome her fear."²⁴⁷

A more promising approach came in the context of a challenge to child maltreatment proceedings, rather than criminal prosecutions of mothers who failed to protect their children from abuse. As discussed previously in the context of drug use by pregnant women, the same event can generate both criminal prosecution and civil proceedings alleging that a parent is unfit and removing the child from the home.²⁴⁸ The New York City Administration for Children Services (ACS) had begun using failure to protect proceedings in the civil context to justify removing children from the home based on the abused mother's failure to protect children from exposure to domestic violence.²⁴⁹ A class action suit argued that such proceedings violated the due process rights of both mothers and children.²⁵⁰ At the end of a complicated procedural history, certifying questions from the Second Circuit to the New York Court of Appeals, the state supreme court held that exposure to domestic violence alone, without harm or imminent harm to the child due to the parent's failure to exercise a minimum required level of care, was not neglect and did not justify ACS removing children into state custody.²⁵¹ The court's holding thus placed a limit on how far a failure to protect law could reach, but only for civil cases in New York. Nonetheless, the court's analysis that the level of harm necessary to justify removal of a child must be more direct and clear than merely witnessing domestic violence could be imported into criminal proceedings as well. Other courts, however, have not been persuaded by similar logic, and exposure to domestic violence is still

246. *Id.*

247. *Tenn. Dep't of Human Servs. v. Tate*, No. 01-A-01-9409-CV-00444, 1995 WL 138858, at *1 (Tenn. Ct. App. Mar. 31, 1995).

248. Fentiman, *supra* note 97, at 581-82.

249. *See Dunlap*, *supra* note 229, at 593-95.

250. *Nicholson v. Williams*, 203 F. Supp. 2d 153, 171-72 (E.D.N.Y. 2002) (finding state policy unconstitutional), *questions certified sub nom.*, *Nicholson v. Scoppetta*, 344 F.3d 154 (2d Cir. 2003), *certified question answered by Nicholson v. Scoppetta*, 820 N.E.2d 840 (N.Y. 2004).

251. *See generally id.*

used to justify neglect charges under a failure to protect framework.²⁵²

C. *Failure to Protect and Immigration*

Another vulnerable group affected by failure to protect charges is undocumented immigrants. Sarah Rogerson recently chronicled the multiple catch-22s faced by such women, writing that “immigration law and policy creates disincentives for parents of immigrant children to act and then punishes them if they do, obscuring the normative guideposts of both immigration and family law.”²⁵³ Undocumented immigrant women know that interaction with law enforcement may expose their lack of legal status, and thus, hesitate to call the police or otherwise seek help from the state in separating their child from an abuser. Rogerson chronicles one such woman, Lucia Medina Martinez, who discovered that her husband had sexually assaulted her daughter.²⁵⁴ Unsure of what to do, she initially kicked her husband out of their home, then on her priest’s advice allowed him to return home for three weeks.²⁵⁵ After further deliberation and counseling during that time, she reported her husband, who was later convicted of child molestation.²⁵⁶ Martinez was then charged with neglect, based on the theory that she had failed to protect her daughter, and entered a plea of no contest, apparently believing a swift resolution would be best.²⁵⁷ She did not know that being found guilty of failure to protect her child made her statutorily ineligible for relief from immigration proceedings, which typically resulted in deportation of the undocumented immigrant parent.²⁵⁸ After the Eleventh Circuit wrote a frustrated opinion explaining that its hands were tied by her ineligibility for relief, Martinez was the beneficiary of prosecutorial discretion that halted her deportation proceedings.²⁵⁹

It is not the aim of this criticism to imply that failure to protect should not exist as a criminal prohibition, nor that every prosecution for failure to protect one’s child is unfair. It is clear, however, that

252. See Rogerson, *supra* note 213, at 583.

253. *Id.* at 581.

254. *Id.* at 580–81.

255. Her husband did not abuse her daughter during these three weeks. *Id.*

256. *Id.* at 580.

257. *Id.*

258. *Id.* at 581.

259. *Id.*

prosecutions for failure to protect are directed almost solely against mothers, and are pursued largely without serious consideration of the context in which individual mothers operate. The third rule of maternity thus demonstrates the insidious problem with the regulation of mothers, as so many of the regulations operate in a gray area. Parents should be held responsible for harm to their children, but in a gender-neutral manner and in a context-specific way.

V. RULE 4: GOOD MOTHERHOOD IS A NARROW ROAD

Few decisions about parenting are black and white. Respective parenting philosophies take very different approaches to the best way to raise a child, and mothers are often stymied by choosing which approach is best for their family. In many different arenas, however, mothers are sanctioned for decisions on either side of the coin. The fourth rule of maternity effectively tells mothers they cannot win: Breast is best, unless you are at work, or in public, or the child is older than a judge, or a bystander believes it is inappropriate. You should be an advocate for a child facing health problems, but not too zealous of an advocate. You should teach your children independence, but not too much independence. Mothers cannot win.

A. *The Importance and Danger of Breastfeeding*

At present, there is a general consensus that breastfeeding offers benefits that formula feeding does not, and so new mothers are advised to breastfeed for at least six months if possible.²⁶⁰ Both federal and state governments have taken some steps to attempt to support and encourage breastfeeding—and yet, mothers who must return to work have little legal protection for attempts to pump

260. See Saru M. Matambanadzo, *The Fourth Trimester*, 48 U. MICH. J.L. REFORM 117, 139 (2014). See also Andrea Freeman, "First Food" Justice: Racial Disparities in Infant Feeding as Food Oppression, 83 FORDHAM L. REV. 3053, 3061 (2015) (contrasting breast milk and formula); Corey Silberstein Shdaimah, *Why Breastfeeding is (Also) a Legal Issue*, 10 HASTINGS WOMEN'S L.J. 409, 410–11 (1999). But see Linda C. Fentiman, *Marketing Mothers' Milk: The Commodification of Breastfeeding and the New Markets for Breast Milk and Infant Formula*, 10 NEV. L.J. 29, 46–49 (2009) ("In sum, the evidence supporting the marketing of breastfeeding to women as behavior that is good for them, as well as beneficial to their babies, is far weaker than acknowledged by the Academy, HHS's National Breastfeeding Campaign, or the popular press.") [hereinafter Fentiman, *Marketing Mothers' Milk*].

breastmilk while at work.²⁶¹ Low income mothers are told as a formal matter that breast is best, but are then given vouchers for formula.²⁶² Women are encouraged by some government agencies to breastfeed, and told they may do so wherever they choose, but then face stigma and even legal sanction if they nurse in the wrong location or for too long.²⁶³

A number of state measures, at various levels of government, ostensibly promote breastfeeding. In 1990, the United States signed on to a joint policy statement by the World Health Organization and UN Children's Fund called the Innocenti Declaration on the Protection, Promotion and Support of Breastfeeding, which committed governments to protecting the ability of working mothers to breastfeed.²⁶⁴ Two years later, Congress included a breastfeeding promotion program in amendments to the Child Nutrition Act.²⁶⁵ The Department of Health and Human Services established a United States Breastfeeding Committee charged with "working collaboratively to protect, promote, and support breastfeeding."²⁶⁶ More recently, the Affordable Care Act included amendments to the Fair Labor Standards Act that require employers to provide space and time for employees to pump breast milk,²⁶⁷ although employers with fewer than fifty employees are exempt from such mandates if they would impose an "undue hardship."²⁶⁸ At the state level, almost every state has a statute specifically allowing mothers to breastfeed their children anywhere that they have a legal right to be.²⁶⁹ A few

261. See Kim Diana Connolly, *The Ecology of Breastfeeding*, 12 SE. ENVTL. L.J. 167, 166–68 (2005).

262. See *infra* notes 291–292 and accompanying text.

263. See Heather M. Kolinsky, *Respecting Working Mothers with Infant Children: The Need for Increased Federal Intervention to Develop, Protect, and Support a Breastfeeding Culture in the United States*, 17 DUKE J. GENDER L. & POL'Y 333, 351–59 (2010) (outlining differing statutory protections or lack thereof at a state level for breastfeeding women).

264. *Id.* at 342.

265. *Id.* at 343.

266. *Id.* at 343–44 (detailing the Committee's report on the economic benefits of breastfeeding).

267. See Marcy Karin & Robin Runge, *Breastfeeding and a New Type of Employment Law*, 63 CATH. U. L. REV. 329, 344 (2014).

268. Matambanadzo, *supra* note 257, at 155. See also Karin & Runge, *supra* note 263, at 344–52; Sarah Andrews, *Lactation Breaks in the Workplace: What Employers Need to Know About the Nursing Mothers Amendment to the FLSA*, 30 HOFSTRA LAB. & EMP. L.J. 121, 126–42 (2012) (discussing the elements of the Nursing Mothers Amendment to the FLSA).

269. Kolinsky, *supra* note 259, at 334.

states also prohibit interfering with a mother breastfeeding in a public area.²⁷⁰

Legal support for breastfeeding, however, is largely contained to symbolic statements and bland encouragement—rather than affirmative legal protections. Despite state laws protecting the right of breastfeeding mothers to nurse in public, women are routinely told to stop breastfeeding or leave.²⁷¹ One woman breastfeeding her child on an airplane as it prepared for takeoff—a common strategy to prevent babies from crying as the pressure changes hurt their ears—was removed from the flight by flight attendants.²⁷² Women also face social stigmatization, as a mother discovered after a man at T.G.I. Friday's was so offended by her breastfeeding that he took a photo of her and her baby and posted it on Facebook captioned "I understand feeding in public but could you at least cover your boob up?!"²⁷³

Although the Affordable Care Act provisions are better than the previous complete lack of support for working mothers trying to continue breastfeeding their children, the improvement is marginal at best.²⁷⁴ In her recent book *Lactivism*, Courtney Jung points out that current support for breastfeeding at work is actually not support for breastfeeding at all:

Most of these campaigns have been launched with great fanfare and publicity, and they have been lauded as supportive of breastfeeding and women. But, without even acknowledging this important shift from breast to pump, they have radically redefined what breastfeeding is. To be clear, pumping at work can help a mother maintain her milk supply so that she can also nurse her baby at home on weekends or in the evening. But the government's recent so-called breastfeeding initiatives are designed to help a woman

270. See generally Charity R. Clark & Elizabeth R. Wohl, *Breastfeeding Laws in Vermont: A Primer*, VT. B.J., Spring 2008, at 36.

271. See LINDA M. BLUM, AT THE BREAST 127–28 (1999); Silberstein Shdaimah, *supra* note 257, at 415.

272. Elizabeth Hildebrand Matherne, *The Lactating Angel or Activist? Public Breastfeeding as Symbolic Speech*, 15 MICH. J. GENDER & L. 121, 127–28 (2008).

273. Jessica Winter, *Breast-Feeding Terror Spreads to Terre Haute, Indiana*, SLATE.COM, (June 1, 2015, 12:12 PM), http://www.slate.com/blogs/xx_factor/2015/06/01/man_takes_creepshot_of_nursing_mother_terror_spreads_via_social_media.html.

