



Fetal Rights, the Policing of Pregnancy, and Meanings of the Maternal in an Age of Neoliberalism

Lisa Cosgrove and Akansha Vaswani
University of Massachusetts Boston

Using protective custody statutes as the grounds for litigation, an increasing number of states have initiated lawsuits against pregnant women on behalf of the fetus (“baby Jane Doe versus Ms. Doe”) in what has been referred to as maternal–fetal conflict. Most of these cases have involved pregnant women taking illicit drugs. However, women’s constitutional rights, in particular the right not to be subjected to “cruel and unusual punishment” (U.S. Const. amend. VIII) and the “right to be secure in their persons” (U.S. Const. amend. IV), as well as the right to refuse treatment, have been denied because they *stopped* taking a licit drug for a mental health condition (e.g., because they were concerned about the potential effects on fetal development). Recently, the U.S. Preventive Services Task Force (Siu et al., 2016) recommended routine depression screening for women during pregnancy and postpartum. The authors discuss the U.S. Preventive Services Task Force recommendation from a Foucauldian perspective, considering the possibility that routine questionnaire-based depression screening may serve as a neoliberal surveillance tactic, thereby undermining women’s ability to have control over their bodies and to be self-determining. Medical neoliberalism and the unintended consequences of screening-qua-surveillance are reviewed in terms of recent legal cases of maternal–fetal conflict.

Public Significance Statement

Practitioners should be aware that questionnaire-based screening for depression is not evidence-based and has many iatrogenic effects. Additionally, depression screening during pregnancy pathologizes and de-politicizes women’s experiences of pregnancy and maternal stress. It may serve as a neoliberal surveillance tactic, thereby undermining women’s ability to have control over their bodies and to be self-determining. Medical neoliberalism and the unintended consequences of screening-qua-surveillance are reviewed in terms of recent legal cases of maternal–fetal conflict.

Keywords: depression, screening, maternal–fetal conflict, women’s health, pregnancy

On the surface, it might seem odd that an article titled “Fetal Rights, the Policing of Pregnancy and Meanings of the Maternal in an Age

of Neoliberalism” would be in a special issue on the *Possibility for Women in Psychology and Interdisciplinary Sciences: Theoreticians, Scientists and Agents for Change in the Twenty-First Century*. One might think, “Perhaps it’s an interesting topic, but what does that have to do with the possibility for women in psychology and the interdisciplinary sciences?” This would be an understandable question looking at the title of this article and the focus of the special issue. We believe that the answer is both simple and complicated. Let’s start with the simple. If

Lisa Cosgrove and Akansha Vaswani, Department of Counseling and School Psychology, University of Massachusetts Boston.

Correspondence concerning this article should be addressed to Akansha Vaswani, Department of Counseling and School Psychology, University of Massachusetts Boston, 100 Morrissey Boulevard, Boston, MA 02125-3393. E-mail: Akansha.Vaswani001@umb.edu

women do not have control over their own bodies, if fetuses have rights that the women carrying them do not have, then gender equality is impossible and any improvement for women in psychology will also remain elusive. The more complicated answer, which we flesh out below, involves making the connection between the new maternalism and neoliberalism and broader discourses on women's equality and autonomy. We aim to show that medicalizing and pathologizing women's mental health needs and preferences reinforces the assumptions that ground both neoliberalism and the new maternalism.

In the United States, fetal protection laws are invoked within a neoliberal climate—one that holds individuals solely responsible for their well-being or emotional distress and that sees surveillance and monitoring as efficient and cost-effective ways to produce better health outcomes. Thus, it is not surprising that there are now mandates for routine depression screening for all women during pregnancy. Pregnant women are being arrested and forced to undergo invasive procedures or are being forced into mental health treatment at an ever increasing—and what many legal scholars are calling an alarming—rate (Soderberg, 2016). Paltrow and Flavin (2013) identified 413 pregnant women across the United States who were detained, arrested, or made to undergo forced intervention between 1973 and 2005, a statistic that is likely a very conservative estimate. The majority were poor and/or women of color and one out of five were still pregnant when action was taken against them. This trend persists—since the passage of Alabama's chemical endangerment statute in 2006, 479 women, a majority of them poor, had been arrested as of 2016 for exposing their unborn children to drugs (AL.com and ProPublica, 2016).

In light of these findings, we believe that issues related to pregnancy profiling, neoliberalism, and the new maternalism should be part of the conversation about the obstacles women face as they try to advance in the sciences. That is, within a neoliberal climate, individuals are not seen as being part of a larger polis or community whereby the state has an obligation to guarantee conditions that lead to well-being, gender equity, and a respect for human rights. Rather, individuals are seen as autonomous en-

trepreneurs solely responsible for their health and well-being and for ensuring that they are successful (Mills, 2013). Thus, competition and the logic of the marketplace are privileged over concerns about equity and social justice. The new maternalism reinforces the gender normative belief that women, not men, are inherently more capable of being the nurturing caretaker, while at the same time invoking a neoliberal discourse that women can “have it all,” “lean in,” and take responsibility for their workplace successes. Thus, the synergy created by the new maternalism and neoliberalism reinstalls “maternal-fetal conflict” and undermines political support for gender equity in the workplace. In the next two sections, we briefly describe a recent case of maternal fetal conflict and discuss how the new maternalism facilitates—and neoliberalism reinforces—pregnancy profiling.

