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

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By Eliza Duggan

ABSTRACT

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 pregnancy in the past decades, Tennessee is the first state to explicitly authorize prosecutors to bring criminal charges against pregnant women if they use drugs. This Comment suggests that this new maternal crime is reflective of a social and political paradigm called “maternalism,” which enforces 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 liberal mother-centric organizations such as MomsRising and through conservative mothers 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. The Comment first tracks the history of policing of pregnant women, with an eye for the effects this has had on women of color and poor women in particular. Next, it describes the progression of maternalism and the ways in which 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. By 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. Through the criminalization and policing of pregnant women’s behavior, women’s reproductive freedoms become increasingly constricted.

Table of Contents

I. Introduction ......................................................................................................................... 2
II. Tennessee’s Newest Criminals......................................................................................... 3
III. The Criminalization of Pregnancy: A Historical Perspective ...................................... 11
    A. From Personal Rights of Privacy to States’ Interests in Protecting the Unborn ....... 13
    B. Critiques of the Prosecution of Pregnant Women ...................................................... 17
IV. Maternalism and Criminal Motherhood ............................................................................... 21
    A. Old Maternalism ............................................................................................................. 23
    B. New Maternalism ........................................................................................................... 26
V. Tennessee’s Law & New Maternalism ................................................................................ 29
    A. Conscripting Women into Motherhood ......................................................................... 31
    B. Punishing “Bad” Mothers ............................................................................................ 35
VI. Conclusion .......................................................................................................................... 40
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*

I. 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 the ways in which women and mothers are supposed to behave may find themselves the subjects of not only cultural or social scrutiny, but 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 vestige of women in America. Though it can be incredibly oppressive, maternalist culture also allowed women to leave the home and become politically active. While American culture has become more modernized, this idea has evolved from an “old maternalism,” governed by coverture and homemaking, to “new maternalism,” which was developed in the twentieth and twenty-first centuries and affirms women’s roles as mothers in new ways. As American maternalism has taken hold, pregnancy has increasingly become a site of regulation over time. This paper argues that “new maternalism” is reflected in recent developments of the laws relating to pregnant women in Tennessee.

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 been especially the case for drug using pregnant women, who have increasingly become targets of prosecution over the past forty years. The paper will first focus on tracking the development of Tennessee’s latest version of its fetal assault statute. In the summer of 2014, Tennessee passed a new measure that empowers district attorneys to prosecute pregnant women if they use drugs,
as a crime separate and distinct from other drug-related offenses. 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 a practice. The next section tracks the criminalization of pregnancy, which has historically been used to target underprivileged mothers, such as poor women and women of color, and this law is certainly part of that history. Then, the paper explores the development of “maternalism” in American culture and its political and legal implications. Finally, the paper 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 to 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, American law in Tennessee (and other places where this is a practice) is able to effectively punish women who fail to conform and solidifies women’s roles as mothers on the whole.

II. Tennessee’s Newest Criminals

Two days after Mallory Loyola gave birth to a baby girl, she was arrested for simple assault of her newborn. The twenty-six-year old from Madisonville, Tennessee, and her two-day-old daughter both tested positive for amphetamines at the University of Tennessee Medical Center; Loyola admitted to having smoked methamphetamine three or four days before giving birth. Three days after the birth of her child, she was in jail. No stranger to the justice system, Loyola previously had been charged with drug offenses. However, what made this arrest

2 Id.
3 Id.
4 Id.
particularly newsworthy was that she was charged under a new Tennessee law that criminalizes drug use during pregnancy.\(^5\) Loyola was the first person to be arrested under the new law, and was released on a $2000 bond.\(^7\) On February 3, 2015, the charges against her were dropped after she completed a drug rehabilitation program as part of an agreement with authorities.\(^8\)

The Tennessee law—the first of its kind in the United States—criminalizes the use of illegal narcotics\(^9\) by a pregnant woman if her infant is born “addicted to or harmed by” the narcotic.\(^10\) 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 a half-century, prosecutors have interpreted various assault


\(^6\) Johnson, supra note 1.

\(^7\) Id.

\(^8\) WBIR Staff, Mom’s Charges in Prenatal Drug Case Dropped After She Completes Program, WBIR.COM (Feb. 6, 2015), http://www.wbir.com/story/news/2015/02/06/moms-charge-in-newborn-drug-case-dropped-after-she-completes-program/23002693/. See also Jeff Mondlock, Program Reacts to East TN Mother’s Dismissed Charges, WBIR (Feb. 6, 2015), http://www.wbir.com/story/news/2015/02/06/susannahs-house-reacts-to-east-tn-mothers-dismissed-charges/23007605/. Directors of the Knoxville, Tennessee rehabilitation program that Loyola was in, Susannah’s House, were glad that the charges were dropped against her. 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.

\(^9\) 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 Mothers, THE TENNESSEAN (Apr. 14, 2015). As of April 2015, the amended bill’s sponsor, Rep. Terri Lynn Weaver, has introduced another amendment to make clear that women whose newborns test positive for methamphetamine can be prosecuted. 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.

and child abuse statutes across the country to charge women with crimes related to their pregnancies.\textsuperscript{11} Some judges also have sentenced pregnant women to prison for drug offenses for which they would be ordinarily released on bond.\textsuperscript{12} Pregnant drug addicts in particular have been targeted for prosecution and punishment, as the protection of the fetus has justified considerable state intervention in the lives of pregnant women.\textsuperscript{13}

This section chronicles the development of Tennessee’s fetal assault statute—designed to make criminal defendants liable for attacks to pregnant women that result in the loss of the fetus\textsuperscript{14}—which in 2014 was amended to make drug use while pregnant a crime. While other states have had fetal assault statutes on the books for many years, 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.\textsuperscript{15} The resulting arrests and prosecutions of pregnant women are not unheard of in American criminal law;\textsuperscript{16} however, prosecutors can now categorically target Tennessee’s newest criminals. This has major consequences not only for pregnant drug users, but for the reproductive freedom of all women.

a. The Original 2011 Statute

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\textsuperscript{11} See Lynn M. Paltrow & Jeanne Flavin, \textit{Arrests and Forced Interventions of Pregnant Women in the United States, 1973-2005: Implications for Women’s Legal Status and Public Health}, 38 \textit{J. Health Pol’y, 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”).

\textsuperscript{12} See, e.g., Heather Lynn Peters, \textit{Pregnant, Incarcerated, and Addicted to Heroin}, MICHIGANLIVE.COM (May 27, 2014) http://www.mlive.com/news/muskegon/index.ssf/2014/05/pregnant_incarcerated_and_addi_1.html (a pregnant heroin addict was sentenced 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].”).

