The Rules of Maternity

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Female behavior has always been strictly cabined by gender stereotypes, societal obligations and expectations, and policing of those norms through law. Femininity has often been treated as synonymous with maternity, from the historical belief that women's place is in the home with children through today's regulation of legal parentage treating motherhood as true parenting, to which fatherhood rates a distant second. Women are viewed almost by default as mothers.

Modern regulation of femininity as maternity is particularly problematic, as it creates a gauntlet of social and legal buffers channeling women into a narrow and normative vision of motherhood. This paper traces these rules of maternity and demonstrates the insidious danger of embedded and powerful expectations of proper female behavior. Women are told over and over: Women want to be mothers. Mothers sacrifice for their children. Mothers provide for their children. Each of these messages is fleshed out, increasingly with legal punishments and regulations of women's behavior. Deviations from the narrowing understanding of what mothers should be face increased regulatory burdens, civil threats to their rights as legal parents, and even criminal punishment.

Part I discusses the threshold default, recognizing women as legal parents, particularly pregnant women who deliver a child. Part II outlines the many restrictions on the choices of pregnant women, pressuring them to sacrifice their own autonomy in the hypothesized interest of their fetus explained to them by the legal and medical establishments. Part III discusses regulatory pressures upon women who are not yet pregnant to make choices regarding their

bodies as though they were already planning to become pregnant. Part IV explains the policing of how women provide for children, particularly how women should provide for their children by choosing an appropriate partner rather than balancing work and home responsibilities themselves.

I. Imputation of Motherhood

As a historical matter, the simplest method of identifying the parent or parents of a newborn child turned solely upon the woman who gave birth to the baby. The pregnant woman's status as mother was self-evident, expressed by the phrase *mater est quam gestation demonstrat*, or "by gestation the mother is demonstrated."[1] If the mother was unmarried at the time of birth, then the child was *filius nullius*, or the "child of no man," and lacked a father in the eyes of the state.[2] If the mother was married at the time of birth, then her husband was deemed to be the father of the child, even if circumstances might justify doubting his actual genetic paternity. For example, an old rule under the English common law specified that the presumption of the husband's paternity could only be disturbed if the man had been "beyond the four seas" during the time of the baby's conception, proving through an absence too long and distant to be ignored that he could not possibly be the genetic father.[3] Any circumstances less dramatic left the marital presumption plausible enough to stand.

Even as laws identifying legal parents modernized and liberalized, the status of pregnant woman as legal mother has remained almost completely untouched. The sole context in which a laboring mother may not be identified as the legal mother at birth is in the context of surrogacy. A surrogate mother is sometimes also the genetic mother of the baby, in which case she can be

[1] Dara E. Purvis, The Origin of Parental Rights: Labor, Intent, and Fathers, 41 Fla. St. U. L. Rev. 645, 660 (2014)
[2] Jacobs, *My Two Dads* at 822
[3] David D. Meyer, Parenthood in a Time of Transition: Tensions Between Legal, Biological, and Social Conceptions of Parenthood, 54 Am. J. Comp. L. 125, 127 (2006).

called the genetic surrogate. In such cases, the surrogate mother often carries a fetus conceived through artificial insemination using sperm donated by the intended father of the child.[4] In the context of gestational surrogacy, by contrast, the surrogate is implanted with a pre-embryo to whom she is not genetically related. There is a great deal of variation in whether a surrogate is recognized as legal mother of the baby to whom she gives birth, often depending in part upon whether she is a genetic or gestational surrogate.[5]

States are somewhat more likely to identify the surrogate as the legal mother if she is a genetic surrogate. Some states, however, create a bright line rule that surrogates are the legal mothers to the babies they carry.[6] Katharine Baker has pointed out that this approach is consistent with the practical power a gestational mother holds over the child and subsequent recognition of relationships between the child and potential other parents, arguing that the de facto power indicates that gestational and not genetic connection justifies the pregnant woman's recognition as legal parent.[7]

Equating parenthood with pregnancy has a number of wide-reaching consequences, both for pregnant women and all other non-pregnant parents such as fathers, adoptive mothers, mothers partnered with the gestational mother, and so on. Just as the parental status of nonpregnant people is minimized, the parental status of women is magnified and imposed prematurely. Pregnant women face the most direct regulation of their conduct, but women and mothers generally are placed under heightened expectations for what appropriate or ideal motherhood should be. In recent years, these expectations have been increasingly expressed in

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[4] Dara E. Purvis, Intended Parents and the Problem of Perspective, 24 Yale J.L. & Feminism 210, 231 (2012)
[5] See id. at 232-34.
[6] See, e.g., Ariz. Rev. Stat. Ann. § 25-218(B) ("A surrogate is the legal mother of a child born as a result of a surrogate parentage contract and is entitled to custody of that child.").
[7] Katharine K. Baker, Bargaining or Biology? The History and Future of Paternity Law and Parental Status, 14 Cornell J.L. & Pub. Pol'y 1, 47 (2004)

law, constructing a pernicious double bind for women. On the one hand, pregnant women are effectively already deemed mothers, with accompanying responsibilities. Women who are not yet pregnant are nonetheless expected to want to become pregnant at some point in the future, and thus encouraged to make choices with their future status in mind. Women who have given birth and are raising children are not relieved of heightened expectations, but held to a particularly narrow standard of mothering.