Maternal-Fetal Conflict and the Policing of Pregnancy

In 2013, Alicia Beltran was arrested in her home and taken in handcuffs to St. Joseph's Hospital in West Bend, Wisconsin. She was around 14 weeks pregnant at the time. As described elsewhere (see, e.g., Henricks, 2015; Paltrow, 2014), she was put in shackles and placed in a holding cell and her request for a lawyer was denied. Despite this, the court appointed a legal guardian for her fetus. Ms. Beltran was being held under a chapter in Wisconsin's Children Code (Wisconsin's Children's Code, 48.133, 2017–2018), written for expectant mothers who “habitually lack self-control.” This provision,

colloquially known as the “cocaine mom” act, gives the state authority to forcibly confine pregnant women that use illegal substances or alcohol to a “severe degree” when there is a “substantial risk” of endangering the health of the fetus while in utero or after birth. (Henricks, 2015, p. 118)

Had Ms. Beltran consumed either an illegal substance or alcohol during her pregnancy? No. Before becoming pregnant, Ms. Beltran had been taking Suboxone because she had become addicted to Percocet. She finished the course of Suboxone treatment 3 days before her prenatal visit, which was confirmed by a urine test. At the visit, a physician's assistant recommended she resume Suboxone treatment, but Ms. Beltran maintained that she no longer had cravings

for the Percocet and did not want to expose her unborn child to medication she did not need and for which there was the potential of harm. Court documents (*Beltran v. Loenish, Strachota Bensen, & Doe*, 2013) state that about 2 weeks after this visit, a social worker came to Ms. Beltran's home and reiterated that she needed to continue taking Suboxone, which she refused once again. Two days later, police arrived at her home, handcuffed her and took her to a hospital where a doctor examined her and declared her and her pregnancy to be healthy. Despite this she was held at a country jail for hours, after which she was taken to courtroom where a Guardian Ad Litem had already been appointed for her 14-week fetus. Eventually she was transported to a women's drug treatment center where she remained against her will for over 2 months. The inpatient facility did not have medical or prenatal care.

This case, like many other arrests of pregnant women with limited financial means, flew under the radar for feminists and women's advocacy organizations.¹ This case also reinforces the myth that poor women, especially poor Black women, who use substances "cannot be educated or rehabilitated—only imprisoned," unlike their middle-class White counterparts who are viewed "as women who have erred but who can learn from their mistakes" (Bhargava, 2004, pp. 519–520). Additionally, it serves as a clear example of how the contemporary invention of "maternal fetal conflict" reinstalls the "bad mother" and how the "bad mother" creates a foil for "maternal fetal conflict."

Indeed, it has been widely recognized that the "policing of pregnancy" (Goodwin, 2016, 2017) and the monitoring of mothers is increasingly common. One of the most egregious examples involves the well-known Hospital for Sick Children in Toronto, Canada. For well over 20 years, the hospital's famous "Motherisk lab" used hair-strand tests, as "hard evidence" of substance abuse of pregnant women and mothers (<http://projects.thestar.com/motherisk/>). Not surprisingly, poor and indigenous women were among the most targeted and there were at least eight criminal cases against women and thousands of child protection cases, many of which resulted in women losing their parental rights and being separated from their children (Mendleson, 2017). An Independent Review in 2015 found that the hair testing was "inadequate

and unreliable for use in child protection and criminal proceedings" and that the use of this evidence had "serious implications for the fairness of those proceedings" (Lang, 2015, para 1). At the request of the Ontario government, an independent commission was convened and described the reliance on these flawed tests in child protection cases as "manifestly unfair and harmful."

Only after we had reviewed several hundred cases and talked with many people who were affected by the testing did we begin to understand the full extent of the harm it had caused. . . . The testing was imposed on people who were among the poorest and most vulnerable members of our society, with scant regard for due process of their rights to privacy and bodily integrity . . . The discovery that unreliable test results were used as expert evidence in child protection proceedings for so many years undermines the public's confidence in the fairness of our justice system, particularly with respect to how it treats vulnerable people. (Beaman, 2018)

In the United States, state laws and statutes have been modified or enacted that have dismantled women's rights, especially as they relate to the control they have over decisions made during pregnancy. For example, there has been a proliferation of aggressive antireproductive rights legislation, such as the Missouri Legislature passing an extreme abortion bans, HB 126. This bill criminalizes abortion as early as 8 weeks, bill HB 126. Additionally, there are now laws protecting pharmacists who refuse to provide women with contraceptives (see, e.g., Guttmacher Institute Report, 2019), and in 2018, 11 states have enacted legislation to restrict access to abortions (Nash, Gold, Mohammed, Ansari-Thomas, & Cappello, 2018). Additionally, states are enacting new statutes as well as reinterpreting existing ones designed to protect fetuses, giving rise to increased fetal rights at the expense of the constitutional rights of pregnant women (Duggan, 2016; Henricks, 2015). Fetal protection laws typically "refer to an array of legislation that purports to promote the protection of fetuses" (Goodwin, 2014, p. 787). However, as a number of feminist attor-

¹ A notable exception is the National Advocates for Pregnant Women, a nonprofit organization that works to protect the civil and human rights of women most likely to be targeted for state control and punishment—low income women, women of color, and drug-using women. Website: <http://www.advocatesforpregnantwomen.org/>.

neys have pointed out, these laws often undermine women's right to privacy, self-determination, and due process under the law. Rinat Dray, for example, was recently forced to have a cesarean: "after she exercised her right to medical decision-making and refused cesarean surgery, the hospital simply overruled her" (McClain-Freeney, 2018, para 2). Some have also suggested that prosecution of pregnancy-based offenses should be viewed as cruel and unusual punishment in violation of the Eighth Amendment (Ocen, 2017), because women are being held against their will and subjected to forced treatment.