\textsuperscript{13} See Paltrow & Flavin, \textit{supra} note 10.

\textsuperscript{14} TENN. CODE ANN. § 39-13-107 (West 2014).


\textsuperscript{16} See infra Part III.
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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. Like many similar fetal assault statutes, the law was actually a definitional change to the state’s criminal assault statute to include the unborn in the list of potential victims. Thus the terms for a victim of assault—“‘another,’ ‘individual,’ ‘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.” The statute made an unborn fetus at any stage of viability a “person” capable of victimhood within the meaning of the assault statute. At the same time, the Tennessee legislature made the same change to the definition of the word “person” to include fetuses in the state’s criminal homicide statute. The Tennessee legislature therefore enabled district attorneys to prosecute people whose attacks on a pregnant woman led to the harm to or death 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.

b. The 2012 Statute Update

Although Tennessee’s legislature understood that the fetal assault statute originally intended to target third-party perpetrators who harmed pregnant women, it also anticipated the

18 See Fetal Homicide Laws, infra note 61.
19 Id.
20 Id.
22 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.
potential use of its new fetal homicide law against pregnant women themselves.\textsuperscript{23} Some legislators were concerned that some 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 them.\textsuperscript{24} In anticipation of such charges (which were condemned as contrary to the “protective” intention of the statute) the legislature created a provision to prevent the prosecution of pregnant women for the outcome of their pregnancies in 2012.\textsuperscript{25} The 2012 law stated: “Nothing in [the statute] shall apply to \textit{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.”\textsuperscript{26} This provision 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 using illegal drugs, were protected.\textsuperscript{27} 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, not perpetrators against their fetuses.

c. The 2014 Amendment

Just two years later, the Tennessee legislature made an about-face, and removed the protections for pregnant women who used drugs from the fetal assault statute.\textsuperscript{28} Although the 2012 version of the law contained a provision that explicitly stated that pregnant women were

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\textsuperscript{23} \text{TENN. CODE ANN. 39-13-107(c) (West 2012) (amended 2014).} \\
\textsuperscript{24} \text{See Tennessee Bill Summary, 2012 Regular Session, H.B. 3517, Feb. 29, 2012 (West 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).} \\
\textsuperscript{25} \text{TENN. CODE ANN. 39-13-107(c) (West 2012) (amended 2014).} \\
\textsuperscript{26} \text{Id. (emphasis added).} \\
\textsuperscript{27} \text{Id.} \\
\textsuperscript{28} \text{TENN. CODE ANN. § 39-13-107 (West 2014).}
\end{flushleft}
not meant to be the targets of prosecution, the new amendment made pregnant women subject to prosecution if they used drugs during their pregnancies. The amendment to Tennessee’s Annotated Code § 39-13-107 expanded the victim list of the criminal assault statute such that “a human embryo or fetus at any stage of gestation in utero” is considered a victim/person. These assaultive offenses include simple assault, aggravated assault, reckless endangerment, vehicular assault, and criminal exposure of another to HIV, among others. In the spring of 2014, Tennessee House Representative Terri Lynn Weaver achieved this change through the passage of her bill to amend the fetal assault statute, which made two significant changes to the law.

First, it altered the line in the 2012 version that provided protection to pregnant women, which read, “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 ….” The new 2014 language of subdivision (c)(1) provided that there was only protection for “any lawful act or lawful omission by a pregnant woman … .” So, while the protective provision is still in the statute, the legislature expanded the world of possibilities for the prosecution of pregnant women (beyond narcotics users, 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 drugs. 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

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29 Id.
30 Id.
31 Id.
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.\(^{37}\)

The second 2014 addition to Tennessee’s fetal assault statute is an exception to the (now less potent) protection for pregnant women; 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 a result of her illegal use of a narcotic drug taken while pregnant.”\(^{38}\) The intention of the statute is to allow for the prosecution of women under the misdemeanor assault statute if the child is born “addicted to or harmed by”\(^{39}\) her narcotic drug use during pregnancy. This is the first law in the country to explicitly authorize prosecutor’s to charge women for using drugs during their pregnancies.

\(^{37}\) There have been many cases in which women are 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 with 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, MEDICAL DAILY (Aug. 4, 2013), http://www.medicaldaily.com/bei-bei-shuai-freed-murder-charges-dropped-against-indiana-woman-who-ate-rat-poison-while-pregnant. 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.

\(^{38}\) TENN. CODE ANN. § 39-13-107(c)(2) (West 2014).

\(^{39}\) While the focus of this paper 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 and psychological as well as physical condition. See Prenatal Exposure to Illegal Drugs and Alcohol: Media Hype and Enduring Myths Are Not Supported By Science, NATIONAL ADVOCATES FOR PREGNANT WOMEN (Mar. 16, 2010), available at http://advocatesforpregnantwomen.org/2010%20drugmyth%20factsheet%20v3.pdf. 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. Id. No studies have confirmed any long-term, harmful effects of NAS. Id. A law such as this which assumes the “harm” to infants from maternal prenatal drug use
The amendment to the statute also included an affirmative defense for a mother who was prosecuted under the newest 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.”40 Although this affirmative defense might appear to reduce the harshness of the law, it has already faced criticisms.41 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 also that she would have access to a drug treatment program—assumptions that in many cases are false.42 Second, the defense refers to a “completed” drug program.43 In many circumstances, it would not be possible to complete such treatment in a short period of time.44 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.”45 Thus, even though Tennessee’s newest amendment to its fetal assault statute contains some language designed to protect some drug-using pregnant women seeking

44 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 26 (quoting Dr. Robert Newman, president emeritus at New York’s Beth Israel Medical Center, who likened methadone treatment to insulin treatment for diabetes and said it can often be “a lifelong process.”).
45 Id.
help for their addictions, it is unclear how effective the measure will be at actually accomplishing this task.\textsuperscript{46}

In the following sections, this paper provides historical context for the ways in which fetal rights have been strengthened over time. Next, it offers past feminist critiques of the use of the law to increase fetal rights, and the ways in which racism and classism have informed legal action taken against pregnant women. Finally, it argues that the new Tennessee criminal statute—the first to explicitly criminalize drug use during pregnancy—is reflective of a sociopolitical movement called “new maternalism,” which supports the rights of the unborn and articulates a particular vision of motherhood by punishing “bad” mothers who take drugs during their pregnancies.