274. Emily F. Suski, *In One Place, but Not Another: When the Law Encourages Breastfeeding in Public While Simultaneously Discouraging it at Work*, 12 UCLA WOMEN'S L.J. 109, 112–13 (2001).

pump breast milk at work so that someone else can feed her baby breast milk from a bottle. In other words, these much-vaunted initiatives depend upon the unstated—and largely unstudied—premise that what is valuable about breastfeeding is the chemical composition of human milk, *not* the mother-child contact that goes along with feeding a baby at the breast.²⁷⁵

Furthermore, although mothers are in theory entitled to a private area and time to pump, in practice the picture is often different. The time that women spend pumping breastmilk is unpaid, meaning that women paid by the hour must either decrease their salary or work longer hours to make up for time spent pumping.²⁷⁶ Employers regularly provide rooms ill-suited to pumping—Jung chronicled employers directing nursing mothers to “other peoples’ offices, copier rooms, file rooms, broom closets, rooms made almost entirely of glass, and open conference rooms.”²⁷⁷

For the most part, there is no legal remedy for any employment issues arising from the needs of nursing mothers.²⁷⁸ As Heather Kolinsky summarized, although breastfeeding resembles a disability in that a breastfeeding mother needs some accommodations at work, it “resides in a parallel universe” outside of the protection of federal or state law.²⁷⁹ The new Affordable Care Act accommodations fall under a penalty provision allowing private claims seeking lost wages, but violations of the breastfeeding provisions do not result in the awarding of lost wages.²⁸⁰ The Pregnancy Discrimination Act (PDA) does not protect breastfeeding employees, as courts generally do not consider breastfeeding “part of pregnancy, childbirth, or a related medical condition.”²⁸¹ A notable exception is the Fifth Circuit, which held recently that breastfeeding is a medical condition related to pregnancy under the PDA and that discrimination on the basis of an employee’s breastfeeding could also constitute sex

275. COURTNEY JUNG, *LACTIVISM: HOW FEMINISTS AND FUNDAMENTALISTS, HIPPIES AND YUPIES, AND PHYSICIANS AND POLITICIANS MADE BREASTFEEDING BIG BUSINESS AND BAD POLICY* 127 (2015).

276. Matambanadzo, *supra* note 257, at 155. See also Karin & Runge, *supra* note 263, at 344–52 (discussing aspects of the Fair Labor Standards Act); Andrews, *supra* note 264, at 126–42 (examining the Nursing Mothers Amendment).

277. JUNG, *supra* note 271, at 136–37.

278. See *id.* at 140–41.

279. Kolinsky, *supra* note 259.

280. See Karin & Runge, *supra* note 263, at 351.

281. See Matambanadzo, *supra* note 257, at 140.

discrimination under Title VII.²⁸² Most courts, however, simply ask women who lack a private office and cannot control their own work schedule to choose between breastfeeding their child and continuing their employment.²⁸³ Jung criticized the legal requirements as

set[ting] up a whole new set of social expectations and norms for new mothers by creating the impression that they can, and should, pump at work. But mothers routinely find themselves unable to comply with those expectations both because of obstacles in the workplace and the government's failure to enforce the regulation.²⁸⁴

It also remains an open legal question whether teenagers who give birth while in high school can breastfeed their babies at school. A Delaware high school told one mother that if she wished to breastfeed during school hours, she had to transfer to an alternative Delaware Adolescent Pregnancy Initiative school exclusively for mothers.²⁸⁵ After public outcry, the principal relented but “no consensus emerged on which source of law might apply regarding the issue.”²⁸⁶

Even well-intentioned programs that aim to directly encourage breastfeeding have used coercive and even punitive measures. Jung argues that promoting breastfeeding under the auspices of public health “place[s] formula feeding alongside other irresponsible lifestyle choices that are overburdening the US health-care system—

282. See *EEOC v. Houston Funding II, Ltd.*, 717 F.3d 425, 428–30 (5th Cir. 2013). See also *Dike v. Sch. Bd.*, 650 F.2d 783, 784 (5th Cir. 1981) (reversing dismissal of a teacher's lawsuit against her employer alleging that the School Board and Superintendent had interfered with her constitutional right to breastfeed her child). But see Thomas H. Limbrick, *Lactation Intolerance: Trivializing the Struggles of Working Mothers & the Need for a More Diverse Judiciary.*, 80 MO. L. REV. 1189 (2015) (discussing Eighth Circuit case rejecting a constructive discharge claim brought by a new mother citing, among other things, the unavailability of a room to pump breast milk on the day of her resignation).

283. Fentiman, *Marketing Mothers' Milk*, *supra* note 257, at 57 (“Unsurprisingly, women at higher paying, usually professional, jobs are more likely to have the flexibility and privacy necessary to pump, while women at lower status jobs are often unable to take a break to pump their milk or to have private space in which to do so.”).

284. JUNG, *supra* note 271, at 143.

285. See Kimberly Jacobsen, *They Can Pump Up the Volume but Can They Pump Out Their Milk? Public Secondary Schools Should Be Required to Accommodate Lactating Students*, 13 CONN. PUB. INT. L.J. 179, 181 (2014).

286. *Id.* at 182.

just like unsafe sex, smoking, and unhealthy eating.”²⁸⁷ In 2012, New York City began a campaign called “Latch On NYC.”²⁸⁸ It had become common in hospitals for nurses to offer new mothers formula, which policymakers believed encouraged mothers to give up efforts to breastfeed too early.²⁸⁹ The “Latch On NYC” response, however, was to treat formula as though it were a prescription medication, directing nurses to encourage breastfeeding, only give a mother formula if she insisted and only provide enough for a single feeding, and to note any use of formula in her baby’s medical chart.²⁹⁰ Coercive pressure in one direction by hospital staff was replaced with legally mandated coercive pressure in the opposite direction.

State regulation of low-income women is even more direct, due to their greater interactions with state agencies. The Special Supplemental Nutrition Program for Women, Infants, and Children (WIC) provides vouchers for food beginning during pregnancy and lasting until a child turns five years old. On the one hand, WIC recipients can receive vouchers for formula, which some advocates criticize as promoting formula over breast milk.²⁹¹ On the other hand, as of 2009, mothers who breastfeed their children are eligible for more and better food vouchers, provided as an explicit reward for women who choose to breastfeed.²⁹² Economic pressures, however, operate against breastfeeding as well. Women in lower status and lower-paid jobs are less likely to have enough control over their own

287. JUNG, *supra* note 271, at 123.

288. See NYC Health, *Latch on NYC* (2016), <https://www1.nyc.gov/site/doh/health/health-topics/breastfeeding-latch-on.page>; Thomas Farley, N.Y. City Dep’t of Health & Hygiene, *Latch on NYC* (2012), <https://www1.nyc.gov/assets/doh/downloads/pdf/ms/initiative-description.pdf>

289. N.Y. City Dep’t of Health & Hygiene, *Latch on NYC*.

290. JUNG, *supra* note 271, at 107.

291. See Silberstein Shdaimah, *supra* note 257, at 433 (“It is difficult to combat the mixed message that WIC patrons receive, especially when WIC also meets the needs of women who choose not to breastfeed. More advertising, promotion, educational programs and videos, particularly directed to WIC participants, would go far in conveying unambiguous encouragement of breastfeeding.”); see also BLUM, *supra* note 267, at 143; Karin & Runge, *supra* note 263, at 333 (“In fiscal year 2009, WIC spent \$850 million to provide this formula.”).

292. JUNG, *supra* note 271, at 111–12. As Jung points out, this reward is particularly perverse if one believes that breast milk is better for babies than formula, as it gives less nutritious food to the children suffering the ostensibly substandard formula feeding. See also BLUM, *supra* note 267, at 139–40 (describing WIC programs in the 1990s giving mothers “t-shirts, infant car seats, and other gifts” as rewards for breastfeeding).

schedule to accommodate pumping at work. Lower-income women are also more likely to be paid by the hour, meaning that time spent pumping is money directly out of their pockets: if a mother spends a total of one hour taking breaks at work to pump, she is not paid for that hour, yet likely still has to pay a daycare or other childcare provider for that time.²⁹³ Andrea Freeman recently wrote critically of policymakers' lack of awareness of such pressures, arguing that

the power of the myth of black women as bad mothers that fosters indifference to structural factors that impede black women's ability to breastfeed successfully . . . supports the formula industry's project of increasing profits by enlisting the government to promote formula feeding through a policy framework that causes disparate harm to black women.²⁹⁴

Unsurprisingly, the rate of breastfeeding is significantly higher among older, wealthier, and white women as compared to younger, lower-income, and nonwhite mothers.²⁹⁵

Family law similarly offers little support for nursing mothers. Where courts are faced with a custody dispute between a breastfeeding mother and the infant's father, Kristen Hofheimer summarizes the dominant approach as "the court salutes the superiority of breastfeeding, but then proceeds to make a custody or visitation order that significantly curtails the breastfeeding relationship."²⁹⁶ At least one court directly ordered a mother to "stop breast feeding the children, if necessary, in order to comply with the visitation order."²⁹⁷

If the biological and employment stars have aligned to allow a mother to breastfeed her child for an extended period, some courts have viewed extended breastfeeding as a reason to award custody to

293. See Karin & Runge, *supra* note 263, at 335–36.

294. Freeman, *supra* note 257, at 3057; see also Melissa L. Breger, *The (in)visibility of Motherhood in Family Court Proceedings*, 36 N.Y.U. REV. L. & SOC. CHANGE 555, 579–87 (2012) (giving fuller background to T.C., discussed in Freeman's article, charged with manslaughter after her breastfed daughter died at six weeks).

295. See Karin & Runge, *supra* note 263, at 335–36.

296. Kristen D. Hofheimer, *Breastfeeding As A Factor in Child Custody and Visitation Decisions*, 5 VA. J. SOC. POL'Y & L. 433, 458 (1998); see also Breger, *supra* note 294, at 579–87; Isabelle Schallreuter Olson, *Out of the Mouths of Babes: No Mother's Milk for U.S. Children the Law and Breastfeeding*, 19 HAMLINE L. REV. 269, 297–98 (1995).

297. Bowen v. Thomas, 656 N.E.2d 1328, 1330 (1995).

the other parent, criticizing the mother for breastfeeding “beyond the time when the judge feels the child should have been weaned.”²⁹⁸ Preferences and practices regarding extended breastfeeding vary, but many doctors recommend that breastfeeding continue for at least one year, and evidence exists to support breastfeeding as beneficial for as long as a child and mother choose.²⁹⁹ Despite this, extended breastfeeding is often regarded as cause for suspicion of maltreatment.³⁰⁰ For example, a South Dakota judge awarded custody to a one-year-old child’s father based in part at the mother’s “insistence on breast feeding [the child] indefinitely.”³⁰¹ An Oregon trial court judge described a mother’s continued breastfeeding of her nineteen-month-old daughter as “a further example of her single-minded eagerness to pursue her own interests irrespective of their impact on the child and [the father].”³⁰²

If a mother engages in extended breastfeeding, it may even become the basis of a child abuse charge.³⁰³ An attorney involved with *La Leche League* chronicled a number of anecdotes of such cases, with mothers charged with abuse for nursing children between the ages of three and six.³⁰⁴ In Illinois, a babysitter called an abuse hotline to report that her six-year-old charge told her that he didn’t want to breastfeed any more.³⁰⁵ Even though the mother said he had never told her he wanted to wean, and that her plan was to stop nursing based on his preferences, the boy was taken from his home and placed in foster care for five months.³⁰⁶

298. Hofheimer, *supra* note 292, at 453.

299. *Id.* at 455–56.

