

# A Velvet Hammer: The Criminalization of Motherhood and the New Maternalism

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*In 2014, Tennessee became the first state to criminalize the use of narcotics during pregnancy. While women have been prosecuted for the outcomes of their pregnancies and for the use of drugs during their pregnancies in the past decades, Tennessee is the first state to explicitly authorize prosecutors to bring criminal charges against pregnant women who use drugs. This Note suggests that this new maternal crime is reflective of a social and political paradigm called “maternalism,” which reinforces the idea that women are meant to be mothers and to perform motherhood in a particular fashion. This concept has developed from the “old maternalism” of the nineteenth and early twentieth centuries to the “new maternalism” of the late twentieth and twenty-first centuries. The new maternalism is developing in a modern world, finding its voice through both liberal, mother-centric organizations like MomsRising and conservative individuals like Sarah Palin and her “mama grizzlies.” While new maternalism is developing in a modern context, it still upholds motherhood as the prime directive of women. This Note first tracks the history of policing pregnant women, with an eye for the effects this history has had on women of color and poor women in particular. Next, it describes the progression of maternalism and how it has shaped American politics and culture. Finally, it proposes that the new law in Tennessee criminalizing the use of drugs during pregnancy is reflective of new maternalism. Through the criminalization and policing of pregnant women’s behavior, women’s reproductive freedoms become increasingly constricted. By*

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*criminalizing the behavior of some pregnant women, this law helps to create a vision of a “bad mother,” whose punishment acts as a foil to the “good mother” that the new maternalism tries to reinforce.*

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*What fabrications they are, mothers. Scarecrows, wax dolls for us to stick pins into, crude diagrams. We deny them an existence of their own, we make them up to suit ourselves—our own hungers, our own wishes, our own deficiencies.*

—Margaret Atwood, *The Blind Assassin*

## INTRODUCTION

American law and society work in tandem to develop normative ideals of motherhood and the roles of women in our culture. Historically, motherhood has been deemed an essential component of womanhood in America. Women who fail to comport with how women and mothers are supposed to behave may find themselves subject not only to cultural or social scrutiny, but also to defending their positions in a court of law. Scholars have identified a cultural motif called “maternalism,” which is a paradigm that dictates women’s essential roles as mothers and prescribes motherhood as the chief duty of women in America. Though it can be incredibly oppressive, maternalist culture also allows women to leave the home and become politically active. With the modernization of American culture, “old maternalism,” governed by coverture and homemaking, has evolved into “new maternalism,” which was developed

in the twentieth and twenty-first centuries and affirmed women's roles as mothers in new ways. As new maternalism has taken hold in the United States, pregnancy has correspondingly developed into a site of regulation over time. This Note argues that recent developments in Tennessee's laws relating to pregnant women reflect "new maternalism."

The American criminal justice system has found ways to target and punish women when they do not perform certain behaviors that society dictates that women must perform. This has especially been the case for drug-using pregnant women, who have increasingly become targets of prosecution over the past forty years. To demonstrate this pattern, this Note will first focus on tracking the development of Tennessee's latest version of its fetal assault statute. Specifically, in the summer of 2014, Tennessee passed a new measure that empowers district attorneys to prosecute pregnant women who use drugs as a crime separate and distinct from other drug-related offenses.<sup>1</sup> Although Tennessee's prosecutors are certainly not the first to prosecute pregnant women for their behaviors during pregnancy, Tennessee is the first state to codify such practice. The next Section tracks the criminalization of pregnancy, which has historically targeted underprivileged mothers, such as poor women and women of color. This law is certainly part of that unfortunate history. Then, this Note explores the development of "maternalism"—new and old—in American culture, along with its political and legal implications. Finally, this Note posits that Tennessee's new fetal assault statute is reflective of "new maternalism," as it reinforces women's roles as mothers and privileges "good" mothers by helping punish "bad" mothers. This paradigmatic "bad" mother who is unable to control her drug use therefore becomes a foil by which the "good" mother is reinforced. As such, the law in Tennessee (and other places where this is a practice) effectively punishes women who fail to conform and simultaneously solidifies women's roles as mothers.

## I.

### TENNESSEE'S NEWEST CRIMINALS: TRAJECTORY TO CRIMINALIZING PREGNANT DRUG USERS

Two days after Mallory Loyola gave birth to a baby girl, she was arrested for simple assault of her newborn.<sup>2</sup> The twenty-six-year-old from Madisonville, Tennessee, and her two-day-old daughter tested positive for amphetamines at

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1. Tennessee State Representative Terri Lynn Weaver, who introduced the law, called this statute a "velvet hammer." See Tony Gonzales, *Criminal Penalty for Prenatal Drug Use Passes House*, TENNESSEAN (Apr. 9, 2014), <http://www.tennessean.com/story/news/politics/2014/04/09/criminal-penalty-prenatal-drug-use-passes-house/7526877> [https://perma.cc/N95T-4DTE].

2. Evan Johnson, *Update: \$2000 Bond Set for East Tenn. Mom Charged Under New Law*, WBIR.COM (July 10, 2014, 3:31 PM), <http://www.wbir.com/story/news/local/2014/07/09/mallory-loyola-charged-simple-assault-baby-tests-positive-methamphetamine/12432493> [https://perma.cc/2H4C-MUED].

the University of Tennessee Medical Center.<sup>3</sup> Deputies said that Loyola admitted to having smoked methamphetamine three or four days before giving birth.<sup>4</sup> Three days after the birth of her child, she was in jail.<sup>5</sup> No stranger to the justice system, Loyola previously had been charged with drug offenses.<sup>6</sup> However, what made this arrest particularly newsworthy<sup>7</sup> was that she was charged under a new Tennessee law that criminalizes drug use during pregnancy.<sup>8</sup> Loyola was the first person to be arrested under this new law and was released on a \$2,000 bond.<sup>9</sup> On February 3, 2015, the state dropped the charges against her after she completed a drug rehabilitation program as part of an agreement with authorities.<sup>10</sup>

The Tennessee law—the first of its kind in the United States—criminalizes the use of illegal narcotics<sup>11</sup> by a pregnant woman if her infant is

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3. *Id.*

4. *Id.*

5. *See id.*

6. *Id.*

7. Several local and national news outlets reported this story. For local Tennessee news stories, see Johnson, *supra* note 2. For national stories, see Nolan Feeney, *First Woman Charged Under Tennessee's Controversial Drugs-During-Pregnancy Law*, TIME (July 14, 2014), <http://time.com/2983767/first-woman-charged-on-tennessees-controversial-drugs-during-pregnancy-law> [<https://perma.cc/YF3V-5ABH>]; Joe Kemp, *Tennessee Mom Arrested Under New Drug Law After Newborn Tests Positive for Meth*, N.Y. DAILY NEWS (July 14, 2014), <http://www.nydailynews.com/news/crime/tennessee-mom-busted-new-drug-law-baby-tests-positive-meth-article-1.1865979> [<https://perma.cc/KM2D-9KSZ>]; Nina Liss-Schultz, *First Woman Arrested Under Tennessee Pregnancy Criminalization Law, for a Drug Not Covered Under the Law*, REWIRE (July 10, 2014), <https://rewire.news/article/2014/07/10/first-woman-arrested-tennessee-pregnancy-criminalization-law-drug-covered-law> [<https://perma.cc/5WG6-FDTS>]; Katie McDonough, *First Woman Arrested Under Tennessee 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](http://www.salon.com/2014/07/11/first_woman_arrested_under_tennessee_law_that_criminalizes_pregnancy_outcomes) [<https://perma.cc/QHQ6-523B>]; Michelle Broder Van Dyke, *First Woman Charged Under New Pregnancy Drug Law in Tennessee*, BUZZFEED (July 14, 2014), <http://www.buzzfeed.com/mbvd/first-woman-charged-under-new-pregnancy-drug-law-in-tennesse> [<https://perma.cc/4EDH-RW7Q>].

8. Johnson, *supra* note 2.

9. *Id.*

10. *See Mom's Charge in Prenatal Drug Case Dropped After She Completes Program*, WBIR.COM (Feb. 6, 2015, 7:24 PM), <http://www.wbir.com/story/news/2015/02/06/moms-charge-in-newborn-drug-case-dropped-after-she-completes-program/23002693> [<https://perma.cc/D6NA-BHRG>]; *see also* Jeff Mondlock, *Program Reacts to East TN Mother's Dismissed Charges*, WBIR.COM (Feb. 6, 2015, 7:37 PM), <http://www.wbir.com/story/news/2015/02/06/susannahs-house-reacts-to-east-tn-mothers-dismissed-charges/23007605> [<https://perma.cc/6WSZ-25T4>]. Directors of Susannah's House, the Knoxville, Tennessee, rehabilitation program that Loyola was in, were glad that the charges were dropped against her. *See id.* They felt that the new law creates fear among pregnant women and encourages those who are drug addicted to keep their addiction to themselves, limiting their ability to get help. *Id.*

11. In Mallory Loyola's case, there was some confusion as to whether or not she was actually breaking the amended law since she was using methamphetamine, which is not a narcotic originally contemplated under the statute. Dave Boucher & Tony Gonzalez, *Prosecutors Argue Controversial Law Helps Drug-Addicted Moms*, TENNESSEAN (Apr. 14, 2015, 10:22 AM), <http://www.tennessean.com/story/news/crime/2015/04/13/prosecutors-argue-controversial-law-helps-drug-addicted-moms/25705273> [<https://perma.cc/UN7P-MQCP>]. Representative Terri Lynn Weaver actually stated that Loyola needed to be released because she could not be charged for meth under the

born “addicted to or harmed by” the narcotic.<sup>12</sup> The new Tennessee law explicitly criminalizes the use of drugs during pregnancy. While this is the first law to do so, the practice of prosecuting women for drug use during their pregnancies is not new. For nearly fifty years, prosecutors have interpreted various assault and child abuse statutes across the country to charge women with pregnancy-related crimes.<sup>13</sup> Some judges also have sentenced pregnant women to jail for drug offenses for which they would be ordinarily released on bond.<sup>14</sup> Pregnant drug addicts in particular have been targeted for prosecution and punishment, as the protection of the fetus has justified considerable state intervention into pregnant women’s lives.<sup>15</sup>

This Section chronicles the development of Tennessee’s fetal assault statute,<sup>16</sup> which was originally designed to hold criminal defendants liable for attacks on pregnant women that resulted in the loss of the fetus, but it was amended in 2014 to make drug use while pregnant a crime. While other states have had fetal assault statutes on the books for many years,<sup>17</sup> Tennessee’s newest amendment is the first to create an explicit authorization for the prosecution of pregnant women who use narcotic drugs during their pregnancies.<sup>18</sup> The resulting arrests and prosecutions of pregnant women are not unheard of in American criminal law.<sup>19</sup> However, prosecutors can now categorically target Tennessee’s newest criminals. This has major consequences not only for pregnant drug users, but also for the reproductive freedom of all women.<sup>20</sup> Notably, in March 2016, a Tennessee legislative committee voted not to renew the law, so it will sunset in summer 2016.<sup>21</sup>

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law. *Id.* There was no challenge to Loyola’s prosecution on the theory that she did not in fact qualify under the statute; instead, she made a plea with the prosecution. *Id.*

12. TENN. CODE ANN. § 39-13-107(c)(2) (West 2014).

13. See 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, 299 (2013) (reporting 413 cases in which “a woman’s pregnancy was a necessary factor leading to attempted and actual deprivations of a woman’s physical liberty”).

14. See, e.g., Heather Lynn Peters, *Pregnant, Incarcerated and Addicted to Heroin: Muskegon County Jail’s Latest Problem*, MICHIGANLIVE.COM (May 27, 2014, 6:44 AM), [http://www.mlive.com/news/muskegon/index.ssf/2014/05/pregnant\\_incarcerated\\_and\\_addi\\_1.html](http://www.mlive.com/news/muskegon/index.ssf/2014/05/pregnant_incarcerated_and_addi_1.html) [<https://perma.cc/53HB-E5BB>] (sentencing a pregnant heroin addict to an extra 200 days in jail for the duration of her pregnancy). The judge who sentenced her explained that the fetus is the first priority for him in these cases: “She’s carrying the child and, (if an addict), the child is a victim and the health of the baby jumps near the top of the line [of priorities].” *Id.*

15. See Paltrow & Flavin, *supra* note 13, at 310–11 tbl.2 (detailing the demographics and case characteristics of the study, highlighting various state actors involved).

