

Normalizing Maternal Ambivalence

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Certain themes are common when identifying good mothers: becoming a mother is an overwhelmingly happy experience; good mothers love their children immediately; good mothers will sacrifice their own health, bodies, and other needs to serve their children's interests; and good mothers do not feel ambivalent about their children or about being a parent. Indeed, the law reinforces this conception of the good mother by responding to perceived maternal ambivalence with scrutiny, investigation, and sometimes prosecution. Expressing ambivalence about being pregnant, giving birth, or caring for one's existing children can be used against someone who suffers a pregnancy loss as evidence that they were responsible for the miscarriage or stillbirth. Expressing uncertainty to the wrong person about whether to choose abortion, adoption, or raising a child can be held against a mother in a subsequent determination about her fitness to parent. Sometimes, even just engaging in conduct that medical or legal authorities find unusual or uncomfortable can put a woman in law enforcement's crosshairs. Rather than look to the realities of reproduction and parenting to explain unfamiliar behavior, including behavior related to a traumatic pregnancy loss, legal authorities are quick to assume a woman's culpability and characterize her as an inadequate mother. Racially minoritized, low-income, and other marginalized women are at increased risk of being perceived as ambivalent and facing punishment as a result. And yet, social science tells us that having conflicted feelings about motherhood is common, normal, and healthy.

By reinforcing the social stigma surrounding maternal ambivalence, law privileges restrictive gender stereotypes about self-sacrificing mothers and

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women fulfilling their natural reproductive destinies by becoming mothers. Strengthening the regulatory power of these stereotypes limits women's autonomy in decisions about childbearing and childrearing, instead vesting greater authority in health care professionals, law enforcement officials, and other state actors who transform maternal ambivalence into a legal matter. To counteract this phenomenon, this Article calls for the normalization of maternal ambivalence to bring law into better alignment with social science and to ease the harms that flow from punishing women's conflicted feelings about motherhood.

INTRODUCTION.....	559
I. DEFINING MATERNAL AMBIVALENCE.....	565
II. DISCIPLINING MATERNAL AMBIVALENCE.....	568
A. <i>Vague Statutes and Assuming the Bad Mother</i>	571
B. <i>Reproductive Uncertainty and Health Care Confidentiality</i>	576
C. <i>Ambivalence in Family Court and Perception of Risk</i>	581
III. RECONCEIVING MATERNAL AMBIVALENCE.....	587
A. <i>The Ubiquity of Maternal Ambivalence</i>	587
B. <i>Understanding Maternal Ambivalence</i>	595
1. <i>The Social Science of Ambivalence</i>	595
2. <i>The Social Science of Maternal Ambivalence</i>	598
IV. NORMALIZING MATERNAL AMBIVALENCE	606
A. <i>Punishing Maternal Ambivalence Is Discriminatory and Causes Harm</i>	607
B. <i>Legal Interventions to Normalize Maternal Ambivalence</i>	613
1. <i>Foreclosing Paths to Prosecution Through Statutory Reform</i>	616
2. <i>Preventing Provider Referrals to Law Enforcement</i>	619
3. <i>Applying Evidentiary Rules to Exclude Maternal Ambivalence</i>	622
V. CONCLUSION.....	625

INTRODUCTION

We're basically given two options for motherhood: good or bad. There is not a lot of room for ambiguity . . . many moms find that discussing with others their ambivalence about their children or their parenting abilities results only in blame, guilt, and in some extreme cases a covert call to child protective services.

– Andrea Buchanan, *Mother Shock*¹

I had my son when I was 23 years old and I can honestly say it was the worst mistake of my life. . . . I wish I had a time machine to wake me up from this living nightmare. . . . I didn't think it was possible to love someone so much but also regret creating them.

– Anonymous on Reddit²

For many women, the desire to be considered a “good mother” drives a multitude of decisions, including how to give birth,³ whether to work outside the home,⁴ and how to feed, clothe, educate, and discipline one's children.⁵ Those deemed to be good mothers receive praise and support, while those labeled bad mothers are criticized and judged for their decisions.⁶ The qualities of a good mother are subjective, impossible to define precisely in any universal sense but easy for observers to scrutinize, especially when the mother falls short of expectations. And yet, certain themes are common when identifying good mothers: becoming a mother is an overwhelmingly happy

1. ANDREA J. BUCHANAN, *MOTHER SHOCK* 60–61 (2003).

2. Zhou, *Meet the Parents That Wish They Were Child-Free*, REFINERY29 (June 28, 2022), <https://www.refinery29.com/en-gb/regretful-parents-reddit> [<https://perma.cc/PG8X-F8TW>].

3. See Sophie Elmhirst, *The Battle Over Birth*, *ECONOMIST* (Aug. 3, 2020), <https://www.economist.com/1843/2020/08/03/the-battle-over-birth> [<https://perma.cc/U39B-3CAD>].

4. See LONNAE O'NEAL PARKER, *I'M EVERY WOMAN*, at xvi–xvii (2005) (“I didn't realize there existed a culture of guilt in motherhood or that some women felt they had to choose between work and family until I was in my mid-twenties.”).

5. See Linda Rose Ennis, *Intensive Mothering: Revisiting the Issue Today*, in *INTENSIVE MOTHERING: THE CULTURAL CONTRADICTIONS OF MODERN MOTHERHOOD* 1, 4–5 (Linda Rose Ennis ed., 2014).

6. See GINA FORD, *GOOD MOTHER, BAD MOTHER* 4 (2014).

experience;⁷ good mothers love their children immediately;⁸ good mothers will sacrifice their own health, bodies, and other needs to serve their children's interests;⁹ and good mothers do not feel ambivalent about their children or about being a parent.¹⁰

When it comes to maternal ambivalence, social scientists do not necessarily attach negative meaning to feelings that fall short of complete enthusiasm about childrearing. Instead of pathologizing maternal ambivalence, psychologists consider it both common and normal, finding fault with the social stigma that attaches to the ambivalence rather than the ambivalent feelings themselves.¹¹ Rather than critique maternal ambivalence as harmful to the family or society more broadly, sociologists identify

7. See Alexandra Sacks, *When Your Experience of Childbirth Doesn't Match Your Expectations*, N.Y. TIMES (Apr. 16, 2020), <https://www.nytimes.com/2020/04/16/parenting/overcoming-traumatic-birth.html>; Janet Beaton & Annette Gupton, *Childbirth Expectations: A Qualitative Analysis*, 6 MIDWIFERY 133, 133 (1990) (discussing disappointed expectations after childbirth).

8. See BUCHANAN, *supra* note 1, at 53 ("The first thing I can remember thinking . . . was 'Who is this little stranger?' . . . I was . . . surprised to discover that my first emotion was not the intense love I'd heard described but, instead, a sense of overwhelming responsibility."); LAUREN SLATER, LOVE WORKS LIKE THIS: MOVING FROM ONE KIND OF LIFE TO ANOTHER 148 (2002) ("I am a mother, but I don't look like a mother. I don't feel like a mother. . . . And the baby? I have come to like her a little bit. That's it. A little bit."); Tina Miller, "Is This What Motherhood Is All About?": *Weaving Experiences and Discourse Through Transition to First-Time Motherhood*, 21 GENDER & SOC'Y 337, 354–56 (2007); Ivana Brown, A Sociological Analysis of Maternal Ambivalence: Class and Race Differences Among New Mothers 38 (Jan. 2011) (Ph.D. dissertation, Rutgers University), <https://rucore.libraries.rutgers.edu/rutgers-lib/31013/PDF/1/play> [<https://perma.cc/CU2T-UZ27>] ("Mothers who do not immediately experience attachment and love for their babies struggle with the cultural image of the instant love and their own feelings of confusion and ambivalence about one's own ability to mother." (citing Miller, *supra*)).

9. See Min Jin Lee, *Will*, in BREEDER: REAL LIFE STORIES FROM THE NEW GENERATION OF MOTHERS 21, 26 (Ariel Gore & Bee Lavender eds., 2001) ("I tried to follow the guidelines of the pregnancy books, but I kept falling short. . . . I was a bad mother, and my baby wasn't even born yet."). See generally MOTHERING AND WELFARE: DEPRIVING, SURVIVING, THRIVING (Levasseur et al. eds., 2020) (discussing the centrality of self-sacrifice in dominant cultural ideologies of motherhood).

10. See BUCHANAN, *supra* note 1, at 60–61 ("[W]e're basically given two options for motherhood: good or bad. There is not a lot of room for any ambiguity . . . many moms find that discussing with others their ambivalence about their children or their parenting abilities results only in blame, guilt, and in some extreme cases a covert call to child protective services.").

11. See BARBARA ALMOND, THE MONSTER WITHIN: THE HIDDEN SIDE OF MOTHERHOOD 1–2 (2010); Paddy Maynes & Joanna Best, *In the Company of Women: Experiences of Working with the Lost Mother*, in MOTHERING AND AMBIVALENCE 119, 126 (Wendy Hollway & Brid Featherstone eds., 1997) ("It is the *denial* of the feelings of fury, boredom or even dislike towards children, all of which are part of motherhood, that makes the burden harder for women to bear, and can so often result in these feelings being expressed in secret and perverse ways.").

structural explanations for the prevalence of ambivalence about childrearing, such as the lack of adequate social supports in the form of paid family leave, affordable childcare, or protections from workplace discrimination.¹² These accounts complicate societal assumptions about the markers of a good (or bad) mother, enabling more diverse, nuanced, and sympathetic understandings of the sources of maternal ambivalence and their implications for motherhood as an institution, as well as for the individuals who do the work of mothering on a daily basis.

Beginning in the late 1990s and early 2000s, a series of memoirs appeared on bookstore shelves offering “true stories of motherhood”¹³ as a counterweight to existing commentary about motherhood available in expert advice books and parenting magazines.¹⁴ Authors shared how they experienced conflicting feelings as mothers, writing about their difficulties navigating the chasm between what society told them to expect and the reality of becoming a mother. The vulnerability and honesty of these accounts created a potential opening in public discourse about modern motherhood in American culture as a site of oppression for some and complex identity work for others. Notably, the authors of motherhood memoirs who publicly shared their ambivalence were predominantly white middle-class women.¹⁵ In recent

12. See, e.g., Brown, *supra* note 8, at 3 (“While psychologists focus on maternal ambivalence as a coexistence of feelings, usually defined as love and hate toward the child, I follow the sociological tradition and study maternal ambivalence as it is located in the social structural position of the mothers and the social conditions and expectations they face.”). The sociological approach aligns with legal scholar Martha Fineman’s vulnerability theory, which posits that “vulnerability is inherent to the human condition, and that governments therefore have a responsibility to respond affirmatively to that vulnerability by ensuring that all people have equal access to the societal institutions that distribute resources.” Nina A. Kohn, *Vulnerability Theory and the Role of Government*, 26 YALE J.L. & FEMINISM 1, 3 (2014); see also Martha Albertson Fineman, *The Vulnerable Subject: Anchoring Equality in the Human Condition*, 20 YALE J.L. & FEMINISM 1, 9–15 (2008).

13. Brown, *supra* note 8, at 2.

14. See, e.g., BUCHANAN, *supra* note 1; FAULKNER FOX, DISPATCHES FROM A NOT-SO-PERFECT LIFE: OR HOW I LEARNED TO LOVE THE HOUSE, THE MAN, THE CHILD (2003); SLATER, *supra* note 8; MARTHA BROCKENBROUGH, IT COULD HAPPEN TO YOU!: DIARY OF PREGNANCY AND BEYOND (2002); RACHEL CUSK, A LIFE’S WORK: ON BECOMING A MOTHER (2001); NAOMI WOLF, MISCONCEPTIONS: TRUTH, LIES, AND THE UNEXPECTED ON THE JOURNEY TO MOTHERHOOD (2003). Over eight hundred books about motherhood were published between 1970–2000. SUSAN J. DOUGLAS & MEREDITH W. MICHAELS, THE MOMMY MYTH: THE IDEALIZATION OF MOTHERHOOD AND HOW IT HAS UNDERMINED WOMEN 8 (2004).

15. See Brown, *supra* note 8, at 54. The collection of knowledge about women’s experiences of maternal ambivalence reflected in these memoirs also excludes people who do not have the opportunity to write, or to publish their writing, about these experiences; indeed, a common theme in such literature is the challenge of balancing the work of being a writer and being a mother, suggesting a certain form of privilege. See Moyra Davey, *Introduction* to MOTHER READER: ESSENTIAL WRITINGS ON MOTHERHOOD, at xiii, xiv–xvi (Moyra Davey ed., 2001).

years, the motherhood regret literature has continued to develop, with new voices describing their conflicted experiences with motherhood, but strong social stigma continues to attach to expressions of maternal ambivalence in the broader culture.¹⁶ Perhaps nowhere is this clearer than in the law's response to maternal ambivalence.

Specifically, actors within the legal system often take a harsh view of maternal ambivalence and its legal significance, contrary to social science findings about the meaning and causes of such feelings.¹⁷ Expressing ambivalence about being pregnant, giving birth, or existing children can be used against someone who suffers a pregnancy loss as evidence that they were responsible for the miscarriage or stillbirth.¹⁸ Expressing uncertainty to the wrong person about whether to choose abortion, adoption, or raising a child can be held against a mother in a subsequent determination about her fitness to parent.¹⁹ Sometimes, even just engaging in conduct that medical or legal authorities find unusual or uncomfortable can put a woman in law enforcement's crosshairs; rather than look to the realities of reproduction and parenting, including the not-uncommon experience of pregnancy loss and related trauma, to explain unfamiliar behavior, legal authorities are quick to assume a woman's culpability and characterize her as an inadequate mother. After ambivalence is expressed, it can be impossible to erase or neutralize the significance of prior feelings; the once-ambivalent mother becomes stigmatized by her association with that ambivalence, regardless of changed

16. Sociologist Ivana Brown observes that although the motherhood memoirs of this time criticize aspects of the ideology of motherhood, "they largely continue to subscribe to the beliefs that it is best for the children to be cared for by their mothers at all times and construct their decisions to stay at home with their children and fully devote themselves to the children as the choice of an 'enlightened mother.'" Brown, *supra* note 8, at 278. This paradox reflects the degree to which the self-sacrificing mother norm continues to dominate cultural discourse about motherhood and good mothers. See *infra* Section III.B.2.