What has given rise to the current assault on pregnant women's decision-making authority and the criminalization of their behavior under "fetal protection" laws? Although the answer to this question is complex and should also include consideration of the "new maternalism" (described in the next section), from a feminist jurisprudence perspective, it is possible to trace a modern trend in the law. As Henricks (2015) explained,

A fetus historically was viewed under the law as an inseparable part of the pregnant woman with no independent legal rights . . . The modern trend is to recognize the rights of an in utero fetus independent of its mother. Under such a system where both mother and fetus have independent rights, when a pregnant woman's wishes conflict with the medical advice of her prenatal care provider a maternal fetal conflict arises. To address this conflict, majority of states have enacted fetal protection laws offer varying degrees of protection for the fetus. (p. 121)

Historically, convictions for harms to fetuses could only be made after an actual birth, but more recent laws ignore this precedent (Murphy, 2014; Smith, 2000). Some legal scholars argue that the backlash against *Roe v. Wade* (1973) has opened the door for states to use laws to prosecute pregnant women for their actions during pregnancy (Duggan, 2016). These laws are disproportionately applied to poor women and women of color (Paltrow & Flavin, 2013; Roberts, 1997); "who becomes the subject of maternal policing and who is exempted" is a judgment call often made by health care providers (Goodwin, 2016, p. 23). It has become increasingly common for states to use existing laws that were originally developed to protect the fetus from acts of violence perpetrated against the mother, to position pregnant

women as perpetrators against their fetuses. For example, laws ranging from child abuse to controlled substance statutes and even homicides have been applied to prosecute and convict pregnant women for their actions taken while pregnant in the name of fetal protection (Meredith, 2016; Ocen, 2017); this has been referred to as "the pregnancy penalty" and "maternal policing" (Goodwin, 2016).

In 2014, Tennessee became the first state to enact a fetal assault statute (Tennessee Senate Bill 1391, 2014) criminalizing women for the outcomes of their pregnancies. This law allowed for a woman to be criminally prosecuted for assault if her child was born addicted to or harmed by a narcotic drug as a result of substance use during pregnancy. Consequently, it caused women who needed prenatal care the most to avoid seeking treatment for fear of being charged and arrested. The law had a "sunset clause" written into it; however, and after 2 years it was apparent that the law did more harm than good by deincincentivizing prenatal care. The Tennessee's General Assembly decided against extending it (American Civil Liberties Union of Tennessee, 2016). The neoliberal emphasis on personal responsibility and choice are apparent in this law; the relational needs, contexts that lead to substance use, and environmental factors that lead to poor pregnancy outcomes become obscured and replaced with a punitive and shaming approach. Thus, the state is exonerated from the responsibility of intervening on behalf of women at systemic levels (e.g., health care), and is not accountable for the most potent influence of poor outcomes of children from low-income neighborhoods—poverty (Hurt et al., 1995). Or as Hurt puts it, "Poverty is a more powerful influence on the outcome of inner-city children than gestational exposure to cocaine" (as cited in FitzGerald, 2013).

Neoliberalism and the New Maternalism

Neoliberalism has been described in various ways—as an economic policy, an ideology, and a cultural logic (Thorsen, 2010). Following historian of science Mirowski (2009), economist Ed Nik-Khah (2014), and psychologist Jeff Sugarman (2015), we believe that the term *neoliberalism* is best understood as a world view (i.e., a way of understanding the world and what it means to be human), and as a form of gov-

ernmentality in which citizenship, social justice, and collective forms of well-being are eroded (see also, [Rottenberg, 2013](#)). Thus, at the very moment that neoliberal policies transfer responsibility to individuals to provide for themselves (because they are seen as autonomous agents always acting in their own self-interest), there is a simultaneous increase in the amount of monitoring of their actions. As noted previously, within the logic of neoliberalism, individual responsibility and competition trump equity and citizenship. Neoliberalism includes, but also reaches beyond, economic policies (e.g., deregulation; cutting social programs and benefits to the disabled) and material conditions and reformulates the subject and psychological life ([Cosgrove & Karter, 2018](#)). It also obscures the connection between “depression” inequality, institutionalized racism, and the dismantling of social policies to protect citizens.

Thus, following [Foucault \(2010\)](#), neoliberalism can be seen as a biopolitical project, within which “fetal protection laws” work to discipline and normalize individuals and populations. That is, fetal protection laws, as a form of biopolitics, function to regulate, monitor, and surveil a population rather than an individual. Indeed, some feminist jurisprudence scholars have argued that fetal protection laws are grounded in a view of women as receptacles, not citizens, and thus from a neoliberal perspective it is not surprising that harm to the fetus is often cast in economic terms. For example, a recent report released by the [North Dakota Taskforce on Substance Exposed Newborns \(2016\)](#) frames “neonatal abstinence syndrome” (NAS) as neglect and requires that any professional who knows or suspects that a mother used a substance during pregnancy reports this to the Department of Human Services. One of their rationales for mandatory reporting is “children diagnosed with NAS incurred medical expenses estimated to cost North Dakota Medicaid at least \$1,332,000 in fiscal year 2013” (p. 6). The logic of this report is consistent with a neoliberal agenda that treats reproduction as an economic activity, and where children are seen as commodities (see, e.g., [McWhorter, 2010](#)). It is also consistent with a worldview that privileges market-based assessments of human worth.