Such expectations of ideal motherhood are not a new phenomenon, but the recent growth of legal policing of these expectations is. The next section turns to the most direct and punitive examples of such regulation; examining the choices and conduct of pregnant women.

II. Pregnancy

As soon as pregnancy begins, the pregnant woman is viewed as a mother. 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.[8] 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."

There are, of course, negative aspects to this attention. Pregnant women are famously the subject of constant attention and criticism if they do anything that might jeopardize their future child. Eating sushi,[9] drinking coffee,[10] lifting heavy packages, exercising,[11] cleaning cat litter

[8] At least if the mother-to-be is herself pregnant, of course. 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.
[9] Sydney Lupkin, *Sorry, Pregnant Women, New Study Is Not a Carte Blanche to Eat Sushi*, ABCNews.com (Jan. 23, 2015), http://abcnews.go.com/Health/pregnant-women-study-carte-blanche-eat-sushi/story?id=28433617.
[10] 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/.
[11] Tracie Snowder, *Pregnant Woman Under Fire for Rigorous Workout Routine*, KSL.com (Oct. 10, 2013), http://www.ksl.com/?sid=27198127.

boxes,[12] drinking alcohol,[13] and any number of other potentially hazardous activities justifies 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 places heightened expectations and regulations upon her behavior based upon the expectation that a mother will and should sacrifice her own wellbeing for the benefit of her children. 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 can be punished as actually harming the child she "should" be acting to protect. Second, where a woman may be 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 where that necessarily means that the state is also asserting control over the pregnant woman.

Obviously, there is one scenario in which the autonomy interests of the pregnant woman and inchoate interest of the fetus are most clearly set against one another; when the pregnant woman contemplates terminating her pregnancy entirely. Abortion regulations and jurisprudence clearly bear upon questions that weigh the perceived rights of the fetus against the rights of the pregnant woman, but this comparison is not entirely on point for purposes of this paper.[14] The women addressed here are women who do wish to be mothers – the pregnant women at issue do

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[12] Diane Taylor, *The Pregnancy Police Are Watching You*, THE GUARDIAN (Sept. 4, 2006), available at http://www.theguardian.com/society/2006/sep/04/health.medicineandhealth1.
[13] Julia Moskin, *The Weighty Responsibility of Drinking for Two*, N.Y. TIMES (Nov. 29, 2006), available at http://www.nytimes.com/2006/11/29/dining/29preg.html?n=Top%2FNews%2FScience%2FTopics%2FChemicals.
[14] Margo Kaplan, "A Special Class of Persons": Pregnant Women's Right to Refuse Medical Treatment After Gonzales v. Carhart, 13 U. Pa. J. Const. L. 145 (2010)

wish to continue their pregnancies. The perceived conflict is thus not *whether* to become a parent, but how to best act as a parent.[15]

II.A. How to Prosecute Pregnant Women

A threshold question is whether and how the law recognizes harm to the fetus. If harm to the pregnant woman resulted in the termination of her pregnancy, the law historically struggled with whether to recognize harm to the fetus as a sanctionable act, or whether only harm to the mother could be punished by the law. The common law rule was known as the "born alive" rule, meaning that in order to legally punish harm to the fetus, it had to be born alive, then subsequently die of injuries incurred while still in the womb.[16] The 1946 case *Bonbrest v. Kotz* moved the line from birth to viability, reasoning that a fetus capable of survival if removed from the womb was not properly viewed as "part' of its mother," but as an independent rightsholder for at least some purposes.[17]

In the twentieth century, over two-thirds of states have passed criminal statutes specifying that fetuses can be the victims of homicide, at least in some circumstances.[18] The federal Unborn Victims of Violence Act of 2004 clarifies that any federal crime that results in the death or injury to a fetus is a separate crime that can be prosecuted in addition to the crime against the pregnant woman, although the statute specifically excepts actions committed by the

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[15] One area where this distinction blurs is a few recent cases in which a woman seeks to harm *herself*, which due to her pregnancy will necessarily also harm the fetus. Such cases are discussed *infra* in [section TK].

[16] See, e.g., Edward Coke, The Third Part of the Institutes of the Laws of England: Concerning High Treason, and Other Pleas of the Crown, and Criminal Causes 50 (1680) ("If a woman be quick with child . . . and she is delivered of a dead child, this is a great [misdemeanor], and no murder: but if the child be born alive, and dieth . . . , this is murder . . . .").

[17] Bonbrest v. Kotz, 65 F. Supp. 138, 140 (D.C. 1946).