17. See Elizabeth Kukura, *Punishing Maternal Ambivalence*, 90 FORDHAM L. REV. 2909, 2921–22 (2022) (describing legal cases where women were punished for behavior perceived to deviate from the stereotype of a good mother). In this prior essay, I used three case studies to illustrate how stigma about maternal ambivalence is weaponized against certain women. *Id.* at 2910. This Article broadens the lens, revisiting some of those cases to develop a fuller critical analysis of the law's treatment of maternal ambivalence and argue that correcting misconceptions held by legal actors about such ambivalence is necessary for promoting justice and the well-being of families.

18. See *infra* Part II. Note that while women are not the only people who get pregnant and give birth, see Heidi Moseson et al., *The Imperative for Transgender and Gender Nonbinary Inclusion: Beyond Women's Health*, 135 OBSTETRICS & GYNECOLOGY 1059, 1061–62 (2020), this Article focuses on the experiences of cisgender women and the impact of gender stereotypes about motherhood that assume mothers are heterosexual and cisgender. Thus, the Article uses gendered language when discussing pregnancy, childbirth, and parenting experiences.

19. See *infra* Section II.C.

conditions and any positive emotions she subsequently experiences related to her children and to the status of parenting.²⁰

Applying criminal law to regulate pregnant women's conduct is not a new phenomenon. But the dominant discourse about pregnancy criminalization focuses on drug use during pregnancy, with commentators criticizing the use of criminal law as a tool to address this social concern, particularly at the intersection of pregnancy and addiction.²¹ There are, however, a variety of contexts beyond substance use where women are investigated and punished for pregnancy outcomes or conduct related to parenting.²² Such cases reflect significant variation in their facts, potential sanctions, and outcomes, but it is worth exploring what they have in common. In particular, viewing these cases through the lens of maternal ambivalence helps us see the powerful work that gender stereotypes, often compounded by race and class bias, do to obscure the structural conditions that make motherhood challenging for many women. Analyzing cases across the criminal legal and family regulation systems from the perspective of maternal ambivalence offers a way to explain why criminalization of pregnancy and parenting does not advance child welfare. Furthermore, it shows how by stigmatizing women for their conflicted feelings about childbearing and childrearing, we entrench ideas about caretaking and dependency as individual and privatized work,²³ a paradigm that has contributed to the historical and ongoing subordination of women.²⁴

This Article argues that law's cramped and punitive understanding of maternal ambivalence causes harm to women and their children by signaling

20. The consequences of expressing ambivalent feelings online, including on social media, can be particularly severe in the United States, given the difficulty of eliminating online content entirely. By contrast, the European Union's approach to privacy as "an absolute fundamental right" that encompasses the right to be "in control of information about yourself [and] to be let alone" creates a more robust set of protections for individuals to control their online presence, which could have implications for the freedom of women to express conflicted feelings about motherhood. See *Data Protection*, EUR. DATA PROT. SUPERVISOR, https://www.edps.europa.eu/data-protection/data-protection_en [https://perma.cc/X8QG-ZLM2]. Thanks to Professor Jonathan Todres for this observation.

21. GRACE HOWARD, *THE PREGNANCY POLICE: CONCEIVING CRIME, ARRESTING PERSONHOOD* 36 (2024); PURVAJA S. KAVATTUR ET AL., *PREGNANCY JUSTICE, THE RISE OF PREGNANCY CRIMINALIZATION* 3 (2023) ("[T]he overwhelming majority of cases rely on substance use allegations. . . ."); WENDY A. BACH, *PROSECUTING POVERTY, CRIMINALIZING CARE* 21 (2022).

22. See, e.g., *infra* Part II.

23. See MARTHA ALBERTSON FINEMAN, *THE AUTONOMY MYTH: A THEORY OF DEPENDENCY* 31–32 (2004).

24. See Suzanne A. Kim, *Reconstructing Family Privacy*, 57 HASTINGS L.J. 557, 558 (2006); Katherine T. Bartlett, *Feminism and Family Law*, 33 FAM. L.Q. 475, 475 (1999).

that mothers who fail to conform to idealized notions of the good mother should face stigma, scrutiny, and even punishment.²⁵ In practical terms, punitive legal regulation of maternal ambivalence can rupture families by causing the displacement of family members through criminal law or child removal processes. More broadly, by reinforcing the social stigma surrounding maternal ambivalence, law privileges restrictive gender stereotypes about self-sacrificing mothers and women fulfilling their natural reproductive destinies by becoming mothers.²⁶ Strengthening the regulatory power of these stereotypes ultimately limits women's autonomy in decisions about childbearing and childrearing, instead vesting greater authority in the health care professionals, law enforcement officials, and other state actors who transform maternal ambivalence into a legal matter.

Part I briefly defines maternal ambivalence, leading to a series of cases in Part II that involve punitive action against mothers who express ambivalence. These examples illustrate how women who fall short of the good mother stereotype face stigma, harmful assumptions about their decision-making, and punishment for departing from gendered norms about motherhood.²⁷ Next, Part III offers an alternative conception of maternal ambivalence, drawing on social science literature to show that maternal ambivalence is

25. By contrast, paternal ambivalence does not generate the same kind of emotional reactions or desire to regulate through criminal law. Beyond psychoanalysis, paternal ambivalence has not been the subject of much commentary. Anecdotally, men who express conflicted or uncertain feelings about becoming fathers may be praised for prioritizing their careers or other commitments, while women who make similar statements are characterized as selfish or unrealized women. See LOIS TONKIN, *MOTHERHOOD MISSED: STORIES FROM WOMEN WHO ARE CHILDLESS BY CIRCUMSTANCE* 27 (2019) (observing that men's lives "are differently socially defined by whether or not they are fathers than women's are by motherhood").

26. See April L. Cherry, *Shifting Our Focus from Retribution to Social Justice: An Alternative Vision for the Treatment of Pregnant Women Who Harm Their Fetuses*, 28 J.L. & HEALTH 6, 39–40 (2015) ("As a hegemonic ideology, motherhood is reinforced by at least three core beliefs and expectations: (1) that motherhood for women is normal, natural, and desired; (2) that good mothers are altruistic and intensive, which includes the assumption of primary responsibility for the care of their children; and (3) that the women who put their own needs and desires before those of their children are bad mothers who need to be regulated and controlled."). The growth of fetal personhood ideology has strengthened the norm of the self-sacrificing mother, as two people in the same body cannot have the same rights. See Meghan M. Boone & Benjamin J. McMichael, *Reproductive Objectification*, 108 MINN. L. REV. 2493, 2500 (2024) ("As the law increasingly conceives of fetuses as people, the *fundamental humanity* of the pregnant person becomes more conceptually precarious.").

27. See Lisa Beneventano & Colleen Manwell, *Ambivalence About Parenting: An Overview for Lawyers Representing Parents in Child Welfare Proceedings*, 20 CUNY L. REV. 151, 155–56 (2016) (discussing "cultural factors" that shape expectations of mothers, including "the commonly held notion that babies are supposed to be desired[,] the high value placed on the maternal role and the social judgment or measuring of a woman based on her participation in and success in the maternal role").

unexceptional and healthy—in stark contrast to the stigmatized and pathologized view of maternal ambivalence that the law reflects and reinforces. Drawing on the justice concerns raised in Part II and the social science discussed in Part III, Part IV argues that punishing maternal ambivalence is discriminatory and harmful, reinforcing gender, race, and class stereotypes and causing harm through unwarranted criminal punishment, family separation, and humiliation. It calls for the destigmatization and normalization of maternal ambivalence, identifying three areas within the law where that work can be advanced.

Finally, Part V concludes by suggesting that alternative understandings of maternal ambivalence as normal and productive should inspire legal actors to understand such feelings as protective of children's well-being, and focus their energy on mobilizing legal and social supports for fragile families instead of a criminal response. In the wake of *Dobbs*, as many states turn to enhanced surveillance and criminal prosecution of reproductive decision-making,²⁸ it is more important than ever to resist norms that advance reproduction-as-destiny for women and that silence narratives about the burdens of motherhood.

I. DEFINING MATERNAL AMBIVALENCE

The motherhood memoirs published at the turn of the twenty-first century were not the first books exploring the conflicts experienced by women in their roles as mothers. In the 1950s, the “first wave of the non-fictional motherhood writing” came from the pens of writers like Erma Bombeck, Shirley Jackson, and Jean Keer, who wrote about “their experiences as middle-class suburban housewives and mothers . . . us[ing] humor and satire . . . to probe and uncover the dissatisfaction and the lack of fulfillment many women felt in these roles.”²⁹ Starting in the 1970s, second-wave feminist writers critiqued the expectations of motherhood in modern society against the backdrop of the patriarchal family, describing maternity as both “oppressive” and “empowering.”³⁰ Certain themes are consistent for women

28. See WENDY A. BACH & MADALYN K. WASILCZUK, PREGNANCY JUSTICE, PREGNANCY AS A CRIME: A PRELIMINARY REPORT ON THE FIRST YEAR AFTER *DOBBS* 2 (2024), <https://www.pregnancyjusticeus.org/wp-content/uploads/2024/09/Pregnancy-as-a-Crime.pdf> [<https://perma.cc/45DF-LRP3>] (finding the highest number of pregnancy-related prosecutions documented in a single year in the twelve months following the *Dobbs* decision).

29. Brown, *supra* note 8, at 23.

30. Andrea O'Reilly, *Introduction* to FROM MOTHERHOOD TO MOTHERING 1, 2 (Andrea O'Reilly ed., 2004); see, e.g., ADRIENNE RICH, OF WOMAN BORN (1976); ANN OAKLEY, FROM HERE TO MATERNITY: BECOMING A MOTHER (1979); JANE LAZARRE, THE MOTHER KNOT (1976).

of different eras, even as authors use different language to describe the tension between one's identity before and after becoming a mother or the discordance between the expectations of motherhood and the reality of mothering. The language of maternal ambivalence can be capacious and subjective, so it is important to start by defining the concept as relevant to the present analysis.

For social scientists, ambivalence refers to the "coexistence of conflicted positive and negative attitudes or *valences*."³¹ By contrast, univalence captures the position of someone who "holds attitudes of single orientation."³² Some theorists apply more expansive definitions to the concept of ambivalence, such as the "coexistence of positive and negative feelings, action, thoughts and volitions";³³ "love and hate, attraction and repulsion";³⁴ "a tension, an oscillation between closeness and distance, and presence of conflicting norms";³⁵ or "simultaneously held opposing feelings or emotions that are due in part to countervailing expectations about how individuals should act."³⁶ Turning to the colloquial meaning of ambivalence, the dictionary offers multiple definitions. Some echo the understanding of social scientists, referring to the "simultaneous and contradictory attitudes or feelings (such as attraction and repulsion) toward an object, person, or action" or to a "continual fluctuation (as between one thing and its opposite)."³⁷ However, another meaning for ambivalence is "uncertainty as to which approach to follow."³⁸ For many people, feeling uncertain is undoubtedly at the center of ambivalence, and uncertainty is often a feature of reproductive decision-making that results in punitive legal consequences.³⁹

When it comes to maternal ambivalence in particular, the sociology literature defines it as the "coexistence of positive and negative feelings and thoughts about a woman's position as a mother and her relationship toward

31. Brown, *supra* note 8, at 59.

32. *Id.*

33. *Id.* (citing ANDREW J. WEIGERT, MIXED EMOTIONS: CERTAIN STEPS TOWARD UNDERSTANDING AMBIVALENCE (1991)).

34. *Id.* (citing Neil J. Smelser, *The Rational and the Ambivalent in the Social Sciences*, 63 AM. SOCIO. REV. 1, 5 (1998)).

35. *Id.* (citing Kurt Lüscher, *Conceptualizing and Uncovering Intergenerational Ambivalence*, in 4 CONTEMPORARY PERSPECTIVES IN FAMILY RESEARCH 23 (Karl Pillemer & Kurt Lüscher eds., 2004)).

36. Ingrid Arnet Connidis & Julie Ann McMullin, *Sociological Ambivalence and Family Ties: A Critical Perspective*, 64 J. MARRIAGE & FAM. 558, 558 (2002).

37. *Ambivalence*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/ambivalence> [https://perma.cc/38QT-AGHN].

38. *Id.*

39. *See infra* Part II.

the institution of motherhood.”⁴⁰ Focusing on the individual rather than societal level, psychologists describe the “combination of the loving and hating feelings we experience toward those who are important to us.”⁴¹ Psychotherapist Rozsika Parker points to the classic lullaby “Rock-a-Bye Baby” as an example of maternal ambivalence, calling it “safely contained and creatively expressed maternal resentment coexisting with the mother’s love for her baby.”⁴² Parker “suggests that most mothers experience . . . mixed feelings towards their child and are able to overcome the negative feelings.”⁴³ Other commentators observe that maternal ambivalence may look more like indifference than coexisting intense love and hate.⁴⁴

Importantly, maternal ambivalence is distinct from parenting stress or postpartum depression. Parenting stress “focuses solely on parenting distress, resulting from everyday frustrations, or ‘daily hassles,’ involved in parenting and a child’s difficult behavior.”⁴⁵ While maternal ambivalence may negatively impact mental health, it is a phenomenon distinct from clinically recognized perinatal mood disorders such as postpartum depression. For example, postpartum depression is qualitatively different from maternal ambivalence because depression is associated with only negative emotions and experiences, not the coexistence of positive and negative feelings that characterizes maternal ambivalence.⁴⁶ Nevertheless, the relationship between postpartum depression and maternal ambivalence can be more complex for some women. In particular, women with postpartum depression—whether diagnosed or undiagnosed—may be perceived as ambivalent mothers, putting

40. Brown, *supra* note 8, at 3.

41. ALMOND, *supra* note 11, at 1.

42. Brown, *supra* note 8, at 1 (citing ROZSIKA PARKER, *TORN IN TWO: THE EXPERIENCE OF MATERNAL AMBIVALENCE* 73 (rev. ed. 2005)). The lullaby’s lyrics are: “Rock a bye baby, on the tree top, When the wind blows, the cradle will rock, When the bough breaks the cradle will fall, And down will come baby, cradle and all.” *Rock a Bye Baby*, WORDS FOR LIFE, <https://wordsforlife.org.uk/activities/rock-a-bye-baby> [<https://perma.cc/8LW7-4MJP>]. The tenderness with which lullabies are usually sung stands in stark contrast to the brutality of the lyrics themselves.