III. 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.\textsuperscript{47} Historian Reva Siegel documented the anti-abortion movement in this period, tracing its roots to physicians who were working to oust midwives from the sphere of childbirth and enhancing the statute of their profession by asserting “scientific authority of the inception of life.”\textsuperscript{48} The doctors began to work with state legislatures to reform state codes and criminalize abortion.\textsuperscript{49} This contradicted the norms of the era, since abortion was considered a practice of married women to

\textsuperscript{46} This law includes a sunset provision, which sets it to expire in the year 2016 for reevaluation. Tony Gonzalez, \textit{On Pregnant Drug Abuse, Lawmakers Whiff on Data}, \textit{The Tennessean} (Apr. 11, 2015). 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 had been no consistent tracking. \textit{Id.} Undoubtedly, this will make the task of evaluating the law’s efficacy in 2016 even more challenging.


\textsuperscript{48} \textit{Id.} at 284.

\textsuperscript{49} \textit{Id.} at 285.
control family size and avoid dangerous pregnancies. These moves towards criminalization of abortion therefore 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. One of these strains, which continued the anti-abortion movement that began with physicians, was the Voluntary Motherhood movement. While the name of the movement might suggest that these feminists would be advocates for birth control and abortion, they actually opposed it. Historian Linda Gordon explains that the Voluntary Motherhood advocates “realized that while women needed freedom from excessive childbearing, they also needed the respect and self-respect motherhood brought.” Additionally, they did not view birth control or abortion as supportive of female freedom from “male sexual tyranny.” 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 say no to sex with their husbands. Gordon posits that feminist reproductive freedom movements were 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.

Gordon further notes that feminists began to develop different attitudes towards birth control and abortion during the second wave of feminism, when there was a greater need for

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50 Id. at 292; see also infra Section IV.A.
52 Id. at 45.
53 Id.
54 Id.
55 Id.
56 Id.
57 Id.
women to have reproductive control.\textsuperscript{58} There was more sexual activity, there were more women as the heads of households, and contraception was overall underdeveloped.\textsuperscript{59} As second-wave feminists fought for women’s rights the 1960s and 1970s and 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 \textit{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.\textsuperscript{60} 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.

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.

\textbf{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.\textsuperscript{61} Historically, the unborn were not considered people for purposes of the law, a rule that was firmly laid out in \textit{Roe v. Wade} in 1973.\textsuperscript{62} However, beginning around the 1970s and 1980s, states 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.\textsuperscript{63}

\textsuperscript{58} Id. at 49.
\textsuperscript{59} Id.
\textsuperscript{60} See \textsc{Sara Dubow, Ourselves Unborn: A History of the Fetus in Modern America}, 112-153 (2011) (discussing the defense of fetal rights in the 1970s through the 1990s).
\textsuperscript{62} 410 U.S. 113, 162 (1973) (“In short, the unborn have never been recognized in the law as persons in the whole sense.”).
\textsuperscript{63} See \textsc{Paltrow & Flavin, supra} note 11, 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
The California Supreme Court in *Keeler v. Superior Court*,\(^{64}\) for example, noted that at common law, the loss of a fetus was not considered murder unless an infant had been born alive.\(^{65}\) This was not only important in the regulation of abortion and the support of women’s right to choose, but it acknowledged a broad right to privacy that declared women were the sole proprietors of their bodies. It 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.

For instance, the Supreme Court of Ohio declared that an unborn fetus was not a “person” for the purposes of a vehicular homicide statute.\(^{66}\) and subsequently affirmed that position when the state prosecuted a pregnant woman for “child endangerment” because she used cocaine before the infant was born.\(^{67}\) 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.\(^{68}\) Critically, Dunn was charged under a law that prohibited “criminal mistreatment of a child.”\(^{69}\) In Wisconsin, a woman was charged with attempted first-degree homicide for drinking alcohol while pregnant in 1999, but the Wisconsin Court of Appeals similarly declared the “legislature did not intend for these statutes to apply to actions directed against an unborn child.”\(^{70}\)

Despite these decisions, by the 1990s, state legislatures and some courts took it upon themselves to remedy what was perceived as a gap in the law: when a pregnant woman was

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\(^{64}\) 2 Cal.3d 619 (Cal. 1970).
\(^{65}\) *Id.* at 626.
\(^{66}\) State v. Dickinson, 275 N.E.2d 599, 600 (Ohio 1971).
\(^{67}\) State v. Gray, 584 N.E.2d 710, 712 (Ohio 1992).
\(^{69}\) *Id.*
attacked and she lost her fetus, prosecutors could not use homicide statutes to prosecute the defendant on behalf of the fetus.\textsuperscript{71} The effort 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 and in the late 1990s and early 2000s,\textsuperscript{72} as Americans started agitating for—and getting—laws that criminalized behavior that affected fetuses.\textsuperscript{73} For example, in 2006, the Alabama legislature updated its criminal statutes for murder, manslaughter, negligent homicide, and assault to include the unborn, “regardless of viability,” as a person or human being.\textsuperscript{74} The Arizona state legislature amended similar criminal statutes in 2005 to consider viable and nonviable fetuses as children under the age of twelve for criminal sentencing purposes.\textsuperscript{75}

In total, thirty-eight states have such fetal homicide laws,\textsuperscript{76} though 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 when used against pregnant women who use drugs.\textsuperscript{77} These laws represent a “recent era of maternal policing,”\textsuperscript{78} 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

\textsuperscript{72} See Dubow, supra note 60, at 112 (discussing the rise of fetal rights in media and popular culture in the 1990s).
\textsuperscript{74} \textit{ALA. CODE} \textsection 13A-6-1 (2006).
\textsuperscript{75} \textit{ARIZ. REV. STAT. ANN.} \textsection 13-1102, \textsection 13-1103, \textsection 13-1104 and \textsection 13-1105 (2014).
\textsuperscript{76} \textit{Fetal Homicide Laws, supra} note 73.
\textsuperscript{77} 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, 373 (Ala. Crim. App. 2011) (holding that Alabama’s chemical endangerment of a child statute applies to unborn fetuses).
\textsuperscript{78} Goodwin, \textit{supra} note 71, at 789.
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.\(^{79}\)

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, discussed above, some state courts began to be much more receptive to such arguments. For instance, in *Johnson v. State*,\(^{80}\) a Florida woman was convicted of delivering drugs to a minor through her infant’s umbilical cord during the seconds that between her baby’s delivery and when the cord was cut. The Florida Supreme Court ultimately reversed Johnson’s conviction, determining that not only did the Florida legislature not intend for the drug delivery statute to apply to pregnant women who take drugs, but also that such an interpretation of the law would go against public policy.\(^{81}\) Quoting the American Medical Association, the court expressed concern that “criminal penalties may exacerbate the harm done to fetal health by deterring pregnant substance abusers from obtaining help or care from either the health or public welfare professions.”\(^{82}\) The court therefore determined that by threatening drug-using pregnant women with prosecution was not in the best interest of the public welfare.\(^{83}\)

Similarly, in *Whitner v. State*,\(^{84}\) 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.\(^{85}\) Whitner appealed her case to the South Carolina Supreme Court, which found no “rational basis

\(^{79}\) DUBOW, *supra* note 60, at 152.