300. In the 1990s, a single mother nursing her two and a half year old daughter attempted to contact a representative from the breastfeeding support organization La Leche League because she was disturbed by feeling a sensation of sexual arousal during breastfeeding. She was instead connected to a rape crisis center, who reported her to the police, who arrested her and placed her daughter in foster care for almost one year. See BLUM, *supra* note 267, at 96.

301. *Friendshuh v. Headlough*, 504 N.W.2d 104 (S.D. 1993). See also *Shunk v. Walker*, 589 A.2d 1303, 1305 (1991).

302. *In re Marriage of Holcomb*, 888 P.2d 1046, 1047–48 (Or. Ct. App. 1995).

303. See Elizabeth N. Baldwin, *Extended Breastfeeding and the Law*, LA LECHE LEAGUE INTERNATIONAL (last updated Oct. 14, 2007), <http://www.llli.org/law/lawextended.html>; originally published in *MOTHERING MAGAZINE*, Mar. 22, 1993 (Issue 66), available at Westlaw (1993 WLNR 5018817).

304. *Id.*

305. Sue Ellen Christian & Julie Deardorff, *Woman Charged with Abuse for Breastfeeding Son*, 6, OTTAWA CITIZEN, Dec. 11, 2000, at A14.

306. Julie Deardorff, *Breastfeeding Case Ends as Mom Regains Custody*, CHI. TRIBUNE, Feb. 1, 2001, available at <http://articles.chicagotribune.com/2001-02->

Mothers who nurse past the infant stage also face intense social scrutiny and criticism. Tamar Lewin summed up the paradox in *The New York Times*: “[T]he same mothers who got kudos from their pediatricians and warm smiles from strangers when they nursed their newborn babies face criticism—and sometimes even formal charges of abuse—for continuing to breast-feed when that sweetly cooing infant becomes a walking, talking schoolchild.”³⁰⁷ Courtney Jung chronicled several stories of mothers participating in WIC who were frustrated by heavy-handed pressure to breastfeed, yet at least one mother she spoke with was then criticized by a WIC employee for breastfeeding longer than one year.³⁰⁸ In 2012, *Time* magazine sparked an uproar when it placed on the cover a photograph of Jamie Lynne Grumet breastfeeding her three-year-old son.³⁰⁹ One poll by the *Today* show found almost three quarters of respondents “really did not want to see it.”³¹⁰ One commentator wrote there was “something profoundly disturbing, even narcissistic, about what Grumet is doing.”³¹¹ Another asked, “will the cover’s shocking – and disturbingly sexy – depiction help or hurt the push to make breastfeeding more publicly acceptable?”³¹² (It is unclear what made the cover “disturbingly sexy” other than the partially-visible breast and the fact that Grumet is conventionally attractive.) Extended breastfeeding disturbed the city council of Forest Park, a suburb of Atlanta, so much that in 2011 it voted to legally prohibit

01/news/0102010210_1_einhorn-mother-and-child-breastfeeding; *Court Case Questions Extended Breastfeeding*, MOTHERING MAGAZINE, Mar. 1, 2001, at 31.

307. Tamar Lewin, *The Nation: Mother’s Milk; Breastfeeding—How Old Is Too Old?*, N.Y. TIMES (Feb. 18, 2001), <http://www.nytimes.com/2001/02/18/weekinreview/the-nation-mother-s-milk-breast-feeding-how-old-is-too-old.html>.

308. JUNG, *supra* note 271, at 114–15.

309. Feifei Sun, *Behind the Cover: Are You Mom Enough?*, TIME (May 10, 2012), <http://time.com/3450144/behind-the-cover-are-you-mom-enough/>.

310. Patricia Reaney & Christine Kearney, *Time Cover Mother Defends Extended Breastfeeding*, REUTERS (May 11, 2012, 2:14 PM), <http://www.reuters.com/article/us-time-breastfeeding-idUSBRE84A0SG20120511>.

311. Luisa D’Amato, *Time Magazine’s Breastfeeding Mom Should Have Put Son’s Interests First*, WATERLOO REGION RECORD (May 12, 2012), <http://www.therecord.com/opinion-story/2602280-d-amato-time-magazine-s-breastfeeding-mom-should-have-put-son-s-interests-first/>.

312. Janice D’Arcy, *Time Cover of Breastfeeding Mom Issues a Challenge to Those Who Support Nursing*, WASH. POST (May 11, 2012), https://www.washingtonpost.com/blogs/on-parenting/post/time-cover-of-breastfeeding-mom-issues-a-challenge-to-those-who-support-nursing/2012/05/10/gIQAZowOGU_blog.html?utm_term=.6859db44ccc8.

breastfeeding a child older than two years old in public.³¹³ After public protest, the council backed down and repealed the prohibition.³¹⁴

Mothers are thus confronted with a series of paradoxical messages immediately after they give birth. Breastfeed exclusively for at least six months—unless you have to go back to work, in which case your employer will dictate your ability to pump at work. Continue breastfeeding for at least one year, unless you and a coparent fight over custody, in which case a judge may make it impossible for practical purposes to continue breastfeeding or view your choice to breastfeed as selfish and a reason to grant custody to the other parent. Feel free to breastfeed in public, although you may face public scrutiny and condemnation. Breast is best, unless your child resembles a toddler more than a baby, in which case it is sexual, narcissistic, and possibly abuse.

B. Munchausen Syndrome by Proxy/Medical Abuse

Munchausen Syndrome, named after a German soldier famous for his exaggerated stories, describes individuals who seek medical treatment for nonexistent illnesses, to the point that they invent medical histories to present to doctors in support of their maladies.³¹⁵ In the late 1970s, a British doctor named Roy Meadow modified the term to Munchausen Syndrome by Proxy (MSBP) to describe an attenuated version, in which parents sought medical treatment for nonexistent illnesses suffered by their children.³¹⁶ The parents involved are overwhelmingly female; one analysis found fewer than two percent of the parents perpetrating MSBP abuse were male.³¹⁷

MSBP is often defined by four key characteristics:

- 1) The parent fabricates an illness or induces an illness in the child;
- 2) The parent repeatedly seeks medical care for the

313. *Forest Park Restricts Public Breastfeeding*, WSBTV (May 17, 2011), <http://www.wsbtv.com/news/news/forest-park-restricts-public-breast-feeding/nFChb>.

314. Angel K. Brooks, *Lactivists' Win in Forest Park*, ATL. J.-CONST., June 8, 2011, at B2.

315. See Kimberly L. Sweet, *Munchausen Syndrome by Proxy: Treatment in the Courts*, 16 BUFF. WOMEN'S L.J. 89, 90 (2008).

316. *Id.* at 90.

317. See Michael T. Flannery, *Munchausen Syndrome by Proxy: Broadening the Scope of Child Abuse*, 28 U. RICH. L. REV. 1175, 1197 (1994) [hereinafter Flannery, *Munchausen Syndrome by Proxy*].

child's falsified illness, subjecting the child to unnecessary medical procedures; 3) The parent denies any knowledge as to the source of the child's illness; [and] 4) The child's symptoms disappear when the parent is separated from the child.³¹⁸

Where a mother fabricates the illness entirely, she is described as a "doctor addict," in contrast to "active inducers," who harm their child in order to present genuine symptoms—although most cases involve both forms of presenting symptoms.³¹⁹ MSBP can be difficult to identify, as for obvious reasons, a worried parent bringing a child with confusing symptoms to doctors and hospitals doesn't immediately raise any suspicions. Occasionally, where doctors or nurses become suspicious of a parent, video surveillance of a child's hospital room can catch the parent in the act of inducing symptoms in their child.³²⁰ Otherwise, MSBP diagnosis is sometimes made by the process of elimination, either by ruling out increasing numbers of medical explanations for a child's symptoms, or because a child's condition improves significantly once the child is in the hospital and out of the parent's care.³²¹

There is no doubt that MSBP does exist, and has resulted in the injury and death of many children. Many of the earliest cases involved clear evidence of abuse. For example, the first use of MSBP as an explanation of abuse involved two children adopted from Korea into the Phillips family in California. Priscilla Phillips and her husband had two biological sons, and they adopted their daughter Tia from Korea in November 1975.³²² Over a period of about one year, Priscilla repeatedly rushed Tia to the hospital reporting vomiting and diarrhea.³²³ Each time, doctors found elevated levels of sodium and bicarbonate in Tia's blood, but could not determine the cause.³²⁴ Tia died in the hospital in February 1977.³²⁵ The Phillips adopted Mindy, a second girl from Korea, a few months after Tia's death, and on the second anniversary of Tia's death, Priscilla

318. E. Selene Steelman, *A Question of Revenge: Munchausen Syndrome by Proxy and A Proposed Diminished Capacity Defense for Homicidal Mothers*, 8 CARDOZO WOMEN'S L.J. 261, 267 (2002).

319. *Id.* at 268.

320. *See id.* at 273.

321. *Id.*

322. *People v. Phillips*, 175 Cal. Rptr. 703, 705 (Cal. Ct. App. 1981).

323. *Id.* at 706.

324. *Id.* at 706–07.

325. *Id.* at 707.

brought Mindy to the hospital with the same symptoms.³²⁶ Mindy's symptoms aroused suspicions in her doctors; since the girls were adopted, and thus not biologically related, it seemed clear that the symptoms were caused by something in Mindy's environment, which made the physicians begin to suspect poisoning.³²⁷ The hospital later tested formula that Priscilla brought to the hospital to feed to Mindy and discovered extremely high sodium levels.³²⁸ The hospital then disposed of the formula, prohibited Priscilla from feeding Mindy, and only allowed her to visit Mindy when a nurse could also be present, and Mindy swiftly recovered.³²⁹ Priscilla was later convicted of willfully endangering the life or health of Mindy and murdering Tia.³³⁰

Similarly, in September 1981, Mary Beth Davis brought her two-month-old son Seth to a local hospital, and she reported that he had suffered a seizure, severe enough that it caused permanent brain damage.³³¹ After he received emergency treatment in two different hospitals, one of Seth's physicians discovered that the seizure was likely caused by an extremely high level of insulin in his blood, which the doctor believed could only have been caused by an injection of insulin.³³² About six months later, Davis brought her three-year-old daughter Tegan to the same hospital, and Tegan was vomiting and having pain with urination.³³³ Tegan died two days later, and an autopsy found evidence in her stomach of caffeine pills.³³⁴ Davis's husband reported that he had found an empty packet of caffeine pills in a garbage bag at their home, and Mary Beth was eventually convicted of poisoning Seth and murdering Tegan.³³⁵

Few cases are as clear-cut as the Phillips's and Davis's, however, and numbers of MSBP cases are hard to quantify. One scholar found fewer than one hundred cases citing MSBP between 1981 and 2002.³³⁶ Many more cases may have arisen that did not result in reported cases, with experts estimating somewhere between two

326. *Id.*

327. *Id.*

328. *Id.* at 708.