43. Brown, *supra* note 8, at 2 (citing Rozsika Parker, *The Production and Purposes of Maternal Ambivalence*, in *MOTHERING AND AMBIVALENCE*, *supra* note 11, at 17).

44. *Id.* at 8 (noting how motherhood memoirs reflect “surprise over the indifference they feel toward the child instead of the intense love they expected”).

45. *Id.* at 108; see Keith A. Crnic et al., *Cumulative Parenting Stress Across the Preschool Period: Relations to Maternal Parenting and Child Behaviour at Age 5*, 14 *INFANT & CHILD DEV.* 117, 118 (2005).

46. See Brown, *supra* note 8, at 108.

them at greater risk of punitive action related to pregnancy or parenting.⁴⁷ Society has gradually come to understand postpartum depression as a mental health condition that requires diagnosis and treatment, rather than a new mother's personal failure. Accordingly, the ease with which postpartum depression may be mistaken for maternal ambivalence should caution against using the criminal law to regulate women perceived to fall short of the good mother stereotype.

II. DISCIPLINING MATERNAL AMBIVALENCE

Historically, law has served as a tool to regulate women who deviate from social norms about femininity, womanhood, marital roles, and especially motherhood.⁴⁸ Women's biological capacity to bear children has led to surveillance and restriction of women's conduct and decision-making, reinforcing the idea that women's proper role is to reproduce and that they have a duty to fulfill this function.⁴⁹ Women who depart from the good mother norm—perhaps by feeling uncertain about whether they want a child, feeling conflicted about their identity as a mother, or expressing ambivalence about motherhood itself—not only face social stigma but may also find themselves subject to legal scrutiny.

Defenders of traditional gender roles have often favored punitive approaches when responding to adverse reproductive health outcomes like pregnancy loss or infant death due to childbirth complications.⁵⁰ Rather than treating them as health issues, requiring non-punitive care by medical and

47. See *infra* Part II. Postpartum depression is significantly underdiagnosed, and research suggests that Black women are less likely than white women to have their postpartum mood and anxiety disorders detected and diagnosed. See Stephanie V. Hall et al., *Racial Disparities in Diagnosis of Postpartum Mood and Anxiety Disorders Among Symptomatic Medicaid Enrollees, 2012–2015*, 75 PSYCHIATRIC SERVS. 115, 115 (2024) (finding only 19.8% of respondents with postpartum mood and anxiety disorder symptoms were diagnosed in the three-month period after giving birth, with Black respondents even less likely to be diagnosed).

48. See, e.g., Allison Anna Tait, *The Return of Coverture*, 114 MICH. L. REV. FIRST IMPRESSIONS 99, 99 (2016); Sarah Bond, *What Not to Wear: A Short History of Regulating Female Dress from Ancient Sparta to the Burkini*, FORBES (Aug. 31, 2016), <https://www.forbes.com/sites/drsarahbond/2016/08/31/a-short-history-of-regulating-female-dress> [<https://perma.cc/VF9Q-K64C>].

49. See MICHELE GOODWIN, *POLICING THE WOMB* 11 (2020).

50. See Kukura, *supra* note 17, at 2910. The impulse to criminalize is particularly strong in the drug use context; indeed, sometimes prosecutors will proceed with charges against pregnant women who use drugs in the absence of an adverse newborn health outcome. See HOWARD, *supra* note 21, at 129. Even when their newborns are healthy, women have been prosecuted for drug use during pregnancy, suggesting we must look beyond concern for child welfare to understand why health care providers, law enforcement, and prosecutors use the criminal law in this way.

mental health professionals, law enforcement assumes that the woman bears responsibility for failing to prevent a loss, even in the absence of any evidence that prevention would have been possible.⁵¹ Medical research on pregnancy loss demonstrates that miscarriage is common and often caused by unavoidable genetic or biological factors, and that while some stillbirth is preventable with appropriate prenatal care, a significant number of stillbirths are caused by unknown—and thus non-preventable—factors.⁵² And yet, certain women, particularly those who are assumed not to be good mothers due to their race or socioeconomic status, face scrutiny and threat of punishment for their reproductive outcomes.⁵³ While there are many examples of women being investigated and prosecuted for their pregnancy outcomes even before the Supreme Court eliminated the constitutional right to abortion in *Dobbs*,⁵⁴ restrictive abortion laws adopted in many states since 2022,⁵⁵ along with expanding public discourse around the concept of fetal personhood,⁵⁶ have increased the incentives for public surveillance of women's reproductive decision-making and eased the path for law enforcement investigation and punishment related to their health outcomes.

51. See KAVATTUR ET AL., *supra* note 21, at 2, 52.

52. See Jill Wieber Lens, *Medical Paternalism, Stillbirth, & Blindsided Mothers*, 106 IOWA L. REV. 665, 675–77, 699 (2020).

53. Race and socioeconomic status are not the only bases on which women are judged to be bad mothers. Age, sexual orientation, gender identity, marital status, number of children, and reproductive history, including history of abortion, among other factors, drive assumptions about whether a particular individual satisfies societal expectations of a good mother.

54. See Lynn M. Paltrow & Jeanne Flavin, *Arrests of and Forced Interventions on Pregnant Women in the United States, 1973–2005: Implications for Women's Legal Status and Public Health*, 38 J. HEALTH POL. POL'Y & L. 299, 301–04, 309–10 (2013) (documenting 413 cases of pregnancy or pregnancy loss leading to attempted or actual arrest, detention, or forced intervention in the United States between 1973–2005). The authors note methodological limitations that led them to conclude their findings reflect a substantial undercount of the number of arrests related to pregnancy-related prosecutions. *Id.* at 304–05. See generally *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215 (2022).

55. *Interactive Map: US Abortion Policies and Access After Roe*, GUTTMACHER INST., <https://states.guttmacher.org/policies> (last updated Feb. 26, 2025); *Tracking Abortion Bans Across the Country*, N.Y. TIMES, <https://www.nytimes.com/interactive/2022/us/abortion-laws-ro-v-wade.html>.

56. See Mary Ziegler, *The Endgame in the Battle Over Abortion*, POLITICO (Mar. 24, 2024), <https://www.politico.com/news/magazine/2024/03/24/personhood-abortion-legal-fight-00147138> [<https://perma.cc/863P-T273>]; Shoshanna Ehrlich, *Seeing Fetal 'People' Everywhere: What Has 'Dobbs' Wrought?*, MS. MAG. (Feb. 29, 2024), <https://msmagazine.com/2024/02/29/fetal-personhood-pro-life-abortion-republicans-alabama> [<https://perma.cc/YZH9-VFAD>]; Celine Castronuovo, *Alabama Embryo Ruling Gives Boost to Fetal Personhood Movement*, BLOOMBERG L. (Feb. 21, 2024), <https://news.bloomberglaw.com/health-law-and-business/alabama-embryo-ruling-gives-boost-to-fetal-personhood-movement> [<https://perma.cc/8CND-RJ8Y>].

This Part examines a set of cases in detail to illustrate how law is deployed to reinforce the idealized good mother norm by policing behavior by mothers that is perceived as deviant. In these cases, state authorities—or medical professionals acting as an extension of state authorities—responded with skepticism, scrutiny, and sanction to women who depart from the stereotype of a good mother, meaning one who embraces her role as childbearer and caregiver without hesitation, concern, or complication.⁵⁷ When these women acted or spoke in ways that suggested less than full enthusiasm about pregnancy or motherhood, they faced punitive consequences. Some of the targeted conduct may seem familiar or relatable to other women who could imagine themselves in a similar position, but it nevertheless triggered a punitive response because someone in a position of medical or legal authority believed the conduct was problematic.

The cases described here illustrate different ways perceived maternal ambivalence can attract law enforcement scrutiny; they are not meant to capture all types of scenarios where the perception of ambivalence might ensnare a woman in the criminal legal or family regulation system. In the first case, a woman who suffered a stillbirth was perceived to have violated the good mother ideal by not telling her parents she was pregnant. Her non-disclosure of the pregnancy, though justified as a way to protect her son from homelessness, combined with certain facts surrounding the stillbirth, prompted the prosecutor to paint her as a deviant, uncaring, and ambivalent mother, securing a criminal conviction against her. In the second case, a pregnant mother of two disclosed to a nurse that she was overwhelmed after her husband announced he was leaving, prompting medical personnel to report her to the police on suspicion that she intentionally threw herself down the stairs rather than tripped. When she disclosed that she was considering abortion or adoption, the nurse perceived her as an ambivalent and thus bad mother, setting off a chain of events that led to her criminal prosecution. Finally, the third case reflects how statements perceived to reflect ambivalence about motherhood are used to justify the removal of children from their mothers, especially against the backdrop of poverty and hardship common among racially minoritized single mothers. As reflected in these cases, the blunt use of both criminal and child protection law to regulate women's behavior ignores the complexity of women's lives and reproductive decision-making, leading to harsh, unjust results.

57. See Paula L. Abrams, *The Bad Mother: Stigma, Abortion and Surrogacy*, 43 J.L. MED. & ETHICS 179, 180 (2015) (“Conception is assumed to begin a process that inevitably leads to gestation and nurturance; the social identity of women has been shaped by the expectation that women are ‘natural’ nurturers.”).

A. Vague Statutes and Assuming the Bad Mother

In 2015, Anne Bynum, a 36-year-old white woman with one son, learned she was pregnant.⁵⁸ She lived with her parents in Arkansas because she did not earn enough at her minimum-wage job to secure separate housing for her and her son.⁵⁹ When Bynum asked her mother, hypothetically, what would happen if she became pregnant again, her mother said she would need to move out.⁶⁰ Bynum determined that having another child was “not feasible” given her economic circumstances, and she arranged to have friends adopt the baby.⁶¹ She continued the pregnancy without telling her parents that she was pregnant.⁶² However, at seven months, she delivered the baby stillborn at home late one night by herself.⁶³ When she went to the emergency room the next morning for an examination, she brought the fetal remains with her, and the hospital confirmed that Bynum had experienced a stillbirth.⁶⁴

Despite the hospital’s findings, the police arrested Bynum on her way home from the hospital several days later and charged her with the crimes of concealing a birth⁶⁵ and abuse of a corpse.⁶⁶ Bynum subsequently described feeling like she was treated as if she had murdered her baby, rather than as someone whose baby was stillborn, let alone someone who had the potentially traumatic experience of delivering a stillborn baby alone at

58. Opinion, *How My Stillbirth Became a Crime, A Woman’s Rights: Part 7*, N.Y. TIMES, (Dec. 28, 2018), <https://www.nytimes.com/interactive/2018/12/28/opinion/stillborn-murder-charge.html>.

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.*

64. *Id.* The *New York Times* reported that Bynum took drugs to induce labor after she realized that the fetus had stopped moving, and the examination at the hospital confirmed the baby was stillborn. *Id.* See also Lens, *supra* note 52, at 666, 671 (explaining that stillbirth describes pregnancy loss that occurs after twenty weeks of pregnancy and noting that the cause cannot be explained in approximately twenty-five percent of stillbirths).

65. ARK. CODE ANN. § 5-26-2023 (2025). Concealing a birth is Class D felony under Arkansas law, committed when a person “hides the corpse of a newborn child with purpose to conceal the fact of the child’s birth or to prevent a determination of whether the child was born alive.” *Id.*

66. ARK. CODE ANN. § 5-60-101 (2025); see also Lisa McClain-Freeney, *Victory in Arkansas*, NAT’L ADVOCS. FOR PREGNANT WOMEN (Dec. 12, 2018), <https://www.nationaladvocatesforpregnantwomen.org/victory-inarkansas> [https://perma.cc/2AQF-PKWF] (noting that the “concealing a birth” charge carried a potential six-year prison sentence and \$10,000 fine, while the “abuse of a corpse” charge carried a sentence of up to ten years in prison and a \$10,000 fine).

home.⁶⁷ Given that Bynum had brought the fetal remains with her to the hospital and willingly disclosed the circumstances to medical personnel, her confusion about the basis for her prosecution was understandable.⁶⁸ Although the abuse of a corpse charge was dismissed at trial, Bynum was convicted of concealing a birth after only forty minutes of jury deliberation.⁶⁹

During the proceedings, the prosecutor introduced evidence of Bynum's reproductive health history and argued for conviction because Bynum "had not told her mother she was pregnant and because she had temporarily placed the stillborn fetus in her car before going to the hospital."⁷⁰ Despite evidence that Bynum "told many people about her pregnancy [and] contacted several people after the stillbirth" before going to the hospital, she was sentenced to six years of incarceration.⁷¹ Ultimately, an appellate court reversed the conviction on the basis that evidence of a previous abortion had been improperly introduced at trial.⁷² The prosecution was prepared to retry Bynum on the same charge, but she settled the case by negotiating a plea to a noncriminal violation.⁷³ Nevertheless, Bynum spent fifty-nine days in jail after her stillbirth, was required to be supervised when she spent time with her son, and described her experience as being "shunned, shamed, and sequestered."⁷⁴

Bynum may have felt ambivalent as she navigated this fraught pregnancy, though she has only spoken publicly about the reproductive uncertainty she experienced before ultimately deciding to give her baby to friends to adopt. It seems clear, however, that the prosecutor interpreted her non-disclosure of the pregnancy to her parents, along with her management of the stillbirth, as a reflection of ambivalence about the pregnancy and motherhood, marking her as a bad mother.