16. § 39-13-107.

17. See *Fetal Homicide Laws*, NAT’L CONF. STATE LEGISLATURES (Mar. 2015), <http://www.ncsl.org/research/health/fetal-homicide-state-laws.aspx> [<https://perma.cc/7CJK-PTYK>].

18. See Feeney, *supra* note 7.

19. See *infra* Part III (discussing the policing of pregnant women under new and old maternalism).

20. See *infra* Part IV.

21. Joel Ebert, *Tennessee Law that Punishes Mothers of Drug-Dependent Babies to End*, TENNESSEAN (Mar. 23, 2016, 12:40 PM),

### A. *The Original 2011 Statute*

In 2011, Tennessee passed a fetal assault statute that was promulgated to protect pregnant women whose fetuses suffered harm as a result of third-party attacks.<sup>22</sup> Like many similar fetal assault statutes,<sup>23</sup> the law was actually a definitional change to the state's criminal assault statute to include the unborn in the list of potential victims.<sup>24</sup> Thus the terms for a *victim* of assault—"another," "individuals," and "another person"—were expanded to include the "fetus of a human being, regardless of viability of the fetus, when any such term refers to the victim of any act made criminal by this part, and when at the time of the criminal act the victim was pregnant."<sup>25</sup> The statute made an unborn fetus at any stage of viability a "person" capable of victimhood within the meaning of the assault statute. Concurrently, the Tennessee legislature made the same change in the state's criminal homicide statute to include fetuses in the definition of a "person."<sup>26</sup> The Tennessee legislature therefore enabled district attorneys to prosecute people whose attacks on a pregnant woman resulted in the harm to or death of her fetus. The inclusion of embryos and fetuses as persons who could be victims under the law was intended to allow courts to acknowledge two victims of a third-party attack: the pregnant woman and her unborn child.<sup>27</sup>

### B. *The 2012 Statute Update*

Although Tennessee's legislature understood that the fetal assault statute was originally intended to target third-party perpetrators who harmed pregnant women, it also anticipated the potential use of its new fetal homicide law against pregnant women themselves.<sup>28</sup> Some legislators were concerned that prosecutors might find the behavior of a pregnant woman towards her unborn fetus to be worthy of criminal charges and use this law to prosecute the women themselves.<sup>29</sup> In anticipation of such charges (which were condemned as

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<http://www.tennessean.com/story/news/politics/2016/03/22/tennessee-law-punishes-mothers-drug-dependent-babies-end/82141832> [<https://perma.cc/P6RJ-VTL5>].

22. TENN. CODE ANN. § 39-13-107 (West 2014).

23. See *Fetal Homicide Laws*, *supra* note 17.

24. See *id.*

25. TENN. CODE ANN. § 39-13-107(a) (West 2011) (amended 2014).

26. TENN. CODE ANN. § 39-13-214 (West 2011) (amended 2012).

27. There may be issues with considering an attack on a pregnant woman a "third-party" attack, since it implies that there are two "people" or "human beings" who are victimized. Linguistically speaking, this seems to support a vision of pregnant women as separate from their fetuses, which may be problematic for an argument that critiques this kind of treatment of pregnant women. However, for the purposes of the statute, it is descriptively helpful to distinguish the "attacks" that a fetus may suffer in the womb as being from an outside "third party" (i.e., not its mother) from the "attack" that the Tennessee legislature envisions its mother is perpetrating.

28. TENN. CODE ANN. § 39-13-107(c) (West 2012) (amended 2014).

29. See Bill Summary, H.B. 3517, 2012 Reg. Sess. (Tenn. 2012) (changing the legislative intent statement of the fetal assault statute to ensure that no acts or omissions by pregnant women were used to prosecute them).

contrary to the “protective” intention of the statute), in 2012 the legislature created a provision to *prevent* the prosecution of pregnant women for the outcome of their pregnancies.<sup>30</sup> This provision stated:

Nothing in [the statute] shall apply to *any act or omission* by a pregnant woman with respect to an embryo or fetus with which she is pregnant, or to any lawful medical or surgical procedure to which a pregnant woman consents, performed by a health care professional who is licensed to perform such procedure.<sup>31</sup>

This protected pregnant women from prosecution for the outcomes of their pregnancies, including those who decided to terminate their pregnancies. Even women who had engaged in illicit behavior, such as the use of illegal drugs, were protected.<sup>32</sup> The law protected women from prosecution for anything they did—“any act or omission by a pregnant woman”—which helped to solidify the law’s commitment to protecting pregnant women and considering them victims of attack, rather than perpetrators against their fetuses.

### C. The 2014 Amendment

Just two years later, the Tennessee legislature made an about-face, removing the protections for pregnant women who used drugs from the fetal assault statute.<sup>33</sup> In the spring of 2014, Tennessee House Representative Terri Lynn Weaver achieved this change by passing her bill to amend the fetal assault statute,<sup>34</sup> making two significant changes to the law as it stood.<sup>35</sup> Although the 2012 version of the law contained a provision explicitly stating that pregnant women were not intended to be the targets of prosecution,<sup>36</sup> the new amendment made pregnant women subject to prosecution if they used drugs during their pregnancies.<sup>37</sup> The amendment to Tennessee’s law expanded the victim list of the criminal assault statute such that “a human embryo or fetus at any stage of gestation in utero” would thereafter be considered a victim or person.<sup>38</sup> These assaultive offenses included simple assault, aggravated

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30. § 39-13-107(c).

31. *Id.* (emphasis added).

32. *See id.*

33. *Id.*

34. Abby Ohlheiser, *Tennessee Passes Legislation to Criminally Prosecute Drug-Addicted Pregnant Women*, WIRE (Apr. 9, 2014, 6:16 PM), <http://www.thewire.com/politics/2014/04/tennessee-passes-legislation-to-criminally-prosecute-drug-addicted-pregnant-women/360424> [<https://perma.cc/82LW-NCF7>].

35. § 39-13-107(c)(1)-(2).

36. § 39-13-107(c).

37. § 39-13-107(c)(2).

38. § 39-13-107(a).

assault, reckless endangerment, vehicular assault, and criminal exposure of another to HIV, among others.<sup>39</sup>

The first major change to the 2012 version of the law came with a rewording of the protective provision in the statute. Namely, the 2014 amendment altered the line, “Nothing in [the statute] shall apply to *any act or omission* by a pregnant woman with respect to an embryo or fetus with which she is pregnant . . . .”<sup>40</sup> The new 2014 language provided protection for “any *lawful* act or *lawful* omission by a pregnant woman . . . .”<sup>41</sup> So, while the protective provision still remains in the statute, the legislature expanded the world of possibilities for the prosecution of pregnant women (beyond narcotics users as discussed below). While the Tennessee legislators who sponsored the bill focused their energies primarily on pregnant drug addicts, this seemingly minor addition of the word “lawful” actually opened the door to more potential offenses that pregnant women could commit, even without drug use. As a result, if there were a scenario in which a pregnant woman committed an illegal act and her fetus was harmed in the process, she may be at risk for prosecution for fetal assault. This troubling (albeit seldom discussed) change to Tennessee’s fetal protection law might create even more opportunities than originally contemplated for the prosecution of pregnant women who have adverse pregnancy outcomes.<sup>42</sup>

The second 2014 addition to Tennessee’s fetal assault statute is an exception to the (now less potent) protection for pregnant women. Namely, it creates a new crime for those who use narcotics during their pregnancies. This controversial section of the statute is as follows:

Notwithstanding subdivision (c)(1), nothing in this section shall preclude prosecution of a woman for assault under § 39-13-101 for the illegal use of a narcotic drug . . . while pregnant, if her child is born addicted to or harmed by the narcotic drug and the addiction or harm is

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39. § 39-13-101 (assault); § 39-13-102 (aggravated assault); § 39-13-103 (reckless endangerment); § 39-13-105 (additional offenses); § 39-13-106 (vehicular assault); § 39-13-109 (criminalizing exposure of another to HIV, hepatitis B, or hepatitis C).

40. § 39-13-107(c) (emphasis added).

41. § 39-13-107(c)(1) (emphasis added).

42. There have been many cases in which women were charged for the outcome of their pregnancies, even when they were not drug addicts. For instance, in Indiana, Bei Bei Shuai was charged with murder (with feticide as an option for a plea deal) when a failed suicide attempt eight months into her pregnancy resulted in the death of her baby. Her case became a national story, and prosecutors eventually dropped charges against her. John Ericson, *Bei Bei Shuai Freed: Murder Charges Dropped Against Indiana Woman who Ate Rat Poison While Pregnant*, MED. DAILY (Aug. 4, 2013, 8:28 AM), <http://www.medicaldaily.com/bei-bei-shuai-freed-murder-charges-dropped-against-indiana-woman-who-ate-rat-poison-while-pregnant> [https://perma.cc/L2GM-U24K]. Samantha Burton of Florida was confined in a hospital to court-ordered bed rest when she refused to stay in the hospital away from her two toddlers at home. She miscarried three days later. Susan Donaldson James, *Pregnant Woman Fights Court-Ordered Bed Rest*, ABC NEWS (Jan. 14, 2010), <http://abcnews.go.com/Health/florida-court-orders-pregnant-woman-bed-rest-medical/story?id=9561460> [https://perma.cc/MFP4-R2CB].

a result of her illegal use of a narcotic drug taken while pregnant.<sup>43</sup>

The intention of the statute is to permit the prosecution of women under the misdemeanor assault statute if the child is born “addicted to or harmed by”<sup>44</sup> her narcotic drug use during pregnancy.<sup>45</sup> This is the first law in the country to explicitly authorize prosecutors to charge women for using drugs during their pregnancies.

However, the amendment to the statute also includes an affirmative defense for a mother who is prosecuted under the new version of the law. The final section of the statute provides:

It is an affirmative defense to a prosecution permitted by subdivision(c)(2) that the woman actively enrolled in an addiction recovery program before the child is born, remained in the program after delivery, and successfully completed the program, regardless of whether the child was born addicted to or harmed by the narcotic drug.<sup>46</sup>

Although this affirmative defense might appear to reduce the harshness of the law, it has already faced at least three criticisms.<sup>47</sup> First, the defense not only assumes that a woman who is pregnant and drug addicted is aware of the potential defense to her potential prosecution, but it also assumes that she has access to a drug treatment program—assumptions that in many cases are false.<sup>48</sup> Second, the defense refers to a “completed” drug program.<sup>49</sup> In many

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43. § 39-13-107(c)(2).

44. *Id.*

45. While the focus of this Note is the law’s relationship to maternalism, it is worth noting that this statute contains puzzling language that may allow women who are prosecuted under it to make various constitutional claims. There are potential equal protection arguments based on the statute’s gender-specific nature (as only women can commit such a crime) and a status-based argument (as it is the status of a woman as pregnant and likely, her status as a drug addict, that make her a target). In addition, the statute requires an infant to be “addicted to or harmed by” a narcotic drug, which advocates of pregnant women point out is a scientifically questionable harm to prove. For instance, babies cannot be “addicted” to anything, since addiction is a behavioral, psychological, and physical condition. *See* NAT’L ADVOCATES FOR PREGNANT WOMEN, PRENATAL EXPOSURE TO ILLEGAL DRUGS AND ALCOHOL: MEDIA HYPE AND ENDURING MYTHS ARE NOT SUPPORTED BY SCIENCE 1 (2010), <http://advocatesforpregnantwomen.org/2010%20drugmyth%20factsheet%20v3.pdf> [<https://perma.cc/PJD8-49RK>]. Infants exposed to opiates and other substances may have neonatal abstinence syndrome (NAS), a temporary condition that goes away within a span of days to a couple of weeks. *See id.* at 2. No studies have confirmed any long-term, harmful effects of NAS. *See id.* A law such as this, which assumes the “harm” to infants from maternal prenatal drug use, not only relies on bad science—reminiscent of the “crack baby” myths of the 1990s—but also disregards the actual needs of new mothers and their babies.

46. § 39-13-107(c)(3).