Interestingly, this taskforce recognizes that criminalization of substance abuse during preg-

nancy leads to underutilization of prenatal care and worse outcomes for infants. However, the report also states that if charges of child abuse or neglect are found, “criminal charges may be brought against the perpetrator” (p. 12). They further discussed, but reached no consensus on, a potential “affirmative defense,” which could be available to mothers who agree to being under surveillance via home visits and drug testing. Abuse or neglect charges must be reported per this taskforce by a wide range of people, ranging from medical personnel, mental health workers, school staff, members of the clergy, and law enforcement officials; there is a virtual army of people to be on the look out for aberrant mothers.

The disciplining of women is also facilitated by the positioning of a pregnant woman with drug or alcohol addiction as an “aberrant other,” an antithesis. [Connolly \(2000\)](#) offered a description of the fictive ideal of the “normal” mother and the cultural scapegoating of homeless mothers that is incisive and highly relevant to pregnant women with drug and alcohol problems. She writes,

[There is] a cultural drive to monitor mothers, regulate them intensively. . . . the good mother and her antithesis are produced together through powerful cultural discourses. Such productions protect the impossible model of the good mother by translating [pregnant women with drug or alcohol problems] into cultural scapegoats. (pp. 49–50)

The cultural drive to monitor and regulate mothers is consistent with the new maternalism: If women are uniquely nurturing and have a special role to play in child rearing, they must be surveilled to make sure they are living up to the role of the “good mother.” In contrast to the old maternalism of the 18th and 19th centuries, which valorized the separate spheres approach and the “cult of domesticity” (see, e.g., [Cott, 1977](#)), the new maternalism is imbued with neoliberal ideals of choice, freedom, women’s agency, and ability to compete in the marketplace (see, e.g., [Adshead, 2017](#); [Duggan, 2016](#)). That is, women can be good entrepreneurs (witness all the mommy blogs) and work outside the home, but they must conform to standards of the ideal mother (always nurturing, being responsible for having an appropriate work and home balance, learning how to manage any resulting stress). The combination of these neoliberal ideals, along with the valorization and romanticizing of motherhood, is nonpartisan. As [Mezey and Pillard \(2012\)](#) astutely noted, Sarah

Palin's attempt to rally right-wing mothers with her spirited and folksy "Mama Grizzlies" rhetoric finds its analog in the leftwing digital community "Momsrising.org" which also valorizes motherhood—not parenthood—as having a special value. The end result is that motherhood is at once glorified and naturalized. It is glorified because "mothering" is a special ability and naturalized because it is of course only women who have this special ability. Insofar as only women can respond fully to their children's needs, if there is a conflict between work and home or if that balance becomes too stressful the assumption is that women must sacrifice their needs and career aspirations. In turn the new maternalism perpetuates "deep and unnecessary inequalities between men and women . . . reinforces traditional understandings of family . . . and diminishes chances of career advancement" (Mezey & Pillard, 2012, pp. 234, 280).

Additionally, insofar as the new maternalism continues to idolatry motherhood, it reinforces the fictive notion of the good mother and her evil counterpart. If, for example, a woman chooses work over home (e.g., choosing a demanding tenure-track job that necessitates missing school drop off and sporting events) she is often subtly demonized by school personnel and other parents. The valorizing/devaluing dynamic supports a cultural and legal framework that is ostensibly punitive toward pregnant women and mothers. Any ensuing fall from grace demands punishment and prosecution. Enter the now erstwhile Tennessee law (Tennessee Senate Bill 1391, 2014) that,

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.* (Duggan, 2016, p. 1323, emphasis added)

Fetal protection laws and the criminalization of pregnant women with drug and alcohol problems also fit with the neoliberal focus on choice, agency, and individual responsibility. In other words, when the new maternalism meets neoliberalism, addiction is not seen as a psychological disorder that warrants compassionate treatment. Rather, as Duggan (2016) noted,

addiction is a bad choice that a bad mother made—and for which she should be punished.

Implications of the Recent U.S. Preventive Services Task Force Recommendation for Routine Depression Screening During Pregnancy and the Postpartum Period

Insofar as neoliberalism is typically equated with a right-wing "less government" stance, mandatory mental health/depression screening may, on the surface, seem antithetical to a neoliberal agenda. However, neoliberalism should not be conflated with a partisan antigovernment position. In fact, mental health screening is consistent with neoliberalism in that efficiency is privileged over engagement, and productivity over citizenship. Indeed, questionnaire-based depression screening is congruent with an audit culture that uses technology to monitor the public, for screening is quite different than a clinical assessment of depression. The latter refers to health care providers using their clinical skills to closely observe and ask thoughtful, contextual questions about a patient's experience and current situation (Vaswani, Karter, Cosgrove, Peters, & Brodt, 2018). Screening for depression differs from clinical assessment in terms of both intent (early detection) and the mechanization of the process, for a questionnaire score, rather than collaborative decision-making, determines the next steps.