[18] See 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, 852 (2014); 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, 462 (2014), quoting Paul Benjamin Linton, The Legal Status of the Unborn Child Under State Law, 6 U. St. Thomas J.L. & Pub. Pol'y 141, 155 (2011); Shannon M. McQueeney, Recognizing Unborn Victims over Heightening Punishment for Crimes Against Pregnant Women, 31 New Eng. J. on Crim. & Civ. Confinement 461, 463 (2005).

pregnant woman herself.[19] Courts have also read criminal statutes to include fetuses as potential victims. The first example of such statutory interpretation arose in 1984 after Massachusetts' vehicular homicide law was used to prosecute a driver who struck a woman two weeks away from her delivery date, who subsequently lost her pregnancy.[20] Similarly to the *Bonbrest* court several decades before, the court reasoned that the common law's "born alive" rule was appropriate when medicine could not ascertain a fetus's development. Modern doctors, however, could accurately determine whether a given action terminated a viable pregnancy, and thus extension of the vehicular homicide statute was appropriate.

This logic, however, is now being extended further and further. The easiest conceptual extension is likely in the context of abortion. One example of how this has manifested arose in Florida, when a pregnant teenager named Kawana in her twenty-fifth week of pregnancy shot herself in an attempt to terminate her pregnancy. Kawana faced not only a criminal abortion charge, but also felony murder and manslaughter. The felony murder charge was eventually dropped, but the manslaughter prosecution continued up to the Florida state supreme court, which held that criminal law has traditionally distinguished between acts done to a pregnant woman by a third party that result in injuries to the fetus and acts committed by the pregnant woman. That distinction, the court ruled, protected Kawana from a manslaughter charge.[21]

As the rest of this Part discusses, however, the conceptual door has been opened further and further, recognizing all manner of actions that might potentially harm a fetus as legally sanctionable. The consequences can be severe: pregnant women can be found criminally liable,

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[19] 18 U.S.C. § 1841(a)(1) (2004); 1841(c)(3).
[20] 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, 203-04 (2001)
[21] State v. Ashley, 701 So. 2d 338, 339 (Fla. 1997) (per curiam); see also 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, 858-59 (2014).

can be subjected to civil orders directing and monitoring their conduct while pregnant, and may face civil consequences after the birth of their child supervising their parenting choices or even losing their parental rights.

II.B. Drug Use

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,[22] but Linda Fentiman has argued that criminal prosecutions of such women have become "markedly more aggressive" in recent years.[23]

A typical example of discovering drug use during pregnancy is at birth, meaning a newborn baby is born with positive toxicology, testing positive for an illegal drug. Beginning in the 1970s, a few states attempted to apply child protective laws to such women, even though the actions at issue took place before the child's birth. In 1977, California indicted a woman for felony child endangerment after she gave birth to twins who tested positive for heroin shortly after birth. [24] 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. In general, courts have refused to apply general statutes prohibiting child abuse or neglect to fetuses in utero.[25]

This has not prevented, however, more creative attempted applications of statutes. For example, multiple prosecutors have interpreted statutes criminalizing giving drugs to a minor very literally. In 1991, a Florida woman who similarly gave birth to a baby with positive

[22] 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)
[23] 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, 392 (2009)
[24] Reyes v. Superior Court, 75 Cal. App. 3d 214 (Ct. App. 1977).
[25] 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).

toxicology was charged with delivering drugs to her child, on the theory that in the moments after the child's birth but before the umbilical cord was cut, the mother transferred the drugs in her own bloodstream to her child.[26] Again, an appellate court rejected the application of the statute.[27] The following year the Georgia court of appeals similarly reasoned that drug delivery statutes are meant to prohibit transferring drugs outside of the bodies of the two people in question, and rejected prosecution of a mother based on drug transfer through the umbilical cord.[28] The Nevada state supreme court reached the same result another two years later.[29]

Applications of criminal statutes, however, have not been uniformly rejected. In 2003, Regina McKnight was convicted in South Carolina of homicide by child abuse due to her use of crack cocaine while pregnant.[30] And despite general rejection of such charges, prosecutors continue to file them. Rennie Gibbs, sixteen years old at the time, was indicted for depraved heart murder on the theory that her cocaine use while pregnant caused her stillbirth at 36 weeks.[31] (Several medical experts who reviewed Gibbs's files, however, noted that the presence of cocaine was low, 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 umbilical cord was wrapped around the baby's neck.[32])

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[26] Seema Mohapatra, JD, MPH, Unshackling Addiction: A Public Health Approach to Drug Use During Pregnancy, 26 Wis. J.L. Gender & Soc'y 241, 248 (2011)
[27] Sandstad at 180, citing Johnson v. State, 578 So. 2d 419, 420 (Fla. Dist. Ct. App. 1991) ("[A]n infant at birth is a person ...."), rev'd, 602 So. 2d 1288 (Fla. 1992).
[28] State v. Luster, 419 S.E.2d 32, 34 (Ga. Ct. App. 1992).
[29] Sheriff v. Encoe, 885 P.2d 596, 599 (Nev. 1994).)
[30] State v. McKnight, 576 S.E.2d 168, 171 (S.C. 2003); see also Dana Page, Note, The Homicide by Child Abuse Conviction of Regina McKnight, 46 How. L.J. 363, 365-70 (2003); 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).
[31] Seema Mohapatra, JD, MPH, 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 Battlefront, 102 Cal. L. Rev. 781, 808-12 (2014)
[32] Id.