\(^{80}\) 602 So. 2d 1288, 1288 (Fla. 1992).

\(^{81}\) *Id.*

\(^{82}\) *Id.* at 1296.

\(^{83}\) *Id.*

\(^{84}\) 492 S.E.2d 777, 777 (S.C. 1997).

\(^{85}\) *Id.* at 778-79.
for finding a viable fetus is not a ‘person’ in the present context.” 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. The court, however, declined to entertain such a “potential parade of horribles,” and instead focused on the fact that Whitner had ingested crack cocaine during pregnancy. While the court admitted that “precise effects of maternal crack use during pregnancy are somewhat unclear,” the court looked to the “well documented” information “within the realm of public knowledge” that such cocaine use “can cause serious harm to the viable unborn child.” Later, this “serious harm” from crack cocaine was essentially debunked as myth; however, the effect of the characterization of fetuses as persons was left intact and continued to animate the prosecutions of pregnant women.

B. Critiques of the Prosecution of Pregnant Women

Feminist critics have been aware of the prosecution of pregnant women for decades. As the anti-abortion backlash against Roe v. Wade gained strength, so did the notion that the unborn had rights that needed protection. 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, some feminists noticed that the increasingly popular laws designed to “protect” the unborn were being used disproportionately to target pregnant women of color.

One of the most well known critics of this trend is Dorothy Roberts, who argued that

86 Id. at 780.
87 Id. at 782.
88 Id.
89 Id. (emphasis added).
90 See Winerip, infra note 99.
91 See Paltrow & Flavin, supra note 11.
93 See Goodwin, supra note 71, at 784-85 (discussing various feminist critiques of government interference with pregnant drug users).
prosecution of drug-using pregnant women intended to vilify women of color. In her acclaimed work *Killing the Black Body*, Roberts tracked not only the rise of the prosecution of pregnant women, but ties it directly to the disparagement of black women and black reproduction. As Roberts explained, the 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. In the media’s portrayal of the “epidemic,” the relevant characters—the addicted mother and her child—were almost always black. The meme of immoral or irresponsible black motherhood relied on a potent combination of science and racial and gender stereotypes that portrayed black women as indolent and selfish. These characterizations were used to create the popular culture myth of the “crack baby,” which helped to support the prosecutions and convictions of pregnant women—especially low-income black women who used crack cocaine.

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. She noted that poor, black women bore “the brunt of prosecutors’ punitive approach.” These characterizations of black women, however, missed the mark. Roberts pointed out that black women do not actually use more substances considered dangerous to fetuses than white women do; rather, a combination of classism and racism leads to substantially

95 Id. at 156.
96 Id.
97 Id.
98 Id.
100 Roberts, supra note 47, at 156-57.
101 ROBERTS, supra note 94, at 162-171 (discussing primarily the prosecutions of Jennifer Johnson in Florida and Cornelia Whitner in South Carolina for taking drugs during their pregnancies).
102 Id. at 171.
higher rates of black women who are reported to authorities and criminally prosecuted.\textsuperscript{103} Noting that there is 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 purposes?”\textsuperscript{104} 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 created a perfect setting to target mothers who historically have been criticized and dehumanized: poor women of color. Such racist oppression of the reproductive freedoms of women of color shape the meaning of reproductive freedom in America and serve the interests of white supremacy.\textsuperscript{105} By targeting poor women of color as subjects of criminal prosecution—which often not only leads to their incarceration but also taking their children out of their care and putting them into the care of the state—women of color are disempowered and controlled, which bolsters white hegemony.

Roberts’ 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 protecting “defenseless children.”\textsuperscript{106} the law holds out drug users as the ultimate “bad mothers.” Roberts instructed us to be skeptical of “prosecutions of black women on the pretext of protecting unborn black children from harm.”\textsuperscript{107}

Although the sample is small since the law is still relatively new, there are signs of racial disparity in the Tennessee prosecutions thus far. As of April 2015, there were at least thirty cases of women charged in Tennessee under the new law according to a survey of district attorneys by

\textsuperscript{103} Id. at 171-175.  
\textsuperscript{104} Id. at 177.  
\textsuperscript{105} Id. at 7-8.  
\textsuperscript{106} See Video, 62nd Legislative Day, Tennessee General Assembly (Apr. 9, 2014) (quoting Terri Lynn Weaver representing the bill on the Tennessee House floor).  
\textsuperscript{107} ROBERTS, supra note 94, at 185.
the Department of Safety and Homeland Security.108 While 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 they seem to all be low-income.109

Additionally, those who promoted the Tennessee measure used 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
makes a mother a criminal if her infant is born “addicted to or harmed by” the narcotic she
ingested.110 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.111
Such disregard for scientific evidence and basic medical terminology is indicative of the law’s
more sinister motives to seek out and punish certain non-conforming mothers. Dorothy Roberts’
analysis suggests that the law is aligned with the “crack baby” logic used to prosecute poor
women of color in particular.112

The Tennessee law that makes a unique crime for pregnant woman who use drugs
follows in the tradition of criminalizing certain women who become pregnant. Although this law
is the first of its kind, this type of prosecution is in fact not new. Roberts’ analysis of this trend
introduced the effects that race and class play in the prosecutions of these women. The

111 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
http://www.medicalnewstoday.com/info/addiction/. See also Lynn Paltrow & Katherine Jack, Pregnant Women,
“addicted” to substances).
112 ROBERTS, supra note 94, at 177.
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 was largely used to target poor women of color—namely, prosecuting drug-using pregnant women—the law is consistent with Roberts’ view that this is largely a tactic used to subjugate women of color and poor women in American law and culture.  

IV. Maternalism and Criminal Motherhood

Dorothy Roberts’ arguments focused on the way that fetal protection laws are aimed at policing black women’s reproduction. While these views help illuminate an important aspect of the influence of these laws, the impact of fetal protection laws are not concentrated solely on 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.Maternalism, in its various evolutions, offers another lens through which to view fetal protection statutes. This Part discusses the historical context for and evolution of maternalism—a cultural paradigm that encourages women to put motherhood above all else—in American culture. Then, Part V argues that Tennessee’s newest version of its fetal assault statute reflects and enforces “new maternalism,” which articulates the ways in which women should perform motherhood in modern American culture.