The 2016 U.S. Preventive Services Task Force (Siu et al., 2016) recommendation to routinely screen during pregnancy and the postpartum period was hailed by many as a long-overdue recognition of a pressing public health problem. Only a few clinicians, researchers, and public policymakers in the United States raised concerns about overdiagnosis and overtreatment (i.e., of harms outweighing benefits). However, contrary to what most clinicians and patients believe, screening can often do more harm than good (Cosgrove, Karter, Vaswani, & Thombs, 2018; Thombs, Ziegelstein, Roseman, Kloda, & Ioannidis, 2014). For example, the U.S. Preventive Services Task Force (2016) no longer recommends routine mammography for all women between the ages of 40–49 and above 75 years because the evidence showed that the harms outweighed the benefits. The task force groups in the United Kingdom and Canada, *looking at the same evidence*, did not rec-

commend screening for depression *for any age-group or population* (Joffres et al., 2013; U.K. National Screening Committee, 2015) because the risk–benefit ratio was poor. Recent research has demonstrated that the call in the United States for universal screening for depression for pregnant and postpartum women is not evidence based (Thombs, Arthurs, & Coronado-Montoya, 2014; Thombs, Kwakkenbos, Levis, & Benedetti, 2018) and will likely lead to an inflated number of false-positives and harm from overtreatment.

Moreover, as feminist science studies scholars have noted (see, e.g., Barad, 2007; Bohr, 1963; Mauthner, 2018), epistemic issues are at the heart of women’s health concerns. That is, an “object” such as depression can never be separated from the agencies of observation/apparatus used to measure it; it is impossible to fully separate measurement and description. Put another way, it is impossible to reveal the pre-determined or objective nature of the entity (e.g., “depression”) being measured/observed (Cosgrove & Wheeler, 2013). The failure to see the connection between measurement and description has profound consequences; to oversimplify a bit, what we measure for (or look for) does indeed determine what we find. From this vantage point, psychiatric tools, such as questionnaire-based screening instruments, could be seen as “performative apparatuses” (Mauthner, 2018, p. 35), and are therefore inseparable from the psychiatric condition they bring into being. As such, they fail to appreciate the material conditions (e.g., inadequate child care, poverty, discrimination, institutionalized racism) that can create distress during pregnancy.

Not only does routine questionnaire-based screening gloss the context in which women’s distress is experienced, but it also risks increasing the incidence of maternal fetal conflict, and concomitantly, forced treatment for poor women and women of color who are pregnant. In light of the increasing data on iatrogenic harm to the fetus and continuing negative effects on child development (Healy, Le Noury, & Mangin, 2016; Urato, 2015) from antidepressant exposure, such forced treatment may lead in some cases to negative health outcomes for the developing fetus and child.

Keeping these risks in mind, let us now reconsider the case of Alicia Beltran. Let us imagine that instead of refusing to take Suboxone,

she goes to her prenatal visit and screens positive for depression. Her screen identifies her as having mild depression and her health care provider accesses the American Psychiatric Association’s guideline for depression and sees that antidepressant medication is recommended for all levels of depression. Alicia’s doctor recommends that she go to therapy and/or take an antidepressant. Alicia does not have the financial resources for therapy nor does she have adequate child care for her other child to be able to attend therapy. Her doctor then recommends that she start taking an antidepressant and gives her a prescription. Concerned about the potential for harm to her developing child, Alicia does a little research and discovers that there is debate about whether antidepressants should be prescribed during pregnancy because of overstated claims of efficacy and studies showing poorer health outcomes for the both the fetuses and mothers (Urato, 2015). On her next, visit Alicia truthfully tells her provider that she did not get the prescription filled because she was worried about the potential for harm to her developing child. She acknowledges that she is certainly “stressed out” as a single mother, but does not want to take the medication. In response, the doctor begins to sternly lecture her on the risks associated with maternal depression, and tells Alicia that she needs to take the medication. Failure to do so will force him to report her to child protective services.

From this very brief vignette, it is all too easy to imagine how a woman’s refusal to take a licit and prescribed drug—especially if she were poor, a single mother, or a woman of color—could become a case of maternal–fetal conflict. Additionally, it is easy to see how seamless it would be to invoke fetal protection laws to force antidepressant treatment on disadvantaged pregnant women.

Conclusion: The Wrong Prescription for Women: “Mama Called the Doctor and the Doctor Said”

An important implication of the feminist truism “the personal is the political,” is that “equality in public life depends on equality in private life” (Mezey & Pillard, 2012, p. 296). The policing of pregnancy and the aggressive use of fetal protection laws to criminalize women’s actions during pregnancy clearly under-

mines women's autonomy and right to privacy (see, e.g., *Roe v. Wade*, 1973) and reinforces gender inequality in multiple domains. Moreover, the criminalization of alcohol and drug addiction in pregnant women and giving rights to the fetus that the mother does not have will likely lead to poor health outcomes for pregnant women and their children (American College of Obstetricians and Gynecologists, 2011, reaffirmed 2014). Of note is that fact that numerous medical groups such as the American Medical Association (1990), the American College of Obstetricians and Gynecologists (2011, reaffirmed 2014), the American Nurses Association (2017), and the American Psychiatric Association (2016) have developed clear position statements against criminalizing pregnant women with drug and alcohol problems. Unfortunately, these position statements have not provided a strong enough counter to pregnancy profiling and incarcerating women during pregnancy.

In the new maternalism, the "bad mother" is constructed through discourses and practices that reinstall gender normativity. Indeed, normative motherhood, much like normative femininity, requires a serene comportment uncontaminated by "negative" emotions such as frustration or anxiety (Cosgrove & Riddle, 2003; Vaswani et al., 2018). Historically, women's responses to stressful, unjust situations have been medicalized and pathologized (McHugh & Chrisler, 2015). In turn, this obscures the structural conditions that create gender inequality.