After a judge dismissed the charges in 2014, the prosecutor initially indicated that he would charge Gibbs with manslaughter.[33]

Another modern expansion of child protective statutes has arisen 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.[34] Prosecutors in Alabama then 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.[35] In one case, Amanda Kimbrough gave birth after only 26 weeks of pregnancy to a child who lived for twenty minutes and died as a result of "acute methamphetamine intoxication." Kimbrough was charged with chemical endangerment of a child, pled guilty, and was sentenced to ten years in prison.[36]

Another woman named Hope Ankrom gave birth six weeks prematurely, but her baby was healthy other than a positive drug test for cocaine and marijuana. She was also charged with chemical endangerment of a child, pled guilty, and was given a suspended three year sentence.[37]

Another creative approach taken by a handful of judges has been to use a woman's pregnancy as a reason to sentence her to a harsher punishment 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 checks. The judge acknowledged that as a first-time offender, another person

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[33] Sarah Fowler, *Judge Dismisses Rennie Gibbs' Depraved Heart Murder Case*, THE DISPATCH (Apr. 3, 2014), available at http://www.cdispatch.com/news/article.asp?aid=32344#.Uz2kxLXl3z0.face-book.
[34] Ala. Code § 26-15-3.2.
[35] Adam Nossiter, Rural Alabama County Cracks Down on Pregnant Drug Users, N.Y. Times, Mar. 15, 2008, at A10.
[36] 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 (2014)
[37] Ex parte Ankrom, 2013 WL 135748, at *2; see also Fentiman, *Pursuing*, at 407-08.

in Vaughn's position would likely be sentenced to probation, but because Vaughn was six months pregnant and had tested positive for cocaine, he wanted ""to be sure she would not be released until her pregnancy was concluded ... because of concern for the unborn child," and sentenced her to six months in jail instead.[38] More recently, Simonne Ikerd was sentenced in 1998 to five years probation, but did not comply with the terms of her probation and was rearrested. 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. The judge sentenced her to prison, explicitly tying her sentence to her pregnancy. 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."[39]

Ikerd's sentence was reversed on appeal, albeit not until after Ikerd gave birth to a healthy baby and was released from prison.[40] One year later, seven month pregnant Kari Parsons, on probation following a shoplifting conviction, violated her probation by testing positive for drugs. A Maryland judge sentenced her to jail, explaining that he was concerned for the

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[38] April L. Cherry, The Detention, Confinement, and Incarceration of Pregnant Women for the Benefit of Fetal Health, 16 Colum. J. Gender & L. 147, 172-73 (2007)
[39] April L. Cherry, The Detention, Confinement, and Incarceration of Pregnant Women for the Benefit of Fetal Health, 16 Colum. J. Gender & L. 147, 173-74 (2007)
[40] New Jersey v. Ikerd (850 A.2d 516, 520 (N.J. Super. Ct. App. Div. 2004).

wellbeing of her fetus.[41] Ironically, Parsons then delivered her baby alone in a jail cell after guards failed to seek medical help when she went into labor.[42]

Note 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.[43] A few states specifically authorize or mandate drug testing of laboring women and newborns, and Wendy Bach has explained that even without specific authorization, hospitals often perform drug tests without the woman's consent.[44] Where a newborn baby tests positive for drugs, the mother may be prosecuted under child abuse or neglect statutes.[45] In such cases, the prosecution is based directly on the baby's drug test results.

Women have also been prosecuted for child abuse based on the use of drugs or alcohol before the baby's birth, however. Typically a pregnant woman seeks medical care for other health reasons – in one memorable example, after seeking help from a domestic violence organization for spousal abuse[46] – and the hospital or doctor runs a drug or alcohol test on her blood.[47] A number of states legally require doctors and nurses to report pregnant women they

[41] 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. Change 381, 390 (2008)
[42] Id.
[43] 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, 458-59 (2014)
[44] Bach at 345.
[45] See, e.g., Whitner v. State, 492 S.E.2d 777, 781 (S.C. 1997) (holding that "child" in South Carolina's child abuse and endangerment statute encompassed a viable fetus who tested positive for cocaine after birth).
[46] 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, 829 (2009), citing Ellen Goodman, Being Pregnant, Addicted: It's a Crime, Chi. Trib., Feb. 11, 1990, at C12; 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
[47] 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, 829-30 (2009)

suspect of drug use to law enforcement.[48] In such cases, 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.