47. *See, e.g.,* Lindsay Beyerstein, *Bad Medicine in Tennessee for Pregnant and Drug-Addicted Women*, AL JAZEERA AM. (Sept. 30, 2014, 5:00 AM), <http://america.aljazeera.com/articles/2014/9/30/tennessee-new-laws1391.html> [<https://perma.cc/MC36-4P9L>].

48. According to the Guttmacher Institute, Tennessee has no targeted program created for drug-addicted pregnant women. GUTTMACHER INST., STATE POLICIES IN BRIEF: SUBSTANCE ABUSE DURING PREGNANCY (2016), [http://www.guttmacher.org/statecenter/spibs/spib\\_SADP.pdf](http://www.guttmacher.org/statecenter/spibs/spib_SADP.pdf) [<https://perma.cc/U4KP-59NM>].

49. § 39-13-107(c)(3).

circumstances, it would not be possible to complete such treatment in a short period of time.<sup>50</sup> Third, as executive director of the Tennessee District Attorneys General Conference, Wally Kirby, described, the defense is not absolute: “[T]here’s no guarantee that a judge will regard this kind of therapy as a legitimate treatment program for the purposes of a defense under the law.”<sup>51</sup> Thus, even though Tennessee’s newest amendment to its fetal assault statute contains language designed to protect some drug-using pregnant women seeking help for their addictions, it is unclear how effective the measure will be at actually accomplishing this task.<sup>52</sup>

Through the latest amendments to its fetal assault and fetal homicide statutes, Tennessee has created a new class of crimes that especially affect pregnant women. Never before have pregnant women been able to assault themselves, but now the Tennessee legislature enables law enforcement to prosecute pregnant women for behavior that may or may not actually harm their fetuses. And while there is an affirmative defense built into this law if a woman manages to complete a drug program, it is unclear whether in practice such a defense will actually protect pregnant women from prosecution. Over time, law enforcement across America has found creative ways to prosecute pregnant women. However, Tennessee is the first state to codify special crimes that only pregnant women can commit.

## II.

### THE CRIMINALIZATION OF PREGNANCY: A HISTORICAL PERSPECTIVE

American law began to regulate reproduction and women’s reproductive choices with the growing dominance of physicians in the field of childbirth in the nineteenth century.<sup>53</sup> Historian Reva Siegel documented the antiabortion movement in this period, tracing its roots to physicians who were working to oust midwives from the sphere of childbirth and enhancing the stature of their profession by asserting “scientific authority over the inception of life.”<sup>54</sup> The

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50. Many women addicted to opiates, for instance, are treated with a medically-assisted treatment using methadone, which is a treatment program without a set end date. Beyerstein, *supra* note 47 (quoting Dr. Robert Newman, president emeritus at New York’s Beth Israel Medical Center, who likened medication-assisted recovery, like methadone treatment, to insulin treatment for diabetes and said it can often be “a lifelong process”).

51. *Id.*

52. This law included a sunset provision such that the law would end in July 2016, and the Tennessee legislature voted not to renew it.” Joel Ebert, *Tennessee Law that Punishes Mothers of Drug-Dependent Babies to End*, TENNESSEAN (Mar. 23, 2016), <http://www.tennessean.com/story/news/politics/2016/03/22/tennessee-law-punishes-mothers-drug-dependent-babies-end/82141832/>. However, the Tennessee legislature never appointed any particular body to track the number of women arrested in the state under the new law, so as of spring 2015, there has been no consistent tracking. *See id.* Undoubtedly, this will make the task of evaluating the law’s efficacy in 2016 even more challenging.

53. *See* Reva Siegel, *Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 STAN. L. REV. 261, 283–85 (1992).

54. *Id.* at 284.

doctors began to work with state legislatures to reform state codes and criminalize abortion.<sup>55</sup> This movement contradicted the norms of the era, as abortion was traditionally considered a practice of married women to control family size and avoid dangerous pregnancies.<sup>56</sup> This trend towards the criminalization of abortion in turn contributed to the creation of separate spheres for men and women, as women became more relegated to their homes and their children.

The reproductive control movement progressed through the nineteenth century, developing into various strains as different groups used reproduction as a site of advocacy for their positions.<sup>57</sup> One of these strains, which continued the antiabortion movement that began with physicians, was the Voluntary Motherhood movement.<sup>58</sup> While the name of the movement might suggest that these feminists would be advocates for birth control and abortion, they actually opposed them.<sup>59</sup> Historian Linda Gordon explains that Voluntary Motherhood advocates “realized that while women needed freedom from excessive childbearing, they also needed the respect and self-respect motherhood brought.”<sup>60</sup> Additionally, these advocates did not view birth control or abortion as supportive of female freedom from “male sexual tyranny.”<sup>61</sup> In their view, such options gave men license to have sex with women at will without the consequence of pregnancy, which at the time was the only leverage that women had to refuse sex with their husbands.<sup>62</sup> Gordon posits that the Voluntary Motherhood reproductive freedom movement was borne of a desire to improve women’s status in society, and their strategies for controlling their reproductive choices were developed in response to the needs of women at the time.<sup>63</sup>

Gordon further notes that feminists began to develop different attitudes towards birth control and abortion during the second wave of feminism, when a greater need for women to exercise reproductive control arose.<sup>64</sup> This second wave saw increased sexual activity and more women as the heads of households, though contraception had been overall underdeveloped.<sup>65</sup> As second-wave feminists fought for women’s rights in the 1960s and 1970s and

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55. *Id.* at 285.

56. *Id.* at 285, 292.

57. See Linda Gordon, *Why Nineteenth-Century Feminists Did Not Support “Birth Control” and Twentieth-Century Feminists Do: Feminism, Reproduction, and the Family*, in *RETHINKING THE FAMILY: SOME FEMINIST QUESTIONS* 40–52 (Barrie Thorne & Marilyn Yalom eds., 1982) (discussing the Voluntary Motherhood, eugenics, and population control movements and their relationships to birth control).

58. *See id.* at 45.

59. *See id.*

60. *Id.*

61. *Id.*

62. *See id.*

63. *Id.*

64. *Id.* at 49.

65. *Id.*

the abortion debate became increasingly controversial, the rights of the unborn became a point of debate and contention. The backlash against the Supreme Court's decision in *Roe v. Wade* and an interest in fetal protection gave rise to the use of the law to prosecute pregnant women for the actions they took during their pregnancies.<sup>66</sup> Some feminists have critiqued this trend as not only attacking the rights of women, but also for the ways in which it uniquely targets poor women and women of color.<sup>67</sup>

This movement towards regulating reproduction, explained in the following Sections, provided the backdrop against which the modern fetal assault statutes (and in particular Tennessee's newest criminalization of drug use during pregnancy) were eventually developed.

A. *From Personal Rights of Privacy to States' Interests in Protecting the Unborn*

Although the 2014 Tennessee law is the first to criminalize drug use during pregnancy, it is not the first to acknowledge the unborn as "victims" of crimes, a trend that has grown in the past decade.<sup>68</sup> Historically, the unborn were not considered people for purposes of the law. In 1973, the landmark *Roe v. Wade* decision firmly laid out this rule.<sup>69</sup> However, beginning around the 1970s and 1980s, state officials attempted to interpret extant child welfare statutes and various criminal assault or homicide statutes to include fetuses as children or persons within the meaning of the statutes.<sup>70</sup>

For example, in 1970, the California Supreme Court considered a writ of prohibition calling upon the court to determine whether a viable fetus was a "person" under California's murder statute.<sup>71</sup> In determining that a fetus was not a person under that statute, the court noted that at common law, the loss of a fetus was not considered murder unless an infant had been born alive.<sup>72</sup> Such determinations were not only important in the regulation of abortion and the support of women's right to choose, but also acknowledged a broad right to

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66. See SARA DUBOW, OURSELVES UNBORN: A HISTORY OF THE FETUS IN MODERN AMERICA 112–53 (2010) (discussing the defense of fetal rights in the 1970s through the 1990s).

67. See, e.g., *infra* Part II.B (discussing feminist critiques of the prosecution of pregnant women).

68. See *Fetal Homicide Laws*, *supra* note 17.

69. 410 U.S. 113, 162 (1973) ("In short, the unborn have never been recognized in the law as persons in the whole sense.").

70. See Paltrow & Flavin, *supra* note 13, at 322 ("Prosecutors, judges, and hospital counsel argued that the legal authority for their actions came directly or indirectly from feticide statutes that treat the unborn as legally separate from pregnant women, state abortion laws that include language similar to personhood measures, and *Roe v. Wade*, misrepresented as holding that fetuses, after viability, may be treated as separate persons.").

71. *Keeler v. Superior Court*, 2 Cal. 3d 619, 623 (1970).

72. *Id.* at 626. It should be noted, however, that the California legislature amended the murder statute to include the killing of a fetus shortly after *Keeler*. See CAL. PENAL CODE § 187(a) (West 2015) ("Murder is the unlawful killing of a human being, or a fetus, with malice aforethought.").

privacy that declared women were the sole proprietors of their bodies. They ensured that even if women were taking actions that might harm the fetuses they carried, the state would recognize that a mother and her unborn child were not separate legal entities.

Like California, some appellate and supreme courts of other states declined to recognize unborn fetuses as persons. The Supreme Court of Ohio, for example, declared that an unborn fetus was not a “person” for the purposes of a vehicular homicide statute<sup>73</sup> and subsequently affirmed that position when the state prosecuted a pregnant woman for “child endangerment” because she used cocaine before the infant was born.<sup>74</sup> The Court of Appeals of Washington came to the same conclusion when the state prosecuted Selena Dunn, a pregnant woman who ingested cocaine during pregnancy.<sup>75</sup> Critically, Dunn was charged under a law that prohibited “criminal mistreatment of [a] child.”<sup>76</sup> Further, when a woman in Wisconsin was charged with attempted first-degree homicide for drinking alcohol while pregnant, the Wisconsin Court of Appeals similarly declared that the “legislature did not intend for these statutes to apply to actions directed against an unborn child.”<sup>77</sup>

Despite these decisions, by the 1990s, state legislatures and some courts took it upon themselves to expand the definition of homicide to include the loss of a fetus resulting from an attack on its mother.<sup>78</sup> This effort purported to remedy a perceived gap in the law: because fetuses were not persons, prosecutors could not use murder statutes to charge defendants on behalf of a fetus.<sup>79</sup> The endeavor to fill this perceived gap suggested a growing interest in being tough on perpetrators of violence against prospective mothers. However, it also signaled a shift in public attitudes towards fetal rights. In the late 1990s and early 2000s,<sup>80</sup> Americans started agitating for—and getting—laws that criminalized behavior that affected fetuses.<sup>81</sup> For example, in 2006, the Alabama legislature updated its criminal statutes for murder, manslaughter,

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73. *State v. Dickinson*, 275 N.E.2d 599, 600 (Ohio 1971).

74. *State v. Gray*, 584 N.E.2d 710, 711–12 (Ohio 1992).

75. *State v. Dunn*, 916 P.2d 952, 953 (Wash. Ct. App. 1996).

76. *Id.* at 952.

77. *State v. Deborah J.Z.*, 596 N.W.2d 490, 491–92, 493 (Wis. Ct. App. 1999).

78. See Michele Goodwin, *Fetal Protection Laws: Moral Panic and the New Constitutional Battlefield*, 102 CALIF. L. REV. 781, 787–88 (2014).

79. In 2004, President George W. Bush signed “Laci and Connor’s Law,” also known as the Unborn Victims of Violence Act, which criminalizes harming a fetus during an assault on a pregnant woman in the commission of a federal crime. See 18 U.S.C. § 1841 (2012). The law was named for the highly publicized murder of Laci Peterson (who was eight months pregnant at the time of her death), which sparked national outrage and a conversation about fetal rights. See *Laci and Connor’s Law Puts Abortion Debate in Focus*, CHI. TRIB. (May 20, 2003), [http://articles.chicagotribune.com/2003-05-20/news/0305200385\\_1\\_laci-peterson-unborn-victims-abortion-debate](http://articles.chicagotribune.com/2003-05-20/news/0305200385_1_laci-peterson-unborn-victims-abortion-debate) [<https://perma.cc/Y9G8-U36A>].