Therefore, it is no surprise that in the United States women are diagnosed with depression at almost twice the rate of men (Strine et al., 2008) and are prescribed antidepressants far more frequently than men are (Pratt, Brody, & Gu, 2017; Soderberg, 2016; Zhong et al., 2014). Certainly, it is important that pregnant women struggling with depression or anxiety be provided with opportunities to disclose what they are struggling with and obtain appropriate support and treatment. However, screening for depression, over and above a thorough, contextual, and individualized clinical assessment, reifies negative affect and pathologizes and depoliticizes women's experiences of pregnancy and maternal stress. In a neoliberal climate that forcefully policies pregnancy, questionnaire-based screening will result in glossing the material conditions (e.g., poor family leave policies, poverty)

that create distress during pregnancy. As we have seen via the hypothetical case described above, it may also result in prosecuting and imprisoning pregnant women and new mothers who dare to challenge what the doctor said.

References

- Adshead, G. M. J. (2017). Motherhood and apple pie: A U.K. perspective on mothers who misuse drugs. *Journal of the American Academy of Psychiatry and the Law*, 45, 204.
- AL.com and ProPublica. (2016). *Special report: Alabama leads nation in turning pregnant women into felons*. Retrieved from https://www.al.com/news/2015/09/when_the_womb_is_a_crime_scene.html
- American Civil Liberties Union of Tennessee. (2016). *Tennessee's fetal assault law sunsets July 1, 2016*. Retrieved from <http://www.aclu-tn.org/wp-content/uploads/2016/09/Fetal-Assault-Legal.pdf>
- American College of Obstetricians and Gynecologists. (2011, reaffirmed 2014). *Substance abuse reporting and pregnancy: The role of the obstetrician-gynecologist*. Retrieved from <https://www.acog.org/Clinical-Guidance-and-Publications/Committee-Opinions/Committee-on-Health-Care-for-Underserved-Women/Substance-Abuse-Reporting-and-Pregnancy-The-Role-of-the-Obstetrician-Gynecologist>
- American Medical Association. (1990). Legal interventions during pregnancy. Court-ordered medical treatments and legal penalties for potentially harmful behavior by pregnant women. *Journal of the American Medical Association*, 264, 2663-2670. <http://dx.doi.org/10.1001/jama.1990.03450200071034>
- American Nurses Association. (2017). *Position statement: Non-punitive treatment for pregnant and breast-feeding women with substance use disorders*. Retrieved from https://www.nursingworld.org/~4af078/globalassets/docs/ana/ethics/non_punitivetreatment-pregnantbreastfeedingwomen-sud.pdf
- American Psychiatric Association. (2016). *Position statement: Assuring the appropriate care of pregnant and newly-delivered women with substance use disorders*. Retrieved from <https://www.psychiatry.org/home/policy-finder>
- Barad, K. (2007). *Meeting the universe halfway*. Durham, United Kingdom: Duke University Press.
- Beaman, J. (2018). *Harmful impacts: The reliance on hair testing in child protection* (Report of the Motherisk Commission). Retrieved from <http://motheriskcommission.ca/wp-content/uploads/Report-of-the-Motherisk-Commission.pdf>