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113 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 109.
114 See ROBERTS, supra note 94.
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.”\(^{116}\) 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 gives credit to 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 entitled *Against the New Maternalism*, Professors Naomi Mezey and Cornelia T. L. Pillard discuss maternalism and how it generally works to promote “motherhood—and not parenthood or caregiving—as a value, an identity, and a site of political mobilization.”\(^{117}\) The authors identify two phases of maternalism in American culture, described below: “old maternalism” of the nineteenth century, and “new maternalism” of the twentieth and twenty-first centuries.\(^{118}\) Old maternalism, rooted in the cult of domesticity, was “wedded 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.”\(^{119}\) New maternalism, on the other hand, has developed in a modern context in which such obvious articulations of women’s roles in the home may not be as widely accepted.\(^{120}\) However, as Mezey and Pillard explain, the new maternalism replays cultural assumptions about motherhood, and in so doing “retreats from the possibility of gender equality in care work precisely when it seems most attainable.”\(^{121}\) New maternalism, therefore, continues in a tradition of enforcing motherhood on women.\(^{122}\) However, new maternalism’s modern, appealing articulations offer the misleading conception that motherhood

\(^{116}\) Id.


\(^{118}\) See id.


\(^{120}\) Mezey & Pillard, supra note 78, at 234.

\(^{121}\) Id. at 283.

\(^{122}\) Id.
is always a choice, which makes it less forgiving of those who fail to perform motherhood in the prescribed manner.\textsuperscript{123}

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 American economy. As the Industrial Revolution transformed American working lives from an agrarian to an industrial model, work became more gendered.\textsuperscript{124} While men were sent to work outside of the home, women were assigned to the home or other people’s homes as their “sphere” of work and the cult of domesticity was born.\textsuperscript{125} This division of labor created an environment in which women’s roles as homemakers, wives, and mothers came to be seen as “natural.”\textsuperscript{126}

The prioritization of motherhood was thus reflected in American society. Professor Barbara Welter identified the nineteenth-century cult of domesticity or “cult of true womanhood,”\textsuperscript{127} which identified the “true woman” as the pinnacle of female piety and virtue in Western civilization.\textsuperscript{128} 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.”\textsuperscript{129} If a woman performed her domestic duties to her husband and her children, she also became a beacon of American patriotism: she “stay[ed] home with her Bible and a well-balanced mind” and “raise[d] her sons to be good Americans.”\textsuperscript{130} In 1908, President Theodore

\begin{thebibliography}{9}
\bibitem{123} \textit{Id.}
\bibitem{124} \textit{See Nancy F. Cott, The Bonds of Womanhood: “Woman’s Sphere” in New England, 1780-1835 1-2 (1977).}
\bibitem{125} \textit{Id.}
\bibitem{126} \textit{See, generally, Theda Skocpol, Protecting Soldiers and Mothers: The Political Origins of Social Policy in the United States (1992).}
\bibitem{128} \textit{Id.} at 151-152.
\bibitem{129} \textit{Id.} at 162.
\bibitem{130} \textit{Id.} at 172.
\end{thebibliography}
Roosevelt declared, “Mother is the one supreme national asset.” He encouraged women to agitate for social reforms that would uphold maternal values, and opined that mothers were uniquely able to build the nation through their families.

Motherhood was not only held as important in society, but its significance in women’s lives also inspired women to organize to protect and reinforce it. Women were able to enter the public arena through social and political organizations that promoted a vision of motherhood and morality. Middle- and upper-class women rallied to create a movement of “a maternal public mind,” extending their duty to uphold motherly values within their individual families to American society as a whole. This level of political engagement, underwritten by maternal domesticity, was subject to 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 set 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 “women movements” in the world. Those movements, in turn, set the stage for the maternalist social policy breakthroughs of the Progressive Era …

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

Old maternalism not only encouraged women generally to be mothers, but specifically identified white, middle- and upper-class women as those who should be reproducing. It was important not only to make sure that women became mothers, but to preserve the power of the

132 Id.
133 Id. (quoting a spokeswoman for the National Congress of Mothers, speaking in 1911).
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 in order to ensure that white, European, Protestant women reproduced.137 President Theodore Roosevelt, who so fervently supported mothers as a “supreme national asset,”138 also railed against “race criminals:” middle and upper class white women who would did not wish to be mothers, and thus did not contribute to the population of American society.139 The eugenics movement not only decried abortion for white women, but supported birth control and sterilization for poor women and women of color.140 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.”141 The anxiety that white, middle- and upper-class Americans felt about the perceived decline of their portion of the population was a key aspect of the old maternalism, which promoted the motherhood of their women and discouraged motherhood in marginalized groups.

Much of the explicit prioritization of gender divisions that characterized the old maternalism has been replaced by a more egalitarian view of the relationship between men and women.142 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

137 JEANNE FLAVIN, OUR BODIES, OUR CRIMES 16 (2009).
138 See 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. He argued, “no race has any chance to win a great place [in the world] unless it consists of good breeders …”).
139 Id.
141 Id.
142 Mezey & Pillard, supra note 117 at 242.
motherhood and plays a key role in American society.\textsuperscript{143} The following section illustrates how this next phase of maternalism is having a profound effect on the law today and the development of increased maternal policing.

B. New Maternalism

Professors Mezey and Pillard have identified the shift in American culture from old maternalism to twenty-first century “new maternalism.”\textsuperscript{144} New maternalism, they argue, follows old maternalism in that it reinforces the unequal parenting duties of mothers versus fathers.\textsuperscript{145} However, because of the movement that American society has made towards a more equal vision of men and women, new maternalism envisions motherhood less as the absolute destiny of women and more as a choice.\textsuperscript{146} New maternalism is appealing in that it values motherhood, correcting the “myopic glorification—by mainstream society as well as some feminists—of values and pursuits traditionally associated with and historically reserved for men.”\textsuperscript{147} 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.”\textsuperscript{148} 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.”\textsuperscript{149}