329. *Id.*

330. *Id.* at 705.

331. *State v. Davis*, 519 S.E.2d 852, 857 (W. Va. 1999).

332. *Id.*

333. *Id.*

334. *Id.* at 858.

335. *Id.*

336. See Steelman, *supra* note 314, at 263.

hundred and one thousand diagnoses of MSBP since 1977.³³⁷ Other experts estimate 1,200 cases of MSBP are at least suspected every year.³³⁸ A 2008 article stated that “[b]y nearly all accounts, instances of Munchausen Syndrome by Proxy are on the rise,” flagging that the medical community in particular has reached consensus that MSBP cases are increasing.³³⁹ Michigan identifies the number of allegations of medical child abuse³⁴⁰ within the larger figures of child abuse and neglect, averaging fifty one charges each year from 2010 to 2013.³⁴¹ Extrapolating this to national numbers would result in over 1,600 charges of medical child abuse per year.³⁴²

The problem is that most MSBP cases are not as strong as the two examples above. Obviously, direct evidence such as video surveillance showing a mother harming her child is unambiguous proof of abuse.³⁴³ In the absence of such dramatic proof, many diagnoses of MSBP are made through a process of elimination, where doctors, and later a prosecutor, show that the likely “reasonable, organic” causes of a child’s symptoms were not present, on the logic that unexplained symptoms were thus caused by the parent.³⁴⁴ Another inferential method of identifying MSBP is by removing the child from the care of her parents and seeing if the

337. Melissa A. Prentice, *Prosecuting Mothers Who Maim and Kill: The Profile of Munchausen Syndrome by Proxy Litigation in the Late 1990s*, 28 AM. J. CRIM. L. 373, 377 (2001).

338. Kathleen R. Miller, *Detecting the Undetectable: An Examination of the Intersection Between Sudden Infant Death Syndrome and Munchausen by Proxy Syndrome*, 5 CONN. PUB. INT. L.J. 287, 295 (2006).

339. Sweet, *supra* note 315, at 89, 91.

340. See explanation below as to the term “medical abuse” replacing MSBP, *infra* at 67. [this crossreference isn’t updated – it’s meant to go to a paragraph currently on page 69.]

341. Maxine Eichner, *The New Child Abuse Panic*, N.Y. TIMES (July 11, 2015), <http://www.nytimes.com/2015/07/12/opinion/sunday/the-new-child-abuse-panic.html>.

342. *See id.*

343. It is worth noting, however, that one commentator has pointed out that video surveillance of a mother suspect of MSBP allows further abuse of the child while doctors or law enforcement hope to catch the abuse on tape. *See* Michael T. Flannery, *First, Do No Harm: The Use of Covert Video Surveillance to Detect Munchausen Syndrome By Proxy-An Unethical Means of “Preventing” Child Abuse*, 32 U. MICH. J.L. REFORM 105, 119 (1998) (“[E]mploying covert video surveillance is both unnecessary and unethical as a means of proving Munchausen Syndrome by Proxy, despite the sometimes positive results from such efforts, because the process not only permits child abuse to occur, but also purposely creates an environment conducive to its perpetration.”).

344. Steelman, *supra* note 314, at 280.

child improves, the reasoning being that if the child improves out of her mother's care, then the mother must have been triggering the symptoms.³⁴⁵ If a child continues to suffer, it proves her mother's innocence. In a particularly dramatic case, parents sued the New York Department of Social Services after their daughter was removed from their home for one year based on the suspicion that her mother was harming her.³⁴⁶ During the entire separation, the mother was not allowed to contact her daughter.³⁴⁷ After one year, a family court determined that the daughter's health had not improved, so she was eventually returned to her parents—who sued the Department of Social Services.³⁴⁸ The Department of Social Services was granted summary judgment against the parents' lawsuit alleging medical malpractice and false imprisonment.³⁴⁹

Identification of MSBP is particularly troubling when it intersects with sudden infant death syndrome, known as SIDS. SIDS causes the death of about five thousand babies each year, mostly before they reach the age of six months.³⁵⁰ Although doctors have become aware of some correlative factors—SIDS is more common during both the winter and among African Americans, for example—it is largely a “diagnosis of exclusion,” meaning that doctors cannot find any other explanation for the baby's death.³⁵¹

Perhaps because of the unclear explanation of SIDS, doctors and commentators have frequently suggested that up to ten percent of SIDS deaths are actually undetected homicides, often explained as mothers smothering their babies.³⁵² Roy Meadow, the physician mentioned above who coined the term Munchausen Syndrome by Proxy, believed that multiple SIDS deaths in a single family was de

345. See *In re Clarissa M.S.*, No. 94-2017, 1995 WL 27793, at *2–3 (Wis. Ct. App. Jan. 24, 1995).

346. See *Straton v. Orange County Dep't of Soc. Servs.*, 628 N.Y.S.2d 818, 819 (N.Y. App. Div. 1995).

347. *Id.*

348. *Id.*

349. See *id.* See also Flannery, *supra* note 339, at 185.

350. Miller, *supra* note 338, at 289–90.

351. See *id.*

352. See *id.* at 302; Catherine L. Goldenberg, *Sudden Infant Death Syndrome as a Mask for Murder: Investigating and Prosecuting Infanticide*, 28 SW. U. L. REV. 599, 612 (1999) (“[W]hen a parent with Munchausen suffocates a child and then presents the child to health care workers for treatment, reporting only that the child suddenly stopped breathing, the child's death can easily be labeled as SIDS.”); see also Miller, *supra* note 338, at 291–92.

facto proof of homicide.³⁵³ As he explained in what came to be known as “Meadow’s law,” “[o]ne sudden infant death is a tragedy, two is suspicious and three is murder until proved otherwise.”³⁵⁴ Meadow’s law, and his own expert testimony about SIDS and MSBP at several trials, contributed to the murder convictions of several British women that were later overturned.³⁵⁵

The most confounding problem of MSBP, however, is that many of the characteristics used to diagnose and identify MSBP are the same traits exhibited by devoted and loving mothers presented with a sick child. Mothers with MSBP are described as “the picture of loving, doting parents”³⁵⁶ and as a “distortion of the traditional maternal nurturer.”³⁵⁷ They are “typically cooperative with medical staff, overzealously involved in the child’s care, and medically knowledgeable.”³⁵⁸ One list of factors associated with MSBP includes a mother’s “unusual degree of attentiveness to child’s needs in hospital” and her “unusually supportive and cooperative attitude toward doctors and hospital staff.”³⁵⁹ Another list of “warning signs” includes “the individual is friendly and cooperates with the health care staff and providers; and . . . the individual appears to be concerned about the patient, and at times may seem overly concerned.”³⁶⁰

In recent years, the medical community has moved towards replacing Munchausen Syndrome by Proxy with the term “medical child abuse,” in an attempt to place the focus on the child as opposed to the parent.³⁶¹ The logic is that rather than arguing about the psychological state of a mother at trial, medical child abuse looks to the child in order to ask whether the child has received unnecessary medical treatment.³⁶² In practice, however, looking to whether a

353. Elaine E. Sutherland, *Undue Deference to Experts Syndrome?*, 16 *IND. INT’L & COMP. L. REV.* 375, 386 (2006).

354. *Id.*

355. *Id.* at 378–79.

356. Sweet, *supra* note 315, at 92.

357. Steelman, *supra* note 314, at 269.

358. Flannery, *Munchausen Syndrome by Proxy*, *supra* note 313, at 1189–90.

359. Melinda Cleary, *Mothering Under the Microscope: Gender Bias in Law and Medicine and the Problem of Munchausen Syndrome by Proxy*, 7 *T.M. COOLEY J. PRAC. & CLINICAL L.* 183, 202–03 (2005) (discussing the factors used in *In the Matter of Jessica Z*, 515 N.Y.S.2d 370 (N.Y. Fam. Ct. 1987)).

360. Tiffany S. Allison, Note, *Proving Medical Child Abuse: The Time Is Now for Ohio to Focus on the Victim and Not the Abuser*, 25 *J.L. & HEALTH* 191, 198 (2012).

361. *See id.* at 202.

362. *See id.* at 210.

child has had excessive medical treatment second-guesses a mother's care even more. Seeking treatment for a child presenting symptoms that confound doctors becomes potential medical child abuse, as testing and treatment in the absence of a diagnosis can be viewed as a mother subjecting her child to unnecessary procedures.

Professor Maxine Eichner published a searing op-ed in *The New York Times* discussing medical child abuse, which she termed "the new child abuse panic."³⁶³ Eichner points out that "what constitutes 'unnecessary medical care'—the heart of the test for medical child abuse—is vague and subjective. After all, doctors often disagree with one another when it comes to the diagnosis and treatment of complicated conditions."³⁶⁴ Eichner draws from her own experience dealing with the puzzling and painful symptoms of her daughter for eight years before being diagnosed with mitochondrial disease, known as mito.³⁶⁵ She writes that she was lucky not to have been accused of medical child abuse, comparing her family's struggles to that of Justina Pelletier, a teenager also diagnosed with mito:

On the advice of a metabolic geneticist at Tufts Medical Center who was treating her, [Justina] was admitted in 2013 to Boston Children's Hospital, so that she could see her longtime gastroenterologist, who had recently moved there. Without consulting the girl's doctor at Tufts, Boston Children's concluded that the girl's problem was not mito, but largely psychiatric, according to *The Boston Globe*. . . . When her parents disagreed and sought to transfer her back to Tufts, Boston Children's called child protection, asserting that the parents were harmfully interfering in her care. Although the Tufts geneticist supported the mito diagnosis, a juvenile court judge deferred to Boston Children's assessment, and Justina's parents lost custody. After more than 16 months in state custody, much of it spent in a locked psychiatric ward, Justina was finally returned to her parents — still in a wheelchair, still sick.³⁶⁶

It is one thing when a mother is caught attempting to feed her child formula that has been tampered with, or when an autopsy shows unexplained caffeine pills in the stomach of a young child. It

363. Eichner, *supra* note 337.

364. *Id.*

365. *Id.*

366. *Id.*

is another problem altogether when the lack of diagnosis, or disagreements among doctors as to the proper diagnosis, is itself taken as proof of child abuse. What mother, worried about her sick child, would not be unusually attentive to her child's needs and extremely concerned about her child's care? What mother, faced with a sick child with an extended series of appointments trying to identify and treat a serious illness, would not try to be supportive and cooperative with doctors and nurses, as well as become knowledgeable about her child's symptoms and possible diagnoses? MSBP and medical child abuse force mothers to walk a careful tightrope: concern but not too much concern, involvement with a child's treatment but not too much knowledge about that treatment.