67. Opinion, *supra* note 58 (video statement of Anne Bynum) ("I was treated like a murderer for suffering a personal tragedy.").

68. *Id.* (video statement of Anne Bynum) ("Who am I arrested for concealing it from? My mom? My dad? My brothers? Who?").

69. *Id.* (video statement of Anne Bynum).

70. McClain-Freeney, *supra* note 66.

71. *Id.*; see also *Judge Acquits Woman of Abuse of Corpse, Jury Convicts Her of Concealing Birth*, SEARK TODAY (Mar. 6, 2016), <https://searktoday.com/judge-acquitswoman-of-abuse-of-corpse-jury-convicts-her-of-concealing-birth> [<https://perma.cc/B2D9-94YN>] (noting Bynum told a "nurse friend, her priest, and two other attorneys" about the stillbirth).

72. Opinion, *supra* note 58; McClain-Freeney, *supra* note 66.

73. McClain-Freeney, *supra* note 66.

74. Opinion, *supra* note 58 (video statement of Anne Bynum).

Sixteen states, including Arkansas, criminalize concealing a birth to enable the prosecution of parents who kill their babies.⁷⁵ Bynum is only the fourth such prosecution reported in Arkansas; the other three were recorded between 1884 and 1944.⁷⁶ While Arkansas classifies the crime as a felony, some other states consider it a misdemeanor.⁷⁷ With roots in England, these criminal laws date back to the colonial period and were originally used to punish women who engaged in premarital sex and infanticide.⁷⁸ Surviving colonial-era records document at least four women who were executed for concealing a birth until the last execution in 1785.⁷⁹ The language of both historical⁸⁰ and current⁸¹ versions of these prohibitions reflects moral judgment about premarital sex and concern that women will resort to infanticide to eliminate evidence of having engaged in transgressive sex. Notably, some statutes criminalize concealing the death of a fetus (as opposed to concealing a birth), thus broadening the potential reach of the law to women's actions after any spontaneously occurring pregnancy loss.⁸²

Although laws criminalizing concealment of the birth or death of a fetus appear to have been motivated by concern about people hiding infanticide,

75. *Id.* Typically, prosecutors have to prove that an infant was born alive, but the Arkansas statute contains language that is sufficiently vague to enable prosecution of “women who have miscarriages or stillbirths at home” if they “wait[] even a minute before calling authorities.” *Id.*

76. *Id.*

77. *See, e.g.*, WASH. REV. CODE § 9.02.050 (2024) (“Every person who shall endeavor to conceal the birth of a child by any disposition of its dead body, whether the child died before or after its birth, shall be guilty of a gross misdemeanor.”).

78. *See* Nisha Chandra, *What to Expect When You're No Longer Expecting: How States Use Concealment and Abuse of a Corpse Statutes Against Women*, 40 COLUM. J. GENDER & L. 167, 169 (2021) (“English law has a long history of punishing women for concealing a birth or concealing a death due to the suspicion that the woman had done something wrong.”).

79. *Id.* at 170.

80. RICHARD CHUSED & WENDY WILLIAMS, *GENDERED LAW IN AMERICAN HISTORY* 290 (2016) (quoting the 1785 Massachusetts' statute's prefatory language: “WHEREAS many lewd and dissolute women, being pregnant with bastard children, who, regardless of natural affection, and to avoid shame and escape punishment, do conceal their pregnancy, and the birth and death of such children, by means whereof many of them perish for want of necessary and usual assistance, and it cannot be known that they were not murdered.”). When the Massachusetts law was codified in 1835, the concealment provisions were listed alongside provisions addressing fornication, polygamy, and prostitution, reflecting the strong moral condemnation conveyed by the law. *Id.* at 293.

81. *See, e.g.*, WIS. STAT. § 948.23 (2024) (criminalizing concealing “the corpse of any issue of a woman's body with intent to prevent a determination of whether it was born dead or alive”).

82. *See* Chandra, *supra* note 78, at 171 n.22 (noting that Colorado's statute complicates the distinction between concealment of a birth and concealment of fetal death because it “applies to any person who conceals the death of another person, where ‘another person’ includes a fetus born dead”) (citing COLO. REV. STAT. § 18-8-109 (2020)).

they can be (and have been) used to punish women for pregnancy loss.⁸³ In particular, the vagueness of these statutes about reporting requirements for a miscarriage or stillbirth exposes women to potential criminal liability in many instances of pregnancy loss.⁸⁴ Indeed, for a woman in Bynum’s position, who may be traumatized and in shock, physically and emotionally depleted from having delivered a stillborn baby, the decision to rest for a few hours until she feels safe to drive to the hospital for examination is a rational one⁸⁵—and yet it also made Bynum vulnerable to prosecution, even though she did not conceal the stillbirth from everyone in her life.⁸⁶ There are various reasons why someone might treat pregnancy, and any resulting loss of pregnancy, as a private matter.⁸⁷ It is unlikely that women in such situations are aware that their discretion may expose them to criminal liability in the event of miscarriage or stillbirth.

Although a psychologist or social worker might recognize certain behaviors as a trauma response among women experiencing pregnancy loss, facts about a woman’s lack of emotion, delay in seeking medical care, or even attempts to conceal fetal remains are portrayed by law enforcement and media as evidence of culpability rather than trauma.⁸⁸ Similarly, it is not

83. *See id.* at 172–73.

84. *Id.* at 173–74.

85. *Bynum v. State*, 546 S.W.3d 533, 537 (Ark. Ct. App. 2018).

86. *Id.* at 538 (“The [concealment] statute does not specify how long a newborn’s corpse must be concealed to be found guilty of this offense, nor does it provide for the prospect that a person can conceal a birth by hiding the corpse temporarily but then can be exempt from the statute’s dictates if he or she reveals the birth to a person a few hours later.”).

87. For example, a woman might not disclose her pregnancy to a partner or former partner with whom she feels unsafe. *See* Jeanne L. Alhusen et al., *Intimate Partner Violence During Pregnancy: Maternal and Neonatal Outcomes*, 24 J. WOMEN’S HEALTH 100, 100–01 (2015) (discussing research findings that approximately 15% of women abused during pregnancy reported that the abuse started or worsened during pregnancy). There is significant literature on the social stigmatization of pregnancy loss and related shame, which can explain women’s non-disclosure of miscarriage or stillbirth. *See, e.g.,* Danielle Pollock et al., *Breaking the Silence: Determining Prevalence and Understanding Stillbirth Stigma*, 93 MIDWIFERY 102884, at 1–4 (2021), <https://www.sciencedirect.com/science/article/pii/S0266613820302564?via=ihub> [<https://perma.cc/9BPG-FR69>] (applying the Stillbirth Stigma Scale to find that 54% of women experienced stigma after a stillbirth and 36.7% had “issues with disclosing their stillbirth to their community”); Jessica Zucker, *Why Is There So Much Silence Around Miscarriage?*, VOGUE (Mar. 9, 2021), <https://www.vogue.com/article/why-is-there-so-much-silence-around-miscarriage> [<https://perma.cc/A9ZG-XMP7>].

88. Advocates for victims of intimate partner violence and sexual assault have highlighted how trauma responses are poorly understood by law enforcement, judges, and juries. *See* Rachel de Leon, *If the Police Don’t Believe You, They Might Prosecute You’: How Officers Turn Victims of Sexual Assault into Suspects*, REVEAL (Sept. 25, 2023), <https://revealnews.org/article/if-the-police-dont-believe-you-they-might-prosecute-you-how-officers-turn-victims-of-sexual-assault->

uncommon for reporting about law enforcement investigations after pregnancy loss to include sensationalized details about how the woman delivered the fetus into a toilet, as if this reflects depravity or disregard, even though it is common to mistake labor contractions for an urge to use the toilet.⁸⁹ In fact, advice to pregnant women includes the technique of sitting on the toilet to encourage cervical dilation and ease discomfort during labor,⁹⁰ but legal authorities who lack knowledge about reproductive health and women's biology regularly misinterpret or mischaracterize facts relating to miscarriages and stillbirths that occur in the bathroom. Finally, many women internalize the message that they should not complain about their pain, particularly pain related to reproduction, because they will not be believed, will be accused of exaggerating, or will be characterized as a bad mother.⁹¹ Women who suffer silently may have their conduct misinterpreted as uncaring or detached because the actual pain they are experiencing is invisible to observers.

Bynum's decision not to disclose her pregnancy to her family caused skepticism among medical personnel treating her, as well as law enforcement officials. She is not alone in this experience, as other women have been prosecuted under similar statutory provisions after a stillbirth.⁹² This highlights the salience of good mother stereotypes among medical and legal authorities who have the power to initiate punitive action against someone whose behavior they do not recognize as falling within the boundaries of how

into-suspects [<https://perma.cc/V5E4-MMH3>]. It is common for women who do not show expected emotions to be disbelieved as victims and witnesses, *id.*, regardless of what research shows about the effects of trauma, including detachment, avoidance, and numbness, *see generally* SUBSTANCE ABUSE & MENTAL HEALTH SERVS. ADMIN., HHS PUB. NO. (SMA) 14-4816, TRAUMA-INFORMED CARE IN BEHAVIORAL HEALTH SERVICES 78–79 (2014) (noting the DSM-5 diagnostic criteria for acute stress disorder).

89. *Signs That Labour Has Begun*, NAT'L HEALTH SERV., <https://www.nhs.uk/pregnancy/labour-and-birth/signs-of-labour/signs-that-labour-has-begun> [<https://perma.cc/2JZX-JWHE>] (“There are several signs that labour might be starting, including . . . an urge to go to the toilet, which is caused by your baby's head pressing on your bowel.”).

90. *Preparing Your Body for Labour and Birth*, HEALTH SERV. EXEC., <https://www2.hse.ie/pregnancy-birth/labour/preparing/preparing-your-body> [<https://perma.cc/8M6A-FLWH>] (noting that sitting on the toilet helps to relax pelvic floor muscles).

91. *See* Diane E. Hoffmann & Anita J. Tarzian, *The Girl Who Cried Pain: A Bias Against Women in the Treatment of Pain*, 29 J.L. MED. & ETHICS 13, 17 (2001); Francesca Laguardia, *Pain That Only She Must Bear: On the Invisibility of Women in Judicial Abortion Rhetoric*, J.L. & BIOSCIENCES 1, 8, 32–33 (2022) (discussing the absence of discussion about pain and long-term health implications in abortion jurisprudence).

92. *See, e.g.*, *Dellis v. Commonwealth*, No. 0341-17-3, 2018 WL 1915460, at *1 (Va. Ct. App. Apr. 24, 2018); *Woman Accused of Discarding Stillborn Twins Said She “Panicked”*, K8 NEWS (Mar. 23, 2018), <https://www.kait8.com/story/37797272/woman-accused-of-discarding-stillborn-twins-said-she-panicked> [<https://perma.cc/25KY-FWL9>].

a good mother would act.⁹³ Given that the vast majority of miscarriages and stillbirths cannot be prevented by the pregnant woman, modern-day concealment statutes do not serve a deterrent purpose regarding the pregnancy loss itself; rather, their selective use sends a message to all childbearing women—and particularly racially minoritized and low-income women who are more likely to be stereotyped as bad mothers—that their conduct related to their pregnancies is subject to scrutiny by the state.⁹⁴

B. Reproductive Uncertainty and Health Care Confidentiality

Christine Taylor is another example of a woman who faced legal scrutiny after law enforcement perceived her as ambivalent about motherhood. Taylor, a white woman from Iowa, fell down a flight of stairs after an upsetting conversation with her estranged husband.⁹⁵ Taylor’s husband had left Taylor and their two children after she became pregnant for the third time.⁹⁶ Taylor described that upon hearing that he “wants to be free,” she was “so upset and frantic [she] almost blacked out, and [she] tripped and fell.”⁹⁷ She went to the emergency room, and the doctors determined that both she and her fetus were healthy after the fall.⁹⁸

93. See Emma Milne, *Concealment of Birth: Time to Repeal a 200-Year-Old “Convenient Stop-Gap”?*, 27 FEMINIST LEGAL STUD. 139, 151–56 (2019) (analyzing sentencing hearings for English women charged with concealment crimes in which evidence of maternal behavior was introduced to assess character).

94. For women who live in states that have banned abortion since *Dobbs*, access to medication abortion through telemedicine and other internet-based providers has preserved some degree of reproductive autonomy for people who want to terminate their pregnancy. See David S. Cohen et al., *Abortion Pills*, 76 STAN. L. REV. 317, 327–28 (2024). States seeking to prosecute women for managing their own abortions with pills secured from out-of-state providers may turn to concealment statutes as a legal tool to accomplish what their criminal abortion laws cannot do alone. See Chandra, *supra* note 78, at 198 (noting that women who procure pills to manage their abortions at home “may be left with the confusing responsibility of reporting and properly disposing of the remains” under existing concealment statutes).

95. Amie Newman, *Pregnant?: Don’t Fall Down the Stairs*, REWIRE NEWS GRP. (Feb. 15, 2010), <https://rewirenewsgroup.com/2010/02/15/pregnant-dont-fall-down-stairs> [https://perma.cc/Y64G-FMRQ].

96. *Iowa Police Almost Prosecute Woman for Her Accidental Fall During Pregnancy . . . Seriously*, ACLU ME. (Feb. 11, 2010), <https://www.aclumaine.org/en/news/iowa-police-almost-prosecute-woman-her-accidental-fall-during-pregnancyseriously> [https://perma.cc/8U43-J27A].

