

# Conceptualizing Violence Against Pregnant Women<sup>†</sup>

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## INTRODUCTION

Victims of domestic violence often describe a history of battering that begins, or escalates, during pregnancy. For these victims, there is a vast disconnect between life and its representation in culture and law. Pregnant women who are battered by their intimates experience a range of suffering that is largely hidden from sociolegal view.<sup>1</sup> Injury is inaptly defined or wholly overlooked, resulting in a socially sanctioned denial of widespread phenomenologies.

It becomes obvious to anyone who works with pregnant victims of domestic violence that battering during pregnancy is a problem of immense proportions.<sup>2</sup> Yet

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1. The same proposition also applies to many domestic violence victims who are not pregnant. See generally Deborah Tuerkheimer, *Recognizing and Remediating the Harm of Battering: A Call to Criminalize Domestic Violence*, 94 J. CRIM. L. & CRIMINOLOGY 959 (2004).

2. My interest in battering during pregnancy originated in practice. For five years, I prosecuted domestic violence cases in the New York County District Attorney's Office. During the last year in my capacity as domestic violence supervisor, I assembled a more complete

this recognition is confined, for the most part, to a relatively small community of advocates and practitioners; the contours and dimensions of the problem have simply not seeped into social discourse.<sup>3</sup>

Law has been similarly impermeable to the realities of pregnancy battering.<sup>4</sup> Seldom does the criminal justice system intervene to address this violence and, on the rare occasion that criminal law is invoked, the resulting remedy is far from commensurate with the victim's injury. Traditional criminal laws fail to capture the extent of harm to the pregnant woman,<sup>5</sup> while more recent efforts to criminalize violence during pregnancy by codifying fetal victimhood have resulted in the shrouding not only of the woman's injury, but of the woman herself.<sup>6</sup> Failures of the conventional statutory apparatus have thus been compounded by reforms that target acts of violence against a fetus.

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picture of the large number of domestic violence cases handled every month by the office. These cases were remarkably diverse along many dimensions, particularly with respect to race, ethnicity, class, age, and educational background. Yet across these dimensions, in the course of the hundreds of interviews I conducted and the hundreds of files I reviewed during my tenure as a prosecutor, women described battering that began or intensified during pregnancy. These accounts, and criminal law's failure to remedy the suffering they detailed, led me to believe that pregnancy battering is a problem of enormous significance, existing largely outside the boundaries of law.

3. Elizabeth Schneider suggests that “[g]iven the societal importance placed on childbearing and motherhood, the very notion that a woman would be subject to battery during her pregnancy is shocking,” and notes that “[i]n the media, this type of battering is rarely exposed except in cases involving famous people.” ELIZABETH M. SCHNEIDER, *BATTERED WOMEN AND FEMINIST LAWMAKING* 150 (2000). This may begin to change as sensational cases involving killings of pregnant women capture the popular imagination. *See* Donna St. George, *Many New or Expectant Mothers Die Violent Deaths*, WASH. POST, Dec. 19, 2004, at A1.

Largely invisible, [the killing of pregnant women and new mothers] is as consequential as it is poorly understood. Even in the past two years—as the Laci Peterson homicide case has become a public fascination, with a jury last week recommending that her husband, Scott, be sentenced to death in her killing—little has been said about the larger convergence of pregnancy and homicide: how often it happens, why, and whether it is a fluke or a social syndrome.

*Id.* Despite this recent coverage, however, the media has not yet focused on nonlethal violence against pregnant women, though it occurs with far greater frequency. *See infra* notes 19–25 and accompanying text. There is a similar gap in discourse and literature within the legal academy with respect to pregnancy battering.

4. By “pregnancy battering,” I am referring to the infliction of violence against women by their intimate partners during the course of their pregnancies. I use the term advisedly, since it may tend to suggest that the pregnancy, rather than the woman, is battered. (I thank Lynn Paltrow for articulating this concern.) My focus on pregnancy battering excludes pregnant women who are injured during pregnancy by a non-intimate. *See, e.g.*, Stephen Kinzer, *Father of Stolen Fetus Lauds Baby's Return*, N.Y. TIMES, Dec. 19, 2004, at 36 (describing the murder of Bobbie Joe Stinnett, eight months pregnant, and removal of the fetus by her killer—suspect Lisa Montgomery, who told her husband and others that she had delivered the baby, was found with the baby at her home the following day). While these women represent a small fraction of pregnant women who are victimized by violence, *see infra* notes 25–27 and accompanying text, their suffering merits independent consideration.

5. *See infra* Part II.

6. *See infra* Part III.B.

This Article explores the nature of pregnancy battering and the limitations of criminal law's response to it. Absent from the law's account is the suffering experienced by women who are battered while pregnant. Feminist theory, which might be expected to provide a framework that addresses criminal law's inadequacies, instead offers an incomplete understanding of pregnancy. In order to challenge the law's flawed definition of pregnancy battering, a richer, more complex story must be told. By integrating two strands of feminist scholarship that have developed largely in opposition to one another, my aim is to conceptualize pregnancy in a manner that animates an affirmative vision for criminal law functioning in this realm.<sup>7</sup>

Part I describes the problem of pregnancy battering, which, despite the silence surrounding it, is staggering. This Part introduces to academic legal discourse current medical and social science research on the prevalence, dynamics, and consequences of violence during pregnancy. Part I also examines the facts recited in various trial and appellate court opinions in order to glean insight into the contours of pregnancy battering.

I then turn, in Part II, to the criminal law's response. The approach of traditional criminal law to violence obfuscates context essential to understanding battering and to constructing its harm. Part II explores the tension between conventional criminal law structures and the acutely context-dependent nature of pregnancy battering. As a consequence of law's exclusive focus on physical injury as a measure of harm, a pregnant domestic violence victim is conceptually severed from her pregnancy, resulting in an unduly restrictive definition of her suffering.

Part III examines an alternative statutory framework that has ascended in recent years to address violence during pregnancy. This approach, embodied in the recently enacted Unborn Victims of Violence Act of 2004,<sup>8</sup> identifies the fetus as the victim of violence and punishes those who inflict death or, in some cases, bodily injury to it. To evaluate the merits of this paradigm, I consider how the construct of fetal personhood has historically served as a vehicle for state control over the lives of women. From the nineteenth-century campaign against abortion through recent changes to a federal law that provide funds for health insurance coverage of poor children, the rhetoric of fetal personhood has been employed to undermine the legal rights of pregnant women. I claim that what is distinct—and particularly pernicious—about the new criminal law framework is that the pregnant woman, who was historically subject to paternalistic regulations enforcing idealized notions of motherhood, is now vanished altogether.

Despite feminist opposition to the Unborn Victims of Violence Act, challenges to the legislation were not, and are not, grounded in a deep analytical critique. Feminist scholarship has not provided a holistic account of pregnancy that can serve as the foundation for a coherent policy approach addressed to criminal law's inadequacies. Part IV describes two tropes that characterize feminist efforts to grapple with pregnancy: reproductive autonomy and connection. Both of these tropes, representing distinct strands of feminism that have generally been regarded as dichotomous, are helpful to conceptualizing pregnancy; yet each, in isolation, provides an incomplete account of pregnancy and the self that experiences it. This Part attempts to integrate the two strands, advancing the proposition that a woman's growing connection to the

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7. See *infra* Part IV.

8. Unborn Victims of Violence Act of 2004, 18 U.S.C.A. § 1841 (West Supp. 2005).

developing fetus impacts her autonomy. I contend that this synthesis of reproductive autonomy and connection norms furthers inquiry into the following questions: *who is the victim of pregnancy battering?* and *what is the nature of her injury?*

I conclude by contemplating the implications of this descriptive project for criminal law. I assert that articulating how pregnant victims of domestic violence suffer allows for the possibility of meaningful legal remedies. By bringing the woman—as fully constituted by her pregnancy—into legal focus, her suffering may at last be redressed.

## I. PREGNANCY BATTERING: PREVALENCE, DYNAMICS, CONSEQUENCES

### A. Social Scientific Understandings

Predictably, given the dialectical nature of the relationship between law and social change,<sup>9</sup> the topic of pregnancy battering has been largely absent from both legal and extralegal discourse on domestic violence and pregnancy. Social scientists have recently begun to address violence during pregnancy,<sup>10</sup> focusing largely on the question of prevalence.

Studies have varied widely in their findings on the frequency with which pregnancy battering occurs.<sup>11</sup> Yet a general consensus among researchers seems to have emerged that pregnancy battering is “a serious public health problem.”<sup>12</sup> In the largest meta-analysis of first-generation research on abuse during pregnancy, the authors found that, on average, from 3.9% to 8.3% of pregnant women experienced violence during pregnancy.<sup>13</sup> If this range is, “reasonably accurate and the estimates . . . [are] applied to the four million women who deliver liveborn infants each year in the United States, one

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9. See SCHNEIDER, *supra* note 3 at 5, 101–11.

10. Current social scientific research in this area, however, has been largely self-contained and, with few exceptions, has not been introduced to academic legal and policy discourses.

11. See Julie A. Gazmararian, et al., *Prevalence of Violence Against Pregnant Women*, 275 JAMA 1915, 1918–19 (1996). According to this meta-analysis, “the prevalence of women experiencing violence at any time in the past (including pregnancy) ranged from 9.7% to 29.7%,” while “the prevalence of women who experience violence during pregnancy ranged from 0.9% to 20.1%.” *Id.* at 1918. The authors determined that “many of the differences [in prevalence estimates] reflect factors related to study methods,” as opposed to true differences based on population. For further discussion of the wide variation in prevalence estimates, see Jacquelyn C. Campbell, *Abuse During Pregnancy: Progress, Policy, and Potential*, 88 AM. J. PUB. HEALTH 185–87 (1998). According to Campbell, this variation may be a result of women underreporting their abuse, as well as:

several factors that are both clinically relevant and methodologically important: when women are asked (if early in pregnancy, later abuse may be missed; if at delivery, women may be under enormous stress and even more invested in the relationship); how many times women are assessed (once or more than once during pregnancy); who asks them (professional category, racial/ethnic group, gender); whether they are assessed in a face-to-face interview, a telephone survey, or a self-administered questionnaire; their perception of the degree of anonymity and/or confidentiality of responses; and their trust in the inquirer.

*Id.* See also *infra* notes 12 and 23.

12. Gazmararian et al., *supra* note 11, at 1919.

13. *Id.*

would expect approximately 156,000 to 332,000 of these women to experience violence during pregnancy.”<sup>14</sup> In all likelihood, however, since they are derived from prevalence ranges that are themselves subject to challenge as misleadingly low,<sup>15</sup> these figures grossly underestimate the number of women victimized by violence during pregnancy.<sup>16</sup> Importantly, the two studies reviewed in the meta-analysis that found a prevalence rate of around 20% relied on “detailed in-person interviews . . . that included several questions related to violence, and both included all 3 trimesters of the pregnancy,”<sup>17</sup> which would tend to suggest greater accuracy.<sup>18</sup>

Researchers have reached divergent conclusions regarding the onset of abuse of pregnant women. While at least one study determined that violence most often begins during pregnancy,<sup>19</sup> many have found that the strongest predictor of violence during pregnancy is prior abuse,<sup>20</sup> which may become more frequent or severe as a woman’s pregnancy progresses.<sup>21</sup> As a means of accommodating this divide, one researcher has suggested the likelihood that “[two] patterns of violence occur. In [one] pattern, violence is a chronic problem for women who experience violence periodically or regularly; in the other pattern, violence is acute among women who had not experienced violence previously.”<sup>22</sup>

Abuse during pregnancy is frequently recurrent. In one study, 60% of abused pregnant women reported two or more episodes of violence by the perpetrator.<sup>23</sup> And

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14. *Id.*

15. See Constance MacIntosh, *Conceiving Fetal Abuse*, 15 CAN. J. FAM. L. 178, 190 (1998) (“The fact that battered women are often prevented by their battering partners from receiving medical care while pregnant suggests both that statistics on and perceptions of abuse may be low—since they are often gathered in prenatal care settings . . .” (citation omitted)).

16. For a discussion of the effects of race and risk factors on prevalence of abuse, see Abbey B. Berenson, Norma J. Stiglich, Gregg S. Wilkinson, and Garland D. Anderson, *Drug Abuse and Other Risk Factors for Physical Abuse in Pregnancy Among White Non-Hispanic, Black, and Hispanic Women*, 164 AM. J. OBSTETRICS & GYNECOLOGY 1491 (1991). See also Campbell, *supra* note 11, at 186 (discussing the effect of methodological factors on the variation in frequency with which pregnancy battering occurs); *supra* text accompanying note 11.

17. Gazmararian et al., *supra* note 11, at 1918 (footnote omitted).

18. See Campbell, *supra* note 11.

19. Hortensia Amaro, Lisc E. Fried, Howard Cabral & Barry Zuckerman, *Violence During Pregnancy and Substance Abuse*, 80 AM. J. PUB. HEALTH 575–79 (1995).

20. Linda L. Dunn & Kathryn S. Oths, *Prenatal Predictors of Intimate Partner Abuse*, 33 J. GYNECOLOGICAL & NEONATAL NURSING 54, 55, 57 (2004) (citing earlier research to this effect and finding that 81% of subjects who reported abuse during pregnancy also reported abuse in the previous year).

21. Studies conducted in prenatal clinics indicate that more than 20% of women who are abused during pregnancy report an increase in violence during pregnancy. See, e.g., Abbey B. Berenson, Constance M. Wiemann, Gregg S. Wilkinson, Wendy A. Jones & Garland D. Anderson, *Perinatal Morbidity Associated with Violence Experienced by Pregnant Women*, 170 AM. J. OBSTETRICS & GYNECOLOGY 1760 (1994).

22. Gazmararian et al., *supra* note 11, at 1919–20. The chronic pattern is also an often escalating one. See Berenson et al., *supra* note 21.

23. Judith McFarlane, Barbara Parker, Karen Soeken & Linda Bullock, *Assessing for Abuse During Pregnancy: Severity and Frequency of Injuries and Associated Entry into Prenatal Care*, 267 J. AM. MED. ASSOC. 3176, 3177 (1992). This study found that 17% of pregnant women reported abuse during pregnancy. *Id.* at 3177. The researchers suggest that this figure is

pregnancy battering is often lethal: an analysis of pregnancy-associated mortality revealed that the leading cause of death among pregnant women was homicide.<sup>24</sup>

In the vast majority of cases, violence against pregnant women is perpetrated by an intimate.<sup>25</sup> While little has been written about victims' perceptions of their abuse,<sup>26</sup> researchers have recognized that "all abuse against women is intentional and is aimed at power and control by the perpetrator."<sup>27</sup>

Many adverse fetal outcomes, including miscarriage, stillborn birth, preterm labor and delivery, direct fetal injury, fetal hemorrhage, and placental abruption, are directly attributable to physical trauma.<sup>28</sup> Studies have also found an association between

more accurate than lower prevalence estimates as a result of a variety of methodological factors: "[t]he women were interviewed by their primary care provider with whom they would have return visits, and . . . [would] have felt safe revealing their abuse history to a clinician they would see again"; also, subjects were interviewed during each trimester, allowing researchers to capture the abuse of women "who were not abused on the first visit [but who] reported abuse later in the pregnancy." *Id.* at 3178.

24. Isabelle L. Horon & Diana Cheng, *Enhanced Surveillance for Pregnancy-Associated Mortality—Maryland, 1993–1998*, 285 J. AM. MED. ASSOC. 1455, 1457 (2001). Although an exact number of pregnancy-associated homicides committed by intimate partners has not been reported, we know that a "significant proportion of all female homicide victims are killed by their intimate partners." Victoria Frye, *Examining Homicide's Contribution to Pregnancy-Associated Deaths*, 285 JAMA 1510, 1511 (2001). According to the Justice Department, femicide is the seventh leading cause of premature death among women in this country, and the leading cause of death among African-American women aged fifteen to forty-five. LAWRENCE A. GREENFELD, ET AL., U.S. DEP'T OF JUSTICE, *VIOLENCE BY INTIMATES: ANALYSIS OF DATA ON CRIMES BY CURRENT OR FORMER SPOUSES, BOYFRIENDS, AND GIRLFRIENDS* (1998), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/vi.pdf>. "The majority (67%–80%) of intimate partner homicides involve physical abuse of the female by the male before the murder." Jacquelyn C. Campbell et al., *Risk Factors for Femicide in Abusive Relationships: Results from a Multisite Case Control Study*, 93 AM. J. PUB. HEALTH 1089 (2003). See *id.* at 1092 (establishing an association between abuse during pregnancy and intimate partner femicide). Recognizing that many pregnant women are killed by their intimate partners should not, of course, obscure the fact that non-lethal pregnancy battering is far more common.

25. See, e.g., Thomas M. Goodwin & Michael T. Breen, *Pregnancy Outcome and Fetomaternal Hemorrhage After Noncatastrophic Trauma*, 162 AM. J. OBSTETRICS & GYNECOLOGY 665 (1990) (88% of cases involving trauma during pregnancy resulted from "domestic discord"); McFarlane et al., *supra* note 23, at 3177 ("[T]he perpetrator of abuse was almost always someone the woman knew intimately."). In most studies of violence during pregnancy, the intimate nature of the relationship between perpetrator and victim is presumed. See, e.g., Campbell, *supra* note 11, at 185–87 (1998); Gazmararian et al., *supra* note 11, at 1915–20.

26. But see Campbell, *supra* note 11, at 185 ("The bewilderment, disbelief, embarrassment, and agony in the voices of battered women when they are interviewed about why they thought their husbands or boyfriends beat them during pregnancy—when, in most cases, the men had said they wanted the baby—are personally shocking and unforgettable." (footnote omitted)).

27. Dunn & Oths, *supra* note 20, at 54 (citing S.J. Reel, *Violence in Pregnancy*, 9 CRITICAL CARE NURSING CLINICS N. AM. (1997)); see also *infra* note 35 (considering why men batter during pregnancy).