There are also civil proceedings that may 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 the state finding a child to be neglected, and can thus justify taking custody of the child or terminating the mother's parental rights.[49] Almost twenty states specify that drug use while pregnant is child abuse.[50]

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. Treatment of such actions has varied. 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.[51] The case began when the Wisconsin Department of Human Services petitioned the juvenile court, reasoning that the unborn child was in need of protection. The argument was supported by the pregnant woman's doctor, who provided an affidavit stating that in his

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[48] 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 Wendy A. Bach, The Hyperregulatory State: Women, Race, Poverty, and Support, 25 Yale J.L. & Feminism 317, 350 (2014)

[49] 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)

[50] See Kathleen Adams, Chemical Endangerment of A Fetus: Societal Protection of the Defenseless or Unconstitutional Invasion of Women's Rights?, 65 Ala. L. Rev. 1353, 1355 (2014); Michele Goodwin, Fetal Protection Laws: Moral Panic and the New Constitutional Battlefront, 102 Cal. L. Rev. 781, 795-96 (2014); 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, 425 (2008)

[51] State ex rel. Angela M.W. v. Kruicki, 561 N.W.2d 729 (Wis. 1997), see also 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, 567 (2006)

professional opinion, in the absence of intervention to prevent further drug use by the pregnant woman, the unborn child would suffer serious harm. The juvenile court then 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."[52] 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.[53] A majority of states, however, allow pregnant women to be subjected to civil commitment orders in order to treat and prevent future drug abuse.[54]

Such broad use of drug use while pregnant to restrict and punish pregnant women is particularly problematic because counter to 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.[55] 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."[56] 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

[52] Id. [tk pincite]; see also April L. Cherry, The Detention, Confinement, and Incarceration of Pregnant Women for the Benefit of Fetal Health, 16 Colum. J. Gender & L. 147, 163 (2007).
[53] Bennett v. Collier, 95 S.W.3d 782 (Ark. 2003); 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, 567 (2006)
[54] 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, 566 (2006)
[55] Kira Proehl, Pregnancy Crimes: New Worries to Expect When You're Expecting, 53 Santa Clara L. Rev. 661, 685 (2013)
[56] McKnight v. State, 661 S.E.2d 354, 358 n.2 (S.C. 2008).

materialized, but research has indicated that children whose mothers used crack cocaine while pregnant face few of the dangers and harms discussed.[57]

Alcohol is similar, and is often lumped together with drug use, in the sense that while excessive use is dangerous for the pregnancy, occasional consumption is less clearly a hazard. Alcohol has also been used as a basis for both criminal and civil actions.[58] 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.[59]

II.C. Tort Suits Against the Mother

Other types of arguably dangerous or negligent behavior have also justified tort suits brought against the mother for actions taken while she was pregnant.[60] Linda Fentiman chronicled six attempted tort suits brought on behalf of a child against the mother for her actions during pregnancy.[61] 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 a 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

[57] Kira Proehl, Pregnancy Crimes: New Worries to Expect When You're Expecting, 53 Santa Clara L. Rev. 661, 685-86 (2013)
[58] See Kathleen Adams, Chemical Endangerment of A Fetus: Societal Protection of the Defenseless or Unconstitutional Invasion of Women's Rights?, 65 Ala. L. Rev. 1353, 1356 (2014)
[59] Gaia Bernstein & Zvi Triger, Over-Parenting, 44 U.C. Davis L. Rev. 1221, 1259 (2011)
[60] The focus of this paper is on legal sanctions placed upon the pregnant 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).
[61] Fentiman, *Pursuing*, at 412-17; 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).

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.[62]

The two other cases discussed by Fentiman – one involving a car accident while the pregnant woman was driving,[63] the other involving use of alcohol and drugs while pregnant[64] – similarly reject later tort suits with similar logic, concerned that if a pregnant woman is deemed to have a cognizable legal duty of care to her fetus, it would be difficult to define or limit that duty.

By contrast, three cases allowed tort suits against a mother for her conduct while pregnant were allowed to proceed. Two such cases involved claims relating to insurance

[62] Remy v. MacDonald, 440 Mass. 675, 677-78, 801 N.E.2d 260, 263 (2004).
[63] 531 N.E.2d 355 (Ill. 1988)
[64] 989 S.W.2d 474 (Tex. 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").

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."[65] Another court simply held in the context of a negligent driving claim that courts need not "den[y] recovery merely because of the identity of the tortfeasor."[66] 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.[67]

A particularly complicated example that has arisen a handful of times 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 who exhibited symptoms of fetal alcohol syndrome.[68] The Court of Appeals rejected a charge of first degree homicide, 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."[69] 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.[70] Finally, Beibei Shuai attempted suicide by eating rat poison after her boyfriend

[65] Bonte v. Bonte, 616 A.2d 464.
[66] National Casualty Co. v. Northern Trust Bank of Florida, N.A., 807 So. 2d 86 (Fla. Dist. Ct. App. 2001).
[67] Grodin v. Grodin, 301 N.W.2d 869 (1980).
[68] State v. Deborah J.Z., 596 N.W.2d 490, 491 (Wis. Ct. App. 1999).
[69] State v. Deborah J.Z., 228 Wis. 2d 468, 477-78, 596 N.W.2d 490, 494-95 (Ct. App. 1999).
[70] Michele Goodwin, Fetal Protection Laws: Moral Panic and the New Constitutional Battlefront, 102 Cal. L. Rev. 781, 792, 806-08 (2014)

broke up with her. She was eight months pregnant at the time, and although she gave birth by emergency c-section, the baby died two days later.[71] 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 feticide.[72] Shuai's attorney filed a motion to dismiss the charges, which was denied by both the trial court and the Indiana Court of Appeals.[73] After the trial court decided some evidentiary rulings that weakened the state's case as to the link between the rat poison and the baby's injuries, however, Shuai reached a plea deal under which she pled guilty to misdemeanor criminal recklnessness and was sentenced to time served.[74]