97. *Id.*

98. Newman, *supra* note 95.

While she was at the hospital, Taylor told a nurse that she was “upset and scared and wasn’t sure she wanted to continue the pregnancy.”⁹⁹ Specifically, she said that she was considering adoption or abortion because she felt uncertain about parenting three children on her own as a single, unemployed mother.¹⁰⁰ Although her husband would contribute financially, Taylor observed: “[M]oney doesn’t make a parent. I don’t have anybody else to turn to.”¹⁰¹ The nurse passed this information along to a doctor, who then called the police.¹⁰² The police arrived at the hospital and interrogated Taylor about the circumstances surrounding her fall.¹⁰³ Upon discharge from the hospital, while driving home in a taxi, she was pulled over, arrested, and detained in jail for two days.¹⁰⁴ Investigators concluded that Taylor intentionally fell down the stairs, and she was charged with attempted feticide under Iowa’s fetal homicide law.¹⁰⁵ Eventually, the doctors confirmed that Taylor was in her second trimester at the time of the fall, not in the third trimester as required by the fetal homicide statute, and so prosecutors dropped the charges.¹⁰⁶

The reaction by medical staff to Taylor’s disclosure that she was considering abortion or adoption highlights the powerful stigma around certain childbearing decisions. Women who choose to terminate a pregnancy or who opt not to raise a child they give birth to are stereotyped as bad mothers.¹⁰⁷ The assumption of selfishness on the part of women who are reluctant or unwilling to have a child erases any nuance involved in reproductive decision-making, contrary to what research and lived experience make clear about the care with which women navigate

99. *Id.* According to the police report, nurse Tiffany Prickett “asked Christine if she just didn’t want the kid tonight, and Christine told her that she hadn’t wanted the baby all along.” ACLU ME., *supra* note 96.

100. Dan Savage, *Woman in Iowa Arrested for Falling Down the Stairs While Pregnant*, STRANGER (Mar. 1, 2010), <https://www.thestranger.com/slog/archives/2010/03/01/woman-in-iowa-arrested-for-falling-down-the-stairs-while-pregnant> [https://perma.cc/V5UB-E4B8]; Newman, *supra* note 95.

101. ACLU ME., *supra* note 96.

102. Newman, *supra* note 95.

103. ACLU ME., *supra* note 96.

104. *Id.*

105. Newman, *supra* note 95.

106. *Id.*

107. See Abrams, *supra* note 57, at 179. At the same time, however, young women who decide against adoption are also stigmatized for choosing to raise their babies. See Lee SmithBattle, *Walking on Eggshells: An Update on the Stigmatizing of Teen Mothers*, 45 AM. J. MATERNAL CHILD NURSING 322, 323 (2020).

complicated childbearing decisions.¹⁰⁸ Stigma attaches even when women explicitly identify the well-being of the future child or other existing children as the reason motivating their choice of abortion or adoption.¹⁰⁹ In fact, it has been a long-time strategy of the anti-abortion movement to characterize women who choose to parent as “good” and women who choose to terminate a pregnancy as “bad,” even though approximately sixty percent of women who have abortions are already mothers.¹¹⁰ Regardless of this reality, the idea that a mother of two children could be considering abortion or adoption seems to have struck the medical staff treating Taylor as something an ambivalent, and thus bad, mother would do, which led them to suspect she had tried to harm herself and her baby.

Even if it were true that Taylor had tried to end the pregnancy by causing physical harm to her own body, the decision to respond with law enforcement intervention rather than counseling and other support highlights how entrenched the punitive impulse is when it comes to maternal ambivalence, expressed in Taylor’s case as reproductive uncertainty. If a healthcare provider suspects self-harm on the part of a pregnant patient, they should respond to the patient’s crisis with care and compassion, facilitating mental health treatment and support from a social worker. The idea that punishment is necessary to protect the fetus—a justification routinely offered by prosecutors who bring charges against pregnant women with a substance use disorder¹¹¹—is belied by the fact that jails are not safe or healthy places for pregnant women.¹¹² The decisions to report, arrest, and incarcerate Taylor also ignored the well-being of her two young children, whose father had left them and whose mother did not return from the hospital after a scary accident. By jumping to unfounded conclusions about Taylor’s ambivalence, the medical and legal actors who had authority over her increased the risk of actual harm to her children.

108. See DIANA GREENE FOSTER, *THE TURNAWAY STUDY: TEN YEARS, A THOUSAND WOMEN, AND THE CONSEQUENCES OF HAVING—OR BEING DENIED—AN ABORTION* 22 (2020).

109. *Id.* at 204.

110. Margot Sanger-Katz et al., *Who Gets Abortions in America?*, N.Y. TIMES (Dec. 14, 2021), <https://www.nytimes.com/interactive/2021/12/14/upshot/who-gets-abortions-in-america.html>.

111. See BACH, *supra* note 21, at 1.

112. See Somayeh Alirezai & Robab Latifnejad Roudsari, *The Needs of Incarcerated Pregnant Women: A Systematic Review of Literature*, 10 INT’L J. CMTY. BASED NURSING & MIDWIFERY 2, 12–14 (2022); Leah Wang, *Unsupportive Environments and Limited Policies: Pregnancy, Postpartum, and Birth During Incarceration*, PRISON POL’Y INITIATIVE (Aug. 19, 2021), https://www.prisonpolicy.org/blog/2021/08/19/pregnancy_studies [https://perma.cc/Y8PS-HUS8].

Cases like Christine Taylor's raise questions about whether women can (or should) trust their health care providers in matters related to reproductive health or mental health care, given that the information a patient discloses, which they believe to be confidential, can so easily lead to law enforcement involvement. There is a long history of cooperation between hospital staff and law enforcement, especially in the context of drug testing pregnant women.¹¹³ Although the U.S. Supreme Court held in 2001 that the Medical University of South Carolina's involuntary drug testing program violated the Fourth Amendment,¹¹⁴ racially biased drug testing and reporting persist in obstetrics units.¹¹⁵ Even as society has come to understand the biological roots of drug addiction and begun to embrace treatment-based solutions over carceral approaches, stereotypes that pregnant women who use drugs are selfish and undeserving of compassion continue to shape attitudes.¹¹⁶ The ease with which unsympathetic medical and legal personnel conflate substance use disorder with maternal ambivalence—concluding that a mother's drug use is a sign of disregard for her children and assuming harm to the children from the supposed ambivalence alone—is itself reason for caution about voluntary disclosure of substance use in medical settings.

Healthcare providers also rely on the threat of punitive state action to coerce pregnant patients into accepting unwanted medical intervention, including cesarean surgery, during childbirth.¹¹⁷ Specifically, doctors report—or threaten to report—their pregnant patients to Child Protective Services (“CPS”) for child abuse if they decline a recommended treatment.¹¹⁸

113. See PREGNANCY JUST., CLINICAL DRUG TESTING OF PREGNANT PEOPLE AND NEWBORNS (Feb. 2024), <https://www.pregnancyjusticeus.org/wp-content/uploads/2024/02/Updated-Clinical-Drug-Testing-Fact-Sheet-1.pdf> [<https://perma.cc/2NXV-QJZV>].

114. *Ferguson v. City of Charleston*, 532 U.S. 67, 86 (2001).

115. Marian Jarlenski et al., *Association of Race with Urine Toxicology Testing Among Pregnant Patients During Labor and Delivery*, 4 JAMA HEALTH F. 1, 2–3 (2023); HOWARD, *supra* note 21, at 122.

116. See Allison E. Korn, *Detoxing the Child Welfare System*, 23 VA. J. SOC. POL'Y & L. 293, 332–35 (2016). In her study of Tennessee prosecutions of pregnant women who use drugs, scholar Wendy Bach has documented the belief among legislators and prosecutors that criminalization is necessary for getting pregnant women with substance use disorder the health care they need. See BACH, *supra* note 21, at 1.

117. See Elizabeth Kukura, *Obstetric Violence*, 106 GEO. L.J. 721, 738–43, 747–50 (2018). Use of such threats most often arises when a physician is pressuring the patient to consent to a cesarean and the patient wants to continue to attempt vaginal delivery. See Elizabeth Kukura, *Pregnancy Risk and Coerced Interventions After Dobbs*, 76 SMU L. REV. 105, 123–27 (2023) (describing provider coercion to accept medical intervention during childbirth and noting overreliance on cesarean surgery in U.S. childbirth).

118. See Elizabeth Kukura, *Birth Conflicts: Leveraging State Power to Coerce Health Care Decision-Making*, 47 U. BALT. L. REV. 247, 251–64 (2018).

In certain instances, hospitals have sent or threatened to send law enforcement to a pregnant woman's house to force her to come to the hospital for medical care.¹¹⁹ In situations where hospital staff refer pregnant women to law enforcement under suspicion of wrongdoing related to their pregnancy, medical and legal actors stereotype the women involved as bad mothers and prioritize the perceived interests of the fetus over the interests of pregnant women.

In instances like Taylor's, where a healthcare provider observes patient behavior that seems unfamiliar or discordant with the provider's personal values, several dynamics lead to a violation of the patient's privacy rights and a breach of medical ethics.¹²⁰ First, the provider hears a patient express ambivalence, regret, or uncertainty about some aspect of pregnancy or motherhood and judges the patient for deviating from the good mother norm. Instead of offering compassion, support, mental health counseling, or just non-judgmental listening, the provider allows bias to shape how she understands the patient's self-narrative. Second, based on a judgment that the patient has defied norms of good motherhood, the healthcare provider concludes they are justified in reporting the patient to law enforcement for investigation. Research suggests that professionals in mandatory reporting roles often misunderstand their reporting obligations and are overinclusive in determining when to report.¹²¹ Healthcare professionals also misunderstand how exceptions to health care privacy law function, confusing mandatory and permissive disclosure exceptions to the general rule, especially regarding disclosure to law enforcement.¹²² Some healthcare providers err on the side

119. See *Pemberton v. Tallahassee Mem'l Reg'l Med. Ctr.*, 66 F. Supp. 2d 1247, 1249–50 (N.D. Fla. 1999); Kukura, *Obstetric Violence*, *supra* note 117, at 740 (noting that the “sheriff and State Attorney removed [Pemberton] from her home—strapping her legs together on a stretcher” during labor to bring her to the hospital where they wanted to perform a cesarean against her wishes).

120. Although the criminal charges against Taylor were dropped, there was no accountability for the legal and ethical violations committed against Taylor when the doctor disclosed to law enforcement a statement Taylor made to her nurse in the course of receiving treatment. Compare Kevin Hayes, *Did Christine Taylor Take Abortion into Her Own Hands?*, CBS NEWS (Mar. 2, 2010), <https://www.cbsnews.com/news/did-christine-taylor-take-abortion-into-her-own-hands> [<https://perma.cc/URH8-KPLV>] (noting conflicting accounts of what Taylor reported to medical professionals), with Newman, *supra* note 95 (quoting legal expert Robert Rigg on the limitations of health care providers' disclosures to law enforcement and the likelihood that medical personnel in Taylor's case exceeded those limits).

121. See, e.g., Tonya Foreman & William Bernet, *A Misunderstanding Regarding the Duty to Report Suspected Abuse*, 5 CHILD MALTREATMENT 190, 190 (2000).

122. See Joel M. Geiderman & Catherine A. Marco, *Mandatory and Permissive Reporting Laws: Obligations, Challenges, Moral Dilemmas, and Opportunities*, 1 J. AM. COLL. EMERGENCY PHYSICIANS OPEN 38, 39 (2020).

of a “better safe than sorry” reporting mentality, without regard for the potential harm to the patient of being subject to law enforcement scrutiny.¹²³

Subjecting women to criminal investigation and surveillance for failure to conform to the good mother norm causes real harm to women and their families. When a health care provider is responsible for the law enforcement referral, there is the potential for even greater harm because patients learn not to trust doctors and nurses with personal information, even when that information is relevant to their medical care, and may avoid health care settings altogether, leading to negative consequences for long-term health.¹²⁴ The harm associated with violating a patient’s trust and turning confidential information over to law enforcement disproportionately impacts racialized minorities, who are more likely to have their information disclosed by providers and who already have worse reproductive health outcomes than white women on a variety of measures.¹²⁵

C. Ambivalence in Family Court and Perception of Risk

Ambivalence also has legal significance in the family regulation system,¹²⁶ where evidence of a mother’s ambivalence—or evidence purporting to reflect

123. See Jeanne Flavin & Lynn M. Paltrow, *Doing Harm: When Healthcare Providers Report Their Pregnant Patients to the Police and Other Authorities*, in REPRODUCTIVE ETHICS IN CLINICAL PRACTICE: PREVENTING, INITIATING, AND MANAGING PREGNANCY AND DELIVERY 212, 215 (Julie Chor & Katie Watson eds., 2021); see also Mical Raz, *Calling Child Protective Services Is a Form of Community Policing That Should Be Used Appropriately: Time to Engage Mandatory Reporters as to the Harmful Effects of Unnecessary Reports*, 110 CHILD. & YOUTH SERVS. REV. 1, 2 (2020).

124. See Flavin & Paltrow, *supra* note 123, at 214; HOWARD, *supra* note 21, at 133–34; see also Elizabeth Kukura, *The Relationship Between Demedicalization and Criminalization in Reproductive Health*, 34 HEALTH MATRIX 217, 217–23 (2024) (analyzing implications of a pediatrician’s referral of a family to CPS because he disagreed with how the parents chose to treat their baby’s jaundice, resulting in two week removal of the newborn from her family).

125. Paltrow & Flavin, *supra* note 54, at 327 (“Hospital-based health care providers and social workers appear more likely to disclose information about patients of color.”).