28. See Goodwin & Breen, *supra* note 25, at 665–71. Violence against pregnant women often involves trauma to the abdominal region. MacIntosh, *supra* note 15, at 189. See also Berenson et al., *supra* note 16, at 1493.

violence during pregnancy and other significant risks to maternal and fetal health.<sup>29</sup> For instance, violence during pregnancy has been associated with maternal substance abuse, smoking, unhealthy diet, low weight gain, delayed entry into prenatal care,<sup>30</sup> and low birth weight.<sup>31</sup>

Existing scientific literature on violence during pregnancy leaves important questions unanswered, suggesting an agenda for future inquiry.<sup>32</sup> Given the extent to which abuse during pregnancy impacts other aspects of women's and children's lives, this next generation of research might be fruitfully integrated with research in related areas.<sup>33</sup>

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29. Jacqueline C. Campbell, a leading researcher in this area, has observed that the "[e]mphasis of much of the research on infant health outcomes [has been] to the detriment of inquiry into the effects on maternal health . . ." Campbell, *supra* note 11, at 185. Campbell suggests that this focus may result from a view of pregnancy that "[r]elegates the women who are being hit, demeaned, and violated to the status of baby carriers." She concludes that since the "[h]ealth and well-being [of both the woman and fetus] are inextricably intertwined . . . both need full attention." *Id.*

30. Linda Chamberlain & Katherine A. Perham-Hester, *Physicians' Screening Practices for Female Partner Abuse During Prenatal Visits*, 4 *MATERNAL & CHILD HEALTH J.* 141, 148 (2000); McFarlane et al., *supra* note 23.

31. Claire C. Murphy, Berit Schei, Terri L. Myhr & Janice Du Mont, *Abuse: A Risk Factor for Low Birth Weight? A Systematic Review and Meta-Analysis*, 164 *CAN. MED. ASS'N J.* 1567, 1570 (2001).

32. See Julie A. Gazmararian et al., *Violence and Reproductive Health: Current Knowledge and Future Research Directions*, 4 *MATERNAL & CHILD HEALTH J.* 79, 81 (2000). The authors note that existing research "clearly documents" that "violence occurs commonly during pregnancy," and propose the following directions for future investigation:

In reviewing the literature for this article and taking into account what others have recommended, some important questions for future research emerge: (1) Does violence increase, decrease, or remain the same during pregnancy and the postpartum periods, and what are the implications for the health of the mother? And the child? (2) What is the role of violence on reproductive decision making including contraceptive use, pregnancy intendedness status, pregnancy resolution, and use of HIV/STD prevention methods? (3) What are the risk and protective factors for violence against women of reproductive age? (4) What screening and intervention strategies might be effective at decreasing violence against women and improving reproductive health?

*Id.*

33. Abuse during pregnancy implicates (among other topics) international women's health, HIV/AIDS transmission, child abuse, adolescent pregnancy, and maternal substance use. Campbell, *supra* note 11, at 185–86. As Campbell notes, these "fields of inquiry . . . could well include abuse during pregnancy systematically in their research, clinical, and policy initiatives."

*Id.* It is further suggested that future research examine the effects of "cultural influences":

There has been a start toward careful delineation of abuse during pregnancy in different ethnic groups and toward setting this abuse within cultural contexts, but this is an area needing much more attention in the next generation of research. Investigations into abuse and ethnicity need to include the full range of ethnic groups and need to consider such issues as cultural norms, acculturation, education, neighborhood structures, and economic resources actually under the control of women.

*B. Glimpses from Case Law*

Although the particularities of pregnant, battered women's experiences differ, common patterns tend to characterize the context in which episodic physical violence occurs. Violence during pregnancy, like other violence between intimates, can best be understood as expressing the batterer's need for control.<sup>34</sup> But a victim of domestic violence likely experiences the power of her batterer differently if she is pregnant. What distinguishes pregnant victims from other domestic violence victims is a unique vulnerability that derives from the status of pregnancy.<sup>35</sup>

Within law, because the definition of crime is framed so as largely to obscure context,<sup>36</sup> accounts of these dynamics—and even, in cases, the very occurrence of pregnancy battering—must be found in what I have called the “fissures of appellate decisions.”<sup>37</sup> Opinions that reference battering during pregnancy generally fall into one of two categories: those that do so incidentally, either while detailing a “prior history” of abuse<sup>38</sup> or simply to complete the event narrative;<sup>39</sup> and those in which the fact of

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*Id.*

34. See *Unborn Victims of Violence Act of 1999: Hearing on H.R. 2436 Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 106th Cong. 34 (1999) (statement of Juley Anna Fulcher, Public Policy Director, National Coalition Against Domestic Violence) (noting in cases involving pregnancy battering, the “[i]ntent [of batterer] was to cause physical and emotional injury to the woman and establish undeniably his power to control her.”); Karla Fischer, Neil Vidmar & Rene Ellis, *The Culture of Battering and the Role of Mediation in Domestic Violence Cases*, 46 SMU L. Rev. 2117, 2126–42 (1993) (describing “systematic pattern of control and domination” characteristic of abusive relationships); Evan Stark, *Re-presenting Woman Battering: From Battered Woman Syndrome to Coercive Control*, 58 ALB. L. REV. 973, 986 (1995) (“[P]hysical violence may not be the most significant factor about most battering relationships . . . [battered women generally] have been subjected to an ongoing strategy of intimidation, isolation, and control that extends to all areas of a woman’s life, including sexuality; material necessities; relations with family, children, and friends; and work.”).

35. See MacIntosh, *supra* note 15, at 194 (“Canadian researchers found that abused pregnant women were far less likely than non-abused pregnant women to feel they had any personal control over the well-being of their pregnancy. Rather, they expressed a sense of powerlessness over their own lives which extended to their pregnancies, and left them believing that health and well-being were matters of chance which they could not effectively influence.”); E-mail from Lynn M. Paltrow, Executive Director, National Advocates for Pregnant Women, to Deborah Tuerkheimer, Professor of Law, University of Maine School of Law (June 17, 2004, 11:47:00 EST) (on file with author) (“Men who beat their pregnant wives understand that the pregnancy, the desired child, is often the most important thing in the world to that woman. What better way to make the woman suffer than to be able to cause her both excruciating physical pain and to lose what she values most in life?”); *infra* notes 66–83 and accompanying text.

36. See *infra* Part II.A.

37. Tuerkheimer, *supra* note 1, at 968.

38. See, e.g., *People v. Scott*, No. F040797, 2003 Cal. App. LEXIS 10525 (Ct. App. Nov. 7, 2003); *People v. Ramsey*, No. F034758, 2002 Cal. App. LEXIS 6266 (Ct. App. July 8, 2002); *State v. Miller*, No. 38560-7-1, 1999 Wash. App. LEXIS 689 (Ct. App. Apr. 19, 1999). This subcategory includes cases where prior history evidence was offered by battered women defendants claiming self-defense in homicide prosecutions. See, e.g., *Ibn-Tamas v. United States*, 407 A.2d 626 (D.C. Cir. 1979); *People v. Scott*, 424 N.E.2d 70 (Ill. App. Ct. 1981);



pregnancy is relevant to the charge or charges, most often because a “fetal victim” has been injured.<sup>40</sup> In none of these cases is the full measure of the woman’s suffering reflected or remedied.<sup>41</sup> Indeed, the extent of the defendant’s control over her may be barely glimpsed among even brief appellate recitations of “relevant” facts.<sup>42</sup> The following cases illustrate this point.

One defendant was convicted of punching his wife—six months pregnant at the time—shoving her body against a dresser, and chasing her as she attempted to escape to a neighbor’s house. The next day he tried breaking into the house by prying open the window. After his arrest, the defendant called his wife from jail with threats to “get her.” At trial, the victim testified to the defendant’s prior history of violence that included numerous threats and assaults, including a recent incident in which the defendant kicked his wife in the hip while she was pregnant, and an attack during a previous pregnancy in which the defendant kicked her in the stomach.<sup>43</sup>

Another defendant was convicted of punching his girlfriend—three months pregnant at the time—in the face and stomach, and kicking her in the stomach. Prior to the incident, a history of abuse had led her to obtain a restraining order against the defendant, but it had expired at the time of the assault. When a police officer suggested to the victim that she apply for another order of protection, she “cried out in fear, ‘he’s out there, he’s going to get me, you can’t make me go out there.’”<sup>44</sup>

One case involved past violence so severe that the pregnant victim had already filed a military protective order against the defendant, a naval officer, at the time of the incident charged. After the defendant learned of this, he “unexpectedly showed up at their apartment complex . . . pulled out his knife and moved the blade back and forth across [the victim]’s face without cutting her, telling her that if his life were ruined, he would also ruin hers.”<sup>45</sup> After she agreed to drop the restraining orders, he tried to rape

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Commonwealth v. Rodriguez, 633 N.E.2d 1039 (Mass. 1994).

39. See, e.g., *Ramsey*, 2002 Cal. App. LEXIS 6266; *People v. Benn*, No. D034836, 2002 Cal. App. LEXIS 732 (Ct. App. Apr. 30, 2002); *Dawson v. State*, 581 S.E.2d 371 (Ga. Ct. App. 2003); *Commonwealth v. Ivy*, 774 N.E.2d 1100 (Mass. App. Ct. 2002); *State v. Bost*, No. 00AP-506, 2000 Ohio App. LEXIS 5513 (Ct. App. Nov. 28, 2000).

40. See, e.g., *People v. Brown*, 42 Cal. Rptr. 2d 155 (Ct. App. 1995); see also *infra* Part III.B. This category includes a smaller number of cases in which pregnancy is relevant to sentencing. See, e.g., *Statc v. Glover*, No. CX-99-1654, 2000 Minn. App. LEXIS 539 (Ct. App. June 6, 2000).

41. See *infra* Part II.

42. One way of understanding the relationship between the substantive criminal law and evidentiary notions of relevance is as follows:

In law, what gives life to a substantive criminal statute is the evidence that bears on its proof. Doctrinally, evidence is relevant only if it supports a factual proposition ‘of consequence’ to the determination of the legal action. Put differently, the elements of a crime—defined statutorily—dictate what is (and is not) meaningful from a criminal justice perspective. Relevance in turn depends on a decisionmaker’s particular worldview, itself deeply embedded in a social context.

Tuerkheimer, *supra* note 1, at 974 (citations omitted).

43. *Ramsey*, 2002 Cal. App. LEXIS 6266, at \*2–\*7.

44. *Ivy*, 774 N.E.2d at 1102 n.3.

45. *People v. Benn*, No. D034836, 2002 Cal. App. LEXIS 732, at \*4–\*5 (Ct. App. Apr. 30, 2002).

her at knife point. With respect to the charged incident, the defendant was convicted of kidnapping, assault, rape, and illegal use of a firearm based on evidence that he threatened to “kill this [b]itch tonight,” punched the victim in the head and throughout the body, pushed her to the floor, “stomp[ed]” on her, and raped and sodomized her at gunpoint. The defendant’s violent and controlling behaviors began shortly after the two were married.<sup>46</sup>

One defendant repeatedly threatened to kill the mother of his child and to “take her daughter away.” A prior history of violence included an incident in which the defendant kicked the victim in the stomach while she was pregnant (after which she miscarried), another beating so severe that the victim was hospitalized, and an attack on her eye that left the victim with permanent scarring.<sup>47</sup>

Yet another defendant kicked the stomach of his live-in girlfriend, who was four months pregnant, after she failed to answer a question quickly enough. At the time of the incident, the victim had been “pondering how she was going to keep her appointment with a lady from Choices, a domestic violence shelter, later that night.”<sup>48</sup>

In one case the defendant was convicted of making a criminal threat to his former girlfriend, after coming to her apartment and threatening to kill her. Although the victim had separated from the defendant more than a decade earlier, the defendant continued to threaten to kill both the victim and their child. A four-year history of abuse detailed by the court included an assault to the stomach with a board when the victim was pregnant, choking to unconsciousness, kicking, spitting, and an incident in which the defendant “overturned the refrigerator and hit [the victim] in the eye and on the head” when she refused to have sex with him.<sup>49</sup>

For every reported appellate decision containing similar facts,<sup>50</sup> there are, of course, far more cases that never result in a written opinion and countless stories of pregnancy battering that never even penetrate the boundaries of law.<sup>51</sup>

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46. *Benn*, 2002 Cal. App. LEXIS 732, at \*4–\*12.

47. *State v. Miller*, No. 38560-7-I, 1999 Wash. App. LEXIS 689, at \*13 (Ct. App. Apr. 19, 1999).

48. *State v. Bost*, No. 00AP-506, 2000 Ohio App. LEXIS 5513, at \*1–\*2 (Ct. App. Nov. 28, 2000).

49. *People v. Scott*, No. F040797, 2003 Cal. App. LEXIS 10525, at \*1 (Ct. App. Nov. 7, 2003).

50. Particularly tragic allusions to pregnancy battering may be found in cases in which a domestic violence victim kills her abuser, is prosecuted for homicide, and presents or seeks to present prior history evidence in support of her self-defense claim. *See e.g.*, *Ibn-Tamas v. United States*, 407 A.2d 626 (D.C. Cir. 1979); *People v. Scott*, 424 N.E.2d 70 (Ill. App. Ct. 1981); *Commonwealth v. Rodriguez*, 633 N.E.2d 1039 (Mass. 1994).

51. When existing criminal laws fail to adequately capture conduct such as pregnancy battering, prosecutors are often unable to pursue charges. In my experience supervising the prosecution of domestic violence, this was frequently the result in cases involving violence during pregnancy. Rarely does pregnancy battering come to the attention of law enforcement immediately after a violent episode occurs. (This is not surprising, given that a domestic violence victim’s reluctance to involve the criminal justice system might well be intensified during pregnancy. *See infra* notes 89–100 and accompanying text.) More commonly, prosecutors learn of pregnancy battering when a victim describes a history of abuse. *See Tuerkheimer, supra* note 1, at 979 (discussing difficulties involved in charging a defendant with past crimes disclosed by the victim in the course of relating a prior history of abuse).

## II. TRADITIONAL CRIMINAL LAW RESPONSE

Violence during pregnancy has been inadequately conceptualized by traditional criminal law, which misconceives the harm of battering and the significance of a victim's pregnant status to her suffering. Given the legal system's general neglect of gender-specific harm,<sup>52</sup> and its inability to frame a meaningful account of pregnancy,<sup>53</sup> it is unsurprising that real injury to pregnant battered women remains unredressed.<sup>54</sup>

A. *Limitations of Conventional Paradigms*

In general, laws applied to domestic violence are characterized by a narrow temporal lens<sup>55</sup> and an exclusive focus on physical injury as the sole cognizable harm.<sup>56</sup>

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Regardless of when the pregnancy violence took place, prosecutors faced with charging decisions in these cases typically find themselves constrained by law's requirement of physical injury (usually defined as an impairment of physical condition). *See infra* notes 89–99 and accompanying text. A prosecutor may attempt to apply paradigmatic criminal laws to the nonparadigmatic facts presented by the woman describing her experience of pregnancy battering. Yet such statutory contortions—even if they survive a defendant's motion to dismiss charges—often result in lenient plea bargains as a result of a prosecutor's assessment of the chances of conviction if the case proceeds to trial, as well as consideration of the likely sentence in the event the defendant is found guilty.

52. As Robin West has noted, “at least some of the harms frequently sustained by many women are quite *different* from the harms typically sustained by men: they are triggered by different events, they have different repercussions, and they cause different sorts of physical, emotional, and psychic trauma.” ROBIN WEST, *CARING FOR JUSTICE* 98 (1997) (emphasis in original).

[P]artly because [the harms suffered by women in this culture] are different [from those suffered by men], they often do not ‘trigger’ legal relief in the way that harms felt by men alone or by men and women equally do. As a result women are doubly injured: first by the harm-causing event itself, and second by the peculiarity or nonexistence of the law’s response to those harms.

*Id.* at 96.

53. Consider the following observation by Catharine MacKinnon:

The legal system has not adequately conceptualized pregnancy, hence the relationship between the fetus and the pregnant woman. This may be because the interests, perceptions, and experiences that have shaped the law have not included those of women. The social conception of pregnancy that has formed the basis for its legal treatment has not been from the point of view of the pregnant woman, but rather from the point of view of the observing outsider, gendered male.

Catharine A. MacKinnon, *Reflections on Sex Equality Under Law*, 100 *YALE L.J.* 1281, 1309 (1991).

54. *Cf.* Robin L. West, *The Difference in Women's Hedonic Lives: A Phenomenological Critique of Feminist Legal Theory*, 3 *WIS. WOMEN'S L.J.* 81, 85 (1987) (“If the pain women feel is different—not shared by men—then it is not surprising that men cannot readily empathize with women who suffer, much less share in the effort to resist the source of their injuries. The strategic inference I draw is this: if we want to enlist the aid of the larger legal culture, the feel of our gender-specific pain must be described before we can ever hope to communicate its magnitude.”).

55. While exceptions to this transactional model of crime exist, *see* Tuerkheimer, *supra*

This myopic perspective obfuscates context that is essential to understanding the crime and its harm, particularly where a victim knows her perpetrator intimately.<sup>57</sup> As I have written elsewhere:

Statutes criminalizing violence do not account for the perpetration of continuing acts. Paradigmatic crimes are “transaction-bound . . . taking place in an instant of time so precise that it can be associated with a particular mental state of intention.” A constricted temporal frame places patterns of abuse outside of criminal law’s reach: the law does not touch the pattern of conduct, for it cannot be captured by a moment in time.<sup>58</sup>

Criminal law paradigms thus obscure defining characteristics of battering generally and pregnancy battering in particular. Domestic violence is ongoing, patterned, and characterized by both physical and non-physical manifestations of power.<sup>59</sup> “Episodic physical violence, while often a devastating manifestation of the abuser’s control, does not fully define its contours or map its reaches.”<sup>60</sup> Criminal law’s construction of the

note 1, at 1020–22, it continues to function as a de facto criminal law norm. *See id.* at 971 n.60.

56. The law’s (default) analogizing of pregnancy battering to stranger violence results in the equation of harm to physical injury. Christyne L. Neff, *Woman, Womb, and Bodily Integrity*, 3 YALE L. J. & FEMINISM 327, 339 (1991) (“[W]hen the harm is framed in terms of visible physical manifestations of intrusion and harm, courts more readily seek to vindicate the victim. . . . In cases of rape and domestic violence, courts have taken less seriously injuries that were not physically graphic.”).