II.D. Pregnant Women and Medical Care

All of the examples given thus far involve affirmative actions committed during a pregnancy. But omissions and failure to act may also trigger punishment or control of a pregnant woman's body in the context of medical treatment. Pregnant women who refuse medical treatment, fail to comply with medical orders, or reject a doctor's advice as to medical care may also be subjected to action by the state. Commentators noted a wave of more aggressive enforcement in the late 1990s, and we may now be in the midst of another cycle upwards.[75]

The most direct conflict which the state may resolve through a court order is when a pregnant woman refuses treatment her doctor believes is necessary. Although there is a general right to refuse medical care,[76] the presence of a fetus, particularly a viable fetus, introduces complexities that have justified orders in a number of jurisdictions. Sometimes the conflict

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[71] 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, 855 (2014)
[72] Kira Proehl, Pregnancy Crimes: New Worries to Expect When You're Expecting, 53 Santa Clara L. Rev. 661, 671 (2013); Jennifer Block, Jailed for a Suicide Attempt, The Daily Beast (Apr. 12, 2011, 10:32 PM), http://www.thedailybeast.com/articles/2011/04/13/jennifer-block-on-bei-bei-shuais-feticide-ordeal.html; Bei Bei Shuai v. State, 966 N.E.2d 619, 622 (Ind. Ct. App. 2012).
[73] Shuai v. State, 966 N.E.2d 619 (Ind. Ct. App. 2012)
[74] TK
[75] Fentiman, *Pursuing the Perfect Mother*, at 400
[76] Cruzan v. Director, Missouri Department of Health, 497 U.S. 261 (1990).

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.[77] 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.[78]

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 members of the Jehovah's Witness church, 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.[79] 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.[80] 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

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[77] http://www.salon.com/2000/09/15/forced_prenatal/

[78] See 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, 567-68 (2006). 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. 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 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. http://abcnews.go.com/GMA/story?id=126346.

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

[80] 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).

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.[81]

A frequent site of disagreement between pregnant woman and medical and legal authorities is the method of giving birth. Many commentators have described birth as increasingly medicalized in recent years,[82] and correspondingly increasingly controlled by doctors rather than the laboring mother.[83] 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.[84] Courts have routinely rejected arguments that women have a right to midwifery rather than doctor's management of the birthing process.[85]

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.[86] As Nancy Ehrenreich has 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

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[81] Crouse Irving Mem'l Hosp., Inc. v. Paddock, 485 N.Y.S.2d 443, 445 (N.Y. 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).

[82] 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).

[83] Nancy Ehrenreich, The Colonization of the Womb, 43 Duke L.J. 492, 536 (1993)

[84] Anna Hickman, 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)

[85] See 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); Rachel A. D. Marquardt, Balancing Babies, Birth, and Belief: A Legal Argument Against Planned Homebirth, 16 J. Gender Race & Just. 607, 619-20 (2013); Joanne Rouse, Indiana's Midwifery Statute and the Legal Barriers That Will Render It Unworkable, 48 Ind. L. Rev. 663, 675-82 (2015)

[86] 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)

unborn)."[87] 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.[88]

About ten years ago, Melissa Rowland initially refused to schedule a c-section to deliver her twins. A few days later she consented, but one twin was stillborn.[89] An autopsy of the stillborn child indicated that he had died two days before Rowland gave birth. 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 pled guilty to two counts of child endangerment.[90]

Other women have been ordered to undergo a c-section. A first prominent example occurred in Georgia in 1981, when Jessie Mae Jefferson was told she had a complete placenta previa 39 weeks into her pregnancy. 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. Jefferson was told that if she attempted to deliver vaginally, her baby would almost certainly die, and she faced even odds of surviving labor. By contrast, both Jefferson and her child would almost definitely survive a c-section.[91] 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. The court issued the order, as well as placed Jefferson's fetus in the temporary custody of the Georgia Department

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[87] Nancy Ehrenreich, The Colonization of the Womb, 43 Duke L.J. 492, 537 (1993)
[88] But see In re Baby Doe (1994), 632 N.E.2d 326 ; In re A.C., 573 A.2d 1235, 1247 (D.C. 1990); see also 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).
[89] Kira Proehl, Pregnancy Crimes: New Worries to Expect When You're Expecting, 53 Santa Clara L. Rev. 661, 669 (2013)
[90] Monica K. Miller, Refusal to Undergo A Cesarean Section: A Woman's Right or A Criminal Act?, 15 Health Matrix 383, 383-84 (2005).
[91] Jefferson v. Griffin Spalding Cnty. Hosp. Auth., 274 S.E.2d 457 (Ga. 1981).