80. See DUBOW, *supra* note 66, at 112 (discussing the rise of fetal rights in media and popular culture in the 1990s).

81. See *Fetal Homicide Laws*, *supra* note 17.

negligent homicide, and assault to include the unborn, “regardless of viability,” as a person or human being.<sup>82</sup> In 2005, the Arizona state legislature amended similar criminal statutes to consider viable and nonviable fetuses as children under the age of twelve for criminal sentencing purposes.<sup>83</sup>

In total, thirty-eight states have such fetal homicide laws.<sup>84</sup> But these are not the only type of fetal protection laws. For instance, some state courts have recognized the unborn as “children” within the meaning of child abuse and neglect statutes—particularly against pregnant women who use drugs.<sup>85</sup> These laws represent a “recent era of maternal policing,”<sup>86</sup> diminishing the rights of pregnant women as their unborn fetuses take priority. Professor Sara Dubow describes the detrimental effect of the woman-versus-fetus paradigm:

Using the fetus to demonize particular kinds of mothers impinges on the rights of all women, but it also jeopardizes the inviolability of the rights of all citizens, and ignores the obligations of the state to protect those rights. The premise of an inevitable conflict between women’s rights and fetal rights, a conflict resolvable only through privileging one set of rights over the other, ignores the ways in which everyone’s rights are called into question when one group’s rights are made contingent, and obscures the social costs of fetal rights.<sup>87</sup>

Additionally, certain state courts began to deviate from the idea that the unborn were not intended as persons within the scope of child abuse and harm statutes. While prosecutors had interpreted extant criminal statutes to prosecute pregnant women in many previous cases, as discussed above, some state courts began to be much more receptive to such arguments. For instance, in *Johnson v. State*,<sup>88</sup> the state’s highest court reviewed a Florida woman’s conviction for delivering drugs to a minor when she delivered the substance through her infant’s umbilical cord during the seconds between her baby’s delivery and when the cord was cut. Nevertheless, the Florida Supreme Court ultimately reversed Johnson’s conviction, determining that the Florida legislature did not intend for the drug delivery statute to apply to pregnant women who take drugs and that such an interpretation of the law would go against public policy.<sup>89</sup> Quoting the American Medical Association Board of Trustees, the court expressed concern that “[c]riminal penalties may exacerbate the harm done to

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82. ALA. CODE § 13A-6-1(a)(1), (3) (2006).

83. ARIZ. REV. STAT. ANN. §§ 13-1102–13-1105 (2014).

84. *Fetal Homicide Laws*, *supra* note 17.

85. See *Whitner v. State*, 492 S.E.2d 777, 777 (S.C. 1997) (holding that a viable fetus is a child within the meaning of South Carolina’s child abuse and endangerment statute); see also *Ankrom v. State*, 152 So. 3d 373, 374 (Ala. Crim. App. 2011), *aff’d sub nom. Ex parte Ankrom*, 152 So. 3d 397 (Ala. 2013) (holding that Alabama’s chemical endangerment of a child statute applies to unborn, viable fetuses).

86. Goodwin, *supra* note 78, at 789.

87. DUBOW, *supra* note 66, at 152.

88. 602 So. 2d 1288, 1290 (Fla. 1992).

89. *Id.* at 1294, 1297.

fetal health by deterring pregnant substance abusers from obtaining help or care from either the health or public welfare professions.”<sup>90</sup> The court therefore determined that threatening drug-using pregnant women with prosecution was not in the best interest of the public welfare.<sup>91</sup>

Similarly, in *Whitner v. State*,<sup>92</sup> a South Carolina woman who ingested cocaine during her pregnancy was prosecuted under a child protection statute. In 1992, Cornelia Whitner pled guilty to criminal child neglect because her baby was born with cocaine metabolites in its system.<sup>93</sup> Whitner appealed her case to the South Carolina Supreme Court, which found no “rational basis for finding a viable fetus is not a ‘person’ in the present context.”<sup>94</sup> Whitner argued that this finding would lead to absurd results, such as the prosecution of pregnant women who take legal but inadvisable actions, such as smoking cigarettes or drinking alcohol.<sup>95</sup> The court, however, declined to entertain such a “potential parade of horrors” and instead focused on how Whitner had ingested crack cocaine during pregnancy.<sup>96</sup> While the court admitted that the “precise effects of maternal crack use during pregnancy are somewhat unclear,” it looked to the “well documented” information “within the realm of public knowledge” to determine that cocaine use “can cause *serious* harm to the viable unborn child.”<sup>97</sup> Later, this “serious harm” from crack cocaine was essentially debunked as a myth.<sup>98</sup> However, the effect of the characterization of fetuses as persons was left intact and continued to animate the prosecutions of pregnant women.<sup>99</sup>

### B. Critiques of the Prosecution of Pregnant Women

Feminist critics have been aware of the prosecution of pregnant women for decades.<sup>100</sup> As the antiabortion backlash against *Roe v. Wade* gained strength, so did the notion that the unborn had rights that needed protection.<sup>101</sup> With the rise of crack cocaine and the war on drugs leading to the advent of the “crack baby” scare of the 1980s and 1990s,<sup>102</sup> some feminists noticed that the

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90. *Id.* at 1296.

91. *See id.*

92. 492 S.E.2d 777 (S.C. 1997).

93. *Id.* at 778.

94. *Id.* at 780.

95. *Id.* at 781–82.

96. *Id.* at 782.

97. *Id.* (emphasis added).

98. See Michael Winerip, *Revisiting the ‘Crack Babies’ Epidemic That Was Not*, N.Y. TIMES (May 20, 2013), <http://www.nytimes.com/2013/05/20/booming/revisiting-the-crack-babies-epidemic-that-was-not.html> [https://perma.cc/7RX6-8LSM].

99. See Paltrow & Flavin, *supra* note 13.

100. See, e.g., *id.*

101. See *Fetal Homicide Laws*, *supra* note 17.

102. See Craig Reinerman & Harry G. Levine, *Crack in the Rearview Mirror: Deconstructing Drug War Mythology*, 31 SOC. JUST. 182, 194 (2004).

increasingly popular laws designed to “protect” the unborn were used disproportionately to target pregnant women of color.<sup>103</sup>

One of the most well-known critics of this trend is Dorothy Roberts, who argued that prosecution of drug-using pregnant women intended to vilify women of color.<sup>104</sup> In her acclaimed work, *Killing the Black Body*,<sup>105</sup> Roberts tracked not only the rise of the prosecution of pregnant women, but also tied it directly to the disparagement of black women and black reproduction. As Roberts explained, popular media concocted the characters in the story of the “crack baby epidemic” in the 1980s and 1990s, weaving a narrative of infants who were born “addicted” to drugs and the immoral women who bore them.<sup>106</sup> In the media’s portrayal of the “epidemic,” the relevant characters—the addicted mother and her child—were almost always black.<sup>107</sup> The meme of immoral or irresponsible black motherhood relied on a potent combination of science with racial and gender stereotypes that portrayed black women as indolent and selfish.<sup>108</sup> These characterizations were used to create the popular culture myth of the “crack baby,”<sup>109</sup> which helped support the prosecutions and convictions of pregnant women—especially low-income black women who used crack cocaine.<sup>110</sup>

Roberts chronicled the development of prosecutors’ use of child abuse and endangerment statutes to prosecute pregnant women, adding the important element that racial bias played in this practice.<sup>111</sup> She noted that poor, black women bore “the brunt of prosecutors’ punitive approach.”<sup>112</sup> These characterizations of black women, however, missed the mark. Roberts pointed out that black women did not actually use more substances considered dangerous to fetuses than did white women; rather, a combination of classism and racism led to substantially higher rates of black women who were reported to authorities and criminally prosecuted.<sup>113</sup> Noting that there was no medical or scientific basis for targeting crack cocaine users as causing fetal damage more than those who use alcohol, cigarettes, or other drugs, Roberts asked, “Could it be that blaming black mothers who smoke crack serves other societal

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103. See Goodwin, *supra* note 78, at 784–85 (discussing various feminist critiques of government interference with pregnant drug users).

104. DOROTHY ROBERTS, *KILLING THE BLACK BODY: RACE, REPRODUCTION, AND THE MEANING OF LIBERTY* 3–20 (1998).

105. *Id.* at 156.

106. *Id.*

107. *Id.*

108. *Id.*

109. Winerip, *supra* note 98.

110. ROBERTS, *supra* note 104, at 156–57.

111. *Id.* at 162–71 (discussing primarily the prosecutions of Jennifer Johnson in Florida and Cornelia Whitner in South Carolina for taking drugs during their pregnancies).

112. *Id.* at 171.

113. *Id.* at 171–75.

purposes?”<sup>114</sup> The social and political milieu in which the war on drugs, the media hype of the “crack baby,” and the mounting pressure to acknowledge fetal rights occurred created a perfect setting to target mothers who historically had been criticized and dehumanized: poor women of color. Roberts thus argued that racist oppression of the reproductive freedoms of women of color shaped the meaning of reproductive freedom in America and served the interests of white supremacy.<sup>115</sup> By targeting poor women of color for criminal prosecution—which often not only led to their incarceration but also their children’s removal from parental care to the care of the state—women of color are increasingly disempowered and controlled. The amalgamation of these factors, in turn, only bolsters white hegemony.

Roberts’s account of how criminal laws are used to target and punish poor mothers of color provides a useful lens through which to examine Tennessee’s newest amendment to its fetal assault statute that criminalizes drug use during pregnancy. By targeting drug-using pregnant women in the name of fetal health and the protection of “defenseless children,”<sup>116</sup> the law holds out drug users as the ultimate “bad mothers.” In response, Roberts instructs us to be skeptical of “prosecutions of Black women on the pretext of protecting unborn Black children from harm.”<sup>117</sup>

Since the law is still relatively new, the sample size of the post-2014 amendment is small. Yet there are already signs of racial disparity in the Tennessee prosecutions. According to a survey of district attorneys by the Department of Safety and Homeland Security, there were at least thirty cases of women charged in Tennessee under the new law as of April 2015.<sup>118</sup> While

114. *Id.* at 177.

115. *Id.* at 7–8.

116. *See Hearing on H.B. 1295*, 108th General Assemb. (Tenn. 2014), [http://tnga.granicus.com/MediaPlayer.php?view\\_id=269&clip\\_id=9325](http://tnga.granicus.com/MediaPlayer.php?view_id=269&clip_id=9325) [https://perma.cc/TDB5-QMHN] (quoting Terri Lynn Weaver representing the bill on the Tennessee House floor).

117. ROBERTS, *supra* note 104, at 185; *see also* Goodwin, *supra* note 78, at 853 (discussing how “states seek to protect the purported dignity interests of fetuses against the perceived reckless, lazy, and negligent conduct of ‘bad mothers’” through the use of fetal protection statutes).