57. *See* Martha R. Mahoney, *Victimization or Oppression? Women’s Lives, Violence, and Agency*, in THE PUBLIC NATURE OF PRIVATE VIOLENCE: THE DISCOVERY OF DOMESTIC ABUSE 59, 60 (Martha Albertson Fineman & Roxanne Mykitiuk eds., 1994) (“Law especially emphasizes acts of physical violence, and this emphasis in turn hides broader patterns of social power, patterns of power within a given relationship, and complexity in the woman’s life, needs, and struggles.”).

58. Tuerkheimer, *supra* note 1, at 972 (quoting Gerald E. Lynch, *RICO: The Crime of Being a Criminal, Parts III & IV*, 87 COLUM. L. REV. 920, 932–33 (1987)). The criminal law conceals not only patterns of abuse, but also non-physical manifestations of power and control that characterize the battering relationship. *See* Fischer et. al., *supra* note 34, at 2123–24 (“Some battered women have described psychological degradation and humiliation as the most painful abuse they have experienced.”). For a fuller discussion of traditional criminal law paradigms and their limitations in the domestic violence context, *see* Tuerkheimer, *supra* note 1, at 971–74.

59. As psychologist Mary Ann Dutton explains:

Abusive behavior does not occur as a series of discrete events. Although a set of discrete abusive incidents can typically be identified within an abusive relationship, an understanding of the dynamic of power and control within an intimate relationship goes beyond these discrete incidents. To negate the impact of the time period between discrete episodes of serious violence—a time period during which the woman may never know when the next incident will occur, and may continue to live with on-going psychological abuse—is to fail to recognize what some battered women experience as a continuing “state of siege.”

Mary Ann Dutton, *Understanding Women’s Responses to Domestic Violence: A Redefinition of Battered Woman Syndrome*, 21 HOFSTRA L. REV. 1191, 1208 (quoting Telephone Interview with Sue Osthoff, Director, National Clearinghouse for the Defense of Battered Women (Jan. 2, 1991)).

60. Tuerkheimer, *supra* note 1, at 966. I have previously argued that criminal law has failed to respond to these dynamics, and I proposed a redefinition of the crime of battering as a course

relevant is inimical to this reality: “[b]y isolating and atomizing violence in intimate relationships, law renders context meaningless.”<sup>61</sup> When law is applied to the experience of pregnancy battering, which is *acutely* context-dependent,<sup>62</sup> the limitations of traditional structures are even more striking.

### B. Decontextualizing the Violence

The significance of any particular act of violence inflicted on a pregnant woman by her intimate cannot be fully grasped without consideration of the ways in which distinctive attributes of pregnancy bear on the battering dynamic.<sup>63</sup> A pregnant battered woman is uniquely vulnerable.<sup>64</sup> She is relatively powerless, both in relation to her abuser and to her society. Whatever the underlying explanation for violence during pregnancy,<sup>65</sup> a distinguishing feature of pregnancy battering is captured by this simple

of conduct to accurately reflect its nature and harm. *Id.* at 1019–23.

61. *Id.* at 973.

62. *See infra* Part II.B.

63. Any accurate definition of the harm of pregnancy battering evolves from a broad conception of relevance, encompassing the circumstances which give meaning to an act of violence that is experienced by the victim as one piece of a larger, more encompassing whole, despite appearing to an outside observer as an isolated incident.

Expanding the bounds of what is deemed relevant furthers a feminist methodology of the type envisioned by Elizabeth Schneider. *See* Elizabeth M. Schneider, *Particularity and Generality: Challenges of Feminist Theory and Practice in Work on Woman-Abuse*, 67 N.Y.U. L. REV. 520 (1992). Schneider endorses a methodology that embraces

a richer and more detailed description of women’s particular problems, an acknowledgment of abuse as part of a general continuum of violence between intimates, and an understanding of the way in which particular experiences of woman-abuse are shaped by more general experiences of motherhood, unequal and constrained relationships with men, and general societal attitudes towards women.

*Id.* at 568.

64. This discussion cannot describe the life of every battered woman who is pregnant and does not purport to do so. My intention is to frame a necessarily contingent account that will be revised and enriched by the infusion of other perspectives.

65. Various explanations for violence during pregnancy have been posited. *See, e.g.*, Dorothy E. Roberts, *Motherhood and Crime*, 79 IOWA L. REV. 95, 115–16 (1993) (noting that some scholars have theorized that “the man’s sense of competition with the child for the woman’s attention” causes pregnancy battering, and suggesting instead that “battering pregnant women and new mothers is part of men’s continued quest to enforce the woman’s compliance with her role as mother.”). One might also hypothesize that batterers exert increased power during pregnancy as a response to an inability to control the woman’s developing relationship with the fetus. *See* E-mail from Lynn M. Paltrow to Deborah Tuerkheimer, *supra* note 35 (“A batterer typically seeks to limit his wife or girlfriend’s contacts with the outside world. During pregnancy women are expected to get regular check ups and to have frequent contact with people the batterer cannot control. Some batterers are jealous of the additional attention the woman may get, or the fact that she may be less accessible for sex.”); *People v. Brown*, 42 Cal. Rptr. 2d 155 (Ct. App. 1995) (defendant kicked girlfriend in stomach after she was paged by another man, causing her to deliver stillborn).

Underlying these various theories, a general consensus has apparently emerged among scholars that pregnancy violence is “[not] motivated by a particular hostility to fetuses.” E-mail from Lynn M. Paltrow to Deborah Tuerkheimer, *supra*. In support of this proposition, consider

truth: a batterer may more easily and more effectively dominate a woman who is already in a position of vulnerability.<sup>66</sup>

Pregnant women are bound to their batterers in a manner that is extraordinarily difficult to escape.<sup>67</sup> In a violent relationship, particularly daunting challenges to separation function to enhance an already significant power differential between victim and abuser.<sup>68</sup> The pregnant domestic violence victim who contemplates “leaving” her batterer often confronts overwhelming material obstacles: single mothers tend to live at or below the poverty line,<sup>69</sup> and welfare reform has only served to worsen their plight.<sup>70</sup>

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the case of *State v. Wickstrom*, 405 N.W.2d 1 (Minn. Ct. App. 1987). In *Wickstrom*, the defendant had kicked his former girlfriend, eight months pregnant at the time, in the abdomen with “hard-toed boots.” *Id.* at 2. The victim, who delivered a stillborn later that day, testified that the defendant “was happy she was pregnant and wanted to get back together with her. She confirmed he had attended prenatal classes. She thought Wickstrom was trying to hurt her, but not the baby.” *Id.* at 3.

66. Although the remainder of this discussion contextualizing pregnancy battering focuses on challenges to separation facing the victim, it should be emphasized that vulnerability also inheres in caring deeply about that which one cannot protect. *See infra* Part IV.D.

67. As Robin West has observed generally, “[a] woman who will care for a newborn is considerably more vulnerable than a man or woman who feels no such imperative, simply because she is radically less autonomous—anyone with obligations is less autonomous than women without.” WEST, *supra* note 52, at 118 (1997) (emphasis omitted). Even for women who are not battered, pregnancy—insofar as it is the precursor to motherhood and often the adoption of primary caregiving responsibilities—may herald a time of increased dependence on a mate. As Robin West writes:

Care of newborns, babies, toddlers, and young children is round-the-clock work, and anyone doing it is going to require help from others to ensure survival . . . . [I]n a patriarchally designed society, the new mother . . . is typically not *interdependent* with a community of equals. She is, instead, often if not typically, *dependent* upon, rather than interdependent with, a man who is not as involved in the nurturance of new life as she is. Because of that inequality and the unequal investment on which it rests, she rightly fears he may disappear at any point . . . . Such a woman is *dependent* upon a man rather than interdependent with him, precisely *because* of his willingness to leave: it is that willingness which renders her unnecessary to him, but he necessary to her.

*Id.* at 118–19 (emphasis in original).

68. *See generally* Sarah Buel, *Fifty Obstacles to Leaving, A.K.A. Why Abuse Victims Stay*, THE COLORADO LAWYER, Oct. 28, 1999, at 19. For a particularly insightful exploration of the problem of defining separation in the domestic violence context, see Martha R. Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 MICH. L. REV. 1 (1991).

69. WENDELL PRIMUS, LYNETTE RAWLINGS, KATHY LARIN & KATHRYN PORTER, CENTER ON BUDGET AND POLICY PRIORITIES, *THE INITIAL IMPACTS OF WELFARE REFORM ON THE INCOMES OF SINGLE-MOTHER FAMILIES* v (1999) (copy on file with author). Further,

Nearly half of all single-mother families have incomes below the poverty line before the effects of government benefits are considered. Many more such families have incomes only modestly above the poverty line. . . . Despite continued growth in the national economy and further expansion of the EITC [“Earned Income Tax Credit”], the average disposable income of the poorest fifth of single-mother families *fell* during [the period from 1995 to 1997, during which time federal welfare reform was enacted], with the primary factor causing the decline being a drop in means-tested benefits that substantially exceeded the decline in need.

*Id.* at v–vi. The United States Census reported that in 2003, poverty, which increased overall,

Faced with the prospect of living without sufficient food or shelter<sup>71</sup> for themselves and their child or children, it is not surprising that many women “choose”<sup>72</sup> to remain in a relationship with a man who can help to provide these subsistence items<sup>73</sup>—even if the cost of the exchange is continued violence.

As welfare reform has increasingly reflected a policy of stigmatizing single motherhood,<sup>74</sup> the consequences for poor women, particularly poor women of color,<sup>75</sup> have been dramatic.<sup>76</sup> Martha Fineman has observed:

increased most significantly among single-parent families. David Leonhardt, *More Americans Were Uninsured and Poor in 2003, Census Finds*, N.Y. TIMES, Aug. 27, 2004 at A1. See also Lucie E. White, *No Exit: Rethinking “Welfare Dependency” from a Different Ground*, 81 GEO. L.J. 1961, 1986 (1993) (“[T]he chance that an American family will be poor is many times greater if that family is headed by a woman, particularly a woman of color, than if it is headed by a man. Furthermore, over the last decade, the correlation between female-headed families and poverty has become dramatically more pronounced.”).

70. See generally Linda Burnham, *Welfare Reform, Family Hardship, and Women of Color*, 577 ANNALS 38 (2001); White, *supra* note 69.

71. Domestic violence shelter housing presents its own challenges. It is often unavailable, more often unavailable to women with children and, at best, a temporary solution to a woman’s housing crisis. For many women, shelter living is simply not an acceptable option for their children. See generally Susan Bennett, *Heartbreak Hotel: The Disharmonious Convergence of Welfare, Housing and Homelessness*, 1 MD. J. CONTEMP. LEGAL ISSUES 27, 54–55 (1990) (describing the hazards of sickness, peeling lead paint, asbestos, and lack of access to recreational areas for children). See also Amy R. Melner, *Rights of Abused Mothers vs. Best Interest of Abused Children: Courts’ Termination of Battered Women’s Parental Rights Due to Failure to Protect Their Children From Abuse*, 7 S. CAL. REV. L. & WOMEN’S STUD. 299, 313–14 (1998) (discussing the inadequacies of battered women’s shelters and the child-related reasons for rejecting available shelter, including the potential impact of shelter living on a battered mother’s custodial rights).

72. For a powerful critique of the agency construct in the domestic violence context, see Mahoney, *supra* note 57.

73. See Jody Raphael, *Domestic Violence and Welfare Receipt: Toward a New Feminist Theory of Welfare Dependency*, 19 HARV. WOMEN’S L.J. 201, 202–03 (1996).

Administrators of programs providing literacy and job training to welfare women at the grassroots level during the past five years have learned, contrary to Census data, that many of the women identified as single heads of households are, in fact, living with or are intimately involved with a male. The most likely explanation for this fact is that, because they cannot live on the welfare check alone, many women become dependent on a man who helps to support the family.

*Id.*

74. See Judith E. Koons, *Motherhood, Marriage, and Morality: The Pro-Marriage Moral Discourse of American Welfare Policy*, 19 WIS. WOMEN’S L.J. 1, 1–2 (2004).

75. See Parvin R. Huda, *Singled Out: A Critique of the Representation of Single Motherhood in Welfare Discourse*, 7 WM. & MARY J. WOMEN & L. 341, 347 (2001) (“The negative rhetoric surrounding single motherhood in welfare policy debates has especially focused on representations of poor black single mothers.”); M.M. Slaughter, *Fantasies: Single Mothers and Welfare Reform*, 95 COLUM. L. REV. 2156, 2166–67 (1995) (reviewing MARTHA ALBERTSON FINEMAN, *THE NEUTERED MOTHER, THE SEXUAL FAMILY AND OTHER TWENTIETH CENTURY TRAGEDIES* (1995)).

76. A survey of new parents in twenty U.S. cities found that 45% of welfare-eligible mothers did not receive Temporary Assistance for Needy Families (TANF) between their child’s birth and the child’s first birthday. Arloc Sherman, Shawn Fremstad & Sharon Parrott,

In poverty discourses . . . the label “Mother” is modified by her legal relationship (or lack thereof) to a male. Mothers are classified by whether or not they are single, a fact that is positioned as significant and even central to the discourses. The absence of the formal legal tie to a male is far more than just a descriptive term or classifying category. It has powerful ideological implications. In addition to providing a basis to determine who is undeserving in our culture, the rhetoric constructs single motherhood as dangerous and even deadly, not only to the single mothers and their children, but to society as a whole.<sup>77</sup>

The demonization of single mothers in poverty discourses has been intensified by recent changes to welfare law.<sup>78</sup> Marriage and family are explicitly promoted<sup>79</sup> and childrearing “outside of marriage” is condemned as being harmful to the well-being of children<sup>80</sup> and a *cause of poverty*.<sup>81</sup> Pregnant battered women considering the prospects

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*Employment Rates for Single Mothers Fell Substantially During Recent Period of Labor Market Weakness*, CENTER ON BUDGET AND POL’Y PRIORITIES, June 22, 2004, <http://www.cbpp.org/6-22-04ui.htm> (last visited Dec. 7, 2004) (citing Nancy E. Reichman, Julien O. Teitler, Irwin Garfinkel & Sandra Garcia, *Variations in Maternal and Child Wellbeing Among Financially Eligible Mothers by TANF Participation Status* (Ctr. for Research on Child Wellbeing, Working Paper #03-13-FF, 2003)).

Only limited research has been conducted to date on why entry rates have fallen, but an increased emphasis on diverting families eligible for welfare benefits away from TANF cash assistance programs may be playing a role. . . . Sanction and time limit policies also may be limiting TANF programs’ responsiveness to labor market weakness. These policies may deny aid—temporarily or permanently—to families that otherwise would participate in TANF cash assistance programs.

*Id.*

77. Martha L. Fineman, *Images of Mothers in Poverty Discourses*, 1991 DUKE L.J. 274, 285–86 (1991); see also Slaughter, *supra* note 75, at 2166–67 (1995) (“Not only are single mothers associated with poverty, but they are also seen to be raising a generation of unhappy, dysfunctional, or pathological children. Increasingly, the face of the poor is that of the single mother, particularly the Black one, and patriarchal ideology officially condemns single mothers as the cause of, and explanation for, poverty through stereotyping that is racist as well as misogynic.”)

78. In 1996, the Welfare Reform Law of 1996, or “Personal Responsibility and Work Opportunity Reconciliation Act of 1996” (PRWORA), Pub. L. No. 104-93, 110 Stat. 2105 (1996), created the Temporary Assistance for Needy Families Program (TANF), replacing what was then known as welfare (Aid to Families with Dependent Children (AFDC) and the Job Opportunities and Basic Skills Training (JOBS) programs). TANF operates by providing states with federal funds to develop and implement programs within specified guidelines and in accordance with an articulated normative vision. See Huda, *supra* note 75, at 342 (“In overtly condemnatory and punitive terms, PRWORA stigmatizes dependence and ascribes moral fault to one particular group: poor single mothers. Ignoring the realities that poor single mothers face as they struggle with caretaking and employment responsibilities, PRWORA imposes strict time limits and stringent work requirements in the name of ‘family values’ and ‘independence.’”); Kara S. Suffredini & Madeline V. Findley, *Speak Now: Progressive Considerations on the Advent of Civil Marriage for Same-Sex Couples*, 45 B.C. L. REV. 595, 603–04 (2004).

79. See Koons, *supra* note 74, at 5.

80. See, e.g., Jason DeParle, *Raising Kevin*, N.Y. TIMES MAG., Aug. 22, 2004 (“[M]ounds of social science, from the left and the right, leave little doubt that the children of single-parent families face heightened risks.”). Marriage as a means of enhancing the financial and emotional health of children has been promoted by conservatives and liberals alike. Robert Pear & David



of separating from their abuser thus confront not only adverse material consequences, but a societal message that many have internalized:<sup>82</sup> children raised in households headed by single mothers are damaged emotionally, developmentally, and financially.<sup>83</sup> Again, it is unsurprising that many women “choose” to remain in battering relationships, given the available options.

In various ways, then, battering is experienced distinctly by women who are pregnant. The relatively vulnerable status of the pregnant abuse victim—both inside and outside the family structure—makes her especially susceptible to more effective control by the abuser.

The lives of women who are battered while pregnant reflect this reality, as the story of a woman called Dolores suggests.<sup>84</sup>

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D. Kirkpatrick, *Bush Plans \$1.5 Billion Drive for Promotion of Marriage*, N.Y. TIMES, Jan. 14, 2004, at A1; Koons, *supra* note 74, at 6–15.

81. Lucie White refers to this discursive transformation of effect into cause as a “kind of voodoo logic” that is often employed “to convince women that their best route off of welfare is a trip to the altar.” White, *supra* note 69, at 1986. See also Koons, *supra* note 74, at 6. On the many ways in which PRWORA denigrates single motherhood, see Huda, *supra* note 75, at 346 (“PRWORA’s ‘pro-family’ and ‘pro-work’ rhetoric and provisions privilege marital status and implicitly and explicitly condemn childrearing and childbearing outside of marriage. The moral tenor of PRWORA reflects an entrenched cultural perception of single motherhood as pathological. . . . American society has branded single mothers as the cause of their own moral unfitness, their children’s perceived maladjustment and, more crucially, of their families’ impoverishment. Sociologists have described a ‘culture of poverty,’ signifying not simply an economic condition but rather a way of life, and women purportedly have transmitted the poverty pathology intergenerationally.”).