Mezey and Pillard locate new maternalism in some political movements and

\textsuperscript{143} Id. at 241.
\textsuperscript{144} Id. at 234.
\textsuperscript{145} Id.
\textsuperscript{146} Id. For a discussion of the some of the misconceptions surrounding the choices that women may or may not have, see Lynn 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).
\textsuperscript{147} Id. at 236.
\textsuperscript{148} Id.
\textsuperscript{149} Id. at 249.
organizations, but they also find it in the lighthearted pontificating of “mommy blogs” and the proliferation of such Internet media as a site of maternal bonding, sharing, and advice-giving in popular culture.\textsuperscript{150} The new maternalist activist is more modern and tech-savvy than her nineteenth-century counterparts,\textsuperscript{151} but “each of the rights and benefits she seeks, even in her own job, are to enable her better to care for her children.”\textsuperscript{152} New maternalism is neither liberal nor conservative; however, women on both ends of the political spectrum have used motherhood to advance various political goals.\textsuperscript{153} Liberal maternalism takes the form of organizations like MomsRising, promoting causes such as paid family leave, non-toxic environments, flexible work spaces, gun safety, and universal healthcare.\textsuperscript{154} Conservative maternalism, on the other hand, finds its champions in those who identify with Sarah Palin and the “mama grizzlies.”\textsuperscript{155}

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.”\textsuperscript{156} Mezey and Pillard point out that although 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 is characteristic of new maternalism.\textsuperscript{157} 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 being

\begin{itemize}
\item \textsuperscript{150} Id.
\item \textsuperscript{151} Ekaterina Walter, The Top 30 Stats You Need to Know When Marketing to Women, THE NEXT WEB, http://thenextweb.com/socialmedia/2012/01/24/the-top-30-stats-you-need-to-know-when-marketing-to-women/ (noting that 90% of moms are online versus 76% of women in the general population).
\item \textsuperscript{152} Mezey & Pillard, supra note 117, at 249.
\item \textsuperscript{153} Id. at 250.
\item \textsuperscript{154} Our Issues, MomsRising.org, http://www.momsrising.org/page/moms/our-issues (last visited Nov. 30, 2014).
\item \textsuperscript{155} Mezey & Pillard, supra note 117, at 249.
\item \textsuperscript{156} See StateOfTheYOUnion, “Sarah Palin – Mama Grizzlies”, YOUTUBE (July 8, 2010) https://www.youtube.com/watch?v=oF-OsHTLfxM (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 the left. See, e.g. John Stewart’s critique of Sarah Palin’s mama grizzly video on The Daily Show, “Sarah Palin’s Mama Grizzly Coalition” (Aug. 3, 2010), http://thedailystory.cc.com/videos/joxvfc/sarah-palin-s-mama-grizzly-coalition.).
\item \textsuperscript{157} Mezey & Pillard, supra note 117, at 252.
\end{itemize}
lipstick\textsuperscript{158}—which is typical of new maternalism in that it celebrates and encourages femininity, domesticity, and motherhood.

Additionally, while new maternalism may not have the overtly racist and classist tone of the old maternalism, race and class still pervade new maternalism: while there are minority communities of mothers, most of the mothers who write “mommy blogs” and review various kid-related products are white, middle- and upper-class women.\textsuperscript{159} White women with money are the targets of such media and advertising, and they are the prime consumers.\textsuperscript{160} If new maternalists tend to be middle- and upper-class white women, racial and class distinctions becomes particularly important in the context of maternalist politics.\textsuperscript{161}

The following Part illustrates how Tennessee’s new criminalization of drug use during pregnancy reflects a punishment of those who fail to perform motherhood in the prescribed fashion.\textsuperscript{162} The way in which American culture and law treats women who are not deemed “good” mothers is demonstrative of maternalist judgment. Women who take drugs while they are pregnant have been particularly vilified by the news media, popular culture, and law enforcement.\textsuperscript{163} The mother who consumes drugs while pregnant—the “bad” mother—provides a

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\textsuperscript{158} Brendan Scott, \textit{She’s a Pitbull with Lipstick}, NEW YORK POST (Sept. 4, 2008),
\url{http://nypost.com/2008/09/04/shes-a-pit-bull-with-lipstick/}.
\textsuperscript{159} \textit{Id.} at 242-43.
\textsuperscript{160} See Walter, \textit{infra} note 151.
\textsuperscript{161} See Camille Gear Rich, \textit{Race-ing Motherhood: A Response to Un-Sex Mothering: Toward a Culture of New Parenting}, by Darren Rosenblum, in OnLine Colloquium, \textit{Harvard Journal of Law & Gender} (Feb. 6, 2012), available at \url{http://harvardjlg.com/2012/02/unsex-mothering-responses-camille-gear-rich/} ("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.").
\textsuperscript{162} Mezey & Pillard, \textit{infra} note 117 at 243-44.
\textsuperscript{163} See Libby Copeland, \textit{Oxytots}, SLATE (Dec. 7, 2014),
\url{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} (discussing the ‘crack baby’ myth of the 1980s and 1990s, and the ways in which similar myths about the effects of oxytocin and methamphetamines on babies are being similarly exaggerated in order to vilify and punish new mothers.).
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foil to the paradigmatic “good” mother, and her punishment reinforces the “good” mother’s significance and power.

V. Tennessee’s Law & New Maternalism

Using Mezey and Pillard’s framework of new maternalism, this paper argues that the Tennessee legislation criminalizing drug use during pregnancy reflects new maternalism in important ways. First, the law criminalizing drug use by pregnant women works alongside abortion restrictions to conscript women into motherhood, restricting certain actions that women can take while they are pregnant. Since maternalism promotes the view that women are destined to be mothers, their unborn children take priority when women become pregnant. Just as abortion restriction are tools to control the actions of pregnant women and thus the outcome of their pregnancies, special criminal prosecution of pregnant women is also a control mechanism that promotes a maternalist view of women. Pregnant women who take action that jeopardizes 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 to mother. The Tennessee law and other efforts that lawmakers make to control women’s reproductive choices reflect this maternalist paradigm and push 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, they are supposed to perform motherhood in particular ways. When a woman deviates—whether through affirmative choices or other circumstances that may restrict such choices—from prescribed maternal behavior, she is subject to 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,” which Mezey and Pillard argue has arisen in popular culture. Thus, the prosecution of
pregnant women for drug use during their pregnancies articulates 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 are then transformed into criminals.

American culture does not tolerate mothers who fail to act out a particular kind of motherhood, which in large part is informed by the prolific groups that have developed a new maternalism stance and are run by middle- and upper-class white women.164 Doing drugs, because of its potential danger to fetuses, is hugely disparaged as the ultimate in poor maternal behavior.165 Tennessee lawmakers have made a separate criminal law for these mothers, making criminal the use of drugs during pregnancy.166 This law reflects the new maternalism and uses the principles of white, middle- and upper-class motherhood to punish those who do not conform.167 The enforcement of new paternalism 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 is reflective of the new maternalism, on the one hand, because it supports fetal rights and prioritizing the unborn; and, on the other hand, it punishes women who fail to perform motherhood in recommended ways.