of Human Resources. Ironically, the order was rendered unnecessary when prior to the c-section, Jefferson's placenta shifted place no longer covered her cervix, making a vaginal delivery safe.[92]

In 1996, Laura Pemberton was at the center of an even more dramatic scene. Pemberton had given birth by c-section in 1995, after her own diagnosis of placenta previa. Because her previous c-section had involved both vertical and horizontal incisions, when she became pregnant again, she could not find a hospital willing to let her attempt a vaginal birth after c-section (VBAC), as the doctors were concerned at the small risk that her c-section scars could rupture. Pemberton and her husband found a midwife willing to supervise her birth at home, and she went into labor naturally at home. After two days of labor, however, she was dehydrated and went to a hospital for IV fluids. 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. 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 went home.

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. The order was enforced when law enforcement and paramedics went to Pemberton's home, restrained her onto a stretcher, and removed her from her home to an ambulance.[93] 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). The judge refused and ordered the c-section to proceed. Pemberton later sued the hospital, alleging that the hospital violated her right to privacy and due

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[92] Kira Proehl, Pregnancy Crimes: New Worries to Expect When You're Expecting, 53 Santa Clara L. Rev. 661, 670 (2013); see also April L. Cherry, The Detention, Confinement, and Incarceration of Pregnant Women for the Benefit of Fetal Health, 16 Colum. J. Gender & L. 147, 161 (2007).

[93] Paul Christopher Estaris Torio, Nature Versus Suture: Why Vbac Should Still Be in Vogue, 31 Women's Rts. L. Rep. 487, 488 (2010)

process, and had falsely imprisoned her and acted negligently. A district court rejected the claims in 1999, reasoning that "Whatever 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 unborn child."[94] (That same year, Pemberton successfully gave birth to twins through a vaginal delivery while in hiding.[95])

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.[96] In some cases, the laboring mother has evaded the initial hospital seeking a court order, such as Amber Marlowe, who in 2004 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. Marlowe went to another hospital and vaginally delivered an eleven-pound baby.[97] 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.[98]

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. [99] 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

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[94] Pemberton v. Tallahassee Mem'l Reg'l Med. Ctr., Inc., 66 F. Supp. 2d 1247, 1251 (N.D. Fla. 1999).
[95] Torio at 489.
[96] See also In re Madyun, 114 Daily Wash. Law Rptr. 2233, 2240 (D.C. Super. Ct. 1986)
[97] Michele Goodwin, Fetal Protection Laws: Moral Panic and the New Constitutional Battlefront, 102 Cal. L. Rev. 781, 817 (2014)
[98] Letitia Stein, USF Obstetrician Threatens to Call Police if Patient Doesn't Report for C-Section, Tampa Bay Times, Mar. 6, 2013, http:// www.tampabay.com/news/health/usf-obstetrician-threatens-to-call-police-if-patient-doesnt-report-for/2107387
[99] N.J. Div. of Youth & Family Servs. v. V.M. (In re J.M.G.), 974 A.2d 448 (N.J. Super. Ct. App. Div. 2009) (per curiam)

consent to medical treatment[100] - 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.[101]

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 U.S. states have statutes prohibiting hospitals from removing life support from a pregnant woman, intended to keep the pregnant woman's body functioning for long enough to be delivered of a viable baby.[102] Many do not allow a proxy decisionmaker to remove life support if she is pregnant when she becomes incapacitated.[103] 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 – also cannot direct a hospital to remove life support from a pregnant woman.[104] Most states also 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.[105] A number of women over the last few decades have been kept on life support in order to continue a pregnancy to term. Sometimes it is unclear what the woman's wishes would have been – in 1996, a 29 year old woman who had been in a coma for ten years was raped by a worker in the nursing home and became pregnant. Her family decided to continue the pregnancy, and the grandmother was awarded guardianship of the child.[106] In other examples, the medical

[100] 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)
[101] Id. at 82.
[102] Katherine A. Taylor, Compelling Pregnancy at Death's Door, 7 Colum. J. Gender & L. 85, 87 (1997)
[103] Katherine A. Taylor, Compelling Pregnancy at Death's Door, 7 Colum. J. Gender & L. 85, 97, 100 (1997)
[104] Katherine A. Taylor, Compelling Pregnancy at Death's Door, 7 Colum. J. Gender & L. 85, 102 (1997)
[105] 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)
[106] Katherine A. Taylor, Compelling Pregnancy at Death's Door, 7 Colum. J. Gender & L. 85, 149 (1997)

dispute amplifies existing family conflict, as when Donna Piazzi's husband wished for her to be taken off life support, but the undisputed genetic father of her 16 week fetus successfully petitioned for a court order to keep Piazzi on life support until the fetus was viable.[107] In another case the genetic father successfully sought an order keeping his 17 week pregnant common law wife on life support against the wishes of her mother.[108] 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.[109] 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 are not on life support when they file the lawsuits.[110]