82. The story of a woman named Barbara Sutton, as related by Lucie White, suggests the effects of such internalization, as well as the importance of context to understanding the dynamics of battering:

After having a child on her own, Ms. Sutton tried for two years to make ends meet as a single mother. Finally, she met a man who seemed both eligible and responsible, and she dutifully fell in love. Her story, in her own assessment, then began to sound like a worn-out cliché. First, there was a whirlwind romance, with lots of roses and a church wedding that made her parents proud. After a few weeks, with no warning there was an occasional slap, a few vile words. Then the cursing got fiercer and the slaps became blows. There were outbursts of jealousy that led him to search through her things, hide her birth control pills so she could not cheat on him, and take her car keys so she would not leave the house. She tried hard to calm his anger—by talking less or cooking better or avoiding “those looks” that he didn’t trust. But it didn’t always work. Once he put his intent bluntly. “I’m going to break you, break your spirit,” she recalls him telling her, “even if I have to kill you first.” Still she tried to hold the marriage together—because she loved him, *and in order to give a future to her child*. She explained how “you’re taught, as a woman that it is your job to keep the family together, and that if it breaks up—no matter what he did to you—it’s your fault.”

White, *supra* note 69, at 1987–88 (emphasis added). After Sutton became pregnant again and received a restraining order and judicial separation, her husband returned to the home and attempted to slit her throat with a boxcutter in the presence of their three-year-old child, leaving Sutton facially disfigured and permanently disabled. *Id.* at 1988.

83. See *supra* note 69.

84. Family Violence Prevention Fund, *Personal Stories: Dolores*, <http://endabuse.org/programs/display.php3?DocID=100113> (last visited Dec. 16, 2006).

Dolores [a pseudonym] is 32 years old. She is originally from Mexico but now lives in a small Texas town about 10 miles from the Mexican border. She met her husband, Enrique [also a pseudonym], a U.S. citizen when she was 13 years old and he was 26 years old. After a six month courtship, Enrique convinced her to marry him. Although Enrique had promised to help Dolores get her permanent residence in the U.S., he later refused to follow through. . . .

During their marriage Enrique was very domineering. He kept the family isolated in a rural community with their closest neighbor being five miles away. Dolores was not allowed to go into town alone for any reason. She was not allowed to look at anyone directly or to have telephone contact with anyone. She discovered that Enrique was also living with another woman and that he had two children with her. She wanted to leave Enrique but had just found out that she was pregnant and knew that her family would not let her return in that condition, so she stayed. It was during the pregnancy that the physical abuse began. When her son was born, Dolores had a black eye, swollen face and her body was covered with bruises as a result of Enrique's physical attack on her.<sup>85</sup>

Enrique would not allow Dolores to use birth control, and she soon found herself pregnant again. After suffering a miscarriage as a result of several violent physical and sexual assaults by Enrique, Dolores attempted to leave him. Enrique eventually found her, took their son, and threatened that if she did not return he would kill her family in Mexico and flee to the United States before he could be caught. Dolores returned to Enrique. She became pregnant again, was beaten by Enrique throughout her pregnancy, and was again covered with bruises by the birth of her second child.<sup>86</sup>

Dolores's account, and others told outside the constraints of traditional legal structures, reveals that the harm of pregnancy battering is far greater than what a narrative framed by the incident-based, physical injury-focused criminal law allows.<sup>87</sup>

### C. Disregarding the Pregnancy

The failure of conventional legal structures to adequately contextualize the battering of pregnant women is compounded by a fundamental misconception of pregnancy itself<sup>88</sup> and a concomitant disregard of the impact of pregnancy on a woman's experience of violence.

Criminal law's singular focus on the harm of physical injury<sup>89</sup> tends to conceal not only the non-physical manifestations of power characteristic of the battering relationship<sup>90</sup> but also the victim's pregnancy. Defining crimes of violence in exclusive relation to physical injury results in the location of a victim's identity entirely in her external shell—a shell that *exists without regard to pregnancy*. In this manner, criminal

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85. *Id.*

86. *Id.*

87. For another account of pregnancy battering that demonstrates the power of extra-legal narrative to illuminate context, see Kathleen Waits, *Battered Women and their Children: Lessons from One Woman's Story*, 35 HOUS. L. REV. 29, 34–35 (1988).

88. See MacKimmon, *supra* note 53.

89. See, e.g., MODEL PENAL CODE § 211.1(1)(a) (2002) (“A person is guilty of assault if he: attempts to cause or purposely, knowingly or recklessly causes bodily injury to another . . .”).

90. See Tuerkheimer, *supra* note 1, at 971–74; *supra* notes 57–60 and accompanying text.

law inaccurately constructs the victim of pregnancy battering, obscuring significant aspects of her self—a self that *mutates and transforms during pregnancy*.<sup>91</sup> As a result, what is often the core of the victim's suffering is overlooked.

The case of *People v. Moorehead*<sup>92</sup> effectively illustrates these dynamics. The defendant was charged with misdemeanor assault for kicking the victim, who was eight months pregnant, in the stomach. Tracking the language of New York's assault statute,<sup>93</sup> the criminal complaint alleged that the defendant intentionally caused physical injury and "that said injury to the victim consisted of: stomach pains."<sup>94</sup>

The defendant moved to dismiss the complaint as facially insufficient based on his contention that the prosecution had not adequately alleged physical injury. The trial court denied the motion, but necessarily framed its conclusion by reference to the relevant law focused on physical injury:

There can be no doubt that a kick to the stomach of a woman, who is eight months pregnant, could result in "impairment of physical condition or substantial pain."... The People should not be required at the time the information is filed to actually prove physical injury. This is a question of fact to be proven by the People at the time of trial and decided by the triers of fact.<sup>95</sup>

The court, in accordance with the governing substantive law, did not consider the impact that the victim's pregnancy may have had on her experience of being kicked in the stomach, except insofar as she may have experienced a heightened sensitivity to physical pain or bodily injury as a result of her condition.<sup>96</sup> The court did not—and, pursuant to the applicable statute, could not—contemplate the victim's interest in carrying her pregnancy to term. Nor did the court take into account the effect of the defendant's violence on the victim's sense of autonomy<sup>97</sup> or her connection to the developing fetus.<sup>98</sup> Instead, the court considered only what the statutory definition allowed: the possibility that the victim's physical discomfort may have risen to the level required by law.<sup>99</sup> Her "stomach pains"<sup>100</sup> completely encompassed her legally

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91. See *infra* Part IV.C.

92. 648 N.Y.S.2d 528 (N.Y. Just. Ct. 1996).

93. N.Y. PENAL LAW § 120.00(1) (McKinney 2002) (stating that a person is guilty of misdemeanor assault when "[w]ith intent to cause physical injury to another person, he causes such injury to such person or to a third person").

94. *Moorehead*, 648 N.Y.S.2d at 529.

95. *Id.* at 530.

96. *Id.* The court's use of the conditional ("could") and its reference to the relatively minimal burden on the prosecution at the early procedural stage in which the defendant makes his motion to dismiss for facial insufficiency are tacit reminders that the prosecution may not be able to withstand a subsequent motion for a judgment of acquittal. The court alludes, as well, to the prosecutor's challenge of proving the physical injury element of the assault charge to the satisfaction of a jury beyond a reasonable doubt. *Id.*

97. See *infra* Part IV.A.

98. See *infra* Part IV.B.

99. *Moorehead* is unusual only because it proceeded as far as the motion stage and resulted in a written opinion by the trial court. In my experience, many similar cases involving the infliction of "stomach pain" are never even pursued by prosecutors. See *supra* note 51 and accompanying text.

cognizable injury, and shrouded what likely were the far more devastating aspects of the assault from the victim's perspective.<sup>101</sup>

We see, then, the traditional criminal law's answer to the question *who is the victim of pregnancy battering*: the victim is her external shell. The pregnancy is of consequence only to the extent that it bears on whether she experienced physical injury; the impact of a victim's pregnancy on her suffering is of no consequence whatsoever.

### III. CODIFYING FETAL VICTIMHOOD

#### A. Historical Transformation of the Fetal Personhood Construct

The criminalization of violence during pregnancy has been a story of the entrenchment of legal recognition of fetal victimhood. At both the state and federal levels, legislative efforts to define and address the problem of violence during pregnancy have, with few exceptions, coalesced around punishing what has come to be known as "fetal homicide."<sup>102</sup> Fetal homicide laws and similarly structured legislation identify the fetus as the victim of violence and punish those who inflict death or, in some cases, bodily injury on the "unborn child."<sup>103</sup> In order to appreciate the conceptual underpinnings of this type of legislation and ultimately to evaluate the merits of the paradigm, it is helpful to consider the development of the construct of

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100. Again, the prosecutor alleged in the charging instrument that the victim's physical injury consisted of "stomach pains." *Moorehead*, 648 N.Y.S.2d at 529.

101. For other illustrations of the dissonance that results when the rubric of physical injury is applied to pregnancy battering, see *State v. Bost*, No. 00AP-506, 2000 Ohio App. LEXIS 5513, at \*2 (Ohio Ct. App. Nov. 28, 2000) (concluding that in order to prove physical harm, as required by the applicable domestic violence statute, the prosecution presented testimony by police that the pregnant victim's stomach "had redness on the left side, approximately six inches in diameter"); *State v. Petty*, No. 13002, 1992 WL 120503 (Ohio Ct. App. June 4, 1992) (holding that in prosecuting the defendant for kicking his pregnant former girlfriend in the stomach and head, evidence that the victim delivered a stillborn was relevant only to establish serious physical harm); *Hayes v. State*, No. 01-96-01027-CR, 1998 Tex. App. LEXIS 81 (Ct. App. Jan. 8, 1998) (upholding a conviction for aggravated assault where the defendant repeatedly kicked his pregnant girlfriend in the stomach, because a foot could be considered "deadly weapon" under the relevant statute).

102. See *infra* Part III.B.

103. This codification of a doctrine of fetal personhood is of relatively recent vintage. The common law requirement that a child be born alive in order for homicide laws to apply was uniformly adopted in the United States before it was ultimately abolished in a majority of jurisdictions. Alison Tsao, Note, *Fetal Homicide Laws: Shield Against Domestic Violence or Sword to Pierce Abortion Rights*, 25 HASTINGS CONST. L.Q. 457, 460-61 (1998). A similar trend toward the recognition of fetal personhood has characterized the development of civil law. See Julia Epstein, *The Pregnant Imagination, Fetal Rights, and Women's Bodies: A Historical Inquiry*, 7 YALE J.L. & HUMAN. 139, 145 (1995) ("[T]he concept of fetal personhood in United States law is a post-World War II phenomenon."); Elisabeth H. Sperow, *Redefining Child Under the State Children's Health Insurance Program: Capable of Repetition, Yet Evading Results*, 12 AM. U. J. GENDER SOC. POL'Y & L. 137, 146 (2004) (noting that over time law has granted fetuses greater property rights, rights to bring wrongful death claims, and rights to sue in civil courts).

fetal personhood. Put differently, abstracting the discourse of fetal personhood from specific contemporary policy debates most effectively illuminates the norms at stake.

Legal recognition of fetal rights can best be understood as a powerful mechanism for enforcing societal notions of maternity and womanhood.<sup>104</sup> In her historical analysis of the effort to criminalize abortion, Reva Siegel asserts that examination of “when and how this society intervenes in women’s lives to protect the unborn illuminates the social logic of fetal-protective regulation, revealing many ways in which the focus and structure of such regulation reflect social judgments about women rather than simple regard for the unborn.”<sup>105</sup>

In the guise of protecting fetuses, the anti-abortion campaign of the nineteenth century reinforced a particular conception of appropriate female conduct, particularly with regard to marital and maternal roles as defined by the prevailing “cult of domesticity.”<sup>106</sup> Discourse around the abortion question was characterized by an “open discussion of women’s duties”<sup>107</sup> that emphasized the campaigners’ view that “[m]otherhood was not a matter of choice for women; it was their destiny.”<sup>108</sup>

This discourse has been absent, for the most part, from contemporary abortion debates. As Siegel observes:

Today, it is unlikely that state actors would direct women to subordinate their interests to the act of bearing or caring for children, forego nontraditional

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104. See MacKinnon, *supra* note 53, at 1315 (“Separate fetal status of any sort, in a male-dominated legal system in which women have been controlled through the control of their procreative capacity, risks further entrenchment of women’s inequality. If the fetus were deemed a person, it may well have more rights than women do, especially since fetal rights would be asserted most often by men in traditionally male institutions of authority: progenitors, husbands, doctors, legislators, and courts. Fetal rights as such are thus in direct tension with sex-equality rights. Indeed, the only point of recognizing fetal personhood, or a separate fetal entity, is to assert the interests of the fetus *against* the pregnant woman.”) (emphasis in original); Patricia Williams, *Fetal Fictions: An Exploration of Property Archetypes in Racial and Gendered Contexts*, 42 FLA. L. REV. 81, 92–93 (1990).

105. Reva Siegel, *Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 STAN. L. REV. 261, 335 (1992). See also Epstein, *supra* note 103, at 155–56 (“Regulatory discourses concerning the physiology and reproductive roles of women have a long social history. . . . The prevailing views in the nineteenth century permitted physicians to step in and ‘restrain’ women who were unwilling or unable to restrain themselves. Both eighteenth-century discourses that attributed fetal malformations to maternal mental activity, and nineteenth-century regulations concerning pregnant women, medical authority, and abortion, served to make women’s role in reproduction conform to prevailing ideas about women’s social place.”).

106. Siegel, *supra* note 105, at 292–93; see also ROSALIND POLLACK PETCHESKY, *ABORTION AND WOMAN’S CHOICE: THE STATE, SEXUALITY, & REPRODUCTIVE FREEDOM* 264 (rev. ed. 1990) (“Historically, the inability to control her pregnancies has been a major restriction on a woman’s sexual activity, in a way that is obviously not the same for men. It is important to note that ‘right-to-life’ ideology is not simply antisex; the point is not wholesale repression but the *rechanneling* of sexuality into patriarchally legitimate forms, those that reinforce heterosexual marriage and motherhood.”) (emphasis in original).

107. Siegel, *supra* note 105, at 328.

108. *Id.* at 311.

employment, or otherwise adhere to conventional norms of feminine conduct as advocates for reform did in the past.<sup>109</sup>

But this latest phase in the evolution of fetal rights rhetoric comes only after decades of growing legal recognition of fetal personhood.<sup>110</sup> As the notion of fetal personhood has become “not merely acceptable” but “increasingly . . . unchallengeable,”<sup>111</sup> fetal protective legislation may now be justified without reference to status-enforcing norms, and even without reference to women.<sup>112</sup> This distinction may well be more rhetorical than substantive.<sup>113</sup> And yet, the rhetorical evolution is itself significant. Where before the pregnant woman was regulable, we will see that she has now become invisible.<sup>114</sup>

Before exploring this latest evolutionary stage, it is important to emphasize that when a fetus is given status and the rights that flow from it—separate and apart from the woman carrying it—conflict (or, at the very least, the potential for conflict)<sup>115</sup> between the fetus and the pregnant woman is created.<sup>116</sup> Legal recognition of fetuses as

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109. *Id.* at 330.

110. For an interesting account of how the Supreme Court’s decision in *Roe v. Wade*, 410 U.S. 113 (1973), galvanized the anti-abortion movement and impacted the development of fetal personhood rhetoric, see KRISTIN LUKER, *ABORTION AND THE POLITICS OF MOTHERHOOD* 137–57 (1984).

111. Siegel, *supra* note 105, at 330.

112. *See infra* notes 141–58 and accompanying text.

113. For example,

even if the contemporary abortion debate lacks the open discussion of women’s duties that marked the nineteenth century campaign, there is indeed evidence that concerns about women’s conduct as mothers may lie just beneath its surface. Those who seek to protect unborn life want to regulate the conduct of women who fail to act as good mothers should.

Siegel, *supra* note 105, at 328. *See also* PETCHESKY, *supra* note 106, at xii (“Only in the last two decades, ‘when traditional justifications for restricting access to abortion became culturally anachronistic or constitutionally impermissible,’ has ‘the moral value attached to the fetus [become] a central issue in American culture and law.’”) (citation omitted).

114. *See infra* notes 141–58 and accompanying text.

115. Whether the opposition of fetus and woman *inevitably* flows from recognition of fetal personhood is perhaps debatable. Within the particular sociolegal context in which fetal rights have evolved, however, the conflict seems virtually certain to arise.

116. Scholars disagree about the root causes of increased differentiation of maternal and fetal interests. Many point to the development of medical technology as the trigger for widespread recognition of fetal personhood. *See, e.g.*, BARBARA DUDEN, *DISEMBODYING WOMEN* 94–98 (Lee Hoinacki trans., 1993) (1991); Janet Gallagher, *Collective Bad Faith: “Protecting” the Fetus, in REPRODUCTION, ETHICS, AND THE LAW* 350 (Joan C. Callahan ed., 1995) (“The compelling new visual images of the fetus play powerfully on deeply rooted patriarchal attitudes in which pregnant women are viewed as vessels, fields, or gardens in which the male seed is temporarily planted. It has become too easy for us to think of the fetus as something quite distinct from the body and life of the woman who carries it, to ignore the ethical and legal significance of the real geography of pregnancy.”) (footnote omitted). Others identify a backlash against the successes of the feminist movement of the 1960s and 70s as the explanation for the expansion of fetal rights. *See, e.g.*, Jean Reith Schroedel, Pamela Fiber & Bruce D. Snyder, *Women’s Rights and Fetal Personhood in Criminal Law*, 7 *DUKE J. GENDER L. & POL.* 89, 97 (2000) (citing CYNTHIA

persons whose rights have been violated—fetuses as victims—reflects and reifies a particular conception of pregnant women and their relationship to the developing fetus. This, in turn, necessarily structures relations between pregnant women and the state.<sup>117</sup> More precisely, recognition of fetal victimhood has dictated heightened governmental control over women's bodies and lives.<sup>118</sup> This control is animated by a vision of motherhood, just as it reinforces the state's authority to enforce this vision.