C. Helicopter Versus Free Range Mothering

Mothers also face paradoxical messages regarding their parenting styles. As discussed above, mothers should minimize risks to their children—but not too much, lest they be termed “helicopter” parents. Mothers should foster independence in their children—but not too much, as it might rise to the level of neglect.

“Helicopter parenting” has become a buzzword, a cautionary tale of parents who go overboard with supervising, supporting, and monitoring their children so extensively that the children never learn independence. Kathleen Vinson chronicled the myriad ways in which parents err on the side of overprotection:

Helicopter parenting involves various forms of hovering and can begin before children are born and continue through graduate school. Helicopter parenting during pregnancy starts when parents seek increasing amounts of information regarding achieving the optimal pregnancy and baby. Once the child is born, it continues as parents try to place children in a protective bubble or armor, relying on numerous safety and monitoring devices like “nanny cams”; putting babies in helmets; using pads on toddlers' knees; and tracking children with GPS. Parents schedule their child's play dates and every aspect of their lives. Children have less freedom and play time today than in the past, as they are involved in an

increasing number of school and after-school activities where every child gets a trophy for participating.³⁶⁷

Faced with such suffocating attention, the theory posits that children lack decision-making and coping skills that they would otherwise develop through grappling with problems on their own.³⁶⁸ Popular media (and parenting advice) provides much of the focus on helicopter parents, but Gaia Bernstein and Zvi Triger have written in recent years about how “intensive parenting,” as they term it, is now actively encouraged by the law.³⁶⁹ Family law rewards the amount of time a parent spends with their child, in both making custody determinations and determining child support awards, providing parents with incentives to supervise a child every available minute.³⁷⁰ Bernstein and Triger also point to modifications of the Parental Immunity Doctrine in tort law, and how it allows more lawsuits against parents for insufficiently protective care and “the ways in which the law repeatedly incorporates knowledge about best child rearing practices into legal monitoring duties.”³⁷¹ Similarly, another recent article argues that parental responsibility laws—holding a parent legally responsible for her child’s prohibited behavior—have been enforced disproportionately against mothers as a punishment for their perceived bad parenting.³⁷²

At the same time, however, too much self-reliance is also a bad thing. The counterpoint to helicopter parents are the free-range parents, who “resist these new protective norms, arguing that if kids are denied an opportunity to develop or demonstrate independence, they will grow up with a diminished sense of personal responsibility and self-sufficiency.”³⁷³ Too much independence has led to repeated

367. Kathleen Vinson, *Hovering Too Close: The Ramifications of Helicopter Parenting in Higher Education*, 29 GA. ST. U. L. REV. 423, 428–29 (2013) (internal citations omitted).

368. *Id.* at 435–36 (analyzing helicopter parenting in the context of higher education, as students are often unable to “analyze important decisions associated with the high-school-to-college transition”).

369. Bernstein & Triger, *supra* note 110, at 1226.

370. *See id.* at 1242–45.

371. *Id.* at 1248–49.

372. *See* Portia Allen-Kyle, *Women at the Forefront: Laissez-Faire Sexism, Mother Blaming, and Parental Responsibility Laws*, 36 WOMEN’S RTS. L. REP. 164 (2015).

373. David Pimentel, *Fearing the Bogeyman: How the Legal System’s Overreaction to Perceived Danger Threatens Families and Children*, 42 PEPP. L. REV. 235, 238 (2015).

interactions with law enforcement and child protective services. In December 2014, Danielle and Alexander Meitiv allowed their children, ten and six years old, to walk by themselves one mile from a playground to their home, a route with which the children were apparently very familiar with.³⁷⁴ Someone saw the two children walking, called the police, and the children were brought home in a police cruiser.³⁷⁵ Montgomery County Child Protective Services then began a two-month investigation into whether the Meitivs were guilty of child neglect.³⁷⁶ The charge was eventually found to be unsubstantiated, meaning that although the charge would not be pursued at that time, CPS would keep a file on the Meitivs open for five years.³⁷⁷

In April 2015, an eleven year old boy arrived home without a key, apparently because his parents had been delayed by weather and traffic.³⁷⁸ While he waited for his parents to arrive with the house key, which took about ninety minutes, he went into the backyard and played basketball.³⁷⁹ A neighbor saw him outside for what the neighbor considered an extended period of time and called the police.³⁸⁰ The parents were arrested for negligence, and the son was put in foster care with a relative for one month.³⁸¹ Although in both of the above examples, both parents were involved in the decision and were investigated for neglect, the mothers became unofficial spokespersons for the family and were the focus of public outrage and criticism.

In other examples, the mother was investigated alone. In 2007, a professor at Montana State University was charged with child endangerment after sending her younger children to the local mall

374. *Id.* at 263.

375. *Id.*

376. *Id.*

377. Donna St. George, "Unsubstantiated" Child Neglect Finding for Free-Range Parents, WASHINGTON POST (March 2, 2015), http://www.washingtonpost.com/local/education/decision-in-free-range-case-does-not-end-debate-about-parenting-and-safety/2015/03/02/5a919454-c04d-11e4-ad5c-3b8ce89f1b89_story.html.

378. Lenore Skenazy, *11-Year-Old Boy Played in His Yard. CPS Took Him, Felony Charge for Parents*, REASON.COM (June 11, 2015, 11:35 AM), <http://reason.com/blog/2015/06/11/11-year-old-boy-played-in-his-yard-cps-t>.

379. *Id.*

380. *Id.*

381. Lenore Skenazy, *Trouble Not Over for Florida Parents of 11-Year-Old Taken in CPS Dispute*, REASON.COM (June 12, 2015, 10:59 AM), <http://reason.com/blog/2015/06/12/kidnapped-by-the-state-trouble-not-over>.

with her twelve-year-old daughter and the daughter's friend.³⁸² Both of the older girls had taken classes in babysitting, but when they left the younger children—eight, seven, and three years old³⁸³—outside dressing rooms as they tried on clothing, store employees called the police.³⁸⁴ In 2012, a mother in Arkansas told her ten year old son that because he had been kicked off the school bus due to his bad behavior for a fifth time, he would have to walk to school.³⁸⁵ She was convicted of child endangerment.³⁸⁶ Similiarly, a mother in Virginia was subjected to a home visit from Alexandria Child Protective Services when someone reported that her nine-year-old son was home alone after he walked home by himself from school, although his grandmother was actually in the home at the time.³⁸⁷ Another mother was charged with child abuse and neglect when she did not accompany her six-year-old son and his slightly older brother to wait for the school bus, and the bus ran over his foot.³⁸⁸ In such cases, mothers are judged for not being sufficiently protective of their children. David Pimentel argues that such prosecutions are “just as much about enforcing gender roles as protecting children.”³⁸⁹

There has been some legislative movement to protect the judgment of parents, most recently in the Every Child Succeeds Act. Although the bulk of the statute focuses on public education, one section aims to protect parents from liability “for allowing their child to responsibly and safely travel to and from school by a means the

382. Pimentel, *Fearing the Bogeyman*, *supra* note 369, at 260–61; *see also* Bridget Kevane, *Reflections from the Montana Mall Mother*, 2013 UTAH L. REV. ONLAW 276 (2013).

383. Judith Warner, *Dangerous Resentment*, N.Y. TIMES: OPINIONATOR (July 9, 2009, 9:00 PM), <http://opinionator.blogs.nytimes.com/2009/07/09/dont-hate-her-because-shes-educated/>.

384. David Pimentel, *Criminal Child Neglect and the “Free Range Kid”: Is Overprotective Parenting the New Standard of Care?*, 2012 UTAH L. REV. 947, 968 (2012).

385. Pimentel, *Fearing the Bogeyman*, *supra* note 369, at 258.

386. *Id.*

387. Donna St. George & Brigid Schulte, *Montgomery County Neglect Inquiry Shines Spotlight on “Free-Range” Parenting*, WASH. POST (Jan. 17, 2015), http://www.washingtonpost.com/local/education/montgomery-county-neglect-inquiry-shines-spotlight-on-free-range-parenting/2015/01/17/352d4b30-9d99-11e4-bcfb-059ec7a93ddc_story.html.

388. Zvi Triger, *The Darker Side of Overparenting*, 2013 UTAH L. REV. ONLAW 284, 289 (2013).

389. Pimentel, *Criminal Child Neglect*, *supra* note 380, at 990.

parents believe is age-appropriate.”³⁹⁰ Broader reform, however, does not seem forthcoming, and mothers remain vulnerable to legal and social censure for their parenting philosophies.

The rules of maternity enforce gender roles, but also enforce other proscribed roles, delineated by race, class, criminal status, and other factors. The final rule of maternity polices the bounds of who “should,” and in some circumstances who *may*, become a mother.

VI. RULE 5: ONLY SOME WOMEN NEED APPLY

In many ways, it seems to modern women that there is a strong norm encouraging them to become mothers. Attempted restrictions of access to contraceptives present women with the untenable and unrealistic choice between abstinence and risk of pregnancy.³⁹¹ The federal government has encouraged young women to make choices with their future reproduction in mind, considering themselves as pre-pregnant at all times, even if they have no plans to become mothers.³⁹² For example, the Centers for Disease Control and Prevention recently released guidelines and infographics recommending that women of childbearing age abstain from alcohol if they “could get pregnant.”³⁹³ Regulation of teratogenic medications, which can be harmful in pregnancy, have triggered the FDA to create aggressive safety measures that restrict prescriptions given to “pre-pregnant” women of childbearing age.³⁹⁴ For example, Accutane, an acne medication that causes a significant risk of miscarriage and birth defects, was at one point prescribed only after the physician gave his female patient of childbearing age a pregnancy test, then had her agree that she would either use two methods of contraceptives or abstain from sexual activity entirely.³⁹⁵

390. Every Student Succeeds Act, Pub. L. No. 114–95, 129 Stat. 1802 (2015), § 8542(a).

391. See Priscilla J. Smith, *Contraceptive Comstockery: Reasoning from Immorality to Illness in the Twenty-First Century*, 47 CONN. L. REV. 971, 994 (2015).

392. *Alcohol and Pregnancy*, supra note 2. See also Cat Ferguson, *CDC Keeps Quietly Changing that Booze and Pregnancy Infographic*, BUZZFEED (Feb. 11, 2016, 12:52 PM), <http://www.buzzfeed.com/catferguson/the-brief-and-wonderous-life-of-a-cdc-infographic>; Olga Khazan & Julie Beck, *Protect Your Womb from the Devil Drink*, THE ATLANTIC (Feb. 3, 2016), <http://www.theatlantic.com/health/archive/2016/02/protect-your-womb-from-the-devil-drink/459813/>.