118. BILL GIBBONS, DEP’T OF SAFETY & HOMELAND SEC., SUMMARY REPORT: SURVEY OF DISTRICT ATTORNEYS GENERAL ON PUBLIC CHAPTER 820 (2015), <https://www.documentcloud.org/documents/1873320-survey-of-district-attorneys-general.html> [https://perma.cc/3NSC-6APQ]. On March 8, 2016, Allison Glass, State Director of Healthy and Free Tennessee, said in a statement to Tennessee’s House Criminal Justice Subcommittee during a hearing on House Bill 1660 (which would permanently extend Tennessee’s fetal assault statute as it currently stands) that it was estimated that at least 100 women have been arrested under this law. *House Subcommittee to Consider Bill Extending Harmful, Ineffective Fetal Assault Law Today*, HEALTHY & FREE TENN. (Mar. 8, 2016), <http://healthyandfreetn.org/news/house-subcommittee-to-consider-bill-extending-harmful-ineffective-fetal-assault-law-today> [https://perma.cc/LA7F-KQJE]; *see also* Nina Liss-Schultz, *Tennessee’s War on Women Is Sending New Mothers to Jail*, MOTHER JONES (Mar. 14, 2016, 6:00 AM), <http://www.motherjones.com/politics/2016/03/tennessee-drug-use-pregnancy-fetal-assault-murder-jail-prison-prosecution>; Kristi L. Nelson, *Detoxing for Delivery: Facing Medical Challenges, Judgment and Sometimes Jail*, KNOXVILLE NEWS SENT. (Mar. 6, 2016), <http://www.knoxnews.com/news/local/detoxing-for-delivery-2d26f94f-d077-0759-e053-0100007f4780-371165481.html>.

there are no statistics on the demographics of the women who have been charged, at least five of them have been identified as black, four are white, and all of them seem to be low-income.<sup>119</sup> Additionally, one can infer that because black and Hispanic women are disproportionately represented in the criminal justice system, it is likely that they will also be disproportionately represented in the prosecutions of this particular law.<sup>120</sup>

Additionally, the intent to target certain populations under the Tennessee measure is evident by the use of much of the same faulty science that helped to promote the “crack baby” myth of the 1980s and 1990s. The language of the law demonstrates a lack of scientific understanding of how drug use affects fetuses: the law criminalizes a mother if her infant is born “addicted to or harmed by” the narcotic she ingested.<sup>121</sup> However, addiction is a behavioral and psychological response, not simply a physical dependency, so the use of the term “addiction” to refer to newborns is medically inaccurate.<sup>122</sup> Such disregard for scientific evidence and basic medical terminology reflects the law’s more sinister motives to seek and punish certain nonconforming mothers. Dorothy Roberts’s analysis suggests that the law aligns with the “crack baby” logic used to prosecute poor women of color in particular.<sup>123</sup>

The Tennessee law, which criminalizes the use of drugs by pregnant women, follows the tradition of criminalizing certain behaviors of women who become pregnant. Although this law is the first of its kind, this type of prosecution is not new. Roberts’s analysis of this trend introduced the effects of race and class on the prosecutions of these women. The Tennessee law, then, can be viewed as a new development in the use of various statutes to prosecute pregnancy that progressed over the course of the 1990s and 2000s. By codifying a practice that largely targeted poor women of color—namely, prosecuting drug-using pregnant women—the law corresponds to Roberts’s view that this tactic subjugates women of color and poor women in American

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119. Rosa Goldensohn & Rachael Levy, *The State Where Giving Birth Can Be Criminal*, NATION (Dec. 10, 2014), <http://www.thenation.com/article/192593/state-where-giving-birth-can-be-criminal> [<https://perma.cc/WG3B-QYTE>].

120. In 2009, the ratio of incarceration of black women to white women was 2.8:1, and the ratio of Hispanic women to white women was 1.5:1. MARC MAUER, RESEARCH & ADVOCACY FOR REFORM, *THE CHANGING RACIAL DYNAMICS OF WOMEN’S INCARCERATION* 8 tbl.1 (2013), [http://sentencingproject.org/doc/publications/rd\\_Changing%20Racial%20Dynamics%202013.pdf](http://sentencingproject.org/doc/publications/rd_Changing%20Racial%20Dynamics%202013.pdf) [<https://perma.cc/VPT2-3W9T>].

121. TENN. CODE ANN. § 39-13-107(c)(2) (West 2014).

122. Scientific authorities describe one of the key aspects of addiction as a lack of control: a person with an addiction “is unable to control the aspects of the addiction without help because of the mental or physical conditions involved.” Christian Nordqvist, *Addiction: Causes, Symptoms and Treatments*, MED. NEWS TODAY (Jan. 4, 2016), <http://www.medicalnewstoday.com/info/addiction> [<https://perma.cc/4V4V-BVJX>]; see also Lynn Paltrow & Kathrine Jack, *Pregnant Women, Junk Science, and Zealous Defense*, 34 CHAMPION 30 (2010), <http://advocatesforpregnantwomen.org/publications/Champion30.pdf> [<https://perma.cc/9Q6C-UUKR>] (describing the inaccuracy of characterizing babies as “addicted” to substances).

123. ROBERTS, *supra* note 104, at 177.

law and culture.<sup>124</sup> Before the amendment to the Tennessee law, law enforcement had to take creative approaches to enforce the criminalization of pregnant women's behavior. Now, Tennessee's specific crime for pregnant women signals an explicit prioritization of these historical practices.

### III.

#### MATERNALISM AND CRIMINAL MOTHERHOOD

Dorothy Roberts's arguments focused on the way fetal protection laws police black women's reproduction.<sup>125</sup> While these views illuminate an important aspect of the influence of these laws, fetal protection laws do not solely affect mothers of color. Indeed, the laws seek to provide a model of self-abnegating motherhood to which all mothers should aspire. In this regard, the laws reflect what some have termed the "new maternalism." This Section lays out the cultural phenomenon referred to as "maternalism," which enforces and reinforces women's roles as mothers, marking motherhood as the primary duty and natural calling of women.<sup>126</sup> Maternalism, in its various evolutions, offers another lens through which to view fetal protection statutes. This Section discusses the historical context for and evolution of maternalism in American culture. Then, Part IV argues that Tennessee's newest version of its fetal assault statute reflects and enforces "new maternalism."

In *Maternalism as a Paradigm*, Professor Lynn Weiner describes maternalism as "a kind of empowered motherhood or public expression of those domestic values associated in some way with motherhood."<sup>127</sup> It should be noted that while this article evaluates "maternalism" as a cultural paradigm, maternalism is distinct from motherhood. While maternalism works to solidify women's roles in the society as mothers and credits certain ways of mothering, it fails to recognize the value of *all* mothers and those women who wish not to become mothers.

In a 2012 article titled *Against the New Maternalism*, Professors Naomi Mezey and Cornelia T. L. Pillard discuss how maternalism promotes "motherhood—and not parenthood or caregiving—as a value, an identity, an occupation, and a basis for political mobilization."<sup>128</sup> The authors identify two phases of maternalism in American culture: "old maternalism" of the nineteenth century and "new maternalism" of the twentieth and twenty-first centuries.<sup>129</sup> Old maternalism, rooted in the cult of domesticity, was "wedded

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124. While no formal statistics on the demographics of the women charged under Tennessee's law are yet available, there are at least five cases in which the defendant was black and four were white. Goldensohn & Levy, *supra* note 119.

125. See ROBERTS, *supra* note 104.

126. Lynn Y. Weiner, *Maternalism as a Paradigm*, 5 J. WOMEN'S HIST. 96, 96 (1993).

127. *Id.*

128. Naomi Mezey & Cornelia T.L. Pillard, *Against the New Maternalism*, 18 MICH. J. GENDER & L. 229, 234 (2012).

129. See *id.* at 232.

to an ideology rooted in the nineteenth-century doctrine of separate spheres and to a presumption of women's economic and social dependence on men."<sup>130</sup> New maternalism, in contrast, has developed in a modern context where such obvious articulations of women's roles in the home may not be as widely accepted.<sup>131</sup> However, as Mezey and Pillard explain, the new maternalism replays cultural assumptions about motherhood, and in so doing "retreat[s] from the possibility of gender equality in care work precisely when it seems most attainable."<sup>132</sup> New maternalism, therefore, continues the tradition of enforcing motherhood on women.<sup>133</sup> However, new maternalism's modern and appealing articulations offer the misconception that motherhood is always a choice, and this makes it less forgiving of those who fail to perform motherhood in the prescribed manner.<sup>134</sup>

#### A. *Old Maternalism*

To track the development of maternalism from old to new, Mezey and Pillard trace the paradigm back to the social and cultural responses to shifts in the American economy. As the Industrial Revolution transformed American working lives from an agrarian to an industrial model, work became more gendered.<sup>135</sup> While men left to work outside of the home, women stayed and worked inside the home or others' homes as their "sphere" of work, and the cult of domesticity was born.<sup>136</sup> This division of labor created an environment in which women's roles as homemakers, wives, and mothers came to be seen as "natural."<sup>137</sup>

These gendered divisions reflecting the prioritization of motherhood were thus reflected in American society. Professor Barbara Welter identified the nineteenth-century cult of domesticity or "cult of true womanhood,"<sup>138</sup> which identified the "true woman" as the pinnacle of female piety and virtue in Western civilization.<sup>139</sup> Women in nineteenth-century America were instructed: "[A] true woman's place was unquestionably by her own fireside—as daughter, sister, but most of all as wife and mother."<sup>140</sup> If a woman performed her domestic duties to her husband and her children, she became a beacon of

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130. Molly Ladd-Taylor, *Toward Defining Maternalism in U.S. History*, 5 J. WOMEN'S HIST. 110, 110 (1993).

131. Mezey & Pillard, *supra* note 128, at 234.

132. *Id.* at 283.

133. *Id.*

134. *Id.*

135. See NANCY F. COTT, *THE BONDS OF WOMANHOOD: "WOMAN'S SPHERE" IN NEW ENGLAND, 1780–1835* 1–2 (1977).

136. *Id.*

137. See generally THEDA SKOCPOL, *PROTECTING SOLDIERS AND MOTHERS: THE POLITICAL ORIGINS OF SOCIAL POLICY IN THE UNITED STATES* (1992).

138. Barbara Welter, *The Cult of True Womanhood: 1820–1860*, 18 AM. Q. 151 (1966).

139. *Id.* at 151–52.

140. *Id.* at 162.

American patriotism: she “stay[ed] home with her Bible and a well-balanced mind and raise[d] her sons to be good Americans.”<sup>141</sup> In 1908, President Theodore Roosevelt declared, “[M]other is the one supreme asset of national life.”<sup>142</sup> He encouraged women to agitate for social reforms that would uphold maternal values and opined that mothers could uniquely build the nation through their families.<sup>143</sup>

Motherhood was not only held as important in society, but its significance in women’s lives also inspired them to organize to protect and reinforce it. Women entered the public arena through social and political organizations that promoted a vision of motherhood and morality.<sup>144</sup> Middle- and upper-class women rallied to create a movement of “a maternal public mind,” extending their duty to uphold motherly values from their families to American society as a whole.<sup>145</sup> This level of political engagement, which had undertones of maternal domesticity, created internal tension. Sociologist and political scientist Theda Skocpol describes the paradox of women in the early twentieth century:

On the one hand, a sharp division of labor—and an even more rigid cultural orthodoxy—confined American women to a narrower sphere of activities, more thoroughly separate from male activities than before or after this century of basic capitalist development. On the other hand, American women developed the largest and most assertive “woman movements” in the world. Those movements, in turn, set the stage for the maternalist social policy breakthroughs of the Progressive Era[.]<sup>146</sup>

Women thus created a public political movement that paradoxically promoted their place in the private, domestic sphere.

Old maternalism not only encouraged women to be mothers, but it specifically identified white middle- and upper-class women as those who should be reproducing.<sup>147</sup> It was important not only to make sure that women became mothers but to preserve the power of the dominant group by making as many mothers as possible from the “right” kinds of women. As Professor Jeanne Flavin explains in *Our Bodies, Our Crimes*, at the turn of the twentieth century the eugenics movement campaigned against abortion to ensure that white, European, Protestant women reproduced.<sup>148</sup> President Theodore Roosevelt, who so fervently supported mothers as a “supreme national

141. *Id.* at 172 (internal quotation omitted).

142. Theodore Roosevelt, Speech to the Delegates to the First International Congress in America on the Welfare of the Child at the White House (Mar. 10, 1908), <http://www.theodore-roosevelt.com/images/research/txtspeeches/281.txt> [<https://perma.cc/X9RZ-BTEF>].

143. *Id.*

144. Mezey & Pillard, *supra* note 128, at 239.

145. *Id.* (quoting a spokeswoman for the National Congress of Mothers, speaking in 1911).

146. SKOCPOL, *supra* note 137, at 321.

147. See Mezey & Pillard, *supra* note 128, at 242.

148. JEANNE FLAVIN, *OUR BODIES, OUR CRIMES: THE POLICING OF WOMEN’S REPRODUCTION IN AMERICA* 16 (2009).

asset,”<sup>149</sup> also railed against “race criminals”: middle- and upper-class white women who did not wish to be mothers and thus did not contribute to the population of American society.<sup>150</sup> The eugenics movement not only decried abortion for white women, but supported birth control and sterilization for poor women and women of color.<sup>151</sup> In addition to working more and more in separate spheres, “[t]he upper-class WASP elite of the industrial North became increasingly aware of its own small-family pattern, in contrast to the continuing large-family preferences of immigrants and the rural poor.”<sup>152</sup> A key aspect of the old maternalism was the anxiety that white, middle- and upper-class Americans felt about their perceived decline as the dominant population. This anxiety promoted the motherhood of their women and discouraged motherhood in marginalized groups.