The twentieth-century manifestation of the "maternal-fetal conflict"<sup>119</sup> has been widely explored in feminist literature, both legal and non-legal. In diverse contexts, commentators have described how increasing recognition of fetal personhood has adversely affected the well-being of pregnant women.<sup>120</sup> For instance: hundreds of women—mostly poor and black—have been prosecuted for "prenatal abuse" based on their drug use during pregnancy,<sup>121</sup> pregnant women engaging in behaviors considered

R. DANIELS, *AT WOMAN'S EXPENSE* 53 (1993) and summarizing feminist assertions that fetal personhood "is part of a broader attack on women's citizenship rights"); see also SUZANNE UTTARO SAMUELS, *FETAL RIGHTS, WOMEN'S RIGHTS: GENDER EQUALITY IN THE WORKPLACE* 9–15 (1995); Eileen L. McDonagh, *From Pro-Choice to Pro-Consent in the Abortion Debate: Reframing Women's Reproductive Rights*, 14 *STUD. L. POL. & SOC'Y* 245, 245 (1994). Dorothy Roberts has suggested that the maternal-fetal conflict was created by slave masters at a far earlier historical moment. DOROTHY ROBERTS, *KILLING THE BLACK BODY: RACE, REPRODUCTION, AND THE MEANING OF LIBERTY* 39–41 (1997). Roberts describes the southern slaveholder practice of whipping pregnant slaves while they were forced to lie face down in the ground in a depression large enough for the stomach, "enabl[ing] the master to protect the fetus while abusing the mother." *Id.* at 40. See also JACQUELINE JONES, *LABOR OF LOVE, LABOR OF SORROW* 20 (1985) (discussing the whipping of pregnant slaves).

117. This claim may arguably be made with respect to women who are not pregnant, as well. See Elizabeth A. Reilly, *The Rhetoric of Disrespect: Uncovering the Faulty Premises Infecting Reproductive Rights*, 5 *AM. U. J. GENDER & L.* 147, 157–58 (1996) ("Women have been subsumed into their reproductive organs. The woman as an independent person with interests and needs is invisible in the Court's decisions: instead, law has treated women first and foremost as potential or actual mothers."); Roberts, *supra* note 65, at 96 ("Being a mother is women's major social role: Society defines all women as mothers or potential mothers."). This discussion, however, remains focused on pregnant women.

118. See *infra* notes 119–27 and accompanying text.

119. ROBERTS, *supra* note 116, at 40 ("Feminists use the term 'maternal-fetal conflict' to describe the way in which law, social policies, and medical practice sometimes treat a pregnant woman's interests in opposition to those of the fetus she is carrying.").

120. See Schroedel et al., *supra* note 116, at 117 ("Every expansion in fetal rights has resulted in a commensurate decline in the fundamental rights of pregnant women."); see also ROSALIND POLLACK PETCHESKY, *ABORTION AND WOMAN'S CHOICE: THE STATE, SEXUALITY, AND REPRODUCTIVE FREEDOM* 329 (1984) ("[Whenever the concept of fetal personhood] has emerged historically, it has been linked with an attack on the social position and morality of women."); *infra* notes 121–27 and accompanying text.

121. Lynn M. Paltrow, *Pregnant Drug Users, Fetal Persons, and the Threat to Roe v. Wade*, 62 *ALB. L. REV.* 999, 1002 (1999). As noted by Dorothy Roberts:

The prosecution of drug-addicted mothers is part of an alarming trend towards greater state intervention into the lives of pregnant women under the rationale of protecting the fetus from harm. . . . Such government intrusion is particularly harsh for poor women of color. They are the least likely to obtain adequate prenatal care, the most vulnerable to government monitoring, and the least able to conform to the

“high risk” have also been subject to criminal sanctions<sup>122</sup> and civil commitment procedures<sup>123</sup> putatively aimed at protecting the fetus; the rhetoric of fetal personhood has been used to undermine a woman’s right to an abortion,<sup>124</sup> in the name of fetal rights, courts have ordered pregnant women to undergo involuntary medical interventions<sup>125</sup> and prosecutors have brought charges against women who refuse to consent to Caesarian sections;<sup>126</sup> and women have been subjected to discriminatory employment policies ostensibly designed to protect fetuses and potential fetuses.<sup>127</sup>

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white, middle-class standard of motherhood. They are therefore the primary targets of government control.

Dorothy E. Roberts, *Punishing Drug Addicts Who Have Babies: Women of Color, Equality, and the Right of Privacy*, 104 HARV. L. REV. 1419, 1421–22 (1991) (footnotes omitted).

122. Dawn Johnsen, *From Driving to Drugs: Governmental Regulation of Pregnant Women’s Lives After Webster*, 138 U. PA. L. REV. 179, 193–94 (1989).

123. See David F. Chavkin, “For Their Own Good”: *Civil Commitment of Alcohol and Drug-Dependent Pregnant Women*, 37 S.D. L. REV. 224, 237–38 (1992).

124. See Paltrow, *supra* note 121, at 1000 (“An ongoing and concomitant part of the anti-choice strategy . . . has been to establish fetal rights under the law. If fetuses are recognized as full legal persons, then their right to life must, as a matter of constitutional law, be protected—and all abortions outlawed.” (footnotes omitted)). Put simply, “[i]f the fetus is a person, how can its life be less important than a woman’s liberty and pursuit of happiness?” KATHA POLLITT, *REASONABLE CREATURES: ESSAYS ON WOMEN AND FEMINISM* 12 (1994) (opposing recognition of fetal personhood).

For a dramatic illustration of this strategy in practice, consider *Whitner v. State*, 492 S.E.2d 777 (S.C. 1997), and its aftermath. In *Whitner*, the South Carolina Supreme Court concluded that a viable fetus is a “person” under the statutory framework being applied by the state to prosecute pregnant drug addicts under a theory of child endangerment. Following this decision, Attorney General Charles Condon

made clear that he would use the decision as a basis for limiting abortion. In a written opinion addressing the legality of the so called “partial-birth abortion procedure,” he argued that *Whitner* stood for the broad proposition that “a viable unborn fetus is a ‘person’ under South Carolina civil and criminal law.” Specifically, he took the position that “*Whitner* must now be construed as part of South Carolina’s abortion statutes.” He concluded that *Whitner*, along with the other precedent cited in that case, made a particular form of abortion—so called partial birth abortion—murder. The Attorney General publicly announced that “he would prosecute any doctor who performs a ‘partial birth’ abortion on charges of homicide by child abuse.” Then, following a natural progression, his office argued that all post-viability abortions regardless of the method or reason could be prosecuted as murder, and that those involved in the procedure could receive the death penalty.

Paltrow, *supra* note 121, at 1035 (footnotes omitted).

125. RACHEL ROTH, *MAKING WOMEN PAY: THE HIDDEN COST OF FETAL RIGHTS* 89–134 (2000). See generally Nancy Ehrenreich, *The Colonization of the Womb*, 43 DUKE L.J. 492 (1993).

126. See Katha Pollitt, *Pregnant and Dangerous*, THE NATION, Apr. 26, 2004, at 9 (describing the prosecution of Melissa Rowland for murder based in part on her refusal to undergo an immediate Caesarean section).

127. See *U.A.W. v. Johnson Controls, Inc.*, 499 U.S. 187 (1991) (reversing summary judgment for employer on gender discrimination challenge to company policy preventing any fertile woman from holding jobs with potential lead exposure); DEBORAH L. RHODE, *JUSTICE AND GENDER* 96 (1989) (“In the interests of maternal and fetal health, courts have sanctioned layoffs



Examining the ways in which notions of fetal personhood have penetrated public discourse and shaped policy reveals a disproportionate disadvantaging of particularly vulnerable women.<sup>128</sup> For instance, the extent to which prosecutions for prenatal abuse have targeted women who are poor, black, and addicted to drugs is well documented.<sup>129</sup> Many of these women were also in violent relationships.<sup>130</sup> Indeed, several were arrested only after a need for medical treatment of injuries inflicted by their batterer led to the discovery of drug or alcohol use.<sup>131</sup> Notwithstanding the

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of pregnant employees and bans on employing fertile women in potentially toxic workplaces. . . . [F]etal protection policies, like other forms of protective-labor legislation, have frequently limited women's opportunities in male-dominated industries, while providing inadequate safeguards in female-dominated sectors."); ROTH, *supra* note 125, at 37–58; Stephen F. Befort, *BFOQ Revisited: Johnson Controls Halts the Expansion of the Defense to Intentional Sex Discrimination*, 52 OHIO ST. L.J. 5, 5 (1991) (noting that some courts have reformulated the traditional framework for the "bonafide occupational qualification" (BFOQ) statutory defense to intentional discrimination under Title VII in order to sustain fetal protection policies, notwithstanding the fact that courts and the Equal Employment Opportunity Commission (EEOC) have historically construed the scope of the defense narrowly).

128. Race, class, sexual orientation, immigration status, and other markers of individual and group identity invariably shape the dynamics of legal differentiation of fetus from pregnant woman. See Siegel, *supra* note 105, at 344 ("Where the class of women targeted for regulation is defined by criteria associated with norms of gender, race, or class, it is all the more likely that fetal-protection policy reflects tacit assumptions about the women whose conduct is regulated, rather than simple solicitude for the welfare of future generations.").

129. See Dorothy E. Roberts, *Creating and Solving the Problem of Drug Use During Pregnancy*, 90 J. CRIM. L. & CRIMINOLOGY 1353, 1364 (2000) (reviewing LAURA E. GOMEZ, *MISCONCEIVING MOTHERS: LEGISLATORS, PROSECUTORS, AND THE POLITICS OF PRENATAL DRUG EXPOSURE* (1997)). Roberts observes:

The vast majority of women charged with prenatal substance abuse [have been] poor Black women who smoked crack. The racial disparity in prosecutions did not stem from a greater propensity of Black women to use drugs while pregnant. Rather, it was the result of drug testing and reporting practices that targeted Black substance abusers for detection by law enforcement authorities. Testing of pregnant patients and newborns—the government's main source of information about prenatal drug use—occurs almost exclusively in public hospitals that serve poor minority communities. There is also evidence that doctors and staff are more likely to test and report Black patients based on biased screening criteria. A study of pregnant women in Pinellas County, Florida, found that despite similar rates of substance abuse, Black women were ten times more likely than whites to be reported to government authorities.

*Id.* (emphasis and footnotes omitted). Records from a hospital in South Carolina that instituted a policy of interagency cooperation in the nonconsensual drug testing of pregnant patients and reporting of results to the police for prosecution of drug and child abuse charges show that equal numbers of black and white pregnant patients had used drugs, yet "all but one of the women arrested under the policy were Black." *Id.* See also Paltrow, *supra* note 121, at 1002. See generally, Roberts, *supra* note 121.

130. In a review of over 150 arrests of women for behaviors during pregnancy, Lynn Paltrow found that a "significant number" of the women were in violent relationships at the time. See Lynn M. Paltrow, *Criminal Prosecutions Against Pregnant Women: National Update and Overview* (Apr. 1992), <http://advocatesforpregnantwomen.org/articles/1992stat.htm> (last visited Nov. 23, 2004).

131. *Id.* See also JEAN REITH SCHROEDEL, IS THE FETUS A PERSON? 124–25 (2000) ("A

relationship between domestic violence and substance use during pregnancy,<sup>132</sup> the pregnant woman is held legally responsible for the well-being of the fetus *regardless* of whether she is able to keep herself safe and healthy.<sup>133</sup> Regulating women in the name of vindicating the rights of fetuses, the law utterly fails to recognize, much less remedy, the full spectrum of violence that impacts their lives.<sup>134</sup>

A pregnant woman's safety and health are thus variables to be controlled—seemingly to ensure an optimal fetal outcome,<sup>135</sup> but more fundamentally to dictate compliance with societal notions of acceptable maternal conduct.<sup>136</sup> Although a pregnant woman is not yet a mother (unless she already has a child),<sup>137</sup> she is expected

cursory reading of case files [involving prosecutions for fetal abuse] shows that a high percentage of the more than 240 women charged with fetal abuse crimes had also been physically assaulted while pregnant. Notwithstanding sometimes clear evidence of third-party physical assaults, the prosecutors charged only the women.”). For instance, one Georgia woman, who gave birth to a stillborn two days after being admitted to the hospital for abdominal trauma caused by her boyfriend, was indicted for cocaine possession based on a positive drug test of the stillborn. Paltrow, *supra* note 130. The victim's batterer was not prosecuted. *Id.* In Wyoming, a pregnant woman waiting in the hospital emergency room to be treated for injuries inflicted by her husband was arrested and charged with criminal child abuse for endangering her fetus after she tested positive for alcohol. *Id.* The victim's husband pleaded guilty to simple assault, a misdemeanor, and was sentenced to a fine. Telephone Interview with Mary Elizabeth Galvan, victim's attorney (Jan. 4, 2005). Similar facts have resulted in the arrests of a number of pregnant victims of domestic violence. *See generally* Paltrow, *supra*.

For a broad critique of the prosecution of drug-addicted pregnant women, see Lynn M. Paltrow, *Punishment and Prejudice: Judging Drug-Using Pregnant Women*, in *MOTHER TROUBLES, RETHINKING CONTEMPORARY MATERNAL DILEMMAS* 59 (Julia E. Hanigsber & Sara Ruddick eds., 1999) and Michelle Oberman, *Sex, Drugs, Pregnancy, and the Law: Rethinking the Problems of Pregnant Women Who Use Drugs*, 43 *HASTINGS L. J.* 505 (1992).

132. One study found that 70% of pregnant drug-addicted women were in battering relationships. Lynn M. Paltrow, *supra* note 131, at 67. *See also* Linda Chamberlain & Katherine A. Perham-Hester, *Physicians' Screening Practices for Female Partner Abuse During Prenatal Visits*, 4 *MATERNAL & CHILD HEALTH J.* 141, 142 (2000) (noting that “[s]everal studies have substantiated the correlation between substance abuse and experiencing abuse during pregnancy”); New York State Office for the Prevention of Domestic Violence, *Relationship of Victimization to Addiction*, [http://www.opdv.state.ny.us/health\\_humsvc/substance/aodvictims.html](http://www.opdv.state.ny.us/health_humsvc/substance/aodvictims.html) (last visited Sept. 21, 2005).

133. The degree to which criminal justice intervention on behalf of the fetus further subordinates the already disempowered population of pregnant substance users who are also victims of domestic violence has been given scant scholarly attention.

134. *See supra* notes 59–70 and accompanying text.

135. *Cf.* ROBERTS, *supra* note 116, at 183 (“The history of state neglect of Black infants casts further doubt on the professed concern for the welfare of the fetus. When a nation has always closed its eyes to the circumstances of pregnant Black women, its current expression of interest in the health of unborn Black children must be viewed with distrust.”).

136. *See infra* notes 138–39 and accompanying text.

137. The construction of pregnant women as mothers both derives from and exacerbates the maternal-fetal conflict. *See* PETCHESKY, *supra* note 120, at 341 (“[The recognition of fetal personhood has resulted in the equation of pregnancy with motherhood] as it has been defined in modern Western patriarchal culture—as a moral and social duty. Although pregnant nulliparous women do not usually regard themselves as ‘mothers,’ since in their experience there is no ‘child’ with whom they have a relationship, this doctrine tells them they should become instantaneously ‘motherly’ from the moment of conception.”); ROTH, *supra* note 125, at

to possess the same characteristics that are associated with idealized motherhood.<sup>138</sup> The paradigmatic pregnant woman is selfless, sacrificing, willing and able to put the interests of her unborn child ahead of her own needs and desires, and fully committed to—and capable of—providing a uterine environment that is nothing short of perfection.<sup>139</sup> Deviation from this archetype threatens social norms; fetal rights provide the justification for punishing any such deviation.

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6 (“Maternal-fetal conflict erases all other aspects of a pregnant woman’s identity. All pregnant women are *expectant* mothers (unless they plan to place their future children for adoption), but only some pregnant women are already rearing children. Referring to pregnant women as ‘mothers’ before they give birth evokes the qualities of selflessness and duty associated with motherhood and suggests that pregnant women have failed to demonstrate these important qualities. It also turns the fetus into a child. Cultural expectations and legal standards of parental duty then apply to pregnant women, and the fetus gains an independent identity that enables it to engage rhetorically in conflict with the pregnant woman (‘mother’).”).

138. See ADRIENNE RICH, *ON LIES, SECRETS, AND SILENCE* 197 (1979) (distinguishing between “motherhood as *experience*, one possible and profound experience for women, and motherhood as enforced identity and as political *institution*”) (emphasis in original). Rich observes that under the institution, “all mothers are expected to experience motherhood unambivalently and in accordance with patriarchal values; and the ‘nonmothering’ woman is seen as deviant.” *Id.*; see also Roberts, *supra* note 65, at 102 (“A mother is a selfless creature. . . . Because society defines women as caretakers of children, it subordinates women’s personal needs and desires. It expects mothers to deny their own identities to fulfill the role prescribed by the state.”).

139. A similar dynamic is at play in the growing number of prosecutions of battered mothers for “failure to protect” their children from the batterer. Here, too, mothers who fall short of societal standards of selflessness suffer the consequences: criminal failure to protect prosecutions are effectively a status-enforcing governmental intervention.

More generally, mothers who “stay” with their batterers are widely perceived as placing their interests above those of their children. As is the case with pregnant battered women, however, the reality is far more complex:

Battered women’s responses may not be a form of psychological entrapment, but may in fact be a form of reasoned action. A battered woman may be making rational choices in order to avoid undesirable outcomes. In choosing to remain in the home with her batterer, a battered woman may be affirmatively acting to protect her children by: (1) minimizing abuse and preventing escalation of abuse; and/or (2) avoiding the harsh social and economic realities that she and her children will face if she leaves. In addition to a lack of adequate protection and shelter, fear of her batterer leads many battered women to conclude that the safest option for themselves and their children is to “survive within the relationship.”

Thus, a mother may indeed be acting to protect her children when she remains with an abusive partner.

Amy R. Melner, *Rights of Abused Mothers vs. Best Interest of Abused Children: Courts’ Termination of Battered Women’s Parental Rights Due to Failure to Protect Their Children From Abuse*, 7 S. CAL. REV. L. & WOMEN’S STUD. 299, 309 (1998) (footnotes omitted). Yet this reality—that women in violent relationships may, in fact, be acting in the interests of their children—continues to defy cultural understanding. As Elizabeth Schneider has remarked, “[b]ecause we consider that a mother’s fundamental duty is to protect her children, maternal behavior that exposes children to harm is viewed as unthinkable, unnatural, and incomprehensible. Battered women who are mothers are reviled.” ELIZABETH M. SCHNEIDER, *BATTERED WOMEN AND FEMINIST LAWMAKING* 148 (2000).