393. *Id.*

394. Lars Noah, *Too High A Price for Some Drugs?: The FDA Burdens Reproductive Choice*, 44 SAN DIEGO L. REV. 231, 233 (2007).

395. *Id.* at 235.

Many women, however, are seen as undesirable mothers and are legally pressured or forced not to have children at all. One charity program even pays one category of undesirables—women with a history of drug addiction—to secure long-term contraceptives, including a payment of \$300 if they undergo sterilization procedures.³⁹⁶ Such women are more likely to be poor and non-white, and any discussion of the rules of maternity must acknowledge that large numbers of women are told not to be mothers at all.³⁹⁷

A. Potential Mothers in Prison

Women sentenced to prison are perhaps the easiest group for some to dismiss as “not suited to be mothers.”³⁹⁸ Such an attitude towards mothers in prison likely contributes to the phenomenon of forcing women in jail to labor and give birth while physically shackled.³⁹⁹ Deborah Ahrens recently chronicled the many obstacles that pregnant women in prison face, ranging from being recognized as pregnant at all while incarcerated to receiving appropriate medical care during pregnancy and labor.⁴⁰⁰

Another approach prevents women in prison from becoming mothers at all. The Human Rights Program at Justice Now wrote in 2009 that “[a] person entering a women's prison in California in her twenties faces a significant risk of leaving prison unable to have children, whether because of a hysterectomy, because of inadequate medical care, or because her prison sentence will outlast her reproductive years.”⁴⁰¹ The prevalence of sterilizations performed

396. See generally Bruce A. Thyer, *Project Prevention: Concept, Operation, Results and Controversies About Paying Drug Abusers to Obtain Long-Term Birth Control*, 24 WM. & MARY BILL RTS. J. 643 (2016) (discussing the methods of Project Prevention); Janet Simmonds, *Coercion in California: Eugenics Reconstituted in Welfare Reform, the Contracting of Reproductive Capacity, and Terms of Probation*, 17 HASTINGS WOMEN'S L.J. 269, 282 (2006).

397. See, e.g., Cherry, *supra* note 1, at 106–17; NO MÁS BEBÉS (NO MORE BABIES) (ITVS 2015), (chronicling story of ten Mexican women sterilized during emergency c-sections in Los Angeles in the 1970's).

398. Robin Levi et al., *Creating the "Bad Mother": How the U.S. Approach to Pregnancy in Prisons Violates the Right to Be A Mother*, 18 UCLA WOMEN'S L.J. 1, 3 (2010).

399. See Priscilla A. Ocen, *Punishing Pregnancy: Race, Incarceration, and the Shackling of Pregnant Prisoners*, 100 CAL. L. REV. 1239, 1250–55 (2012).

400. See Ahrens, *supra* note 97, at 6.

401. Human Rights Program At Justice Now, *Prisons As A Tool of Reproductive Oppression*, 5 STAN. J. CIV. RTS. & CIV. LIBERTIES 309, 310 (2009).

upon women in prisons is a disturbing message as to which women should be allowed to become mothers.

In 2013, a report written by The Center for Investigative Reporting uncovered a startling number—nearly 150—of tubal ligations performed upon female inmates in just two California prisons from 2006 to 2010.⁴⁰² The procedures were performed in violation of an approval process aimed at overseeing and minimizing the circumstances in which sterilizations are performed, which was itself instituted in response to a problematic history of sterilizing women in jail without medical necessity or the women's consent.⁴⁰³ The California State Auditor later investigated tubal ligations performed in state prisons and found “systematic failures to secure advance approval for the surgery and to document in women's files that appropriate counseling had taken place.”⁴⁰⁴ Similarly, Justice Now reported that it “heard anecdotally of many hysterectomies performed under questionable circumstances—hysterectomies that appear to occur disproportionately to people of color.”⁴⁰⁵

B. Potential Mothers on Probation

Sterilization and long-term birth control methods have also been imposed as conditions of probation. As a general rule, conditions of probation must be “reasonable” in two ways: first, the probation condition must be reasonably related to the crime, rehabilitation, or the safety of the public; second, the condition must be reasonable as opposed to excessively punitive or harsh.⁴⁰⁶ In 1967, a California court rejected a probation condition that a woman convicted of robbery not become pregnant until she was married on the logic that a restriction on pregnancy was not reasonably related to the crime of robbery.⁴⁰⁷ A number of judges tried to impose such restrictions on women convicted of child abuse in the 1970s, reasoning that a reasonable relationship existed between the crime and the condition,

402. Rachel Roth & Sara L. Ainsworth, *“If They Hand You A Paper, You Sign It”*: A Call to End the Sterilization of Women in Prison, 26 HASTINGS WOMEN'S L.J. 7, 32 (2015).

403. Elizabeth J. Chen, *Restoring Rights for Reproductive Justice*, 22 AM. U. J. GENDER SOC. POL'Y & L. 281, 296 (2014).

404. Roth & Ainsworth, *supra* note 398, at 35.

405. Human Rights Program At Justice Now, *supra* note 397, at 321.

406. See Janet F. Ginzberg, *Compulsory Contraception As A Condition of Probation: The Use and Abuse of Norplant*, 58 BROOK. L. REV. 979, 990–91 (1992).

407. *People v. Dominguez*, 64 Cal.Rptr. 290, 293 (Ct. App. 1967).

but were repeatedly rebuffed by appellate courts.⁴⁰⁸ However, one exception from this time period was a case in which the abuse in question occurred during pregnancy, as a mother adhered to a strict diet that caused harm to the developing fetus.⁴⁰⁹

Nonetheless, courts continue to impose restrictions on having children as conditions of probation. One wave of attempts arose when Norplant was approved by the FDA in 1990.⁴¹⁰ Norplant is a small implant of contraceptive hormones placed under the skin of a woman's upper arm that prevents pregnancy for up to five years.⁴¹¹ The prospect of effortless prevention of pregnancy after a relatively small medical procedure proved irresistible to state legislators, who proposed more than two dozen laws at the state level requiring or incentivizing implantation of Norplant for women on probation or women receiving public benefits.⁴¹² Even without authorizing legislation, some creative judges began ordering women convicted of child abuse or neglect to have Norplant implanted as a condition of their probation.⁴¹³ For example, less than a month after Norplant's approval, a California superior court judge earned "instant notoriety" when he required that a woman convicted of three counts of child abuse to be implanted with Norplant for the duration of her probation.⁴¹⁴ The woman initially accepted the condition, although a subsequent appeal was rendered moot when she violated another probation condition.⁴¹⁵

Other judges simply focus on preventing pregnancy as a condition of probation, without specifying a method. In 2000, a Montana judge sentenced a woman convicted of using drugs during her pregnancy to ten years in jail, but then suspended five on the condition that she take birth control pills to prevent pregnancy for

408. See, e.g., *Rodriguez v. State*, 378 So.2d 7 (Fla. Dist. Ct. App. 1979); *State v. Livingston*, 372 N.E.2d 1335 (Ohio Ct. App. 1976). See also Ginzberg, *supra* note 402, at 995.

409. See *People v. Pointer*, 199 Cal. Rptr. 357, 359–60, 366 (Cal. Ct. App. 1984); Ginzberg, *supra* note 406, at 995–96.

410. See Ginzberg, *supra* note 402, at 980.

411. *Id.*

412. Sarah Gill, *Discrimination, Historical Abuse, and the New Norplant Problem*, 16 WOMEN'S RTS. L. REV. 43, 45–46 (1994).

413. *Id.* at 46.

414. Ginzberg, *supra* note 402, at 979 n.1, 980.

415. Elaine E. Sutherland, *Procreative Freedom and Convicted Criminals in the United States and the United Kingdom: Is Child Welfare Becoming the New Eugenics?*, 82 OR. L. REV. 1033, 1058–59 (2003).

the entire five years, as well as take pregnancy tests to verify that she had not become pregnant.⁴¹⁶

Why do judges continue to impose such conditions when there is precedent finding such restrictions unreasonable? One reason is that the women subjected to such orders are generally low-income and lack the resources to challenge their sentence. Another is that when the options presented are avoid pregnancy or receive a longer prison sentence, many women will rationally prefer the shorter time in jail, particularly if they already have children from whom they will be separated while incarcerated. For this reason, the number of cases with such conditions is unclear—one scholar's review of the American Law Reports found only eleven cases, but those were appeals from orders. By contrast, when reviewing both cases and press reports, she found examples of such probation conditions in twenty-one states.⁴¹⁷

C. Potential Mothers on Welfare

Poor women are also subjected to control and limitation of their reproductive capacities. As mentioned above, a number of states proposed bills that would either require women receiving public assistance to have Norplant implanted, or to provide financial incentives for women who did.⁴¹⁸ Although proposals for such direct requirements were unsuccessful, some states made Norplant available to women on Medicaid, an unusually permissive step compared to the availability of other new contraceptive options.⁴¹⁹

The rhetoric surrounding "welfare queens"⁴²⁰ using up public funds with irresponsible childbearing is still very much present in civic life. A Louisiana state legislator suggested in 2008 that the state pay \$1,000 to any woman receiving public benefits who would

416. Rachel Roth, "No New Babies?" *Gender Inequality and Reproductive Control in the Criminal Justice and Prison Systems*, 12 AM. U. J. GENDER SOC. POL'Y & L. 391, 392 (2004).

417. *Id.* at 406.

418. Gill, *supra* note 408, at 45. See Laurence C. Nolan, *The Unconstitutional Conditions Doctrine and Mandating Norplant for Women on Welfare Discourse*, 3 AM. U. J. GENDER & L. 15, 17 (1994). See also Catherine Albiston, *The Social Meaning of the Norplant Condition: Constitutional Considerations of Race, Class, and Gender*, 9 BERKELEY WOMEN'S L.J. 9, 11 (1994) ("The common thread among these various programs is that they target poor women of color.").

419. Nolan, *supra* note 414, at 17.

420. See Michele Estrin Gilman, *The Return of the Welfare Queen*, 22 AM. U. J. GENDER SOC. POL'Y & L. 247, 256–66 (2014).

agree to be medically sterilized.⁴²¹ A Republican party executive in Arizona declared on his own radio show, “You put me in charge of Medicaid, the first thing I'd do is get [female recipients] Norplant, birth-control implants, or tubal ligations.”⁴²²

Such rhetoric relies on a belief that women receiving public assistance do not, or will not, provide adequate care to their children. As Carol Sanger summarized in the context of welfare reform in the mid-1990s:

Whatever developmental benefits were once thought to accrue from a mother's presence at home have been superseded by hopes of fostering a wage-labor work ethic in the children of the poor. The mother's relationship to work becomes the explanation for why children turn out the way they do. Thus workfare is explicitly about separating nonworking mothers from their children.⁴²³

Where Sanger viewed workfare as removing bad mothers from their existing children, modern proposals point towards preventing such women from becoming mothers in the first place.