126. Given the documented harms of child removal, many scholars and advocates have adopted the terms “family policing system” or “family regulation system” in favor of “child welfare system.” Jayla Whitfield-Anderson, *‘A Nightmare’: Texas Parents Say Their Baby Was Taken by CPS After They Used Midwifery Care for Jaundice*, YAHOO NEWS (Apr. 12, 2023), <https://www.yahoo.com/news/a-nightmare-texas-parents-say-their-baby-was-taken-by-cps-after-they-used-midwifery-care-for-jaundice-191528392.html> [https://perma.cc/BMQ5-39SK] (quoting law professor Dorothy Roberts on why the “family policing system” is more appropriate language than “child welfare system”). See generally DOROTHY ROBERTS, *TORN APART: HOW THE CHILD WELFARE SYSTEM DESTROYS BLACK FAMILIES—AND HOW ABOLITION CAN BUILD A SAFER WORLD* (2022) (presenting research that the “child welfare system” is more of a “family

such ambivalence—can sway investigators to remove children and judges to keep families separated.¹²⁷ For example, M. was a 24-year-old Black woman living with her two children in an apartment complex in a large city when the local CPS agency opened an investigation against her for child neglect after she left her sleeping children unattended one night.¹²⁸ Lacking family support and facing eviction, M. had sought overnight shifts as a home health care aide. When she was working, a neighbor in the building would stay with the children, sleeping on the couch until M. returned home. One night, the neighbor fell ill and could not help; fearing that the agency she worked for would fire her if she cancelled at the last minute, M. left a baby monitor linked to her children's bedroom with the neighbor in case of emergency. The neighbor's sister reported M. to CPS.

During the course of the investigation, the CPS agent identified three other instances when M. had left her children alone at night. After finding empty kitchen cabinets and rodent droppings in the apartment, the investigator removed the children from M.'s custody. When M. went to family court to regain custody, CPS introduced statements from M.'s ex-boyfriend, the father of her children, about M.'s attempt to terminate her first pregnancy. He said she "tried to get an appointment at the clinic, but by the time it came she was too late for the abortion" and "if she'd known about those pills, I'm sure she would've taken them to get rid of the baby." When she subsequently sought child support from him, he recalled her saying, "You better pay our rent—I

policing system" for Black communities); Shanta Trivedi, *The Harm of Child Removal*, 43 NYU REV. L. & SOC. CHANGE 523 (2019) (exploring how the "child welfare system" does not necessarily prioritize the welfare of children).

127. Perception of maternal ambivalence may also influence custody and visitation decisions in private family law disputes where evidence employing good mother/bad mother stereotypes may shape what a judge determines to be in the best interest of the child. *See, e.g.*, Amy J. L. Baker, *Parental Alienation Syndrome—The Parent/Child Disconnect*, 8 SOC. WORK TODAY 26 (2008), <https://www.socialworktoday.com/archive/102708p26.shtml> [<https://perma.cc/QAK7-BASF>] (observing how "creat[ing] the appearance of a lack of interest" on the part of the other parent can be a feature of parental alienation in families experiencing divorce or separation). This Article limits its discussion of maternal ambivalence and family law to the impact of maternal ambivalence stigma within the family regulation system, both because advocates working within that system report that punitive responses to perceived maternal ambivalence are common in child removal proceedings and because there is more scholarly discussion of the issue within the child protection context than in private custody disputes (though the literature is limited in both respects). Although the role of maternal ambivalence in family law determinations more broadly is beyond the scope of this Article, it remains an area in need of further (multi-disciplinary) research.

128. This case example is a fictional composite based on conversations between the author and several attorneys who specialize in representing parents accused of neglect and abuse. Due to the sensitive nature of child removal proceedings, use of a fictional composite protects the privacy interests of both parents and children involved in these cases.

didn't even want these babies in the first place!" CPS also introduced evidence from the children's medical records that M. did not receive regular prenatal care during her pregnancies and a statement from the neighbor that M. on several occasions made comments like: "having kids is too hard" and "I wish I could have my old life back." The CPS attorney opposed returning the children to M.'s custody, arguing, "Your Honor, even the Respondent herself says she struggles to care for her own children!" The judge denied M.'s petition, leaving the children in foster care while M. completed a family reunification plan, which included mandatory parenting classes.

Given the high degree of discretion that applies in family court, and the operation of bias in decisions about which families can remain together as families and which will be broken up, the family regulation system is another area where unmasking the stigma of maternal ambivalence and inviting new social understandings of this phenomenon can be hugely consequential. It is well documented that Black mothers and other people of color are overrepresented in the family regulation system, and that many cases mistake the hardship and deprivation of poverty for parental neglect.¹²⁹ This phenomenon is reflected in M.'s experience: the high cost of housing meant all she could afford was to rent an apartment in a poorly maintained building with an uncontrolled rodent problem, and she struggled to pay rent and also buy food for her family.¹³⁰ Regular child care was too expensive, requiring

129. See, e.g., Hyunil Kim et al., *Lifetime Prevalence of Investigating Child Maltreatment Among US Children*, 107 AM. J. PUB. HEALTH 274, 277 (2017) (finding that between 2004 and 2013, 53% of Black children were subjects of investigations by the family regulation system, compared to only 28% of white children); SUSAN CHIBNALL ET AL., CHILDREN OF COLOR IN THE CHILD WELFARE SYSTEM: PERSPECTIVES FROM THE CHILD WELFARE COMMUNITY 5 (2003), https://ncwwi.org/files/Children_of_Color_in_the_CW_System.pdf [<https://perma.cc/KB9L-ADFA>] ("These findings suggest that the overrepresentation of African-American children in the child welfare system is not attributable to higher rates of maltreatment in this population, but to factors related to the child welfare system itself."); ROBERTS, *supra* note 126, at 43–44.

130. See Emma S. Ketteringham, Opinion, *Live in a Poor Neighborhood? Better Be a Perfect Parent.*, N.Y. TIMES (Aug. 22, 2017), <https://www.nytimes.com/2017/08/22/opinion/poor-neighborhoods-black-parents-child-services.html>. Ketteringham recounts the investigation of a client whose empty cabinets were assumed to indicate child neglect, when in reality, she had to stop storing food in the cabinets because it was routinely eaten by rats. *Id.* Because she could not obtain affordable rodent-free housing, her child's pediatrician faulted her for failing to adhere to the dietary plan for her underweight child. *Id.* This story highlights both how poverty puts women at risk of losing their children and how agents of the family regulation system draw inferences about maternal ambivalence and even neglect when there are alternative explanations rooted in structural inequality. Likewise, M.'s failure to get regular prenatal care could reflect disregard for her baby's health, or it could be explained by limited public transportation, the difficulty of traveling to appointments with two small children, the lack of appointment times that did not conflict with her unpredictable shift work, or negative experiences with discrimination that caused her to lose trust in her health care providers.

her to care for her children during the day and to seek shifts at night when she could ask a neighbor to stay with the children.¹³¹ Systemic problems like lack of affordable housing, food, and child care—which are exacerbated for single parents without family support—are treated as individual failings for parents caught up in the family regulation system.¹³² Furthermore, parents are held to different standards, and face different levels of scrutiny, based on class and privilege. Parents in wealthy neighborhoods can smoke marijuana to manage anxiety or lose their temper without fearing loss of their children, whereas parents in poor neighborhoods are forced into drug treatment and parenting classes for the same behavior.¹³³ As one set of commentators notes, the “often unspoken truth of the child welfare system is that poor parents are punished for actions that are ubiquitous and unnoticed in middle class homes.”¹³⁴

When an investigation is opened, parents are subjected to intrusive surveillance and face onerous requirements to prove themselves as parents who deserve their children.¹³⁵ Parents do not have the same constitutional protections in the family regulation system that apply in criminal matters, even though removal of one’s children is arguably a deprivation as profound as those contemplated by the Fourteenth Amendment.¹³⁶ Because investigators spend time observing mothers engaged in their caretaking responsibilities at home, they are likely to witness moments of frustration and overwhelm. Women who express conflicted feelings about their children or their role as mothers in the presence of investigators may find those

131. The lack of affordable childcare, especially care that is available on a flexible basis for service-sector workers whose schedules fluctuate, means that many low-income parents must cobble together childcare solutions that may be unstable or unreliable. See Mary Romero, *Unraveling Privilege: Workers’ Children and the Hidden Cost of Paid Childcare*, 76 CHI.-KENT L. REV. 1651, 1664 (2001).

132. See ROBERTS, *supra* note 126, at 68–69.

133. See Ketteringham, *supra* note 130; cf. Jennifer Eyre White, *Wake Up and Smell the Martinis: A Review of The Three-Martini Playdate: A Practical Guide to Happy Parenting*, LITERARY MAMA (Feb. 2005), <https://literarymama.com/articles/departments/2005/02/wake-up-and-smell-the-martinis> [<https://perma.cc/J4TL-7PUP>] (book review reflecting on the ambivalence of privileged parents); Tina Fey, *Confessions of a Juggler*, NEW YORKER (Feb. 6, 2011), <https://www.newyorker.com/magazine/2011/02/14/confessions-of-a-juggler-tina-fey> [<https://perma.cc/X6ST-EQTQ>] (describing ambivalence related to balancing work and family, a privilege available to the author due to her cultural status as a comedian and writer).

134. Beneventano & Manwell, *supra* note 27, at 169–70.

135. See ROBERTS, *supra* note 126, at 158–59.

136. See Eli Hager, *In Child Welfare Cases, Most of Your Constitutional Rights Don’t Apply*, PROPUBLICA (Dec. 29, 2022), <https://www.propublica.org/article/some-constitutional-rights-dont-apply-in-child-welfare> [<https://perma.cc/N32R-4JG2>] (noting the frequency of warrantless searches by CPS and the lack of procedural protections for parents in family court).

statements used against them in a court proceeding to determine whether they are fit to parent. Introduction of women's statements about their ambivalence in court can "humiliate and demoralize parents" who may already feel anxiety or guilt about their conflicted feelings.¹³⁷ This runs counter to the mandate child welfare agencies have to reunify families when possible and strengthen parents through the provision of supportive services.¹³⁸

Parents are encouraged to cooperate with investigators, opening their homes to inspection and participating in interviews about wide-ranging aspects of their personal and family lives, but unlike a therapy relationship—where the therapist has a duty to the patient and confidentiality protections make it safer to share one's feelings—information shared with an investigator can be, and often is, used against mothers in court.¹³⁹ As in M.'s case, mothers who acknowledge ambivalence about parenting "can find themselves standing in court, listening as things they said in their home among family are humiliatingly transplanted, read aloud in an antiseptic courtroom by government attorneys or a judge."¹⁴⁰ Lawyers for parents in the family regulation system report that "expressions of ambivalence are sometimes presented as 'smoking guns' or 'confessions' made to" agency staff, and such statements can sway judges to rule against mothers and keep their families separated.¹⁴¹

Perhaps understandably, fear of scandal may prompt investigators to err on the side of caution.¹⁴² However, this type of risk aversion leads to profound harm when investigators interpret common, mundane expressions of ambivalence about motherhood as a sign of future risk posed to the child by the parent.¹⁴³ In a "climate of panic around child abuse," investigators are on alert for potential red flags that might suggest an unsafe environment; in

137. Beneventano & Manwell, *supra* note 27, at 166.

138. In practice, the family regulation system causes significant harm to children, mothers, and families, prompting a growing number of scholars and advocates to call for its abolition. See generally JANE M. SPINAK, *THE END OF FAMILY COURT: HOW ABOLISHING THE COURT BRINGS JUSTICE TO CHILDREN AND FAMILIES* 1–6 (2023); ROBERTS, *supra* note 126; Trivedi, *supra* note 126.

139. Beneventano & Manwell, *supra* note 27, at 157 (noting that poorly defined roles "result[] in confusion for both caseworkers and parents" and that ultimately caseworkers "are there to investigate and report").

140. *Id.*

141. *Id.*

142. See Linda Davies, *Omnipotence in Child Protection: Making Room for Ambivalence*, 22 J. SOC. WORK PRAC. 141, 141–45 (2008) (discussing the unrealistic expectation that CPS staff can ensure the safety of children).

143. See Beneventano & Manwell, *supra* note 27, at 157 ("Fear of public backlash creates a sense of panic about 'the potential disasters that lie within their caseloads.'").

doing so, they too readily “split mothers into binary classifications of ‘good’ and ‘bad.’”¹⁴⁴ There is little tolerance (and minimal time) to explore whether ambivalent feelings a woman expresses in the presence of an investigator are the normal, common emotions shared by many mothers, as described in Part III, *infra*, or truly signal the inability of a mother to protect and care for her children.¹⁴⁵ When sensitivity to risk combines with preexisting biases, investigators, agency lawyers, and family court judges are more likely to consider statements of maternal ambivalence as “morally repugnant” and probative of unfitness.¹⁴⁶

Dependency hearings in family court are particularly fertile territory for the perversion and misuse of ambivalent feelings against mothers. Practitioners describe family court as a “lawless place” when it comes to child removal cases; “[t]here are few bright-line rules to guide decisions and often the judge’s subjective opinion about what is safe, reasonable and acceptable prevails.”¹⁴⁷ Unlike their colleagues elsewhere in the judicial system who are bound by rules that limit introduction of hearsay evidence,¹⁴⁸ family court judges allow CPS social workers to use hearsay evidence to support the separation of a child from their parent.¹⁴⁹ This liberal approach to evidence increases the likelihood that CPS attorneys will introduce statements mothers make to investigators or other people in their lives about their mixed emotions regarding the challenges of parenting. It also enables the state to draw inferences from statements about a parent’s personal history and life circumstances including a woman’s reproductive decision-making, as in M.’s case, where her ex-boyfriend’s statements about M. considering abortion were used to characterize her as a reluctant, and thus bad, mother.¹⁵⁰ By relying on hearsay evidence about ambivalence, CPS draws on good

144. Davies, *supra* note 142, at 148.

145. Beneventano & Manwell, *supra* note 27, at 158.

146. *Id.* at 158–60 (“When caseworkers are facing high-pressure decisions with little background information, expressions of parental ambivalence unfortunately become the litmus test for whether a parent is ‘good’ or ‘bad.’” (quoting Davies, *supra* note 142, at 143)).