Fetal-protective legislation in any guise—including laws that purport to protect fetuses from violence during pregnancy—further this end, more or less circuitously. Once fetuses are granted status as persons/children/victims, pregnant women become subject to control by the full panoply of laws already in place to protect the rights of persons/children/victims. Women who fail to conform to the maternal ideal—typically, the most marginalized members of society—have been the primary targets of state intervention on behalf of the fetus.<sup>140</sup>

As the rhetoric of fetal personhood has transformed, however, state regulation impacting pregnant women has also developed, as have justifications for the new legislative apparatus.<sup>141</sup> As we will see, this new regulatory regime subordinates women in ways that are hardly visible.<sup>142</sup> Indeed, the codification of fetal victimhood causes the virtual disappearance of *the pregnant woman*—and obviates any consideration of her interests. Recent changes to the definition of “child” for purposes of allocating federal health insurance dollars exemplify this phenomenon.<sup>143</sup>

In 2003, a federal regulation that distributes funds to the states to provide health insurance to poor children was expanded.<sup>144</sup> The regulation, promulgated by the Department of Health and Human Services (HHS), explicitly defines “child” to include human life post-conception.<sup>145</sup> HHS has emphasized that “coverage extends to the unborn child only, not to the pregnant woman, unless she is under age nineteen and thus also considered a child.”<sup>146</sup> As a consequence, a doctor providing medical treatment to a pregnant woman insured by the federal government must confront the question of whether the doctor’s duty of care is owed the “unborn child,” rather than the woman—a prospect that inevitably raises a morass of medical, legal, and ethical issues, but one that may well be dictated by the logic of the regulation, if not the regulation itself.<sup>147</sup>

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140. See *supra* note 128–33.

141. Apropos of this evolution is what Reva Siegel has, in a different context, called “preservation through transformation.” She has described this as a “change in the rules and rhetoric of a status regime” that occurs when the legitimacy of that regime are challenged, forcing legal elites to “both cede and defend status privileges—gradually relinquishing the original rules and justificatory rhetoric of the contested regime and finding new rules and reasons to protect such status privileges as they choose to defend.” Reva B. Siegel, “*The Rule of Love*”: *Wife Beating as Prerogative and Privacy*, 105 YALE L. J. 2117, 2119 (1996).

142. See *infra* Part III.B.

143. See *infra* notes 145–46 and accompanying text.

144. See State Children’s Health Insurance Program, 42 C.F.R. § 457 (2004); Sperow, *supra* note 102, at 137–38.

145. See 42 C.F.R. § 457 (2004); Sperow, *supra* note 103, at 138.

146. See Sperow, *supra* note 103, at 152.

147. See *id.* (“[T]he patient to whom the doctor owes his or her duty of care is clearly the unborn child and not the pregnant woman.”). As Senator Bingaman, who supported alternative legislation that would allow states to cover pregnant women under State Children’s Health Insurance Program (SCHIP), observed:

*Leaving the woman out of the equation* is completely contrary to the clinical guidelines of the American College of Obstetricians and Gynecologists and the American Academy of Pediatrics . . . . You cannot perform fetal surgery without thinking about the consequences for the mother . . . . Moreover, if you are only covering the fetus, this eliminates important aspects of coverage for women during

Like the recent HHS redefinition of "child," the new criminal law framework that purports to target violence during pregnancy, as embodied by the Unborn Victims of Violence Act,<sup>148</sup> represents the latest stage in this evolution of statist regulation. What is different—and particularly pernicious—about this approach is that the pregnant woman, who has historically been subject to paternalistic regulations enforcing idealized notions of motherhood, has been rendered invisible. Whereas before the pregnant woman was simply a vessel for the fetus, now she is vanished.

### *B. Unborn Victims of Violence Act*

The recently enacted federal Unborn Victims of Violence Act of 2004 (UVV), also entitled "Laci and Connor's Law,"<sup>149</sup> makes it a crime to injure or kill an "unborn child" in the course of committing a crime against a pregnant woman (designated elsewhere in the statute as "the unborn child's mother").<sup>150</sup> "Unborn child" is defined

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all the stages of a birth—pregnant, delivery, and postpartum care . . . . According to today's published rule, pregnant women would not be covered during their pregnancy for cancer, medical emergencies, accidents, broken bones, or mental illness. Even life-saving surgery for a mother would appear to be denied coverage. Further, during delivery, coverage for epidurals is a state option and is justified only if the health of the child is affected. On the other hand, anesthesia is covered for C-sections. This rule would wrongly push women and providers toward performing C-sections to ensure coverage. And finally, during the postpartum period, women would be denied all health coverage from the moment the child is born. Important care and treatment, including but not limited to the treatment of hemorrhage, infection, episiotomy repair, C-section repair, family planning counseling, treatment of complications after delivery, and postpartum depression would not be covered.

*Mothers and Newborns Health Insurance Act of 2001*, S. 724, 107th Cong. (Oct. 2, 2002) (statement of Senator Bingaman) (emphasis added).

148. H.R. 503, 107th Cong. (2001).

149. While the UVV was being considered by Congress, Laci Peterson, eight months pregnant with a fetus she had decided to name Connor, was murdered in California. V. Dion Haynes, *Fetal Homicide Bill Spurs Abortion Debate*, CHI. TRIB., May 9, 2003, at C1.

150. The statute delineates a number of federal laws that qualify for purposes of defining a "separate offense" when death or injury is caused to the fetus. The UVV

does not require proof that an assailant "had knowledge or should have had knowledge that the victim of the underlying offense was pregnant." This absence of an intent requirement is justified by the theory of "transferred intent," a common law doctrine that dictates, "a defendant[,] who intends to kill one person but instead kills a bystander, is deemed the author of whatever kind of homicide would have been committed had he killed the intended victim." Thereby, under the UVV, when an assailant commits an unlawful act against a pregnant woman and, in so doing, harms the fetus, the unlawful intent toward the mother is "transferred" to the fetus. The assailant is then punished using the federal law that would apply if "the injury or death occurred to the unborn child's mother." If, however, the harm or attempted harm to the fetus is intentional, the assailant is punished according to the Federal Criminal Code provisions for "intentionally killing or attempting to kill a human being."

Tara Kole & Laura Kadetsky, *Recent Developments: The Unborn Victims of Violence Act*, 39 HARV. J. ON LEGIS. 215, 218–19 (2002) (footnotes omitted).

as “a child in utero, [which] means a member of the species homo sapiens, at any stage of development, who is carried in the womb.”<sup>151</sup> The statute, then, does not create any new crimes or enhanced sentences with respect to pregnant victims of violence,<sup>152</sup> nor does it recognize that the harm of violence may be distinct when experienced by a woman during pregnancy. Rather, the UVV supplements existing law only insofar as it makes fetuses a new class of crime victims.

The vast majority of state laws related to violence during pregnancy similarly target fetal harm.<sup>153</sup> Thirty-one states currently have laws against fetal homicide, implicitly or explicitly defining the fetus as victim.<sup>154</sup> A small number of states criminalize acts that injure a pregnant woman, causing her to suffer a miscarriage or stillbirth as a result of that injury.<sup>155</sup> Finally, a few jurisdictions have enacted criminal statutes with enhanced penalties for the infliction of death or injury on a pregnant woman.<sup>156</sup> In the remaining states, pregnancy has no legal significance for criminal law purposes.

Despite the spread of laws ostensibly directed at violence during pregnancy, existing statutory frameworks fail to capture the harm of pregnancy battering. By granting fetuses victim status, the UVV and similar state laws sever the interests of fetus and pregnant woman, ultimately furthering an agenda of control over women’s bodies and lives.<sup>157</sup> Redefining the fetus as a victim—to the exclusion of the pregnant woman—the law obscures the injury that has been inflicted on the woman. It does so in

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151. This definition of “fetus” as “child” is unprecedented in federal criminal law. *Id.* at 218.

152. A narrowly defeated amendment to the UVV sponsored by Senator Dianne Feinstein would have increased penalties for assaults against pregnant women and affirmed that the woman attacked is the crime victim. *Votes in Congress*, N.Y. TIMES, Mar. 28, 2004, at A38.

153. For a helpful summary of state approaches to fetal homicide legislation, see Sandra L. Smith, Note, *Fetal Homicide: Woman or Fetus as Victim? A Survey of Current State Approaches and Recommendations for Future State Application*, 41 WM. & MARY L. REV. 1845 (2000).

154. National Conference of State Legislatures, *Fetal Homicide*, <http://www.ncsl.org/programs/health/fethoin.htm> (last visited Sept. 28, 2005) (“At least 15 states have fetal homicide laws that apply to the earliest stages of pregnancy (‘any state of gestation,’ ‘conception,’ ‘fertilization’ or post-fertilization) . . .”). Although some state laws, like the UVV, allow for the prosecution of non-lethal violence against fetuses, such prosecutions are exceedingly uncommon. See SCHROEDEL, *supra* note 131, at 131 (“In marked contrast to prenatal drug cases, in which women are prosecuted and often incarcerated even when their offspring are born alive with no signs of adverse consequences, I failed to find a single prosecution of a third party’s act of violence that did not result in the death of the fetus.”). Although most state law analogues contain no such provision, the UVV specifically exempts pregnant women from prosecution, expressly indicating that “[n]othing in this section shall be construed to permit the prosecution . . . of any woman with respect to her unborn child.” Unborn Victims of Violence Act of 2004, 18 U.S.C.A. § 1841(c)(3) (West Supp. 2005).

155. See, e.g., KAN. STAT. ANN. § 21-3440 (1995); N.H. REV. STAT. ANN. § 631:1 (1996); N.M. STAT. ANN. § 30-3-7 (West 1994).

156. See, e.g., CONN. GEN. STAT. §§ 53a-59a (2001 & Supp. 2005); DEL. CODE ANN. tit. 11, § 612 (2001 & Supp. 2004); VA. CODE ANN. §§ 18.2-31, 32.1 (2004); WYO. STAT. ANN. § 6-2-502 (2005).

157. See *supra* notes 115-40 and accompanying text. This would be true even if legislation effectively criminalizing violence against pregnant women, see *supra* notes 229-36 and accompanying text, were to co-exist with a UVV-type law. See *supra* note 115 (discussing the inevitability of maternal-fetal conflict).

a manner that, by removing her from consideration altogether, effectively precludes an account of the nature of her suffering, or even recognition of her existence as a person who has been harmed. The suffering of pregnant victims of domestic violence is thus rendered invisible, leaving real injuries to women unremedied.<sup>158</sup>

Feminist opposition to the UVV, while vociferous,<sup>159</sup> was not and is not grounded in a penetrating analytic critique. Feminist legal scholarship has not provided a rich account of pregnancy that can serve as the foundation for a coherent policy approach different from that of traditional criminal law. Part IV describes how two distinct strands within this body of scholarship might be integrated to deepen our understanding of how a pregnant victim of battering is harmed.

#### IV. FEMINIST ACCOUNTS OF PREGNANCY

Law's failure to frame a meaningful account of pregnancy is born of its historical preoccupation with the concerns of men<sup>160</sup> and its propensity to construct by analogy.<sup>161</sup> Legal doctrines developed in response to conditions experienced by men have been, to varying degrees, inapt when applied to pregnancy (which, of course, men have not experienced). Responding to this tension, feminist theorists have challenged law's treatment of pregnancy—often described as the “pregnancy difference”—in a variety of contexts.<sup>162</sup> By both descriptive and prescriptive measures, feminist

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158. As Mari Matsuda has remarked: “The kinds of injuries and harms historically left to private individuals to absorb and resist through private means is no accident. The places where the law does not go to redress harm have tended to be the places where women, children, people of color, and poor people live.” Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320, 2321–22 (1989) (footnotes omitted).

159. See Haynes, *supra* note 149 (“Opponents [of the UVV], largely groups that support abortion rights, argue that the measures place the rights of the fetus above the rights of women and do little to protect pregnant women from violence.”); *The Unborn Victims of Violence Act of 1999: Hearing on H.R. 2436 Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 107th Cong. 33–37 (July 21, 1999) (statement of Juley Anna Fulcher, Public Policy Director, National Coalition Against Domestic Violence).

160. Stephen J. Schulhofer, *The Feminist Challenge in Criminal Law*, 143 U. PA. L. REV. 2151, 2151 (1995). Criminal law's preoccupation with the lives of men did not, of course, extend to protecting the interests of colored men. For one particularly powerful proof of this proposition, see Jennifer Wriggins, Note, *Rape, Racism, and the Law*, 6 HARV. WOMEN'S L. J. 103 (1983).

161. See MacKinnon, *supra* note 53, at 1314 (“Because legal method traditionally proceeds by analogy and distinction, attempts at analogy between the relationship between the fetus and the pregnant woman and relations already mapped by law are ubiquitous. . . . Sometimes there are no adequate analogies.”); *Alberto v. Columbia Presbyterian Medical Center*, 210 N.Y.L.J., Sept. 10, 1993, at col. 5 (“Attempts to analogize pregnancy to other, more legally cognizable subjects have lead to a troubling and apparently unsolvable set of dichotomies . . . .”) (footnotes omitted).

162. See, e.g., Susan E. Dalton, *From Presumed Fathers to Lesbian Mothers: Sex Discrimination and the Legal Construction of Parenthood*, 9 MICH. J. GENDER & L. 261, 265 (2003) (asserting that “judges' inability to conceive of a gender neutral subject, at least when considering issues related to human reproduction, creates serious legal disadvantages for virtually all women”); Lucinda M. Finley, *Transcending Equality Theory: A Way Out of the Maternity and the Workplace Debate*, 86 COLUM. L. REV. 1118, 1122 (1986) (critiquing the use

perspectives on pregnancy have been remarkably divergent.<sup>163</sup> Moreover, because “most of the disadvantages imposed on women, in the workforce and elsewhere, derive from this central reality of the capacity of women to become pregnant and the real and supposed implications of this reality,”<sup>164</sup> many feminists have been reluctant even to explore the contours of the pregnancy difference.<sup>165</sup>

Strategic concerns aside, any effort to describe pregnancy raises the substantive challenge of speaking meaningfully about women’s lives across a spectrum of experiences that defy categorization:<sup>166</sup> women exercise varying degrees of autonomy in choosing, or not choosing, to become and remain pregnant;<sup>167</sup> women suffer a range

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of biological difference to justify subordination of women’s roles in the workplace); Sylvia A. Law, *Rethinking Sex and the Constitution*, 132 U. PA. L. REV. 955, 962 (1984) (arguing for an evolution in constitutional doctrine that would enable it to “confront squarely the reality of categorical biological differences between men and women” in equal protection analysis). Robin West has responded to the “recent explosion of feminist writings on the multitude of problems generated by women’s ‘difference’” by refocusing on the phenomenology of women’s distinct pains and pleasures. West, *supra* note 54, at 153.

163. See Robin West, *Jurisprudence and Gender*, 55 U. CHI. L. REV. 1, 30–31 (1988) (summarizing radical feminist understanding of pregnancy as “a dangerous, psychically consuming, existentially intrusive, and physically invasive assault upon the body which in turn leads to a dangerous, consuming, intrusive, invasive assault on the mother’s self-identity,” and contrasting this perspective with the cultural or relational feminist account, in which pregnancy is “celebrate[d]” and viewed as a “source of moral value”).

164. *Id.* at 21–22 (quoting *Discrimination on the Basis of Pregnancy: Hearings on S. 995 Before the Subcommittee on Labor of the Senate Committee on Human Resources*, 95th Cong. 123 (1977) (remarks of Professor Wendy Williams)) (emphasis omitted). See MacKinnon, *supra* note 53, at 1315 (“Women have lost jobs and been stigmatized and excluded from public life because they are pregnant . . . . No body part has the specific consequences pregnancy has on women’s social destiny.”).

165. West, *supra* note 163, at 22 (“The response to this ‘central reality’ among American liberal feminists and American feminist lawyers has been to deny or minimize the importance of the pregnancy difference, thus making men and women more ‘alike,’ so as to force the legal system to treat men and women similarly.”). West concludes that “there is a growing awareness amongst even liberal feminist legal theorists that this strategy has to some extent backfired. It has become increasingly clear that feminists must attack the burdens of pregnancy and its attendant differences, rather than denying the uniqueness of pregnancy.” *Id.*

166. “The circumstances in which each individual woman brings forth life are as varied as the circumstances of each woman’s life.” *Stallman v. Youngquist*, 531 N.E.2d 355, 360 (Ill. 1988) (denying a cause of action by a fetus against its mother for the unintentional infliction of prenatal injuries). See also MARTHA MINOW, *MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION, AND AMERICAN LAW* 231 (1990) (“The medical, social, and psychological meanings of pregnancy vary by culture and by individual . . . .”); MacKinnon, *supra* note 53, at 1315 (“The cultural meanings of pregnancy are distinct. Pregnancy can be an emblem of female inferiority of adulation, or denigration or elevation; it can bring closeness or estrangement, can give a new sense of the meaning of life and new depth or desperation to the experience of family. It attracts violence against women, sentimentality, attempts at control, gives rise to financial costs and the need for difficult decisions.”).

167. “Social forces define the circumstances under which a woman conceives a child, including how voluntary her participation in intercourse may be. Social forces determine whether a woman has access to methods of preventing and terminating a pregnancy, and whether it is acceptable for her to use them.” Siegel, *supra* note 105, at 267. See *infra* note 168 and accompanying text.



of physical, psychic, and material consequences throughout the course of their pregnancies;<sup>168</sup> pregnant women perceive their relationships to the developing fetus and to the surrounding world in dramatically different ways;<sup>169</sup> and pregnancy shapes a woman's identity uniquely, including by, in many instances, altering her future prospects.

Given the tremendous variation in how women experience pregnancy, we might wonder whether pregnancy can be theorized in any meaningful way. My effort to do so here is fairly circumscribed. I make no larger claims about the essence of women<sup>170</sup> or about how women are different from men by virtue of their pregnancies and their capacity to become pregnant.<sup>171</sup> Nor do I speculate about the possible reasons that

168. "Social forces determine the quality of health care available to a woman during pregnancy, and they determine whether a pregnant woman will be able to support herself throughout the term of gestation, or instead will be forced to depend on others for support." Siegel, *supra* note 105, at 267.