- Beltran v. Loenish, Strachota Bensen, & Doe, 28 U.S.C. § 2241. United States District Court Eastern District of Wisconsin (2013). Retrieved from http://advocatesforpregnantwomen.org/Beltran_Petition_Final_9%2026%202013.pdf
- Bhargava, S. (2004). Challenging punishment and privatization: Response to the conviction of Regina McKnight. *Harvard Civil Rights-Civil Liberties Law Review*, 39, 513–542.
- Bohr, N. (1963). *The philosophical writings of Niels Bohr: Vol. I. Atomic theory and the description of nature*. Woodbridge, CT: Oxbow Press.
- Connolly, D. (2000). *Homeless mothers: Face to face with women and poverty*. Minneapolis: University of Minnesota Press.
- Cosgrove, L., & Karter, J. (2018). The poison in the cure: Neoliberalism and contemporary movements in mental health. *Theory & Psychology*, 28, 669–683. <http://dx.doi.org/10.1177/0959354318796307>
- Cosgrove, L., Karter, J., Vaswani, A., & Thombs, B. (2018). Unexamined assumptions and unintended consequences of routine screening for depression. *Journal of Psychosomatic Research*, 109, 9–11. <http://dx.doi.org/10.1016/j.jpsychores.2018.03.007>
- Cosgrove, L., & Riddle, B. (2003). Constructions of femininity and experiences of menstrual distress. *Women and Health*, 38, 37–58. http://dx.doi.org/10.1300/J013v38n03_04
- Cosgrove, L., & Wheeler, E. (2013). Drug firms, the codification of diagnostic categories, and bias in clinical guidelines. *The Journal of Law, Medicine and Ethics*, 41, 644–653. <http://dx.doi.org/10.1111/jlme.12074>
- Cott, N. (1977). *Bonds of womanhood: Woman's sphere in New England 1780–1835*. New Haven, CT: Yale University Press.
- Duggan, E. (2016). A velvet hammer: The criminalization of motherhood and the new maternalism. *California Law Review*, 104, 1299–1332.
- FitzGerald, S. (2013, June 8). ‘Crack baby’ study ends with unexpected but clear result. *The Inquirer*. Retrieved from http://www.philly.com/philly/health/20130721_Crack_baby_study_ends_with_unexpected_but_clear_result.html
- Foucault, M. (2010). *The birth of biopolitics: Lectures at the Collège de France, 1978–1979*. New York, NY: Palgrave Macmillan.
- Goodwin, M. (2014). Fetal protection laws: Moral panic and the new constitutional battlefield. *California Law Review*. Advance online publication. <http://dx.doi.org/10.15779/Z38BJ8V>
- Goodwin, M. (2016). The pregnancy penalty. *Health Matrix: Journal of Law-Medicine*, 26, 17–39.
- Goodwin, M. (2017). How the criminalization of pregnancy robs women of reproductive autonomy. *The Hastings Center Report*, 47, S19–S27. <http://dx.doi.org/10.1002/hast.791>
- Guttmacher Institute Report. (2019). *Refusing to provide health services*. Retrieved from <https://www.guttmacher.org/state-policy/explore/refusing-provide-health-services>
- Healy, D., Le Noury, J., & Mangin, D. (2016). Links between serotonin reuptake inhibition during pregnancy and neurodevelopmental delay/spectrum disorders: A systematic review of epidemiological and physiological evidence. *International Journal of Risk and Safety in Medicine*, 28, 125–141. <http://dx.doi.org/10.3233/JRS-160726>
- Henricks, J. (2015). What to expect when you're expecting: Fetal protection laws that strip away the constitutional rights of pregnant women. *Boston College Journal of Law and Social Justice*, 35, 117–152.
- Hurt, H., Brodsky, N. L., Betancourt, L., Braitman, L. E., Malmud, E., & Giannetta, J. (1995). Cocaine-exposed children: Follow-up through 30 months. *Journal of Developmental and Behavioral Pediatrics*, 16, 29–35. <http://dx.doi.org/10.1097/00004703-199502000-00005>
- Joffres, M., Jaramillo, A., Dickinson, J., Lewin, G., Pottie, K., Shaw, E., . . . Tonelli, M. (2013). Recommendations on screening for depression in adults. *Canadian Medical Association Journal*, 185, 775–782. <http://dx.doi.org/10.1503/cmaj.130403>
- Lang, S. E. (2015). *Report of the Motherisk hair analysis independent review*. Retrieved from http://www.m-hair.ca/docs/default-source/default-document-library/motherisk_enbfb30b45b7f266cc881aff0000960f99.pdf?sfvrsn=2
- Mauthner, N. S. (2018). Screening, diagnosing, and medicating depression: Psychiatric methods and the making of mental disorder. *Women's Reproductive Health*, 5, 32–36. <http://dx.doi.org/10.1080/23293691.2018.1429393>
- McClain-Freeney, L. (2018). *Rinat Dray decision proves how hard it is for women subjected to forced surgeries to get justice*. New York, NY: National Advocates for Pregnant Women. Retrieved from http://advocatesforpregnantwomen.org/blog/2018/04/rinat_dray_decision_proves_how.php
- McHugh, M., & Chrisler, J. (2015). *The wrong prescription for women: How medicine and media create a “need” for treatments, drugs, and surgery*. Santa Barbara, CA: Praeger.
- McWhorter, L. (2010). Darwin's invisible hand: Feminism, reproductives, and Foucault's analysis of neoliberalism. *The Southern Journal of Philosophy*, 48, 43–63. <http://dx.doi.org/10.1111/j.2041-6962.2010.00020.x>