D. *Free Range Redux: Not if You're Poor*

The previous section discussed mothers who face child neglect allegations for allowing their children more independence than dominant social mores. Such “free range” mothers tend to be middle or upper class – the modern debate was sparked, in part, by outrage after Lenore Skenazy published a story in the *New York Sun* describing how she let her nine year old son travel home alone from Bloomingdale's.⁴²⁴ Such mothers are unaccustomed to having the state second-guess their parenting choices or interfere in their

421. Roth & Ainsworth, *supra* note 398, at 15.

422. See *id.* See also Sean Sullivan, *Arizona GOP Official Resigns After Controversial Comments*, WASH. POST (Sept. 15, 2014), <http://www.washingtonpost.com/news/post-politics/wp/2014/09/15/arizona-gop-official-resigns-after-controversial-comments/>.

423. Carol Sanger, *Separating from Children*, 96 COLUM. L. REV. 375, 476–77 (1996).

424. Lenore Skenazy, *Why I Let My 9-Year-Old Ride the Subway Alone*, N.Y. SUN (April 1, 2008), <http://www.nysun.com/news/why-i-let-my-9-year-old-ride-subway-alone>.

family life, and they often react to the appearance of child protective services with outrage.⁴²⁵

By contrast, lower-income mothers may similarly let their children play or travel unattended, but the motivation is necessity rather than parenting philosophy. In the absence of affordable and reliable childcare, mothers are faced with leaving children unsupervised or losing their job. This lack of support for working mothers, and mothers who are looking for work, occasionally results in painful dilemmas for mothers.

A series of such mothers have made headlines in the last few years. In June 2015, Laura Browder had recently moved to Houston with her two children, two and six years old.⁴²⁶ She was offered a job interview held at a food court in a nearby mall.⁴²⁷ She could not secure childcare for her children, so she brought them with her to the food court, bought them some food, then met with her interviewer at another table.⁴²⁸ She said she was never more than thirty feet from her children and kept them in her line of sight the entire time.⁴²⁹ Her interview went well, and she was offered and accepted the job.⁴³⁰ She then returned to her children and was arrested, as a bystander had seen the children sitting alone and called the police.⁴³¹

The summer before, Debra Harrell could not get affordable babysitting for her nine-year-old daughter while she was at work at McDonald's.⁴³² At first Harrell brought her laptop, which could

425. St. George & Schulte, *supra* note 383 (“We were stunned and extremely angry We are the parents. We are the ones who decide what’s best for the children.”).

426. *Mom Charged With Abandonment Said Kids Were Never Out of Sight*, KHOU.COM (July 17, 2015, 11:00 PM), <http://www.khou.com/story/news/local/2015/07/17/houston-mom-charged-with-abandoning-children-during-job-interview/30307379/>.

427. *Id.*

428. *Id.*

429. *Id.*

430. *Id.*

431. *Id.*

432. Lenore Skenazy, *Mom Jailed Because She Let Her 9-Year-Old Daughter Play in the Park Unsupervised*, REASON.COM (July 14, 2014, 9:10 AM), <http://reason.com/blog/2014/07/14/mom-jailed-because-she-let-her-9-year-old#bvjkvj:rwB>. Ann Cammett points out that full-time employees of McDonald’s so frequently cannot support themselves on the fast food company’s salary that the business offers a “McResource” line to help employees sign up for state assistance. Ann Cammett, *Welfare Queens Redux: Criminalizing Black Mothers in the Age of Neoliberalism*, 25 S. CAL. INTERDISC. L.J. 363, 370–71 (2016).

connect to McDonald's free wireless internet, and the girl sat in the restaurant using the internet while her mother worked.⁴³³ But the Harrell's home was broken into and the laptop stolen, and without the computer her daughter was bored.⁴³⁴ She asked Harrell if she could instead spend the day at a popular park.⁴³⁵ Harrell agreed, and gave her daughter a cellphone so she could call her at work in case of emergency.⁴³⁶ On the third day she spent at the park, an adult asked Harrell's daughter where her mother was.⁴³⁷ When she answered at work, the adult called the police.⁴³⁸ Harrell was then arrested for "unlawful conduct toward a child," a felony with a possible ten-year jail sentence, and her daughter was taken into the custody of the Department of Social Services.⁴³⁹ After Harrell was arrested, a video of her interrogation was shown on a local news station.⁴⁴⁰ The police officer made clear his opinion of Harrell's parenting skills:

OFFICER: You're her mother, right?

HARRELL: Yes sir.

OFFICER: You understand that you're in charge of her well being?

HARRELL: Yes sir.

OFFICER: It's not other people's job to do so.⁴⁴¹

Four months before, Shanesha Taylor of Phoenix was in dire straits.⁴⁴² Her monthly income, including food stamps, was \$1,232, but her monthly expenses totaled \$1,274.⁴⁴³ She and her three children—nine years old, two years old, and six months old—had lost

433. Skenazy, *Mom Jailed Because She Let Her 9-Year-Old Daughter Play in the Park Unsupervised*, *supra* note 393.

434. *Id.*

435. *Id.*

436. *Id.*

437. *Id.*

438. *Id.*

439. Noah Remnick, *Debra Harrell and the Mythology of Bad Black Mothers*, L.A. TIMES (July 18, 2014, 1:47 PM). <http://www.latimes.com/opinion/opinion-la/la-ol-debra-harrell-mythology-black-mothers-20140718-story.html>.

440. Lenore Skenazy, *Watch This: Police Interrogation of Arrested Mom Is Patronizing and Wrong*, REASON.COM (Aug. 18, 2014, 11:07 PM), <http://reason.com/blog/2014/08/18/police-interrogation-of-arrested-mom-pat>.

441. *Id.*

442. Shaila Dewan, *A Job Seeker's Desperate Choice*, N.Y. TIMES (June 21, 2014), <http://www.nytimes.com/2014/06/22/business/a-job-seekers-desperate-choice.html>.

443. *Id.*

their home, and alternated staying with friends and sleeping in her car.⁴⁴⁴ She had been offered a job interview for a position she believed would solve her financial problems, and had arranged to leave her two younger children with a babysitter, but when she went to drop the children off no one answered the door.⁴⁴⁵ Desperate not to cancel the interview, she took the children with her to the interview and left them in the car.⁴⁴⁶ It was a 71 degree day, and she left the car windows partially down with the fan running.⁴⁴⁷ After she finished her interview, she returned to the car to find her children unharmed alongside the police, who arrested her.⁴⁴⁸

Taylor's mug shot, with tears streaming down her face, attracted significant attention on the internet.⁴⁴⁹ Readers created a meme comparing her photograph with another Arizona mother, Catalina Clouser, who while high on marijuana, placed her two month old baby in its carseat on the roof of her car, then got in the car and drove twelve miles.⁴⁵⁰ (The baby was found uninjured in the carseat in the middle of the freeway Clouser drove down.)⁴⁵¹ Clouser, who is white, pleaded guilty to child abuse and driving under the influence of marijuana, and was sentenced to sixteen years' probation.⁴⁵² Taylor, who is black, was initially charged with two felony counts of child abuse.⁴⁵³ The meme juxtaposed the two women's mug shots, labeling Taylor (whose trial was not concluded) with "jail and children taken away," versus Clouser's "probation."⁴⁵⁴ The meme, although inaccurate when it was made, expressed outrage at the perceived different treatment of the two women.⁴⁵⁵ Ultimately, further public outcry was forestalled. After protracted negotiations with the prosecutor, Taylor eventually pleaded guilty to one count of child abuse, was required to complete parenting classes and classes

444. *Id.*

445. *Id.*

446. *Id.*

447. Soraya Nadia McDonald, *Shaneshia Taylor, Arrested for Leaving Children in Car During Job Interview, Speaks*, WASH. POST (June 23, 2014), <http://www.washingtonpost.com/news/morning-mix/wp/2014/06/23/shaneshia-taylor-arrested-for-leaving-children-in-car-during-job-interview-speaks/>.

448. Dewan, *A Job Seeker's Desperate Choice*, *supra* note 438.

449. McDonald, *Shaneshia Taylor*, *supra* note 443.

450. *Id.*

451. *Id.*

452. *Id.*

453. *Id.*

454. *Id.*

455. *Id.*

on domestic violence, and was put on probation for eighteen years.⁴⁵⁶ Taylor avoided jail time, but was subjected to both legal and societal scrutiny.

In a perfect world, Browder, Harrell, and Taylor would have had babysitting or other childcare arrangements for their children. But in the absence of affordable and available childcare, such mothers are forced to weigh the relative harms of leaving their children unsupervised and being unable to provide for them. Chris Gottlieb sympathetically outlined the dilemma faced by such mothers:

The parent who “chose” to leave her ten-year-old alone while she went to work is deemed to have such bad parenting judgment that she may not be trusted to keep her child safe under any circumstances. Of course, a mother who leaves a child home because otherwise she will lose her job and means of supporting that child was choosing between two bad options. She may have made the wrong decision (though, of course, this is one of the many parenting questions on which contradictory views are held), but she may be an excellent parent. She certainly is a parent who could be given better options.⁴⁵⁷

The lives of low and no-income mothers are much more public than well-off mothers. They lack the private spaces afforded by single-family homes. Their parenting choices are thus more exposed to public and legal judgment, resulting in what one commentator called “somewhat arbitrary judgment calls” by police and child protective services: “They wouldn’t think of preventing many statistically riskier parenting decisions so long as those decisions

456. Sarah Jarvis, *Shaneshia Taylor Sentenced to 18 Years Probation*, THE ARIZ. REPUBLIC (May 15, 2015, 9:16 AM), <http://www.azcentral.com/story/news/local/scottsdale/2015/05/15/shaneshia-taylor-sentenced-friday-abrk/27365949/>. Initially the charges were to be dropped in exchange for Taylor depositing \$60,000 from crowdfunded internet donations into trust funds for her children. After she failed to make the deposit, the prosecutor reinstated the charges. Kody Acevedo & Alexa N. D’Angelo, *Shaneshia Taylor Pleads Guilty to Child Abuse*, THE ARIZ. REPUBLIC (Mar. 16, 2015, 2:18 PM), <http://www.azcentral.com/story/news/local/scottsdale/2015/03/16/shaneshia-taylor-change-plea/24841277/>; Katie Bieri, *Shaneshia Taylor Explains Decision Not to Fund Trusts*, THE ARIZ. REPUBLIC (Nov. 6, 2014, 11:14 PM), <http://www.azcentral.com/story/news/local/scottsdale/2014/11/06/shaneshia-taylor-misses-deadline-abrk/18585269/>.

457. Gottlieb, *supra* note 4, at 381.

jive comfortably with social norms.”⁴⁵⁸ For those “undesirable” mothers who struggle to provide for their children, their circumstances combine to make them both financially and legally vulnerable.