Much of the explicit prioritization of gender divisions that characterized old maternalism has been replaced by a more egalitarian view of the relationship between men and women.<sup>153</sup> However, the notion that women have essential roles as mothers—while men do not have parenthood as entirely essential to their beings—has not faded from American culture. Rather, it has been transformed over time into a “new maternalism,” which still prioritizes motherhood and plays a key role in American society.<sup>154</sup> The following Section illustrates how this next phase of maternalism profoundly affects present law and the development of increased maternal policing.

### B. *New Maternalism*

Professors Mezey and Pillard identified the shift in American culture from old maternalism to twenty-first century “new maternalism.”<sup>155</sup> New maternalism, they argue, follows old maternalism in that it reinforces the unequal parenting duties of mothers versus fathers.<sup>156</sup> However, because of the movement that American society has made towards a more equal vision of men and women, new maternalism envisions motherhood as more of a choice than the absolute destiny of women.<sup>157</sup> New maternalism is appealing because it

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149. See Ebert, *supra* note 21; see also WENDY KLINE, BUILDING A BETTER RACE: GENDER, SEXUALITY AND EUGENICS FROM THE TURN OF THE CENTURY TO THE BABY BOOM 11 (2001) (discussing Theodore Roosevelt’s frequent use of the term “race suicide” and its subsequent media popularity). Roosevelt argued, “[N]o race has any chance to win a great place [in the world] unless it consists of good breeders . . .” *Id.*

150. KLINE, *supra* note 149, at 11.

151. See Gordon, *supra* note 57.

152. *Id.* at 45.

153. Mezey & Pillard, *supra* note 128, at 242.

154. *Id.* at 241.

155. *Id.* at 236.

156. *Id.*

157. *Id.* For a discussion of some of the misconceptions surrounding the choices that women may or may not have, see Lynn M. Paltrow, *The War on Drugs and the War on Abortion: Some Initial Thoughts on the Connections, Intersections and the Effects*, 28 S.U. L. REV. 201, 227–30 (2001).

values motherhood and corrects the “myopic glorification—by mainstream society as well as some feminists—of values and pursuits traditionally associated with and historically reserved for men.”<sup>158</sup> But new maternalism still fails to explain “why the core values associated with mothering are not deemed important and universal enough to apply to fathers, other men, and a variety of other caregivers as well.”<sup>159</sup> Although it is modern—and as such, one might expect that new maternalism would be supportive of more gender-equal parenting—it also “demonstrates an increasingly common reticence to critique the pervasive patterns of unequal allocation of childcare and housework between women and men.”<sup>160</sup>

Mezey and Pillard locate new maternalism in some political movements and organizations, but they also find it in the lighthearted pontificating of “mommy blogs” and the proliferation of such Internet media as sites of maternal bonding, sharing, and advice-giving in popular culture.<sup>161</sup> The new maternalist activist is more modern and tech-savvy than her nineteenth-century counterparts,<sup>162</sup> but “each of the rights and benefits she seeks, even in her own job, are to enable her better to care for her children.”<sup>163</sup> New maternalism is neither liberal nor conservative; however, women on both ends of the political spectrum have used motherhood to advance various political goals.<sup>164</sup> Liberal maternalism takes the form of organizations like MomsRising, which promotes causes such as paid family leave, nontoxic environments, flexible workspaces, gun safety, and universal healthcare.<sup>165</sup> Conservative maternalism, on the other hand, finds its champions in those who identify with Sarah Palin and the “mama grizzlies.”<sup>166</sup>

Sarah Palin and other conservative Republican women adopted a vision of mama grizzlies who would go to Washington to change the social and political landscape for their “cubs.”<sup>167</sup> Mezey and Pillard point out that although

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158. Mezey & Pillard, *supra* note 128, at 236.

159. *Id.*

160. *Id.* at 249. Notably, men have continued to be absent from caregiving responsibilities, as they were during the time of old maternalism. See Welter, *supra* note 138, at 162 (discussing women’s roles as mothers in the cult of domesticity).

161. Mezey & Pillard, *supra* note 128, at 244.

162. Ekaterina Walter, *The Top 30 Statistics You Need to Know When Marketing to Women*, NEXT WEB, <http://thenextweb.com/socialmedia/2012/01/24/the-top-30-stats-you-need-to-know-when-marketing-to-women> [<https://perma.cc/L273-3HZP>] (noting that 90 percent of moms are online versus 76 percent of women in the general population).

163. Mezey & Pillard, *supra* note 128, at 249.

164. *Id.* at 250.

165. *Our Issues*, MOMSRISING.ORG (2016), <http://www.momsrising.org/page/moms/our-issues> [<https://perma.cc/D5B8-CYKA>].

166. Mezey & Pillard, *supra* note 128, at 249.

167. See StateOfTheYOUion, *Sarah Palin—Mama Grizzlies*, YOUTUBE (July 8, 2010), <https://www.youtube.com/watch?v=oF-OsHTLfxM> [<https://perma.cc/Z5N4-2QT7>]. Sarah Palin used this viral YouTube video in the 2010 midterm elections to introduce her “mama grizzly” motif to the world—one that became very popular both as a point of alignment and as a source of criticism from

conservative female politicians and the mama grizzlies seem to incorporate some of the political outrage and indignation of old maternalism, they also often use a folksy and relatable tone that characterizes new maternalism.<sup>168</sup> Not only are these women relatable, they are “fun” and “feminine.” Many remember Palin’s famous impromptu joke about the difference between a hockey mom and a pitbull with lipstick<sup>169</sup>—this humor is typical of new maternalism in that it celebrates and encourages femininity, domesticity, and motherhood.

Additionally, while new maternalism may not carry the overtly racist and classist tone of the old maternalism, race and class still pervade new maternalism. While minority communities of mothers exist, most of the mothers who write mommy blogs and review various kid-related products are white, middle- and upper-class women.<sup>170</sup> More affluent white women with money are the targets of such media and advertising, and they are the prime consumers.<sup>171</sup> Because maternalists tend to be middle- and upper-class white women, racial and socioeconomic distinctions become particularly important in the context of maternalist politics.<sup>172</sup>

Mezey and Pillard’s theory regarding the development of old and new maternalism provides a paradigmatic explanation of the ways in which maternal behavior has been proffered and monitored over time.<sup>173</sup> In our current age of new maternalism, ideal maternal behavior has developed from a distinctly white, middle- and upper-class perspective. Mothers who do not adhere to the prescribed set of behaviors may face punishment from American social, political, and legal systems.

#### IV.

##### TENNESSEE’S LAW AND NEW MATERNALISM

Using Mezey and Pillard’s framework of new maternalism, this Note argues that Tennessee’s legislation, which criminalizes drug use during

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the left. See, e.g., *Sarah Palin’s Mama Grizzly Coalition*, DAILY SHOW WITH JON STEWART (Aug. 3, 2010), <http://thedailyshow.cc.com/videos/joxvfc/sarah-palin-s-mama-grizzly-coalition> [https://perma.cc/VX35-7DP3] (playing Jon Stewart’s critique of Sarah Palin’s mama grizzly video).

168. Mezey & Pillard, *supra* note 128, at 252.

169. Brendan Scott, *She’s a ‘Pitbull with Lipstick,’* N.Y. POST (Sept. 4, 2008, 8:10 AM), <http://nypost.com/2008/09/04/shes-a-pit-bull-with-lipstick> [https://perma.cc/ZL8H-A7Z9].

170. Mezey & Pillard, *supra* note 128, at 242–43.

171. See Walter, *supra* note 162.

172. See Camille Gear Rich, *Race-ing Motherhood: A Response to Darren Rosenblum’s Un-Sex Mothering: Toward a Culture of New Parenting*, HARV. J.L. & GENDER (Feb. 6, 2012), <http://harvardjlg.com/2012/02/unsex-mothering-responses-camille-gear-rich> [https://perma.cc/Z7H9-F6QD] (“We must bear in mind that historically poor women and women of color . . . were made to feel like lesser mothers because of their inability to discharge parenting obligations in this manner. . . . Today middle class women who do not have the inclination to parent using the ‘ideal’ approach are similarly made to feel inadequate because they do not submit to the cult of engaged middle class motherhood.”).

173. Mezey & Pillard, *supra* note 128, at 252–53.

pregnancy, reflects new maternalism in important ways. First, the law works alongside abortion restrictions to conscript women into motherhood by restricting the actions that pregnant women can take. Since maternalism promotes the view that women are destined to be mothers, when women become pregnant, their unborn children take priority. Pregnant women who take actions that jeopardize their pregnancies—whether seeking abortion or taking substances that could increase the risk of a poor pregnancy outcome—fail to promote the maternalist viewpoint that a woman’s foremost duty is motherhood. The Tennessee law, along with other efforts to control women’s reproductive choices, therefore reflects this maternalist paradigm and pushes women towards motherhood.

Second, the law punishes a certain group of women (those who use drugs) for reproducing, which reinforces the idea that not only are women supposed to be mothers, but they are also supposed to perform motherhood in particular ways. When a woman deviates from prescribed maternal behavior, she faces criminal liability. The law creates a “bad mother”—a woman who uses drugs during her pregnancy—as a foil to the new maternalism’s vision of the “good mother.” Thus, the prosecution of women who use drugs during their pregnancies sends a message to women that aligns with the “new maternalism”: women who become pregnant should become mothers and, more specifically, particular *kinds* of mothers. When women do not comport with these ideals, they become criminals.

American culture does not tolerate mothers who fail to act out a particular kind of motherhood, one that is informed by middle- and upper-class white women’s prolific new maternalism groups.<sup>174</sup> New maternalism disparages drug use as the ultimate in poor maternal behavior because of its potential danger to fetuses.<sup>175</sup> Tennessee lawmakers have made a separate criminal law for these mothers, criminalizing the use of drugs during pregnancy.<sup>176</sup> While legitimate health concerns exist for drug use during pregnancy, many of the justifications for this law are built upon junk science.<sup>177</sup>

This law reflects the new maternalism and uses the principles of white, middle- and upper-class motherhood to punish those who do not conform.<sup>178</sup>

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174. *See id.* at 243.

175. *See* Libby Copeland, *Oxytots*, SLATE (Dec. 7, 2014, 7:52 PM), [http://www.slate.com/articles/double\\_x/doublex/2014/12/oxytots\\_and\\_meth\\_babies\\_are\\_the\\_new\\_crack\\_babies\\_bad\\_science\\_and\\_the\\_rush.html](http://www.slate.com/articles/double_x/doublex/2014/12/oxytots_and_meth_babies_are_the_new_crack_babies_bad_science_and_the_rush.html) [<https://perma.cc/3HDA-9SN5>] (discussing the “crack baby” myth of the 1980s and 1990s, and the ways in which similar myths about the effects of Oxycontin and methamphetamines on babies are being similarly exaggerated to vilify and punish new mothers); *see also* Paltrow, *supra* note 157.

176. TENN. CODE ANN. § 39-13-107 (West 2014).

177. *See supra* Part II.B (discussing the inaccurate science incorporated into Tennessee’s fetal assault statute).

178. Given the racial implications present here, it is helpful to revisit Dorothy Roberts’s analysis, discussed in Part II.B. Additionally, it suggests that Tennessee’s fetal assault statute is

The enforcement of new maternalism has thus taken on a criminal defense of motherhood, which (somewhat ironically) makes criminals out of mothers. While previous prosecutions of pregnant women repurposed other child abuse, neglect, or homicide statutes, this law creates a new model by codifying and explicitly authorizing a criminal prosecution of pregnant women. This reflects new maternalism because it supports fetal rights, prioritizes the unborn, and punishes women who fail to perform motherhood in prescribed ways.

A. *Conscripting Women into Motherhood*

Tennessee's newest amendment to its fetal assault statute prioritizes the rights of the unborn by making a mother criminally liable if her drug use harms the fetus.<sup>179</sup> This prioritization of the unborn shares the aim of laws that limit abortion access and works to police and enforce women's reproduction.<sup>180</sup> This restriction of abortion and support of the unborn as "persons" with constitutional rights prevent women from rejecting motherhood and foster a maternalist agenda.<sup>181</sup> In order to make women into the type of mothers that a maternalist society says they should be, it is first necessary to *have* plenty of mothers in the society. As law supports the rights of the unborn and chips away at the rights of women,<sup>182</sup> it helps to promote a culture of new maternalism. Just as new maternalism, with its jovial style and lighthearted tone, surreptitiously controls the actions of women as mothers,<sup>183</sup> the increasingly popular fetal protection statutes pull a sleight of hand. Like a magician, they distract the audience with shiny, appealing promises to "protect" women and their "defenseless children,"<sup>184</sup> while they simultaneously diminish women's constitutional protections and lay the groundwork for more direct laws like Tennessee's. Such statutes and judicial authorization allow for more ammunition to use against drug-using pregnant women when they disobey the authorities of the law and their doctors.