- Mendleson, R. (2017). *Separated by a hair*. Toronto star. Retrieved from <http://projects.thestar.com/motherisk/>
- Meredith, S. (2016). *Policing pregnancy: The law and ethics of obstetric conflict*. New York, NY: Routledge. <http://dx.doi.org/10.4324/9781315246604>
- Mezey, N., & Pillard, C. (2012). Against the new maternalism. *Michigan Journal of Gender and Law*, 18, 229–296.
- Mills, C. (2013). *Decolonizing global mental health: The psychiatrization of the majority world*. London, United Kingdom: Routledge.
- Mirowski, P. (2009). The neo-liberal thought collective. *Renewal: A Journal of Labour Politics*, 17, 26–36.
- Murphy, A. S. (2014). A survey of state fetal homicide laws and their potential applicability to pregnant women who harm their own fetuses. *Indiana Law Journal*, 89, 847–883.
- Nash, E., Gold, R. B., Mohammed, L., Ansari-Thomas, Z., & Cappello, O. (2018). *Laws affecting reproductive rights and health*. Retrieved from <https://www.guttmacher.org/article/2018/07/laws-affecting-reproductive-health-and-rights-state-policy-trends-midyear-2018>
- Nik-Khah, E. (2014). Neoliberal pharmaceutical science and the Chicago School of Economics. *Social Studies of Science*, 44, 489–517. <http://dx.doi.org/10.1177/0306312714520864>
- North Dakota Taskforce on Substance Exposed Newborns. (2015–2016). *Report to legislative management (2016)*. Retrieved from https://www.legis.nd.gov/files/committees/64-2014%20appendices/17_5140_03000appendixf.pdf
- Ocen, P. A. (2017). Birthing injustice: Pregnancy as status offense. *The George Washington Law Review*, 85, 1163–1223.
- Paltrow, L. M. (2014). *Press release: Wisconsin Alicia Beltran case federal district court avoids ruling on constitutionality*. Retrieved from http://advocatesforpregnantwomen.org/blog/2014/09/wisconsin_alicia_beltran_case.php
- Paltrow, L. M., & Flavin, J. (2013). Arrests of and forced interventions on pregnant women in the United States, 1973–2005: Implications for women's legal status and public health. *Journal of Health Politics, Policy and Law*, 38, 299–343. <http://dx.doi.org/10.1215/03616878-1966324>
- Pratt, L. A., Brody, D. J., & Gu, Q. (2017). Antidepressant use among persons aged 12 and over: United States, 2011–2014. *NCHS Data Brief*, 283, 1–8.
- Roberts, D. E. (1997). Unshackling black motherhood. *Michigan Law Review*, 95, 938–964. <http://dx.doi.org/10.2307/1290050>
- Roe v. Wade, 410 U.S. 113 (1973). Retrieved from <https://supreme.justia.com/cases/federal/us/410/113/>
- Rottenberg, C. (2013). The rise of neoliberal feminism. *Cultural Studies*, 28, 1–20. <http://dx.doi.org/10.1080/09502386.2013.857361>
- Siu, A. L., United States Preventive Services Task Force (USPSTF), Bibbins-Domingo, K., Grossman, D. C., Baumann, L. C., Davidson, K. W., . . . Pignone, M. P. (2016). Screening for depression in adults: U.S. preventive services task force recommendation statement. *Journal of the American Medical Association*, 315, 380–387. <http://dx.doi.org/10.1001/jama.2015.18392>
- Smith, S. L. (2000). Fetal homicide: Woman or fetus as victim? A survey of current state approaches and recommendations for future state application. *William and Mary Law Review*, 41, 1845–1884.
- Soderberg, V. (2016). More than receptacles: An international human rights analysis of criminalizing pregnancy in the United States. *Berkeley Journal of Gender, Law and Justice*, 31, 299–351.
- Strine, T. W., Mokdad, A. H., Balluz, L. S., Gonzalez, O., Crider, R., Berry, J. T., & Kroenke, K. (2008). Depression and anxiety in the United States: Findings from the 2006 behavioral risk factor surveillance system. *Psychiatric Services*, 59, 1383–1390. <http://dx.doi.org/10.1176/ps.2008.59.12.1383>
- Sugarman, J. (2015). Neoliberalism and psychological ethics. *Journal of Theoretical and Philosophical Psychology*, 35, 103–116. <http://dx.doi.org/10.1037/a0038960>
- Tennessee Senate Bill 1391. (2014). Retrieved from <https://legiscan.com/TN/text/SB1391/2013>
- Thombs, B. D., Arthurs, E., & Coronado-Montoya, S. (2014). Depression screening and patient outcomes in pregnancy or postpartum: A systematic review. *Journal of Psychosomatic Research*, 76, 433–446. <http://dx.doi.org/10.1016/j.jpsychores.2014.01.006>
- Thombs, B. D., Kwakkenbos, L., Levis, A. W., & Benedetti, A. (2018). Addressing overestimation of the prevalence of depression based on self-report screening questionnaires. *Canadian Medical Association Journal*, 190, E44–E49. <http://dx.doi.org/10.1503/cmaj.170691>
- Thombs, B. D., Ziegelstein, R. C., Roseman, M., Kloda, L. A., & Ioannidis, J. P. A. (2014). There are no randomized controlled trials that support the United States Preventive Services Task Force guideline on screening for depression in primary care: A systematic review. *BMC Medicine*, 12, 13. <http://dx.doi.org/10.1186/1741-7015-12-13>
- Thorsen, D. E. (2010). The neoliberal challenge: What is neoliberalism? *Contemporary Readings in Law and Social Justice*, 2, 188–214.
- U.K. National Screening Committee. (2015). *U.K. NSC recommendation on screening for depression*

- in adults*. Retrieved from <https://legacyscreening.phe.org.uk/depression>
- Urato, A. C. (2015). Are the SSRI antidepressants safe in pregnancy? Understanding the debate. *International Journal of Risk and Safety in Medicine*, 27, 93–99.
- U.S. Const. amend. IV. Retrieved from <https://www.govinfo.gov/content/pkg/GPO-CONAN-1992/pdf/GPO-CONAN-1992-10-5.pdf>
- U.S. Const. amend. VIII. Retrieved from <https://www.govinfo.gov/content/pkg/GPO-CONAN-2002/pdf/GPO-CONAN-2002-9-9.pdf>
- U.S. Preventive Services Task Force. (2016). *Breast cancer: Screening*. Retrieved from <https://www.uspreventiveservicestaskforce.org/Page/Document/UpdateSummaryFinal/breast-cancer-screening1>
- Vaswani, A., Karter, J., Cosgrove, L., Peters, S., & Brodt, M. (2018). Depression screening during pregnancy and the postpartum period: Enhancing informed consent practices. *Women's Reproductive Health*, 5, 1–12. <http://dx.doi.org/10.1080/23293691.2018.1429532>
- Wisconsin's Children's Code. 48.133 (2017–2018). Retrieved from <https://docs.legis.wisconsin.gov/statutes/statutes/48/III/133>
- Zhong, W., Kremers, H. M., Yawn, B. P., Bobo, W. V., St Sauver, J. L., Ebbert, J. O., . . . Rocca, W. A. (2014). Time trends of antidepressant drug prescriptions in men versus women in a geographically defined U.S. population. *Archives of Women's Mental Health*, 17, 485–492. <http://dx.doi.org/10.1007/s00737-014-0450-7>

Received March 31, 2019

Revision received September 3, 2019

Accepted September 4, 2019 ■