147. *Id.* at 152.

148. See generally Ronald J. Allen, *The Hearsay Rule as a Rule of Admission Revisited*, 84 *FORDHAM L. REV.* 1395 (2016) (providing an overview of the federal hearsay rule and its exceptions).

149. Jeremy Pion-Berlin, *Exploring the Dark Side of the Child Welfare System*, TALKHOUSE (Nov. 8, 2023), <https://www.talkhouse.com/exploring-the-dark-side-of-the-child-welfare-system> [<https://perma.cc/5KWU-CQKC>] (quoting civil rights attorney Robert Powell: “[w]hen you allow hearsay into the courtroom, you bastardize it”).

150. See Paula Abrams, *The Bad Mother: Stigma, Abortion and Surrogacy*, 43 *J.L. MED. & ETHICS* 179, 179 (2015) (“Stigma attached to these reproductive decisions reflects a legacy of gendered roles and disapproval of women who fail to conform to social expectations of motherhood.”).

mother/bad mother stereotypes to convince the judge that a woman is a risk to her children, giving such statements regulatory power that is at odds with what social science tells us about maternal ambivalence.

Expressions of maternal ambivalence often loom large in child removal proceedings. Black mothers and other women of color caught up in the family regulation system are disproportionately likely to suffer harm as a result of legal authorities misinterpreting (or over-interpreting) their expressions of ambivalence, both due to their overrepresentation in the system generally and due to the high degree of judicial discretion characteristic of dependency proceedings in family court, which allows for racial, class, and gender biases to operate with few safeguards. Changing how family regulation system actors understand maternal ambivalence is a necessary step in reducing child removals and the harm they inflict.

III. RECONCEIVING MATERNAL AMBIVALENCE

The cases discussed in Part II illustrate how law can be a tool to enforce the norms of motherhood, communicating and reinforcing messages about how women are supposed to embrace childbearing and nurturing roles. However, the punitive approach taken by state actors to root out ambivalence and reinscribe the stereotypical good mother ignores both how common maternal ambivalence is and what social scientists tell us about its meaning and significance. The discordance between how maternal ambivalence is understood within and outside the law suggests the need for robust theorizing of the legal significance of maternal ambivalence—a project this Article aims to inspire.

To develop a fuller account of the legal treatment of maternal ambivalence, this Part begins with a non-exhaustive survey of different contexts that reflect uncertainty about childbearing and illustrate how people cope with their ambivalence. Next, Section III.B summarizes existing scholarly analysis of maternal ambivalence that runs counter to the judgment and condemnation central to the legal treatment of such ambivalence, starting first with a brief overview of the social science of ambivalence and then turning to the psychology and sociology of maternal ambivalence in particular.

A. The Ubiquity of Maternal Ambivalence

While the motherhood memoirs of the early twenty-first century “[broke] the silence about maternal ambivalence,” “creating a public discourse that makes ambivalence part of the motherhood experience” and thus “more

manageable for other mothers,” the project of normalizing mixed and negative feelings about motherhood remained incomplete.¹⁵¹ The ability to speak openly about ambivalence is shaped by race, class, age, and other identities; the risk of doing so varies for women according to their social status and life circumstances.¹⁵² Women thus engage in different actions (and inaction) that enable them to manage their ambivalence about childrearing. Identifying how individual women cope with their conflicted feelings highlights how much variation there is in the experience of and response to maternal ambivalence.

For example, some women experience ambivalence about the prospect of becoming pregnant, either in the abstract or upon learning of a positive pregnancy test. Research shows that young people who hold ambivalent views about getting pregnant¹⁵³—which describes approximately one in seven female adolescents—are less likely to use contraception consistently.¹⁵⁴ This finding has complicated the accepted view that adolescents forego contraception or do not use it properly because “they do not appreciate the consequences of pregnancy.”¹⁵⁵ Other research suggests an association between mild symptoms of depression and ambivalence about pregnancy among adolescent females.¹⁵⁶

Young women are not the only ones whose reproductive decision-making can be shaped in powerful ways by their ambivalence. Elsewhere, ambivalence leads women to delay decisions about childbearing, even after they have established careers, married, or found committed partners.¹⁵⁷ Commentators have explored how such ambivalence reflects concern about the ability to balance work and family; others point to complicated family

151. See Brown, *supra* note 8, at 50.

152. See *id.* at 277 (“White, educated and professional mothers (and sometime[s] celebrities) thus have the latitude to discuss their mixed feelings about motherhood without the likelihood of being negatively sanctioned.”).

153. Pregnancy ambivalence refers to “those with ‘mixed,’ contradictory, or not fully established intentions about pregnancy.” Jenny Francis et al., *Ambivalence About Pregnancy and Its Association with Symptoms of Depression in Adolescent Females Initiating Contraception*, 56 J. ADOLESCENT HEALTH 44, 45 (2015).

154. See Hannah Brückner et al., *Ambivalence and Pregnancy: Adolescents’ Attitudes, Contraceptive Use and Pregnancy*, 36 PERSPS. ON SEXUAL & REPROD. HEALTH 248, 253, 255 (2004) (defining ambivalence to “capture the failure to form an opinion, rather than the presence of conflicting opinions”).

155. *Id.* at 248; see also *id.* at 256 (“The way programs focusing on attitudes toward pregnancy can make a difference is by helping adolescents who are ambivalent about pregnancy to form any opinion—regardless whether it is positive, negative or mainstream.”).

156. See Francis et al., *supra* note 153, at 44.

157. See JESSICA VALENTI, WHY HAVE KIDS? A NEW MOM EXPLORES THE TRUTH ABOUT PARENTING AND HAPPINESS 122–23 (2012).

dynamics in childhood, uncertainty about remaining connected to a current partner, or concerns about loss of self as drivers of ambivalence that leads to delayed childbearing.¹⁵⁸ The category of women delaying a decision about having children has expanded as increased options for fertility treatment have reassured women with resources that they still have time to decide without biology deciding for them.¹⁵⁹

At the same time, the number of women without children as they age suggests that voluntary childlessness is the “ultimate way of resolving ambivalence about motherhood” for an expanding subset of the population.¹⁶⁰ In the 1980s, only ten percent of women did not have children by age 44, but by 2004, approximately twenty percent of women aged 40–44 did not have children—and that number has fluctuated between fifteen and twenty percent in the years since.¹⁶¹ Until the 1970s, the rate at which white women did not have children was higher than the rate for Black woman, though by the early 2000s this gap between Black and white women was largely eliminated.¹⁶² Notably, from 1982 to 2002, between 44% and 59% of childless women in the 40–44 age bracket identified as voluntarily childless.¹⁶³ It is unclear how many of those women were always certain about their decision not to have children and how many resolved prior ambivalence in favor of foregoing motherhood, but it seems likely that growth in the number of women identifying themselves with the more positive modifier “childfree” reflects a reduction in stigma surrounding the decision not to have children.¹⁶⁴

158. See Nancy J. Chodorow, “Too Late”: *Ambivalence About Motherhood, Choice, and Time*, 51 J. AM. PSYCHOANALYTIC ASS’N 1181, 1187 (2003).

159. See Jill Filipovic, *The Uncertain Loneliness of Ambivalence on Motherhood*, SLATE (Dec. 5, 2023), <https://slate.com/human-interest/2023/12/ambivalent-motherhood-how-to-choose.html> [<https://perma.cc/QQ9Q-5MEC>].

160. Brown, *supra* note 8, at 77.

161. Karen B. Guzzo & Valerie Schweizer, *Number of Children to Women Aged 40–44, 1980–2018*, NAT’L CTR. FOR FAM. & MARRIAGE RSCH. (2020), <https://www.bgsu.edu/ncfmr/resources/data/family-profiles/guzzo-schweizer-number-children-women-40-44-1980-2018-fp-20-04.html> [<https://perma.cc/T4BQ-PP56>]; see also Jane Lawler Dye, *Fertility of American Women: June 2004*, CURRENT POPULATION REPORTS, U.S. CENSUS BUREAU 1, 12 (2018), <https://www.census.gov/content/dam/Census/library/publications/2005/demo/p20-555.pdf> [<https://perma.cc/WYL5-P73Y>].

162. Jennifer Hickey Lundquist et al., *Race and Childlessness in America, 1982–2002*, 71 J. MARRIAGE & FAM. 741, 746–48 (2009).

163. Joyce C. Abma & Gladys M. Martinez, *Childlessness Among Older Women in the United States: Trends and Profiles*, 68 J. MARRIAGE AND FAM. 1045, 1050 fig.1 (2006).

164. Maddy Savage, *The Adults Celebrating Child-Free Lives*, BBC (Feb. 14, 2023), <https://www.bbc.com/worklife/article/20230208-the-adults-celebrating-child-free-lives> [<https://perma.cc/2TSN-QXNW>]; see also WE ARE CHILDFREE, <https://wearechildfree.com> [<https://perma.cc/82D6-NETS>]; Keturah Kendrick, Opinion, *Why We ‘Childless Cat Ladies’ Are*

Ambivalence can also influence women's decision-making during pregnancy. Once pregnant, some women consider terminating the pregnancy but feel ambivalent about the decision of whether to have an abortion.¹⁶⁵ Research suggests the percentage of women who approach abortion decision-making with ambivalence is small overall,¹⁶⁶ and conflicted feelings are usually temporary with most women who decide to terminate experiencing subsequent relief (and not long-term regret or poor mental health).¹⁶⁷ In a rare qualitative study of the experiences of women who express ambivalence about their decision to have an abortion, age, timing, relationship status, and available support were significant drivers of uncertainty.¹⁶⁸ Also relevant was their physical experience of early pregnancy, including nausea, exhaustion, hormonal fluctuations, and "not being myself."¹⁶⁹ Feeling shame about the unplanned nature of the pregnancy, combined with loneliness in the decision-making process, contributed to ambivalence about whether to terminate.¹⁷⁰ Interestingly, reaching a decision about the pregnancy did not necessarily eliminate a woman's ambivalent feelings; both women who continued the pregnancy and women who terminated were among those reporting that their ambivalence persisted.¹⁷¹

Some ambivalent pregnant women carry their pregnancies to term but upon giving birth decide to surrender the child under safe haven laws that allow women to leave infants in designated places, such as a firehouse,

JD Vance's Biggest Fear, MSNBC (July 29, 2024), <https://www.msnbc.com/opinion/msnbc-opinion/jd-vance-childless-cat-ladies-fear-rcna164007> [https://perma.cc/ZEQ9-7T9F] (discussing then Republican vice-presidential nominee JD Vance's comment that the country is being run "by a bunch of childless cat ladies who are miserable at their own lives and the choices that they've made").

165. Diana G. Foster et al., *Attitudes and Decision Making Among Women Seeking Abortions at One US Clinic*, 44 PERSPS. ON SEXUAL & REPROD. HEALTH 117, 119–21 (2012).

166. *Id.* at 119 (reporting, in a large study of women's attitudes toward abortion decision-making, that only two percent of cases involved women who changed their minds at the clinic or, "demonstrating ambivalence about the decision, [were] sent home by the counselor for further reflection and did not return."); see also Lauren J. Ralph et al., *Measuring Decisional Certainty Among Women Seeking Abortion*, 95 CONTRACEPTION 269, 269 (2017) ("[U]ncertainty in abortion decision[-]making is comparable to or lower than other health decisions.").

167. Sharon Cameron, *Induced Abortion and Psychological Sequelae*, 24 BEST PRAC. & RSCH.: CLINICAL OBSTETRICS & GYNAECOLOGY 657, 660–61 (2010).

168. Marianne Kjelsvik et al., *Women's Experiences When Unsure About Whether or Not to Have an Abortion in the First Trimester*, 39 HEALTH CARE FOR WOMEN INT'L 784, 790–92 (2018).

169. *Id.* at 791–92.

170. *Id.* at 795–96.

171. *Id.* at 798 (quoting a woman who chose abortion: "I am completely at ease with the decision I have made. I know that it is impossible to undo. But at the same time, I think, sometimes, 'Oh, what have I done?' It gets to me, but then again I think: 'Oh, I am glad it's done!'").

anonymously and without criminal penalty. All fifty states adopted safe haven laws between 1999 and 2009, often prompted by sensationalized stories about newborns abandoned in dumpsters and promoted as a rare point of consensus during contentious debates about abortion, sex education, teen pregnancy, and welfare.¹⁷² Scholar Laury Oaks argues that although a very small number of girls and women abandon their newborns, advocates of safe haven laws target particular women assumed to be potential bad mothers—including teenagers, women of color, and poor women—encouraging them to relinquish their newborns after birth.¹⁷³ In this way, safe haven laws influence individual women’s perceptions about their identities as prospective mothers, as well as public discourse about motherhood more generally.¹⁷⁴

Women who carry their pregnancies to term and become mothers may find themselves navigating a set of norms that sociologist Sharon Hays has identified as the ideology of intensive mothering.¹⁷⁵ Such norms make parenting a “child-focused, emotionally taxing, labour intensive, time-consuming task best completed by women as they are the ‘expert’ caregivers.”¹⁷⁶ Because mothers are expected to prioritize the child’s needs above their own, the expectation that mothers will dedicate themselves to caregiving results in “limited opportunity for mothers to engage in activities outside of child-rearing, suggesting a mother’s needs should be completely fulfilled by their child.”¹⁷⁷ For middle-class and upper-middle-class women, intensive mothering is “the ultimate female Olympics,” creating the conditions for internal conflicts and ambivalence among mothers who invest in the ideology and chase the intensive mothering ideal through countless decisions they make in the course of caring for their children.¹⁷⁸ Scholars Susan Douglas and Meredith Michaels have written about the impossible expectations attached to motherhood, calling it the “new momism,” which they describe as “a set of ideals, norms, and practices, most frequently and powerfully presented in the media, that seem on the surface to celebrate

172. LAURY OAKS, *GIVING UP BABY: SAFE HAVEN LAWS, MOTHERHOOD, AND REPRODUCTIVE JUSTICE* 1 (2015).

173. *Id.* at 2.