CONCLUSION

This article presents an incomplete listing of all the myriad ways in which mothers are restricted and punished by the law. This is not to say that all regulation of parents is problematic or should be eliminated. A central inquiry in feminist legal theory, however, is to identify ways in which the law disadvantages women, and this article’s survey of the various areas of law and resulting impacts upon a mother’s life demonstrates how seemingly minor restrictions across so many topics adds up to significant regulation and coercion, with the full power of the state behind it.⁴⁵⁹ The institutional motherhood Robin West referred to in 1988 has become a regulated and policed motherhood, corralled from all sides into an ideal of mothering that may not exist in reality.⁴⁶⁰

This institutional motherhood has not been envisioned by a centralized source of power intent on dominating women.⁴⁶¹ The restrictions discussed above arise from an unspoken but deeply-rooted general skepticism or distrust of women’s autonomy and decision making capacities. The status of motherhood at present is to be subordinated to paternalistic assessments of what is best for children. This subordination takes place through a thousand small cuts. Each individual legal restriction is quite different, and arises from varying concerns and via disparate entities. For example, concern for the healthy delivery of a fetus, often framed as state interest in “potential” life, has been most strongly articulated in the context of abortion. Statutes specifying that pregnant women should be kept on life support in order to bring the pregnancy to term are often drafted and supported by pro-life activists who seek to protect the life of the unborn. Such activists, however, are not the driving

458. Conor Friedersdorf, *Working Mom Arrested for Letting Her 9-Year-Old Play Alone at Park*, THE ATLANTIC (July 15, 2014), <http://www.theatlantic.com/national/archive/2014/07/arrested-for-letting-a-9-year-old-play-at-the-park-alone/374436/>; see also Mutcherson, *supra* note 8, at 349–50.

459. See Katharine T. Bartlett, *Feminist Legal Methods*, 103 HARV. L. REV. 829, 831, 837 (1990).

460. West, *supra* note 9, at 48.

461. See Bordo, *supra* note 7, at 26.

force behind failure to protect laws, or application of child neglect statutes against free range mothers, or tubal ligations performed on women without their meaningful consent. Much of the regulation arises in response to extreme examples of harms inflicted upon children – and while the motivation and sympathy in the individual case is entirely understandable, the broader rule is later applied to harder and more attenuated examples.

Thus, the first lesson from the rules of maternity may be a difficult one. Legislators, regulators, judges, and prosecutors must consciously take a step back from the laudable instinct to protect children and promote their well-being. However, counterintuitive it may seem, it is necessary to reassess the role of legal regulation in order to fully respect the agency of mothers. Autonomy “depends on social conditions that allow for its exercise,” and as chronicled in this article, the legal restrictions surrounding motherhood at present constrict autonomy severely.⁴⁶² Instead, regulation of motherhood should shift in order to allow greater variety in parenting choices, accepting that there is a swathe of gray between good mother and bad mother encompasses perfectly acceptable parenting choices.⁴⁶³

The obvious objection to lessening regulation of parenting is that some legal regulation is still appropriate, and this article does not suggest that *all* legal regulation of parenting is suspect and should be amended. Instead, regulation should use as a starting point the parameters of the *Troxel* presumption: that so long as a mother is a fit parent, the law should presume that she acts in the best interest of her child and trust those choices, even though they might not be what an individual regulator believes is ideal.⁴⁶⁴

This will benefit not only the mother, who will receive the respect and deference that she deserves as a competent parent, but also the child. Any interference in a mother/child relationship, no matter how well-intentioned, harms the value of the child’s individual and irreplaceable link to her mother.⁴⁶⁵ This relationship is not only important at an emotional and psychological level, but also in teaching children themselves to become autonomous

462. Carlos A. Ball, *This Is Not Your Father's Autonomy: Lesbian and Gay Rights from A Feminist and Relational Perspective*, 28 HARV. J.L. & GENDER 345, 368 (2005).

463. See Kathryn Abrams, *Sex Wars Redux: Agency and Coercion in Feminist Legal Theory*, 95 COLUM. L. REV. 304, 374–76 (1995).

464. See Annette Ruth Appell, *Virtual Mothers and the Meaning of Parenthood*, 34 U. MICH. J.L. REFORM 683, 704 (2001).

465. See Elizabeth S. Scott & Robert E. Scott, *Parents As Fiduciaries*, 81 VA. L. REV. 2401, 2415 (1995).

adults.⁴⁶⁶ Part of modeling autonomy for children is demonstrating the value of plurality. The variety in parenting choices and philosophies that children observe growing up teaches them that they live in a pluralistic society, and that diversity within reasonable boundaries is a strength of their community.⁴⁶⁷

Reasonable boundaries, moreover, can be indicated through a rewriting of the rules of maternity. Again, *Troxel* points the way: lawmakers and enforcers should presume that a fit parent is acting in her child's best interest.⁴⁶⁸ This is not to say that the only circumstances justifying state intervention in any manner should be events that give rise to a child maltreatment proceeding. Instead, a broader principle should arise that defers to parental judgment if the issue does not implicate a reasonably direct threat to the safety of children. Policymakers should attempt to draw a line between issues with potentially dangerous consequences and issues of best practices or optimal care.

Examples on either end of the extreme illustrate the difference. Questions with potentially dangerous consequences include regulations of explicit safety concern, such as car seats for infants and vaccine requirements. Issues that merely implicate the best care for children include the decision to breastfeed or use formula. In such circumstances, any legal regulation affecting the decision of what to feed one's child should aim to support whatever choice an individual mother makes—justifying both further accommodations of mothers who work outside the home and wish to continue breastfeeding, and making formula available to low-income mothers who cannot or choose not to breastfeed through the WIC program, without penalizing them by denying them other food vouchers. Both choices are legitimate, and neither implicates dangerous consequences for children.

Obviously, this leaves considerable gray area in the middle, and potentially dangerous consequences can be defined to arguably include matters this article would leave to parental discretion. Many breastfeeding advocates argue, to be fair, that breastfeeding is safer

466. See Katharine K. Baker, *Property Rules Meet Feminist Needs: Respecting Autonomy by Valuing Connection*, 59 OHIO ST. L.J. 1523, 1544-45 (1998).

467. See Katharine K. Baker, *Alternative Caretaking and Family Autonomy: Some Thoughts in Response to Dorothy Roberts*, 76 CHI.-KENT L. REV. 1643, 1648 (2001).

468. See *Troxel v. Granville*, 530 U.S. 57 (2000); Appel, *supra* note 383 at 704.

for a child and improves that child's health.⁴⁶⁹ Identifying danger may be an imprecise standard in some ways, but it at least nudges the line of acceptable state intervention outwards a bit, leaving more parental choices left to the individual mother.

Additionally, an assessment of danger versus optimal choices must be accompanied by a principle of equal application, both between mothers and between all parents. Two questions discussed above easily qualify as issues with potentially dangerous consequences: drug use during pregnancy and failure to protect a child from abuse. Both are appropriate arenas for regulation, but both are currently characterized by inconsistent application. Although hospital staff must report positive drug tests, it is left to individual hospitals to determine when or if a woman or baby's blood is tested, and if so what result is positive versus negative.⁴⁷⁰ Failure to protect laws are virtually always used to prosecute mothers, even though fathers are often liable as well.⁴⁷¹ When state intervention is justified, therefore, a firm principle should require every person involved in creation and application of the mechanisms of intervention to consider how to ensure equal application, from drafting relevant statutes or other regulations to prosecutorial discretion. Again, regulators must recognize that existing tendencies have become too coercive and be willing to err on the side of respecting a mother's autonomy and decisions.⁴⁷²

Although a full explanation of policy alternatives to the rules of maternity discussed above is beyond the scope of this article, guiding principles and alternatives to the existing rules of maternity can be briefly outlined. As first principles: *Only intervene when justified by potential danger. Interventions must be equally applied to all parents. Err on the side of autonomy.*

Instead of treating a mother's body as a child's vessel, Rule 1 of maternity should be *pregnancy does not erase bodily privacy*. Notwithstanding her relationship to the child, a mother's autonomy and agency is most strongly implicated when it comes to decisions about her own medical care and body. Barring the most extreme

469. See, e.g., Benjamin Mason Meier & Miriam Labbok, *From the Bottle to the Grave: Realizing A Human Right to Breastfeeding Through Global Health Policy*, 60 CASE W. RES. L. REV. 1073, 1076–81 (2010) (outlining health benefits in context of global public health); Silberstein Shdaimah, *supra* note 257, at 410–11.

470. See *supra* notes 89–95.

471. See Laufer-Ukeles, *supra* note 14, at 590.

472. See Sherwin, *supra* note 37, at 37.

circumstances, decisions such as the method of childbirth should be left up to the mother.

Rather than telling women that doctor knows best, *pregnant women should be empowered to choose their own medical care*. Physicians can and should provide information, but must leave the ultimate decision to the individual patient. If a woman disagrees with her doctor's recommendation, unless a doctor can prove near-unanimous consensus among medical professionals and potentially dangerous consequences to rejecting that near-unanimous recommendation, she should be free to direct her own care (or lack of care).

While expecting parents in general to protect their children is an appropriate goal, telling women that the "mother must always protect" has been applied in a starkly gendered and insufficiently contextualized way. Instead, *parents protect, but sometimes need protection too*. Failure to protect statutes should not be applied routinely, particularly when the mother who failed to protect is vulnerable as a victim of domestic violence or an undocumented immigrant. Given the one-sided application of such statutes, legislators should consider narrowing them to apply only in situations where a parent was present for the abuse, as opposed to leaving a child in the care of an abuser. This is a particularly difficult line to draw, as child abuse is undoubtedly the serious danger that the state is justified in trying to prevent, but however well-intentioned failure to protect statutes have been, the application has nonetheless been problematic.

Mothers—and parents—come in many different types, and good mothers can take very different approaches to the same aspects of raising children. They should not be told that "good motherhood is a narrow road," but rather *all parents deserve respect*. A multitude of individual variables play into questions like whether to breastfeed, how long to breastfeed, how closely to supervise a child, or how to best develop a child's independence and self-sufficiency. Although free-range parents may arguably risk potential danger by letting a child travel without supervision to school or a park, this is an area where the *Troxel* line of parental fitness may be the best boundary line to identify where the state may intervene.

Finally, instead of "only some women need apply," the state should recognize that all women have agency, and *every woman chooses whether to become a mother*. Every individual woman should make decisions whether or not to have children free of any coercion by the state. To the extent that the state regulates mothers who belong to traditionally disadvantaged groups, the regulation should

seek to support each woman's individual decisions. Poor mothers should not have to choose between work and childcare. The most effective way of supporting their choices is by making employment viable through reliable and affordable childcare, rather than punishing mothers who have been forced to attempt to balance both at once.

Such revisions to the rules of maternity may seem unattainable. It is natural for representatives of the state, and society at large, to form educated and reasonable opinions about the best parenting practices, and it may seem counterproductive not to strongly encourage the best choices for all children. But recognizing the importance of relationships and obligations arising from those relationships should not eliminate women's autonomy entirely. Without thoughtful examination and modification, the rules of maternity threaten to limit women's choices even more narrowly with each new danger identified or bit of data developed about how to be the best mother. The rules must be rewritten to support mothers as individuals with agency, so that they raise autonomous children who may, under circumstances of their own choosing, become mothers themselves.