164 See Mezey & Pillard, supra note 117, at 243.
167 Given the racial implications present here, it is helpful to revisit Dorothy Roberts’ analysis, discussed pages 13-16 of this article. Additionally, it suggests that Tennessee’s fetal assault statute is reminiscent of some of the eugenicist overtones of present in the “old paternalism,” discussed on page 20.
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 fetus is harmed.\textsuperscript{168} This prioritization of the unborn is precisely the aim of laws that limit abortion access, and works to police and enforce women’s reproduction.\textsuperscript{169} The restriction of abortion and support of the unborn as “persons” with constitutional rights prevent women from being able to reject motherhood, fostering a maternalist agenda.\textsuperscript{170} 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,\textsuperscript{171} 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,\textsuperscript{172} 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,”\textsuperscript{173} as they simultaneously diminish women’s constitutional protections, laying 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 \textit{Roe v. Wade} determined that the right of privacy includes a right to choose an abortion,\textsuperscript{174} many states moved to attack abortion—the ultimate offense to maternalism—

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\textsuperscript{168} \textit{See} TENN. CODE ANN. § 39-13-107 (West 2014).
\textsuperscript{169} \textit{See} Lynn Paltrow, \textit{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.”).
\textsuperscript{170} \textit{See} Mezey & Pillard, \textit{supra} note 73, at 233.
\textsuperscript{171} \textit{See} DUBOW, \textit{supra} note 60, at 152.
\textsuperscript{172} Mezey & Pillard, \textit{supra} note 73, at 244-45.
\textsuperscript{173} Video, \textit{supra} note 106.
\textsuperscript{174} 410 U.S. 113, 162 (1973).
\end{flushright}
Between 2011 and 2013, state legislatures enacted more abortion restrictions than in the entire previous decade. Such restrictions include Targeted Restrictions of Abortion Providers (or “TRAP” laws, which include requirements that abortions only be performed at ambulatory surgical centers or hospitals and demanding that abortion providers to have admitting privileges at local hospitals), limiting coverage of abortions for women on Medicaid or other Affordable Care Act insurance, restricting access to medication abortions (which can be particularly useful to rural women), so-called “heartbeat bills” (which attempt to ban an abortion after a fetus has a detectable heartbeat), and pre-viability abortion bans. These kinds of abortion restrictions are relatively recognizable in the public sphere, with anti-abortion advocates pushing for their passage and pro-choice advocates working against them. For years, these kinds of restrictions have been deliberately used to reduce abortion access without being able to ban it altogether.

However, there are other types of restrictions on women’s bodily autonomy that 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, Tennessee’s criminalization of drug use during pregnancy also contributes to restricting access to abortion and conscript women into motherhood. Thus, abortion restrictions, fetal protection statutes, and

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175 See Memorandum From Samuel Alito (Alito Memo), Assistant to the Solicitor General, to Charles Fried, Solicitor General (May 30, 1985), (recommending that the anti-abortion movement use state legislative efforts to work against abortion in the wake of Roe v. Wade.).


179 Boonstra & Nash, supra note 176, at 10-12.


181 See Alito Memo, supra note 175.

182 See Pruitt & Vanegas, supra note 132.
now, Tennessee’s newest version of its fetal assault statute, all have the same agenda in terms of protecting fetal rights. In the aggregate, these statutes imagine pregnant women and fetuses as two separate people, and prioritize the rights of the unborn. Although advocates of fetal protection laws might say otherwise, giving rights to fetuses can significantly diminish the rights of the women carrying them. When outside forces come in to try to do something for the unborn that a pregnant woman does not want, they often interfere with her by limiting her choices, movement, and liberty.

Tennessee’s new law may not appear to force women into motherhood; indeed, at first glance, it might even seem to drive more women to have abortions, because drug-using women might be more inclined to use abortion to avoid prosecution. While that might be the avenue that some women would wish to take (if other obstacles do not prevent them from accessing an abortion, limiting that “choice”), there are many women who would rather continue their

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183 See Shelley DuBois & Tony Gonzalez, Drug-Dependent Babies Challenge Doctors, Politicians, USA TODAY (June 15, 2014), http://www.usatoday.com/story/news/nation/2014/06/15/drug-dependent-babies-challenge-doctors-politicians/10526103/ (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.”).

184 For a discussion of the legal rationale behind fetal protection laws, see Paltrow & Flavin, supra note 11.

185 See DUBOW, supra note 60; see also, Paltrow, supra note 169.


187 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.

188 See generally, ANNE NICOL GAYLOR, WHY ABORTION? THE MYTH OF CHOICE FOR POOR WOMEN (1993) (telling stories of individual women who were unable to access abortion due to their socioeconomic disadvantages). In Tennessee in 2011, 96% of the counties had no abortion provider and 63% of women lived in these counties. State Facts About Abortion: Tennessee, GUTTMACHER INSTITUTE (2014), available at http://www.guttmacher.org/pubs/sfaa/pdf/tennessee.pdf.
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. 189 This law, especially when taken together with other abortion restrictions, 190 increases the rights of the unborn and supports the restriction of abortion.

Tennessee State Representative Terri Lynn Weaver, who was the main sponsor and champion of the amendment in the Tennessee legislature, was not particularly subtle about 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.” 191

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. Such laws support maternalist forces, which work to enforce women’s roles as mothers, by creating more control mechanisms for women’s bodies and decision-making. Representative Terri Lynn 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 their wellbeing, and simultaneously diminishes the freedoms of pregnant women.

189 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.” Lynn 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).
190 See Anita Wadhwan, Tennessee Amendment 1 Abortion Measure Passes, THE TENNESSEAN (Nov. 6, 2014), http://www.tennessean.com/story/news/politics/2014/11/04/amendment-takes-early-lead/18493787/ (discussing a ballot amendment that passed in Tennessee in 2014. It allows legislators to restrict and regulate abortion, stating, “Nothing in this Constitution secures or protects a right to abortion or requires the funding of an abortion.”).
191 Video, supra note 106.
B. Punishing “Bad” Mothers

When Tennessee State Representative Terri Lynn Weaver was promoting her bill—the latest amendment to Tennessee’s fetal assault statute that allows women to be prosecuted for using narcotic drugs during pregnancy—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. Indeed, one need not look further for signs of the strong maternalist overtones of Tennessee’s new law for pregnant women 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.