Since *Roe v. Wade* determined that the right of privacy includes a right to choose an abortion,<sup>185</sup> many states moved to attack abortion—the ultimate

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reminiscent of some of the eugenicist overtones present in the "old maternalism," discussed in Part III.A.

179. See § 39-13-107.

180. See Lynn M. Paltrow, *Roe v. Wade and the New Jane Crow: Reproductive Rights in the Age of Mass Incarceration*, 103 AM. J. PUB. HEALTH 17, 17 (2013) ("[A]ll pregnant women are at risk of being assigned to a second-class status that will not only deprive them of their reproductive rights and physical liberty through arrests, but also effectively strip them of their status as full constitutional persons.").

181. See Mezey & Pillard, *supra* note 128, at 233.

182. See DUBOW, *supra* note 66, at 152.

183. Mezey & Pillard, *supra* note 128, at 244–45.

184. *Hearing on H.B. 1295*, *supra* note 116.

185. 410 U.S. 113, 162 (1973).

offense to maternalism—locally.<sup>186</sup> Between 2011 and 2013, state legislatures enacted more abortion restrictions than in the entire previous decade.<sup>187</sup> Such restrictions commonly include, but are by no means limited to, (1) Targeted Restrictions of Abortion Providers, or “TRAP” laws, which include requirements that abortions only be performed at ambulatory surgical centers or hospitals and which demand that abortion providers have admitting privileges at local hospitals; (2) limiting coverage of abortions for women on Medicaid or other Affordable Care Act insurance; (3) restricting access to medical abortions, which can be particularly useful to rural women;<sup>188</sup> (4) so-called “heartbeat bills,” which attempt to ban an abortion after a fetus has a detectable heartbeat;<sup>189</sup> and (5) viability abortion bans.<sup>190</sup> These kinds of abortion restrictions appear frequently in the public sphere, with antiabortion advocates pushing for their passage, while pro-choice advocates work against them.<sup>191</sup> For years, these kinds of restrictions have been deliberately used to reduce abortion access in lieu of banning it altogether.<sup>192</sup>

However, other types of restrictions on women’s bodily autonomy do not get the same media coverage and attention. Just as TRAP laws and other abortion restrictions limit women’s reproductive options and push women towards motherhood,<sup>193</sup> Tennessee’s criminalization of drug use during pregnancy also restricts reproductive freedoms and conscripts women into motherhood. Thus, abortion restrictions, fetal protection statutes, and now, Tennessee’s fetal assault statute, all have the same agenda in terms of protecting fetal rights.<sup>194</sup> In the aggregate, these statutes imagine pregnant

186. See Memorandum from Samuel Alito, Assistant to the Solicitor General, to Charles Fried, Solicitor General (May 30, 1985) [hereinafter Alito Memo] (recommending that the antiabortion movement use state legislative efforts to work against abortion in the wake of *Roe v. Wade*).

187. Heather D. Boonstra & Elizabeth Nash, *A Surge of State Abortion Restrictions Puts Providers—and the Women They Serve—in the Crosshairs*, 17 GUTTMACHER POL’Y REV. 9, 10 (2014), <https://www.guttmacher.org/about/gpr/2014/03/surge-state-abortion-restrictions-puts-providers-and-women-they-serve-crosshairs> [https://perma.cc/8K67-4TEE].

188. See Lisa R. Pruitt & Marta Vanegas, *Urbanormativity, Spatial Privilege, and Judicial Blind Spots in Abortion Law*, 30 BERKELEY J. GENDER L. & JUST. 76 (2015).

189. See Tara Culp-Ressler, *Texas Legislators File Radical ‘Fetal Heartbeat’ Bill to Ban Abortion After Just Six Weeks*, THINK PROGRESS (July 18, 2013, 5:27 PM), <http://thinkprogress.org/health/2013/07/18/2326191/texas-heartbeat-bill> [https://perma.cc/F7DM-8V8F].

190. Boonstra & Nash, *supra* note 187, at 10–12.

191. See NAT’L RIGHT TO LIFE, <http://www.nrlc.org> [https://perma.cc/SA5H-YUEE] (last visited Dec. 15, 2014); NARAL PRO-CHOICE AM., <http://www.prochoiceamerica.org> [https://perma.cc/4UR7-8KB9] (last visited Dec. 15, 2014).

192. See Alito Memo, *supra* note 186.

193. See Pruitt & Vanegas, *supra* note 188.

194. See Shelley DuBois & Tony Gonzalez, *Drug-Dependent Babies Challenge Doctors, Politicians*, USA TODAY (June 15, 2014, 7:23 AM), <http://www.usatoday.com/story/news/nation/2014/06/15/drug-dependent-babies-challenge-doctors-politicians/10526103> [https://perma.cc/S7Y6-T3FB] (quoting Tennessee State Representative Terri Lynn Weaver: “It would just seem to me that any society that puts value on life would agree that these defenseless children deserve some protection and these babies need a voice”).

women and fetuses as two separate people, and prioritize the rights of the unborn. Although advocates of fetal protection laws might say otherwise,<sup>195</sup> giving rights to fetuses can significantly diminish the rights of the women carrying them.<sup>196</sup> When outside forces attempt to do something for the unborn that a pregnant woman does not want, they often limit her choices, movement, and liberty.<sup>197</sup> In promoting fetal rights, the Tennessee law bolsters an antiabortion position and restricts the freedom of the female body.

Tennessee's new law may not appear to force women into motherhood; indeed, at first glance, it seems to drive more women to have abortions because drug-using women may be more inclined to use abortion to avoid prosecution.<sup>198</sup> While that may be the avenue that some women take (if other obstacles do not prevent them from accessing an abortion, thereby limiting that "choice"),<sup>199</sup> many women prefer to continue their pregnancies. More importantly, one can read this law not as encouraging abortion, but, rather, as working against women's choice to have one by prioritizing fetal rights and criminally prosecuting mothers who might put their pregnancies at risk.<sup>200</sup> This

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195. For a discussion of the legal rationale behind fetal protection laws, see Paltrow & Flavin, *supra* note 13.

196. See DUBOW, *supra* note 66; see also Paltrow, *supra* note 180.

197. See Lois M. Collins, *Heated Debate About Whether Pregnant Women Being Given Unduly Harsh Jail Sentences*, HERALD TIMES ONLINE (Dec. 16, 2014, 11:43 AM), [http://www.heraldtimesonline.com/life/heated-debate-about-whether-pregnant-women-being-given-unduly-harsh/article\\_ac5d5288-db04-59d4-928c-b7d2d463fa70.html](http://www.heraldtimesonline.com/life/heated-debate-about-whether-pregnant-women-being-given-unduly-harsh/article_ac5d5288-db04-59d4-928c-b7d2d463fa70.html) [https://perma.cc/U2RL-4VDB] (discussing the prosecutions of pregnant drug users in Minnesota, Tennessee, Wisconsin, and South Dakota, among other states); Libby Copeland, *Wisconsin is Throwing Pregnant Women in Jail to Protect "Unborn Children"*, SLATE (Dec. 16, 2014, 11:47 AM), [http://www.slate.com/blogs/xx\\_factor/2014/12/16/tamara\\_loertscher\\_wisconsin\\_mother\\_is\\_thrown\\_in\\_jail\\_for\\_refusing\\_drug\\_treatment.html](http://www.slate.com/blogs/xx_factor/2014/12/16/tamara_loertscher_wisconsin_mother_is_thrown_in_jail_for_refusing_drug_treatment.html) [https://perma.cc/L5M6-SHWB] (discussing the cases of Alicia Beltran, Tamara Loertscher, and other Wisconsin women who were subject to escalating prosecutions of pregnant, drug-using women).

198. Indeed, some pro-life legislators expressed this very concern and were hesitant to support the measure for fear that it would encourage more women to get abortions to avoid prosecution. Sometimes, this is the case: in *State v. Greywind*, No. CR-92-447 (N.D. Cass County Ct., Apr. 10, 1992), a pregnant North Dakota woman was charged with reckless endangerment of her twelve-week-old fetus for inhaling paint fumes. The prosecutor only dropped the charges after she had an abortion. *Id.*

199. See generally ANNE NICOL GAYLOR, *WHY ABORTION? THE MYTH OF CHOICE FOR WOMEN WHO ARE POOR* (1993) (telling stories of individual women who were unable to access abortion due to their socioeconomic disadvantages). In Tennessee in 2011, 96 percent of the counties had no abortion provider and 63 percent of women lived in these counties. GUTTMACHER INST., *STATE FACTS ABOUT ABORTION: TENNESSEE* (2014), <http://www.guttmacher.org/pubs/sfaa/pdf/tennessee.pdf> [https://perma.cc/3YKN-ZTGW].

200. Reproductive justice attorney and executive director of National Advocates for Pregnant Women, Lynn Paltrow, suggests that such prosecutions and efforts to restrict women's reproductive freedom, "if unchecked, not only will result in massive deprivations of pregnant women's liberty, but also will create a basis for ensuring a permanent underclass for pregnant women or, for lack of a better term, a new Jane Crow." Paltrow, *supra* note 180.

law, especially when taken together with other abortion restrictions,<sup>201</sup> increases the rights of the unborn and supports the restriction of abortion.

Tennessee State Representative Terri Lynn Weaver, the main sponsor and champion of the amendment in the Tennessee legislature, made clear her “pro-life” intentions for the law. During the legislative session, she said on the house floor, “Any society that puts a value on life would want to protect these defenseless children, and these babies need a voice.”<sup>202</sup>

Whatever Representative Weaver’s personal objectives for the bill may have been, it weakens women’s rights of privacy, liberty, and to control their reproductive fates. Representative Weaver, with the help of the Tennessee legislature, has developed an effective method to accomplish this: she created a law that increases the rights of the unborn, prioritizes the unborn’s wellbeing, and simultaneously diminishes the freedoms of pregnant women.

### B. Punishing “Bad” Mothers

When Tennessee State Representative Terri Lynn Weaver was promoting her bill, she called it a “velvet hammer,” designed to take a firm hand and a sort of “tough love” approach to these women who deviate so much from acceptable maternal behavior.<sup>203</sup> Indeed, one need not look further for signs of the strong maternalist overtones of Tennessee’s new law than Terri Lynn Weaver. Her personal and professional life, especially in her promotion of this particular bill, evokes the folksy, cheerful attitude of new maternalism as well as its tendency to judge—and now, punish—those mothers who do not conform.<sup>204</sup>

Weaver’s invocation of the “velvet hammer” motif connotes the idea of a punishing instrument that is covered in softness—a feminine penalty appropriate for a crime only women can commit. Like the term “mama grizzly,” “velvet hammer” has an oxymoronic tone and implies some sort of female power or strength: it is, after all, Terri Lynn Weaver who wields the “velvet hammer” and makes it the weapon of choice. These terms also have a sense of branding about them: Sarah Palin’s success in gathering women around her as fellow “mama grizzlies”<sup>205</sup> may have been due in part to the attractiveness of the term “mama grizzly.” In the Tennessee legislative and

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201. See Anita Wadhvani, *Tennessee Amendment 1 Abortion Measure Passes*, TENNESSEAN (Nov. 6, 2014, 9:31 AM), <http://www.tennessean.com/story/news/politics/2014/11/04/amendment-takes-early-lead/18493787> [<https://perma.cc/GB6Q-K9JX>] (discussing a ballot amendment that passed in Tennessee in 2014, allowing legislators to restrict and regulate abortion, and state, “Nothing in this Constitution secures or protects a right to abortion or requires the funding of an abortion”).

202. *Hearing on H.B. 1295*, *supra* note 116.