169. As Reva Siegel writes:

Because gestation is a social as well as a physiological act, it implicates women in relationships and defines their identity in many ways. A woman may experience pregnancy as a bond tying her to a man with whom she may or may not wish to be involved, or, alternately, it may signify the brute fact of his absence or abandonment. During the course of gestation, a pregnant woman often bonds to the unborn life she bears, so that over time a maternal relation is formed that she may feel herself incapable of severing. Nor is this relational aspect of pregnancy a matter of intimate experience alone. A woman may find that pregnancy comes to embody her social identity to others, who may treat her with love and respect or, alternatively, abuse her as a burden, scorn her as unwed, or judge her as unfit for employment. Or, precisely because the work of pregnancy is believed to involve intellectual and moral judgments, they may brand her, socially or legally, as an irresponsible mother. Pregnancy, and the period of lactation that follows it, are not merely burdensome, disruptive, or even consuming forms of work. They amplify the gendered judgments and constraints to which women are already subject, exposing them to material and dignitary injuries having nothing to do with the physiology of reproduction, and entangling them in relationships that profoundly define their identity and life prospects.

*Id.* at 374 (emphasis in original) (footnotes omitted). See also ROTH, *supra* note 125, at 90 ("Pregnant women are not a monolithic group sharing the exact same identity or priorities. How a woman defines herself and understands her place in the world as well as the place of pregnancy and childrearing in her life are important elements of her identity. One woman may willingly sacrifice her preferences or even her life for her fetus. Another may value her life over the outcome of any given pregnancy. Some pregnant women may trust their own insight and experience more than doctors' predictions. Or the commitment women feel to their religion may be greater than what they feel for one particular fetus or even their own lives."); Christyne L. Neff, *Woman, Womb, and Bodily Integrity*, 3 YALE J.L. & FEMINISM 327, 352 (1991) ("Each woman's relationship to her womb and to a resultant pregnancy will be unique.").

170. See *infra* note 198.

171. Cf. West, *supra* note 163, at 2-3 ("[W]omen, distinctively, are quite clearly 'connected' to another human life when pregnant."). Because women "are in some sense 'connected' to life and to other human beings" during pregnancy and other "critical material experiences," West argues that women are "'essentially connected,' not 'essentially separate,' from the rest of human life . . ." *Id.* at 3. As a consequence, for women,

pregnancy is imbued with a distinct status in our society.<sup>172</sup> My contention is simply that aspects of pregnancy are unique, even across experiential divides,<sup>173</sup> and that an important task of feminist legal scholars is to articulate the nature of this wholly gendered phenomenon.

Conceptualizing pregnancy from the perspective of pregnant women entails consideration of two basic concerns: (1) a woman's interest in reproductive self-determination, and (2) her interest in developing and maintaining a connection to the growing fetus. These concerns, though rarely articulated explicitly, appear throughout the literature that grapples with the theoretical implications of pregnancy. For the most part, however, the two strands are depicted as oppositional in nature; that is, pregnancy is understood as implicating *either* a woman's right to control her reproductive destiny *or* her relationship with the fetus. This dichotomization structures a story of pregnancy that is incomplete. A fuller account incorporates tropes of bodily integrity *and* connection with developing life, describing a pregnant self that is multiplicitous.<sup>174</sup> As we will see, battering harms this pregnant self in ways still un contemplated by law.

#### A. Reproductive Autonomy

The principle of bodily integrity has historically been invoked in the reproductive context to defend the rights of women to terminate a pregnancy.<sup>175</sup> Forcing a woman to carry an unwanted pregnancy to term, feminists have argued, has potentially devastating consequences on her life options.<sup>176</sup> The demand for universal access to safe abortion is thus intricately connected to issues of reproductive control and equality.<sup>177</sup>

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intimacy with the "other" comes naturally. Caring, nurturance, and an ethic of love and responsibility for life is second nature. Autonomy, or freedom from the other constitutes a value for men because it reflects an existential state of being: separate. Intimacy is a value for women because it reflects an existentially connected state of being.

*Id.* at 18.

172. See ADRIENNE RICH, *OF WOMAN BORN: MOTHERHOOD AS EXPERIENCE AND INSTITUTION* 11 (1976) ("There is much to suggest that the male mind has always been haunted by the force of the idea of *dependence on a woman for life itself*, the son's constant effort to assimilate, compensate for, or deny the fact that he is 'of woman born.'") (emphasis in original).

173. See Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, in *FEMINIST LEGAL THEORY: READINGS IN LAW AND GENDER* 235, 239 (Katharine T. Bartlett & Rosanne Kennedy eds., 1991) (recognizing that even a post-essentialist feminist theory must categorize, since "without categorization . . . there can be no moral responsibility or social change."). Harris urges "only that we make our categories explicitly tentative, relational, and unstable, and that to do so is all the more important in a discipline like law, where abstraction and 'frozen' categories are the norm." *Id.*

174. See *infra* Part IV.C.

175. PETCHESKY, *supra* note 106, at 2.

176. "The work of gestation . . . involves on-going calculations and compromises that can have a pervasive impact on women's lives; its inpositions are simultaneously physical and social." Siegel, *supra* note 105, at 373-74.

177. See generally Law, *supra* note 162. Law writes:

[P]regnancy, abortion, reproduction, and creation of another human being *are* special—very special. Women have these experiences. Men do not. An equality

But these ideals of bodily integrity and reproductive control also animate an understanding of reproductive freedom that encompasses a far wider range of concerns than the legal right to abortion.<sup>178</sup> An expansive conception of reproductive rights accounts for all of the ways in which women are deprived of the ability to control their reproductive lives.<sup>179</sup> As Anika Rahman, president of the United States Committee for the United Nations Population Fund (UNFPA), has asserted:

[T]he term reproductive rights should be understood to cover the full range of reproductive decision-making, particularly the decision about if and when to have a child, as well as whether or not to have a child. This conception of reproductive rights includes not only the right to decide when to become pregnant and to terminate a pregnancy, but also the right to carry a healthy child to term. It is crucial to maintain the neutrality of reproductive rights to include the ability to have *and* to not have a child.<sup>180</sup>

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doctrine that ignores the unique quality of these experiences implicitly says that women can claim equality only insofar as they are like men. Such a doctrine demands that women deny an important aspect of who they are. Such a doctrine is, to say the least, reified. Further, deny as we might, the reality remains that only women experience pregnancy. If women are to achieve fully equal status in American society, including a sharing of power traditionally held by men, and retain control of their bodies, our understanding of sex equality must encompass a strong constitutional equality guarantee that requires “radically increasing the options available to each individual, and more importantly, allowing the human personality to break out of the present dichotomized system.”

*Id.* at 1007 (emphasis in original) (footnotes omitted).

178. “Reproduction in the lives of women is a far larger and more diverse experience than the focus on abortion has permitted.” MacKinnon, *supra* note 53, at 1318. This may be particularly true for poor women of color, whose reproductive freedom is “limited significantly not only by the denial of access to safe abortions, but also by the lack of resources necessary for a healthy pregnancy and parenting relationship.” Roberts, *supra* note 121, at 1461. Dorothy Roberts concludes that “[a]ddressing the concerns of women of color will expand our vision of reproductive freedom to include the full scope of what it means to have control over one’s reproductive life.” *Id.* at 1461–62.

179. See Roberts, *supra* note 116, at 301 (“A broader understanding of reproductive freedom does not reject abortion rights in favor of a right to procreate. Rather, it sees the right to terminate a pregnancy as one part of a broader right to autonomy over one’s body and one’s reproductive decisionmaking.”); Ariela Dubler, Anika Rahman, Kathy Rodgers & Jane Spinak, *Women’s Rights: Reframing the Issues for the Future*, 12 COLUM. J. GENDER & L. 333, 345 (2003) (“[E]nsur[ing] that reproductive rights addresses the full range of reproductive health concerns that women and men actually face . . . starts with sexuality education and includes contraception, sexually transmissible infections (including HIV/AIDS), and issues of sexual violence.”); MacKinnon, *supra* note 53, at 1318 (“The right to reproductive control I have in mind would include the abortion right but would not center on it. Women would have more rights when they carry a fetus: sex equality rights. Women who are assaulted and miscarry, women who are forced to have abortions and women who are denied abortions, women who are sterilized, and women who are negligently attended at birth all suffer deprivation of reproductive control.”).

180. Dubler et al., *supra* note 179, at 344–45 (emphasis in original). Rahman’s remarks were made at a panel discussion held at Columbia Law School on October 19, 2002. See *id.* Rahman further argued that reproductive rights should be redefined to “refer to the constellation of rights that enable individuals, particularly women, to control their bodies and to go through

The decision to continue a pregnancy is, at its core, an exercise of autonomy; any interference with a woman's ability to carry her pregnancy safely to term effectively diminishes that autonomy.<sup>181</sup> The right to carry a pregnancy to term is, as Rahman suggests, essential to a positive reproductive freedom.<sup>182</sup> A woman who chooses to bear a child exercises a right that is fundamental in both doctrinal and non-doctrinal respects.<sup>183</sup>

A theoretical account of pregnancy that recognizes the centrality of reproductive self-control must simultaneously confront how the realities of women's lives challenge the construct of choice. Women often become pregnant as a result of rape, statutory or forcible, or of intercourse that is legally consensual but coerced.<sup>184</sup> As Robin West observes, many of these legally consensual but "unwanted" pregnancies "lead not to abortion, but to unwanted—even if noncoerced—motherhood."<sup>185</sup> While the influence

childbearing safely." *Id.* at 345.

181. I use the word "interference" to include not only actions but also omissions that function to restrict positive reproductive freedom. *See supra* notes 175–80 and accompanying text (defining expansive notion of positive reproductive freedom).

182. *See WEST, supra* note 52, at 142 (arguing that women should consider reproductive freedom as "the positive freedom to make life-enhancing decisions regarding their reproductive lives, rather than simply the negative freedom to be free of state intrusion into decisions to end pregnancies").

183. For a fascinating critique of the majority opinion in *Skinner v. Oklahoma*, 316 U.S. 535 (1914), a case that is commonly understood as recognizing a fundamental right of procreation, see Victoria F. Nourse, *Law's Constitution: A Relational Critique*, 17 WIS. WOMEN'S L. J. 23, 44–51 (2002).

184. Adriemie Rich, by envisioning motherhood chosen freely, captures the extraordinary complexity that attends reproductive decision making in this culture. Rich suggests that only when the "institution of motherhood" is destroyed will a woman's choice to mother be a meaningful one:

[Abolishing the institution of motherhood] means, among other things, that a woman could choose motherhood freely, not just because safe and effective birth control was universally available, but because she would have no need to prove her adequacy as a woman by getting pregnant; that a woman need not look for economic security to a man, getting pregnant as a by-product; that no false necessity would dictate a choice between a woman's uterus and her brain; that the woman mothering her child was a being with dignity in the world, who respected her body, who had as much power as any other individual person to act upon and shape her society, and who possessed the wherewithal to meet her own needs and those of her children, whether she chose to live with a man, with a woman, with other parents and children, or in a separate household with her children. These are minimal conditions; but implied in them are enormous social and political changes.

RICH, *supra* note 138, at 272. For further discussion of motherhood as a "colonized concept," see Fineman, *supra* note 77, at 289–90.

185. WEST, *supra* note 52, at 142. "Motherhood provide[s] a purpose, an identity . . . and even when it is essentially unwanted and in no one's 'best interest,' if no other opportunities for adult fulfillment are presented, it will be the 'chosen' career path of countless girls and women." *Id.* West suggests that in order for positive reproductive freedom to "exist in any meaningful way," "women and girls, particularly poor women and girls, would have to be given opportunities for growth and self-fulfillment other than the opportunities provided by

of societal pressures to mother is generally widespread,<sup>186</sup> the reproductive decision making of women in violent relationships<sup>187</sup> and teenage girls<sup>188</sup> may be especially constrained.<sup>189</sup>

Pressures to carry a pregnancy to term undoubtedly complicate theoretical accounts of reproductive control. Critiquing the notion of choice, however, does not undermine the importance of reproductive autonomy norms to a conceptualization of pregnancy. Pregnant women often make decisions in the face of grim options;<sup>190</sup> the right to *choose*—to control one's reproductive destiny—is nevertheless a powerful component of freedom.

The vision of reproductive self-determination that we have been discussing tends to embody a traditional liberal understanding of the self.<sup>191</sup> The woman who chooses to

motherhood." *Id.*

186. "Society, at one level or another, exerts structural and ideological pressures upon women to become mothers." Roberts, *supra* note 65, at 96–97. Yet the notion that women freely choose to carry to term is challenged not only by social forces promoting motherhood, but also by powerful disincentives to mother. As Mary Becker has observed:

[W]omen are under tremendous pressure not to be mothers as well as to be mothers.

... "[O]ne of the most characteristic and ubiquitous features of the world as experienced by oppressed people is the double bind—situations in which options are reduced to a very few and all of them expose one to penalty, censure, or deprivation."

Whether to be a mother is one such double bind. If you decide not to be a mother, some people will regard you as not a "real" woman. However, if you do become a mother, you are likely to be seen as essentially a mother. This is particularly damaging in the workforce . . . . But this is only the tip of the iceberg with respect to disincentives.

Mary Becker, *Care and Feminists*, 17 WIS. WOMEN'S L.J. 57, 68 (2002) (quoting MARILYN FRYE, *THE POLITICS OF REALITY 2* (1983) (citations omitted)).

187. See *supra* notes 68–86 and accompanying text.

188. Mothering provides "not just a job, but a chance for emotional fulfillment—an infant, baby, and child will love you back, and intensely. Many children get pregnant, in short, so that they can produce someone who will love them. What 'causes' these pregnancies is that the girls are . . . not sufficiently loved." WEST, *supra* note 52, at 142. See generally CONSTANCE WILLARD WILLIAMS, *BLACK TEENAGE MOTHERS: PREGNANCY AND CHILD REARING FROM THEIR PERSPECTIVE* (1991). Williams's fascinating study, analyzing interviews with thirty mothers who had given birth as adolescents, explores the meaning of pregnancy and childbearing to black teenage girls. In her discussion of "unintended pregnancies but wanted births," Williams suggests that "[a]mong the reasons for wanting babies are the often cited reasons—wanting someone to love and having something to call one's own." *Id.* at 69. For most mothers interviewed, moreover, "it was more acceptable to carry an unintended pregnancy to term and keep the baby than to choose abortion. Even if the teenage girl is not ready to have children, her mother and boyfriend often encourage her to have the baby." *Id.* at 68.

189. Social forces that shape, and perhaps contort, a woman's decision to carry a pregnancy to term may be experienced in dramatically divergent ways. The reproductive choices of a black teenager of limited economic means and a white middle class woman in a hattering relationship, for instance, will likely be limited for different reasons.

190. To be clear, reproductive freedom cannot exist until these conditions are transformed.

191. The autonomy ideal contemplates rational actors making decisions in their own self-interest: that is, interest bounded entirely by the borders of the self.

carry a pregnancy to term is a self unencumbered by attachments or relationships. To the extent that her connections to others influence her decisions, from a liberal perspective she acts as a less than fully autonomous being.<sup>192</sup>

As we will see, the pregnant self need not be constructed in this manner. As a woman's pregnancy progresses, her attachment to the developing fetus often grows stronger.<sup>193</sup> A conceptualization of pregnancy that accounts for this attachment describes a self that is fundamentally connected.<sup>194</sup> After examining what this conceptualization entails, I will consider whether the "autonomous self" and the "connected self" are inherently polar.<sup>195</sup> I will argue that a holistic understanding of pregnancy suggests otherwise<sup>196</sup> and, finally, that this recognition is essential to identifying the victim of pregnancy battering and defining the full measure of her injury.

### B. Connection

Pregnancy, for many women, is experienced as a time of growing connection to the developing fetus.<sup>197</sup> As Robin West has observed, "[w]omen are not essentially, necessarily, inevitably, invariably, always, and forever separate from other human beings: women, distinctively, are quite clearly 'connected' to another human life when pregnant."<sup>198</sup>

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[W]e might think of autonomy as the 'official' liberal value entailed by the physical, material condition of inevitable separation from the other: separation from the other entails my freedom from him, and that in turn entails my political right to autonomy. I can form my own conception of the good life, and pursue it. Indeed, any conception of the good which I form, will necessarily be my conception of the good life.

West, *supra* note 163, at 6 (emphasis in original); see also Catherine Albiston, Tonya Brito & Jane E. Larson, *Feminism in Relation*, 17 WIS. WOMEN'S L.J. 1, 3-4 (2002) ("Liberalism portrays law as preserving liberty and protecting autonomy by keeping the state out of the day-to-day living of social life. From the liberal perspective, law is about individuals and not relationships. Liberty rather than connection is the highest value, and law should be agnostic about the substantive value of particular social relationships.")

192. Cf. West, *supra* note 163, at 5 ("According to liberal legalism, the inevitability of the individual's material separation from the 'other,' entails, first and foremost, an existential state of highly desirable and much valued freedom: because the individual is *separate* from the other, he is *free* of the other. Because I am separate from you, *my* ends, *my* life, *my* path, *my* goals are necessarily my own. Because I am separate, I am 'autonomous.'") (emphasis in original).

193. See *infra* notes 197-201 and accompanying text.

194. See *infra* notes 197-203 and accompanying text.

195. See *infra* notes 203-06 and accompanying text.

196. See *infra* Part IV.C.

197. Criminal law has largely failed to capture the extent to which pregnancy is experienced as relational in nature. Cf. WEST, *supra* note 52, at 4 ("The 'connected individual'—whether she be sustained or damaged, enlarged or diminished, by those connections—is simply not the subject of modern political and legal thought any more than she is the subject of political and legal protection.")