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 seems to connote 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. There is also a sense of branding in the use of such terms: Sarah Palin’s success in gathering women around her as fellow “mama grizzlies” may have been due in part to the attractiveness of the term “mama grizzly.” In the Tennessee legislative and executive branches, Terri Lynn Weaver has similarly been able to

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193 See Mezey & Pillard, supra note 106.
garner support around her “velvet hammer;” people have even complimented her on the term and she takes many opportunities to use it.\textsuperscript{195}

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!”\textsuperscript{196} Her devotion to motherhood makes her a particularly likely candidate to propose a law such as this amendment, but her attitude towards the women who have become vulnerable to prosecution under the new law 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.”\textsuperscript{197} When asked about whether or not this bill would protect women when they were getting 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.”\textsuperscript{198} Her discussion on the floor of the Tennessee House of Representatives created visions of pregnant drug addicts, caring not for their “poor, defenseless children,” but instead roaming the streets, looking for drugs and giving birth to damaged, inconsolable babies.\textsuperscript{199} 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.\textsuperscript{200} The code provides: “It is an

\textsuperscript{195} Id.
\textsuperscript{196} Terri Lynn Weaver, \textit{About, Tennessee State Representative Terri Lynn Weaver}, http://www.weaverhouse40.com/About.html (last visited Dec. 15, 2014).
\textsuperscript{197} Video, \textit{supra} note 106.
\textsuperscript{198} Id.
\textsuperscript{199} Id.
\textsuperscript{200} For further discussion of this affirmative defense and the structure of the law, see \textit{supra} Part II(c).
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.**201 While some of her colleagues questioned the efficacy of this provision as a protection of pregnant women who seek help with a drug addiction,202 its inclusion in the newest amended version of the fetal assault statute is part of the controlling, maternalist attitude towards pregnant drug users. In Representative Weaver’s vision, these women are both deserving of punishment and capable of escaping it if they are able to accomplish the likely very difficult task of satisfying the requirements of the affirmative defense (if they are even aware of them). Indeed, Representative Weaver implied in her personal newsletter, “The Loop,” that the bill would actually provide treatment to the women she made criminals: “HB 1295 has accountability and offers treatment, making it legislation with an incentive to get clean, get your life back, and your children back.”203 It is unclear precisely what “treatment” she believes is being offered, since the law makes no such provisions and there is no reason to believe that every pregnant addict would have independent resources to access a drug program.204
Second, Representative Weaver wanted to emphasize the good that such prosecutions would accomplish, saying, “This legislation will get [these ladies] help.”\textsuperscript{205} Her proposition that jailing women shortly after giving birth will “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.\textsuperscript{206} Additionally, there is evidence to suggest that having incarcerated parents is detrimental to children,\textsuperscript{207} so it does not follow that creating a measure to incarcerate new mothers would help their children. Even so, it is 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 (which would seem to encourage maternal support) and promotes the criminal prosecution of “bad” mothers.

Thus, there is tension between the desire to “help” the mothers of infants born with a dependence on narcotics and to punish them. Such tension is also significant because it interacts with some of broader complications with such a treatment of drug-using pregnant women. For instance, one of the reasons that drug users are criticized so harshly when they become pregnant is because there is a 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

\textsuperscript{205} Video, supra note 106.
\textsuperscript{206} See MedLine Plus, Neonatal Abstinence Syndrome, U.S. NATIONAL LIBRARY OF MEDICINE, http://www.nlm.nih.gov/medlineplus/ency/article/007313.htm (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.).
\textsuperscript{207} See Assistant Secretary for Planning and Evaluation, Effects of Parental Incarceration on Children, U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, http://aspe.hhs.gov/hsp/08/mfs-ip/incarceration&family/ch4.shtml (last visited Dec. 17, 2014) (noting that 2% of all children and 7% of black children have an incarcerated parent, and discussing the many negative effects that incarceration can have on the children of incarcerated parents).
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.\(^{208}\)

Lynn Paltrow illustrates the very real challenges that drug-using pregnant women often have to accessing various services and resources that they would need in order to have meaningful reproductive choices, as well as choices about how to address their drug use. 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, rather than a psychological and physical malady,\(^{209}\) is simply a “poor choice.”

Historian Rickie Solinger also discusses the “right to choose” an abortion and describes it as “fairly ridiculous.”\(^{210}\) 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.\(^{211}\) 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 babies and


\(^{209}\) 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, *What is Addiction? What Causes Addiction?*, MEDICAL NEWS TODAY (Mar. 2009), http://www.medicalnewstoday.com/info/addiction/.

\(^{210}\) RICKIE SOLINGER, BEGGARS AND CHOOSERS: HOW THE POLITICS OF CHOICE SHAPES ADOPTION, ABORTION, AND WELFARE IN THE UNITED STATES 7 (2002).

\(^{211}\) Id.
motherhood status, while others were defined as illegitimate consumers.” 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 are not the types of women that maternalism values as mothers, but also that certain women actually deserve punishment for becoming mothers.

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 attacked 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 is not actually supportive of motherhood. Instead, it insists on motherhood for women and works against those who historically have been devalued as mothers and as people in American society. Tennessee’s law reflects a dark side to new maternalism: the swift and harsh punishment of the “bad” mother, whose identification and punishment help to reify the vision “good” mother that the new maternalism creates.

VI. Conclusion

This paper suggests that Tennessee’s latest amendment to its fetal protection statute, which criminalizes drug use during pregnancy, supports a maternalist vision of American

\[\text{\textsuperscript{212} Id.; see also Robert L. Hale, Bargaining, Duress, and Economic Liberty, 43 Colum. L. Rev. 603, 606 (1943) (discussing individuals' relationships with the economy and the illusion of choice in commerce: “The fact that [a person] exercised a choice does not indicate a lack of compulsion.”).}\]
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. In this era of new maternalism, laws such as this are becoming ever more successful at reducing the reproductive choices women have and, further, their abilities to exercise their constitutional rights.

The women who are hurt by this law are going to be primarily poor women, women of color, and other women who face disadvantages such that a drug addiction is not going to be easily cured by the supportive environment of a rehabilitation program that many cannot afford. The law represents a public health risk, since it is likely that women will simply avoid getting prenatal care for the fear of prosecution. But it is so much more than that. It represents a devaluation of women as full and equal participants in the society, an elevation of the rights of fetuses, and an increasing willingness to turn to incarceration as a form of betterment of the 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 is led to believe are best, but to support all women in their reproductive decision-making and in their abilities to be mothers if they so choose. Mallory Loyola, Jamilla Washington,\(^{213}\) and countless others like them\(^ {214}\) 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 to their personhood 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


\(^{214}\) See Goldensohn & Levy, *supra* note 108 (describing the first nine cases of women charged under the law).
mothers—and break out of this evolution of various forms of maternalism, which controls women and injures the society as a whole.