203. Gonzales, *supra* note 1.

204. See Mezey & Pillard, *supra* note 128.

205. See Lisa Miller, *What Does ‘Mama Grizzly’ Really Mean?*, NEWSWEEK (Sept. 27, 2010, 10:30 AM), <http://www.newsweek.com/what-does-mama-grizzly-really-mean-72001> [<https://perma.cc/STTX-4RY2>] (discussing conservative women who identify as “mama grizzlies”).

executive branches, Terri Lynn Weaver has similarly been able to garner support around her “velvet hammer”: people have even complimented her on the term and she takes many opportunities to use it.<sup>206</sup>

Representative Terri Lynn Weaver, like her conservative sister Sarah Palin, prioritizes and burnishes her image as both a politician and a mother. On her website, Weaver writes:

Being a wife, mother and now a grandmother are priority to me and will prayerfully be my greatest accomplishments. . . . I am reminded of Proverbs 31 verse 28, “Her children stand and bless her. Her husband praises her.” That my friend is a reward that every woman receives when she fears and honors her Lord. I am truly blessed!<sup>207</sup>

Her devotion to motherhood makes her a particularly likely candidate to propose a law such as this amendment, but her attitude towards the women whom the law criminalizes is conflicted. When proposing her bill in front of the Tennessee state representatives, she expressed a true distaste and distrust of the women the bill targeted, calling them the “worst of the worst.”<sup>208</sup> When asked about whether or not this bill would protect women when they received prenatal care, she said, “These ladies are not those who would consider prenatal care . . . Their only next decision is how to get their next fix.”<sup>209</sup> Her discussion on the floor of the Tennessee House of Representatives created visions of pregnant drug addicts who did not care for their “poor, defenseless children,” but instead roamed the streets, looking for drugs and giving birth to damaged, inconsolable babies.<sup>210</sup> The reality is, of course, much more complex.

Representative Weaver then complicated her own image of these women in two ways. First, she included an affirmative defense to her new crime.<sup>211</sup> The code provides:

It is an affirmative defense to a prosecution permitted by subdivision (c)(2) that the woman actively enrolled in an addiction recovery program before the child is born, remained in the program after delivery, and successfully completed the program, regardless of whether the child was born addicted to or harmed by the narcotic drug.<sup>212</sup>

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206. *Id.*

207. *About*, TENN. STATE REPRESENTATIVE TERRI LYNN WEAVER, <http://www.weaverhouse40.com/About.html> [<https://perma.cc/56EW-ZTBU>] (last visited Dec. 15, 2014).

208. *Hearing on H.B. 1295, supra* note 116.

209. *Id.*

210. *Id.*

211. For further discussion of this affirmative defense and the structure of the law, see *supra* Part II.C.

212. TENN. CODE ANN. § 39-13-107(c)(3) (West 2014).

While some of her colleagues questioned whether this provision effectively protected pregnant women who seek help with a drug addiction,<sup>213</sup> its inclusion in the newest amended version of the fetal assault statute was part of the controlling, maternalist attitude towards pregnant drug users. In Representative Weaver's vision, these women deserved punishment but could escape it if they could accomplish the likely very difficult task of satisfying the requirements of the affirmative defense (if they even knew of its existence). Indeed, Representative Weaver implied that the bill would actually provide treatment to the women she made criminals: "This bill says we can get you help."<sup>214</sup> It is unclear precisely what "treatment" she believed was being offered, since the law made no such provisions and there was no reason to believe that every pregnant addict would have independent resources to access a drug program.<sup>215</sup>

Second, Representative Weaver wanted to emphasize the good that such prosecutions would accomplish, saying, "This legislation will get [these ladies] help."<sup>216</sup> Her proposition that jailing women shortly after giving birth would "help" them or their newborns is problematic in various ways. Medically speaking, the latest research demonstrates that infants born to drug-addicted mothers often benefit from swaddling, lots of interaction and bonding with their mothers, and skin-to-skin contact.<sup>217</sup> Additionally, evidence suggests that having incarcerated parents hurts children,<sup>218</sup> so it does not follow that creating a measure to incarcerate new mothers would help their children. Even so, it is

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213. See *Hearing on H.B. 1295*, *supra* note 116 (Representative Sherry Jones from Nashville expressed many concerns about the bill, and asked Representative Weaver about the "affirmative defense," though her questions mostly deflected. She said, "I want anybody who wants to get clean to be able to do it. They have to want it or it doesn't work. I am concerned about the way this would work and that she would have to go into a program before the baby is even born so it can be tested." Representative Jones doubted the logic of the defense, since it presumes the mother is able to get to such a program, that there are programs available, and then she must somehow complete the program after the baby is born, even though she would likely be in custody if she were arrested under the law.).

214. *TN bill would charge moms whose babies are born addicted*, WSMV.COM NASHVILLE (Feb. 24, 2014, 7:27 PM), <http://www.wsmv.com/story/24834172/tn-bill-would-charge-moms-whose-babies-are-born-addicted> [<https://perma.cc/MGP8-NCJF>].

215. See GUTTMACHER INST., *supra* note 48.

216. *Hearing on H.B. 1295*, *supra* note 116.

217. See MedlinePlus, *Neonatal Abstinence Syndrome*, U.S. NAT'L LIBR. MED., <http://www.nlm.nih.gov/medlineplus/ency/article/007313.htm> [<https://perma.cc/8Q43-3ZTT>] (last visited Dec. 17, 2014) (recommending that infants born with neonatal abstinence syndrome (the condition that some infants whose mothers who used drugs during pregnancy can experience) get a lot of time with their mothers, skin-to-skin contact, and swaddling). Such recommended treatments of newborns with NAS are likely going to be unavailable to infants whose mothers are arrested soon after they are born. *Id.*

218. Mindy Herman-Stahl et al., RTI, Int'l, *The Effects of Parental Incarceration on Children, in INCARCERATION AND THE FAMILY: A REVIEW OF RESEARCH AND PROMISING APPROACHES FOR SERVING FATHERS AND FAMILIES* (2008), <http://aspe.hhs.gov/hsp/08/mfs-ip/incarceration&family/ch4.shtml> [<https://perma.cc/WQL7-PJU6>] (a study prepared for the U.S. Department of Health and Human Services) (noting that 2 percent of all children and 7 percent of black children have an incarcerated parent, and discussing the many negative effects that incarceration can have on the children of incarcerated parents).

interesting that Weaver was simultaneously concerned with “helping” these new mothers and with punishing them. It seems to evoke the broader dual maternalism of the law, which forces women into motherhood (encouraging maternal support) and promotes the criminal prosecution of “bad” mothers.

Thus, the desire to “help” the mothers of infants born with a dependence on narcotics clashes with the desire to punish them. Such tension is significant because it further complicates the treatment of drug-using pregnant women under the statute. For instance, one of the reasons that drug users receive such harsh criticism when they become pregnant is because of the presumption that if they wanted to, they could simply get an abortion and therefore avoid the “selfish” choice to continue their pregnancies. Lynn Paltrow, the founder and executive director of National Advocates for Pregnant Women, writes about the ways in which American culture builds myths of choice around abortion and drug use:

The term “choice” is often applied to both reproductive decisionmaking and to drug use. Women have a right to “choose” to have an abortion and drug addicts make a “choice” to use drugs. In both areas, however, it is a term that obscures the lack of choice that many people have and the larger economic and institutional barriers that deny people, and disproportionately deny people of color, particularly low-income women of color, the ability to make consumer-like choices.<sup>219</sup>

Paltrow illustrates the very real challenges that drug-using pregnant women often have with accessing the various services and resources that they would need to have meaningful choices about their drug treatment and reproductive health. It is often very difficult for women to access an abortion clinic and afford an abortion (if they want it). However, even more ludicrous, perhaps, is the suggestion that pregnant drug addicts could simply stop using drugs if they wished, and that addiction is simply a “poor choice,” rather than a psychological and physical malady.<sup>220</sup>

Historian Rickie Solinger also discusses the “right to choose” an abortion and describes it as “fairly ridiculous.”<sup>221</sup> Not only are poor women, women of color, and rural women particularly disadvantaged when it comes to having meaningful reproductive “choices,” but such women are often the targets of punishment for failing to perform motherhood properly.<sup>222</sup> Solinger writes, “During a time when babies—and even pregnancy itself—became ever more commodified, some women were defined as having a legitimate relationship to

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219. Paltrow, *supra* note 157, at 227–30.

220. Scientific authorities describe one of the key aspects of addiction as a lack of control: a person with an addiction “is unable to control the aspects of the addiction without help because of the mental or physical conditions involved.” Nordqvist, *supra* note 122.

221. RICKIE SOLINGER, BEGGARS AND CHOOSERS: HOW THE POLITICS OF CHOICE SHAPES ADOPTION, ABORTION, AND WELFARE IN THE UNITED STATES 7 (2002).

222. *Id.*

babies and motherhood status, while others were defined as illegitimate consumers.”<sup>223</sup> The latest amendment to Tennessee’s fetal assault statute imagines not only that certain women (drug addicts in particular, but more broadly, poor women and women of color as well) should not be mothers because they do not exemplify the type of motherhood that maternalism values, but also that certain women actually deserve *punishment* for becoming mothers. These myths of choice help justify the punishment of certain pregnant women and make distinctions between “good” pregnant women who choose to follow prescribed maternal behavior and “bad” pregnant women who “choose” not to do so.

Tennessee’s amendment to its fetal assault law therefore supports a maternalist vision of American culture in a new and rather extreme fashion, seeking out women who fail to protect their unborn babies from their own drug addiction and prosecuting them under the same statute that is used to prosecute defendants accused of physically attacking other people. While new maternalism has a lighthearted character, this type of punishment of drug-addicted women—arresting them within a matter of days after they give birth—demonstrates the particularly forceful results that such devaluation of pregnant women’s liberty and privacy can produce. Maternalism supports the punishment of certain women because it does not actually support motherhood. Instead, it insists on motherhood for women and works against those who have been historically devalued as mothers and as people in American society. Tennessee’s law reflects a dark side to new maternalism’s jovial character.<sup>224</sup> The swift and harsh punishment of the mother who consumes drugs while pregnant—the “bad” mother—provides a foil to the paradigmatic “good” mother, and the “bad” mother’s punishment reinforces the “good” mother’s significance and power.

#### CONCLUSION

This Note suggests that Tennessee’s latest amendment to its fetal protection statute, which criminalizes drug use during pregnancy, supports a maternalist vision of American culture. By promoting and protecting the lives and rights of the unborn, the law further deprives pregnant women of their reproductive choices. Additionally, it seeks to punish those who do not perform motherhood in accepted ways, leading to the incarceration of new mothers in the name of protecting their children.

Poor women, women of color, and other marginalized women will feel the harshest effects of these laws. The law represents a public health risk, since

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223. *Id.*; see also Robert L. Hale, *Bargaining, Duress, and Economic Liberty*, 43 COLUM. L. REV. 603, 606 (1943) (discussing individuals’ relationships with the economy and the illusion of choice in commerce: “The fact that [a person] exercised a choice does not indicate a lack of compulsion”).

224. See *supra* Part III.B (discussing the new maternalism).

women will likely avoid getting prenatal care for the fear of prosecution. But it is so much more than a health risk. It represents a devaluation of women as full and equal participants in society, an elevation of the rights of fetuses, and an increasing willingness to use incarceration to better society. What we must instead envision is not incarceration and punishment of new mothers (and their babies) because they have failed to perform motherhood in the ways that American society believes are best, but we must instead support all women in their reproductive decision making and in their abilities to be mothers if they so choose. Mallory Loyola, Jamillah Washington,<sup>225</sup> and countless others like them<sup>226</sup> should not have been whisked away from their newborns by authorities, only to face jail time and the possible loss of custody of their children. Instead, their constitutional rights and their rights as mothers should be protected. Only then can we begin to call ourselves a culture that values women—whether or not they become mothers—and break out of this evolution of various forms of maternalism that has controlled women and injured society as a whole.

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225. *2 Moms Charged Under Tennessee Drug Baby Law*, HLN (July 25, 2014, 3:52 PM), <http://www.hlnv.com/video/2014/07/25/drug-addicted-baby-tennessee-law-aclu-narcotics> [<https://perma.cc/58JK-F7G9>] (discussing the arrests of Malory Loyola [*sic*] and Jamillah Washington, both charged under the newly amended law).

226. *See* Goldensohn & Levy, *supra* note 119 (describing the first nine cases of women charged under the law).