198. West, *supra* note 163, at 2. This state of connectedness—the many ways in which it is experienced, its centrality to the lives of women in particular, and the relationship of law to it—has been the focus of a body of legal scholarship that is often described as relational feminism. See generally Mary Becker, *Patriarchy and Inequality: Towards a Substantive Feminism*, 1999

The relationship between a pregnant woman and her developing fetus is unique; its intimate nature is qualitatively different from that which characterizes the closeness of two fully formed human beings.<sup>199</sup> The nature of this relationship has been variously described.<sup>200</sup> Reva Siegel writes, "During the course of gestation, a pregnant woman often bonds to the unborn life she bears, so that over time a maternal relation is formed that she may feel herself incapable of severing."<sup>201</sup> For Iris Marion Young, the interiority of the developing fetus in relation to the pregnant woman is critical:

The first movements of the fetus produce this sense of the splitting subject; the fetus's movements are wholly mine, completely within me, conditioning my experience and space. Only I have access to these movements from their origins, as it were. For months only I can witness this life within me, and it is only under my direction of where to put their hands that others can feel these movements. I have a privileged relation to this other life, not unlike that which I have to my dreams and

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U. CHI. LEGAL F. 21 (1999); West, *supra* note 54. As suggested by Robin West, who according to Becker, *supra* note 186, at 59, is perhaps most closely associated with the development of relational feminist thought:

Women's cognitive development, literary sensibility, aesthetic taste, and psychological development, no less than our anatomy, are all fundamentally different from men's, and are different in the same way: unlike men, we view ourselves as connected to, not separate from, the other. As a consequence, women's ways of knowing are more "integrative" than men's; women's aesthetic and critical sense is "embroidered" rather than "laddered;" women's psychological development remains within the sphere of "attachment" rather than "individuation."

The most significant aspect of our difference, though, is surely the moral difference. According to cultural feminism, women are more nurturant, caring, loving and responsible to others than are men. This capacity for nurturance and care dictates the moral terms in which women, distinctively, construct social relations: women view the morality of actions against a standard of responsibility to others, rather than against a standard of rights and autonomy from others.

West, *supra* note 163, at 17–18.

While one may question the validity of broad phenomenological claims about women, *see, e.g.*, Becker, *supra* note 186, at 58–59, many of the insights of West and other relational feminists are clearly applicable to the relational aspects of pregnancy. Put differently, the importance of connection to the lives of pregnant women may be evaluated independently from the "connection thesis," which views the potential for material connection as defining women's subjective lives. West, *supra* note 163, at 14. Here, for instance, I make no effort to generalize beyond the experiences of a particular population of women who are, in fact, pregnant.

199. "There is no way a pregnant woman can passively let the fetus live; she must create and nurture it with her own body, a symbiosis that is often difficult, sometimes dangerous, uniquely intimate." PETCHESKY, *supra* note 106, at 346 (quoting Ellen Willis, *Abortion: Is a Woman a Person?*, in *BEGINNING TO SEE THE LIGHT: PIECES OF A DECADE* 205, 208 (1981)).

200. Interestingly, while the existence of a relationship between pregnant woman and developing fetus is often assumed, its contours are only rarely explored in the feminist literature. Although this relationship would seem to be a logical site of discourse for feminist theorists, the centrality of the abortion debate to the feminist agenda, along with underlying fears of fetal personhood recognition, have likely muted stories of connection.

201. Siegel, *supra* note 105, at 374.

thoughts, which I can tell someone but which cannot be an object for both of us in the same way.<sup>202</sup>

Robin West emphasizes the nurturing component of the maternal-fetal relationship. The pregnant woman's act of sustaining a fetus is

particular, contextual, and utterly nonuniversalizable. It is a profoundly physical, rather than rational act. It is, most importantly, motivated by intense, consuming, and to some degree instinctive emotion, rather than any sense of willed duty. Each maternal act, when the fetus is in utero, is a relatively passive, largely *unwilled* and profoundly role-governed 'giving over' of one's body to the creation and nurturance of another life.<sup>203</sup>

In each of these accounts, relational dynamics are profoundly important to an understanding of a woman's stake in her pregnancy. The self that chooses to carry to term is connected to the fetus inside her in ways seemingly in tension with the liberal ideal of autonomy. But this tension may be reconciled: a theory of pregnancy that acknowledges both a pregnant woman's interest in reproductive self-determination and her connection to the developing fetus constructs a self whose boundaries are essentially unstable. It is this self—a multiplicitous self<sup>204</sup>—that is the victim of pregnancy battering.

### C. Integration

Pregnancy challenges the notion that the self is either separate and autonomous or connected and embedded in relationship. The pregnant self defies simple categorization; its conceptualization demands a "constant shifting of consciousness"<sup>205</sup> that transcends dualistic, oppositional theorizing. Descriptions of pregnancy that collapse the divide between reproductive self-determination and relationship also reveal the falsity of other apparent dichotomies.<sup>206</sup>

For instance, Adrienne Rich has suggested that "[t]he boundaries of the ego seem . . . much less crudely definable than the words 'inner' and 'outer' suggest."<sup>207</sup> She writes, "[t]he child that I carry for nine months can be defined *neither* as me or [sic] as not-me."<sup>208</sup> The developing fetus is experienced by Rich not as "decisively internal,"

202. IRIS MARION YOUNG, *THROWING LIKE A GIRL AND OTHER ESSAYS IN FEMINIST PHILOSOPHY AND SOCIAL THEORY* 163 (1990).

203. WEST, *supra* note 52, at 108.

204. *See infra* notes 215–19 and accompanying text.

205. *Cf.* Mari J. Matsuda, *When the First Quail Calls: Multiple Consciousness as Jurisprudential Method*, 11 *WOMEN'S RTS. L. REP.* 7 (1989). Matsuda urges that jurisprudential method employ what she calls "multiple consciousness," or a "constant shifting of consciousness [that] produces sometimes madness, sometimes genius, sometimes both." *Id.* at 8.

206. *See* Linda C. McClain, "Atomistic Man" Revisited: *Liberalism, Connection, and Feminist Jurisprudence*, 65 *S. CAL. L. REV.* 1171, 1263 (1992) ("[A]lthough the conceptual models of feminism and liberalism may be different, kindred concerns are present," and "the simple dichotomies drawn to date have obscured such kinship.").

207. RICH, *supra* note 172, at 63.

208. *Id.* at 64 (emphasis in original); *see* MacKinnon, *supra* note 53, at 1281 ("From the



but “rather, as something inside and of me, yet becoming hourly and daily more separate, on its way to becoming separate from me and of-itself.”<sup>209</sup> She continues:

In early pregnancy the stirring of the fetus felt like ghostly tremors of my own body, later like the movements of a being imprisoned in me; but both sensations were *my* sensations, contributing to my own sense of physical and psychic space. . . . Far from existing in the mode of “inner space,” women are powerfully and vulnerably attuned both to “inner” and “outer” because for us the two are continuous, not polar.<sup>210</sup>

Iris Marion Young similarly asserts that “[p]regnancy challenges the integration of my body experience by rendering fluid the boundary between what is within, myself, and what is outside, separate.”<sup>211</sup> According to Young,

[t]he pregnant subject . . . is decentered, split, or doubled in several ways. She experiences her body as herself and not herself. Its inner movements belong to another being, yet they are not other, because her body boundaries shift and because her bodily self-location is focused on her trunk in addition to her head.<sup>212</sup>

For Rich and Young, pregnancy is not experienced as “counter-autonomous,”<sup>213</sup> yet neither is it experienced by a self fully defined by its external physical boundaries without regard to interiority. The pregnant self is “multiplicitous, not unitary”<sup>214</sup>; her interest in reproductive self-determination is real and powerful, as is her growing connection to the developing fetus.

The pregnant self—along with its desires and its fears—is mutating.<sup>215</sup> This self may be contemplated only by a multiple consciousness expansive in its conception of identity. Angela Harris has described this multiple consciousness as “home both to the first and second voices, and all the voices in between.”<sup>216</sup> Accordingly, Harris posits that

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standpoint of the pregnant woman, [the fetus] is *both* me and not me.”) (emphasis added).

209. RICH, *supra* note 172, at 63.

210. *Id.* at 63–64.

211. YOUNG, *supra* note 202, at 164. Young adds: “I experience my insides as the space of another, yet my own body.” *Id.*

212. *Id.* at 160.

213. *But see* West, *supra* note 54, at 140 (“When a woman is pregnant her biological life embraces the embryonic life of another . . . . The experience of being human, for women, differentially from men, includes the counter-autonomous experience of a shared physical identity between woman and fetus.”). I am suggesting that pregnancy entails a process of identity formation that is more complex than this passage from West suggests. *See infra* notes 214–17 and accompanying text.

214. *Cf.* Harris, *supra* note 173, at 250 (arguing that due to the fact that they are “enmeshed always in multiple, often contradictory, discourses of sexuality and color,” one of the “major contributions that black women have to offer post-essentialist feminist theory [is] the recognition of a self that is multiplicitous, not unitary”).

215. *Cf.* YOUNG, *supra* note 202, at 167 (“The pregnant subject is not simply a splitting in which the two halves lie open and still, but a dialectic. The pregnant woman experiences herself as a source and participant in a creative process. Though she does not plan and direct it, neither does it merely wash over her; rather, she *is* this process, this change.”) (emphasis in original).

216. Harris, *supra* note 173, at 237.

we are not born with a “self,” but rather are composed of a welter of partial, sometimes contradictory, or even antithetical “selves.” A unified identity, if such can ever exist, is a product of will, not a common destiny or natural birthright. Thus, consciousness is “never fixed, never attained once and for all”; it is not a final outcome or a biological given, but a process, a constant contradictory state of becoming, in which both social institutions and individual wills are deeply implicated.<sup>217</sup>

As pregnancy progresses, so, too, is identity forged and reformed. From moment to moment, shifting boundaries and exploding dichotomies shape the pregnant self. A woman’s growing connection to the developing fetus transforms her sense of who she is and what is important to her, reconfiguring what it means to be fully autonomous.<sup>218</sup> By beginning to articulate this “constant contradictory state of becoming,”<sup>219</sup> we move closer to understanding all that is implicated when a woman chooses to carry her pregnancy to term and when this decision is jeopardized by her batterer.

#### D. The Harm of Pregnancy Battering

A woman who is battered while pregnant suffers in ways both similar to and distinct from the suffering of other battered women. Pregnancy battering is, at its core, a pattern of conduct characterized by power and control.<sup>220</sup> What distinguishes battering during pregnancy is that the woman’s pregnant state itself becomes a further mechanism of subordination: a victim’s stake in the pregnancy heightens her vulnerability, intensifying the power differential between herself and the batterer.

A pregnant woman subjected to violence reasonably fears the consequences for her pregnancy.<sup>221</sup> She is perpetually reminded that she cannot protect that which she has chosen to bring into this world. Indeed, her reproductive autonomy—which is contingent on the right to make this choice a meaningful one—is effectively trampled. At the same time, a pregnant battered woman endures the prospect of a relationship severed against her will.

The woman who chooses to carry her pregnancy to term is uniquely situated to suffer the consequences of violence. Pregnancy battering harms its victims both by undermining autonomy and by compromising connections; indeed, the two are of a piece. Recognition of the full panoply of a pregnant woman’s suffering must account for each of these aspects of her injury.

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217. *Id.*

218. Ironically, this insight, largely absent from legal doctrine and feminist theory, is effectively operationalized by the abuser who batters his victim during pregnancy. *See supra* notes 34–35 and accompanying text (discussing pregnant victim’s heightened vulnerability and batterer’s need for control).

219. *Harris, supra* note 173, at 237.

220. *See supra* notes 59–62 and accompanying text.

221. *See supra* notes 28–31 and accompanying text (discussing research on medical consequences of pregnancy battering).

## CONCLUSION: TOWARD CRIMINAL LAW REDRESS

Nowhere in law is the harm of pregnancy battering recognized.<sup>222</sup> The criminal law, whose function would seem to encompass the redress of violence against pregnant women,<sup>223</sup> has failed to conceptualize the nature and harm of this type of violence.<sup>224</sup> As we have seen, both the practice of battering<sup>225</sup> and the experience of pregnancy<sup>226</sup> have “eluded legal grasp.”<sup>227</sup>

While traditional criminal law frameworks have decontextualized violence against pregnant women and discounted the impact of pregnancy on women’s suffering, the alternative paradigm—which purports to vindicate the rights of fetal victims—renders the pregnant woman conceptually nonexistent altogether. This disappearance effectively precludes recognition of women’s suffering, rendering remediation an impossibility. A statutory scheme that meaningfully redresses pregnancy battering must account for the experiences of women whose suffering it purports to remedy.<sup>228</sup>

As we have seen, the battering of pregnant women—like the battering of women who are not pregnant—is dependent on context: neither the meaning of a physical act considered in isolation, nor its harm, can be understood without recognition of a larger pattern of domination and how the physical abuse furthers it. As I have argued elsewhere,<sup>229</sup> in order to contextualize violence, battering should be statutorily defined as encompassing a course of conduct<sup>230</sup> characterized by power and control.

222. See Dorothy E. Roberts, *The Meaning of Gender Equality in Criminal Law*, 85 J. CRIM. L. & CRIMINOLOGY 1, 3–4 (1994) (“Feminists examining criminal law should be concerned with uncovering the ways that the criminal law contributes to women’s deprivation by continuing to reflect and protect patriarchal interests. Feminist scholars should use these discoveries to devise ways to transform criminal law into a more egalitarian system that respects all women as self-determining human beings.” This involves “reveal[ing] the inequality that is embedded in the very definition of crime—an inequality which reinforces prevailing relationships of power.”).

223. See Kathleen Waits, *The Criminal Justice System’s Response to Battering: Understanding the Problem, Forging the Solutions*, 60 WASH. L. REV. 267, 270 (1985); cf. Siegel, *supra* note 141 (critiquing the law’s historic ambivalence towards criminalizing domestic violence); Tuerkheimer, *supra* note 1, at 971 (arguing that criminal law structures in place when violence against wives was lawful cannot remedy the harm of battering).

224. This failure is, of course, just one manifestation of law’s inattention to harms suffered by women. See West, *supra* note 163, at 60 (“[T]he distinctive values women hold, the distinctive dangers from which we suffer, and the distinctive contradictions that characterize our inner lives are not reflected in legal theory because legal theory (whatever else it’s about) is about actual, real life, enacted, legislated, adjudicated law, and women have, from law’s inception, lacked the power to make law protect, value, or seriously regard our experience.”).

225. See *supra* Part II.A.

226. See *supra* Part IV.C.

227. See MacKinnon, *supra* note 53, at 1316.

228. My claim that the suffering of pregnant battered women should be redressed by law embeds equality norms. See Law, *supra* note 162.

229. For a complete statutory definition of the battering statute I propose and a discussion of its precedent in substantive criminal law, see Tuerkheimer, *supra* note 1, at 1019–23.

230. “‘Course of conduct’ means a pattern of conduct comprised of a series of acts over a period of time, however short, evidencing a continuity of purpose.” *Id.* at 1020. The proposed battering statute requires that at least two acts comprising the course of conduct constitute a crime in the governing jurisdiction. *Id.*

### Criminalizing battering as a course of conduct

refocuses the lens through which evidence is filtered. Context is now relevant, as is relationship. Physical manifestations of power are no longer understood as the sole incidents of battering. What were seemingly disconnected events become woven together by the thread of control. Battering is described accurately by the legislative language which purports to criminalize it.<sup>231</sup>

The criminal law must reflect not only the context of victims' lives, but also the significance of victims' pregnant status to the harm of violence during pregnancy. A crime of assault on a pregnant woman—defined as subjecting a pregnant woman to offensive physical contact<sup>232</sup>—would embody an awareness that the suffering of a pregnant domestic violence victim cannot be fathomed without consideration of her pregnancy. Criminalizing offensive physical contact<sup>233</sup> with a pregnant woman<sup>234</sup> would serve as recognition that the harm of pregnancy battering cannot be captured by exclusive reference to physical injury. While the infliction of either physical injury or serious physical injury may constitute an aggravating factor which elevates the severity of the crime,<sup>235</sup> pregnancy battering injures far more than the victim's external shell.<sup>236</sup>

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231. *Id.* at 1020.

232. Because a woman's fear that the developing fetus may be adversely affected by the batterer's physical abuse is integral to the harm that she suffers, *see supra* notes 220–21 and accompanying text, the application of force may be viewed as triggering the paradigm of violence against pregnant women that I have been discussing. I am suggesting not that fear per se be defined as an injury requiring redress by criminal law, but rather that a pregnant victim's fear of fetal harm be recognized as enabling the batterer to more effectively control her. *Cf.* Martha Chamallas & Linda K. Kerber, *Women, Mothers, and the Law of Fright: A History*, 88 MICH. L. REV. 814 (1990) (critiquing the history of tort law's treatment of fright-based injuries and framing the fright cases as claims for women's rights).

233. The language of "offensive physical contact" often appears in definitions of the tort of battery, *see* Jeunifer Wriggins, *Domestic Violence Torts*, 75 S. CAL. L. REV. 121, 130 n.39 (2001), and, in the criminal context, in statutes criminalizing harassment, *see, e.g.*, ARK. CODE ANN. § 5-71-208 (1987); COLO. REV. STAT. ANN. § 18-9-111 (West 2004); HAW. REV. STAT. § 711-1106 (1993); OR. REV. STAT. § 6.065 (1990). Maine's assault statute is unusual in requiring proof that the defendant caused bodily injury *or* offensive physical contact. *See* ME. REV. STAT. ANN. tit. 17-A, § 207 (2004) (providing that a person is guilty of assault if the person intentionally, knowingly, or recklessly causes bodily injury or offensive physical contact to another person). This use of the disjunctive is, as I have suggested, atypical of assault statutes.

234. The definition of this crime might include a requirement that the defendant knew or should have known that the victim was pregnant. Issues related to mens rea, as well as consideration of whether the meaning of "offensive physical contact" warrants further statutory elaboration, are beyond the scope of this discussion. My purpose here is to suggest the broad contours of the crime of assault on a pregnant woman—and to emphasize that it be severed from a physical injury requirement—rather than to propose specific language for a comprehensive statutory scheme.

235. Other aggravating factors might include, for example, the use of a weapon, impairment of the victim's pregnancy, or a prior conviction for the same crime.

236. A crime of assault on a pregnant woman that dispenses with a physical injury requirement would allow victims to more fully recount their experiences of pregnancy violence in accordance with applicable legal structures. *See supra* Part II.C.

Only by accounting for a woman's pregnancy and contemplating the context of her life can the criminal law bring pregnancy battering within its reach.