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, 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."[111] Pregnant women are portrayed as irrational for not immediately deferring to medical expertise and behaving accordingly.[112]

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[107] Univ. Health Servs. Inc. v. Piazzi, No. CV86-RCCV-464 (Ga. Super. Ct. Aug. 4, 1986); see also 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)

[108] Emma Murphy Sisti, Die Free or Live: The Constitutionality of New Hampshire's Living Will Pregnancy Exception, 30 Vt. L. Rev. 143 (2005)

[109] Michele Goodwin, Fetal Protection Laws: Moral Panic and the New Constitutional Battlefront, 102 Cal. L. Rev. 781, 814-15 (2014)

[110] See Gabrynowicz v. Heitkamp, 904 F. Supp. 1061 (N.D. 1995); 684 P.2d 1297 (Wash. 1984) (en banc); see also 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, 565-66 (2006).

[111] John A. Robertson, Procreative Liberty and the Control of Conception, Pregnancy, and Childbirth, 69 Va. L. Rev. 405, 453 (1983)

[112] 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)

It is hard to see where such deferral 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. Kira Proehl recently pointed out that 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" under the logic of a decision of the South Carolina Supreme Court.[113] Even the method of conception could be treated as a potentially risky choice, as the potential dangers to pregnancies begun through ART can be compared to the potential dangers of drug and alcohol use while pregnant.[114]

Such comparisons may seem ludicrous, but it is not difficult to imagine at least a few steps down a slippery slope. 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.[115]

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[113] Kira Proehl, Pregnancy Crimes: New Worries to Expect When You're Expecting, 53 Santa Clara L. Rev. 661, 667-68, 683-84 (2013)

[114] 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, 397-98 (2009).

[115] Christopher M. Burkle, M.D., J.D., Hugh M. Smith, M.D, Ph.D., Katherine W. & Arendt, M.D., Punishing Maternal Behavior: Potential Legal Consequences for Obesity-Associated Poor Fetal Outcome in the United States, 34 J. Legal Med. 251, 270 (2013)

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."[116] 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.[117] 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."[118]

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.[119] 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

[116] 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).
[117] Dorothy E. Roberts, Punishing Drug Addicts Who Have Babies: Women of Color, Equality, and the Right of Privacy, 104 Harv. L. Rev. 1419 (1991)
[118] Nancy Ehrenreich, The Colonization of the Womb, 43 Duke L.J. 492, 518 (1993)
[119] 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. Change 381, 389-90 (2008)

woman (such as smoking) that harms the developing fetus.[120] Yet a man's choices that may affect his future children are not even socially criticized, let alone legally punished.

It is only the women, particularly during their pregnancy, whose choices are judged through a lens of health of the fetus. Other societal stereotypes regarding the ideal, model mother magnify this judgment. If the woman otherwise presents herself as the "right" kind of mother, then some deviations in behavior may be excused. If not, then every choice she makes is scrutinized as potentially harming the pregnancy.

III. Pre-Motherhood and the Rules of Pre-Maternity

Rules of maternity first come into play before a woman is a mother, even before she is pregnant. Recent debate over health insurance coverage of contraceptive methods has revealed a strict policing of any action taken that might terminate a woman's perceived maternal status. Contraceptives could be viewed as responsible motherhood, as they allow women to plan the best time in their life to become a mother, when they are adequately financially and personally prepared to take on the responsibilities of parenthood. Instead, hysteria over the possibility that a contraceptive method might lead to the termination of an early pregnancy triggered massive resistance. Although *Hobby Lobby*'s claims to exemption from the Affordable Care Act's contraceptive mandate were framed as individual (or corporate) religious freedom, the broader message is about women who use contraceptives as going against nature to reject their inchoate maternal role. Women who reject motherhood are problematic in ways that make them uniquely objectionable such that their conduct must be cordoned off from all other behaviors.

IV. Rules of Providing as a Mother

[120] 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, 302-03 (2014)

Finally, once a woman becomes a mother, she is expected to simultaneously provide financially and emotionally for her child. Financial provision, moreover, should come through selection of an appropriate partner, rather than through her own labor. This is magnified exponentially when her marital status, family support, and economic status mean that she has no way to provide both financial and emotional support for her child at once. Not only does she not receive adequate maternity leave from work, and not only does she not have affordable childcare made available to her (especially if she is of low economic status), but if she leaves her child in a playground or in her car as she interviews for a job that might allow her to support her child financially, she may face prosecution.

Conclusion

The rules of maternity thus tightly constrain the choices of today's women. Women want to be mothers: they should never do anything to terminate their status as a potential mother, including even the earliest chance of pregnancy. Mothers sacrifice for their children: they defer to the judgment of a patriarchal medical establishment telling them how to be pregnant and how to give birth. Mothers provide for their children: through proper, licit life choices such as obtaining a financially successful male partner and marrying him, they appropriately secure material provisions for their child, and may devote their time to nurturing their child. None of these rules are new, but they have strengthened and multiplied in recent years. In order to push back against encroaching regulation of female choices, the rules of maternity must be uncovered and systematically dismantled.