174. *Id.*

175. SHARON HAYS, *THE CULTURAL CONTRADICTIONS OF MOTHERHOOD* (1998).

176. Tricia Williamson et al., *Mothering Ideology: A Qualitative Exploration of Mothers’ Perceptions of Navigating Motherhood Pressures and Partner Relationships*, 88 *SEX ROLES* 101, 102 (2023); see also Catherine Verniers et al., *Intensive Mothering and the Perpetuation of Gender Inequality: Evidence from a Mixed Methods Research*, 227 *ACTA PSYCHOLOGICA* 1, 2 (2022).

177. Williamson et al., *supra* note 176, at 102.

178. DOUGLAS & MICHAELS, *supra* note 14, at 6.

motherhood but which in reality promulgate standards of perfection that are beyond your reach.”¹⁷⁹

Against the backdrop of intensive mothering norms, some women have turned to online platforms for venues to safely, sometimes anonymously, share their conflicted feelings about motherhood and seek community with other mothers who feel pressure to celebrate being a mother without voicing any discontent or ambivalence. Since 2013, a Reddit thread titled “Regretful Parents” has been a place for thousands of parents who “think they shouldn’t have become parents” to “rant, confess, get off their chest about their kids, significant others [and] families.”¹⁸⁰ Other Reddit threads have provided places for mothers in particular to share their regrets and ambivalence.¹⁸¹ Similar to the motherhood memoirs, many users express love for their children while also mourning their pre-motherhood lives and expressing hatred for their current status as a mother.¹⁸² The ability to post anonymously

179. *Id.* at 4–5.

180. Zhou, *supra* note 2; r/regretfulparents, REDDIT, <https://www.reddit.com/r/regretfulparents> [<https://perma.cc/R2ES-MKK9>] (reflecting over 155,000 members as of March 2025); *see also* Orna Donath, *Women Who Regret Motherhood Share Their Stories*, BUST (Nov. 3, 2017), <https://bust.com/regretting-motherhood> [<https://perma.cc/CT43-YVQE>]; *100 Women 2016: Parents Who Regret Having Children*, BBC (Dec. 6, 2016), <https://www.bbc.com/news/magazine-38145118> [<https://perma.cc/9XNA-8A4W>]; Sarah Treleaven, *Inside the Growing Movement of Women Who Wish They’d Never Had Kids*, MARIE CLAIRE (Sept. 28, 2016), <https://www.marieclaire.com/culture/a22189/i-regret-having-kids> [<https://perma.cc/HJ6J-NUAE>]; Lola Augustine Brown, *Regretting Motherhood: What Have I Done to My Life?*, TODAY’S PARENT (Oct. 13, 2022), <https://www.todaysparent.com/family/parenting/i-regret-motherhood> [<https://perma.cc/ML2R-8XRT>]; Isabella Dutton, *The Mother Who Says Having These Two Children Is the Biggest Regret of Her Life*, DAILY MAIL (Feb. 5, 2016), <https://www.dailymail.co.uk/femail/article-2303588/The-mother-says-having-children-biggest-regret-life.html> [<https://perma.cc/HNK2-EEAS>].

181. *See, e.g.*, Outraged-babie, *Mothers Who Regret Having Children, What Made You Realize It? And How Are You Coping?*, REDDIT, https://www.reddit.com/r/AskWomen/comments/u5pi4y/mothers_who_regret_having_children_what_made_you [<https://perma.cc/C42S-249E>].

182. While motherhood regret and maternal ambivalence are not synonymous, the consistency with which women expressing motherhood regret also articulate love for their children reflects the idea of ambivalence as the coexistence of positive and negative feelings. *See* Anne Kingston, *‘I Regret Having Children’: In Pushing the Boundaries of Accepted Maternal Response, Women Are Challenging an Explosive Taboo—and Reframing Motherhood in the Process*, CHATELAINE (Jan. 11, 2018), <https://chatelaine.com/living/i-regret-having-children> [<https://perma.cc/PK8J-VK3N>] (“There are mothers who experience ambivalent feelings but do not regret becoming mothers, and there are mothers who regret becoming mothers and are not ambivalent about motherhood.”). As such, the concepts are sufficiently related phenomena for the purposes of this Article’s arguments about the need to destigmatize and normalize maternal ambivalence. *See* RACHEL WILLIAMSON, 21ST-CENTURY NARRATIVES OF MATERNAL AMBIVALENCE 55–56 (2023) (discussing the relationship between regret and maternal

relieves users of the stigma associated with maternal ambivalence and regret, facilitating raw and often devastating posts without fear of detection.¹⁸³ Elsewhere on the internet, women use blogs¹⁸⁴ and social media platforms¹⁸⁵ to share their regret, ambivalence, and frustrations about motherhood.

Finally, reflecting perhaps the most extreme manifestation of conflicted maternal feelings, a very small subset of women commit filicide: “the killing of a child by a parent.”¹⁸⁶ In their profoundly moving book based on interviews with women incarcerated in Ohio for killing their children, scholars Michelle Oberman and Cheryl Meyer capture themes related to the frequency of violence in their interviewees’ lives from childhood through adulthood; the “lack of a safe haven amid the violence,” leading women to be “profoundly isolated”;¹⁸⁷ and the women’s “intimate familiarity with various state agents” as they navigated state involvement in their lives.¹⁸⁸ When discussing motherhood, the women addressed “both their hopes and dreams as mothers and the distance between those dreams and the realities they encountered,” echoing accounts from the motherhood memoirs and elsewhere about the conflicts women experience as mothers.¹⁸⁹ Their stories reflect unplanned pregnancies, often the result of rape; choosing to mother against the wishes of family members; lack of preparation to care for a child; the loss of a home in the early postpartum period and continued housing instability; violence, isolation, chaos, and loss of control; and a profound sense of connection to their children, “refer[ring] to their children as if they were extensions of themselves.”¹⁹⁰ Oberman and Meyer document how these

ambivalence through the lens of HBO’s *Big Little Lies*). See generally Orna Donath, *Regretting Motherhood: A Sociopolitical Analysis*, 40 SIGNS: J. WOMEN CULTURE & SOC’Y 343 (2015) (discussing the distinctions between maternal regret and other forms of maternal ambivalence).

183. See, e.g., Zhou, *supra* note 2 (quoting anonymous Reddit users: “I had my son when I was 23 years old and I can honestly say it was the worst mistake of my life. . . . I wish I had a time machine to wake me up from this living nightmare. . . . I didn’t think it was possible to love someone so much but also regret creating them . . .”).

184. See, e.g., MY SO-CALLED SELFISH LIFE, <https://myselfishlife.com/read-stories-blog/tag/Regret+having+children> [<https://perma.cc/Q3SA-5MZW>].

185. See, e.g., *I Regret Having Children*, FACEBOOK, <https://www.facebook.com/IRegretHavingChildren>; *Wine and Whining*, FACEBOOK, <https://www.facebook.com/wineandwhining>; *Mom’s Wine & Whine Club*, FACEBOOK, <https://www.facebook.com/profile.php?id=100075911787353>.

186. MICHELLE OBERMAN & CHERYL L. MEYER, *WHEN MOTHERS KILL: INTERVIEWS FROM PRISON 2* (2008).

187. *Id.* at 6.

188. *Id.* at 8.

189. *Id.* at 7.

190. *Id.* at 78.

women “struggled to be good mothers” and “continu[ed] to view and to value themselves as mothers” even long after the acts that landed them in prison.¹⁹¹

Scholars have observed that the dominant narratives about motherhood, whether through academic research, motherhood memoirs, or elsewhere in popular culture, tend to center the experiences of white middle-class mothers.¹⁹² Dominant discourse about mothering and its challenges typically focuses either on the experiences of mothers who are full-time caregivers, subject to the ideology of intensive mothering, or the experiences of career-oriented women facing difficult choices about how to balance professional and family demands. Both phenomena are important for understanding maternal ambivalence, but they do not capture the full range of motherhood experiences.¹⁹³

For example, Black mothers, working-class and poor mothers, and other mothers belonging to marginalized or vulnerable groups have long lived under economic circumstances that required them to work outside the home and, indeed, were part of families where women had engaged in labor outside the home for generations. Scholars have observed that Black mothers “do not experience the same feelings of guilt about not being sufficiently devoted to their children” as “such feelings are for black mothers overshadowed by the history of women who labored under harsh circumstances and were lucky to see their children briefly in the evenings.”¹⁹⁴ Against this backdrop, many Black women do not perceive a meaningful choice about whether to work outside the home and thus do not experience conflicted feelings in the same way as white middle-class women, who historically had been expected to be mothers and homemakers with little to no option for paid work.¹⁹⁵ Scholar Patricia Hill Collins observes:

[T]o be “good mothers” black women cannot lose their identities and give everything for the children because they need to tend to the needs not just of their children and immediate family but also to

191. *Id.* at 67–84. *See also* SARAH LACHANCE ADAMS, MAD MOTHERS, BAD MOTHERS, AND WHAT A “GOOD” MOTHER WOULD DO: THE ETHICS OF AMBIVALENCE 2–4 (2014) (discussing mothers who kill their children, the good mother “ideal,” and maternal ambivalence).

192. *See* PARKER, *supra* note 4, at xvi; Brown, *supra* note 8, at 9.

193. *See* Brown, *supra* note 8, at 10.

194. *Id.* at 10–11 (citing PARKER, *supra* note 4). Parker is one of the few Black authors whose work was part of the wave of motherhood memoirs published at the turn of the twenty-first century. *Id.* at 20.

195. PARKER, *supra* note 4, at 9 (“Growing up there was never any question that I would go to college and then go to work. It wasn’t until I was an adult that I even understood that some women considered paid, outside-the-home work optional. Because for the black women in my world, work wasn’t an option at all.”).

the needs of their community. In this way, for black mothers, motherhood identities are firmly rooted in the history and presence of their community.¹⁹⁶

At the same time, some low-income mothers, including those working long hours outside the home, may feel heightened ambivalence due to economic stress caused by trying to meet their children's needs. These important race and class variations in whether and how mothers experience ambivalence underscore the fact that what constitutes a good mother is not fixed. Rather, different social and cultural contexts lead to diverse understandings about motherhood experiences, as well as different forms of conflicted or ambivalent feelings about those experiences.

Exploring maternal ambivalence across a range of social contexts reinforces the idea that ambivalence is common and also that it can arise from different experiences along the reproductive spectrum. Why people experience ambivalence, and what they do about it, is specific to the individual—with significant variation according to the circumstances. Because the stigma associated with expressing maternal ambivalence remains strong, it can be difficult to understand the nature of an individual woman's ambivalence about being a mother, but as the examples of ambivalence discussed in this Part show, the factors driving these emotions, and the emotions themselves, are more complex and nuanced than they might seem at first. Society's limited understanding of this phenomenon, combined with the diversity of women's experiences with ambivalence, cautions against legal responses to maternal ambivalence that depend on generalizations and stereotypes to identify culpable behavior suitable for punishment.

B. Understanding Maternal Ambivalence

1. The Social Science of Ambivalence

Psychologists were the first to describe the concept of ambivalence, developing a theory about conflicting attitudes in individual relationships.¹⁹⁷ Swiss psychiatrist Eugene Bleuler coined the term in 1910, using ambivalence to mean a “simultaneous existence of opposing attitudes, mostly

196. Brown, *supra* note 8, at 42 (citing PATRICIA HILL COLLINS, *BLACK FEMINIST THOUGHT: KNOWLEDGE, CONSCIOUSNESS, AND THE POLITICS OF EMPOWERMENT* (2000)).

197. See Brown, *supra* note 8, at 58–60.

love and hate.”¹⁹⁸ The concept became central to psychoanalytic theories, including the work of Sigmund Freud.¹⁹⁹ Social psychologists subsequently developed various theories to understand the phenomenon of people expressing conflicting thoughts or attitudes, such as cognitive dissonance,²⁰⁰ imbalance,²⁰¹ and self-consistency,²⁰² with a focus on how to address the unpleasantness associated with such conflicts.²⁰³ Later research suggested that conflicting attitudes are not necessarily distressing,²⁰⁴ and “that certain people can hold inconsistent attitudes, particularly about social and political issues for long periods of time.”²⁰⁵

Other research in the field of psychology has examined inconsistent views people hold about themselves and when those dissonant views can lead to ambivalence. For example, Higgins’ theory of self-discrepancy refers to “three basic domains of self”:

a) the *actual* self, which is how you represent the attitudes that you or someone else believe you possess, b) the *ideal* self, which are the attitudes that you or somebody else would like you to ideally have, representing hopes, aspirations or ideals, and c) the *ought* self, which are the attributes that you or someone else believe you should possess, representing duties, obligations and responsibilities.²⁰⁶

According to this theory, when these three parts of the self do not align, individuals can experience ambivalence arising out of any such

198. *Id.* at 61; see also Kurt Lüscher, *Conceptualizing and Uncovering Intergenerational Ambivalence*, in 4 CONTEMPORARY PERSPECTIVES IN FAMILY RESEARCH 23, 26 (Karl Pillemer & Kurt Lüscher eds., 2004).

199. See Neil J. Smelser, *The Rational and the Ambivalent in the Social Sciences*, 63 AM. SOCIO. REV. 1, 5–6 (1998) (summarizing Freud’s writing on ambivalence, including the idea that “[t]he stronger the positive side of ambivalence, the stronger the negative”).

200. See LEON FESTINGER, A THEORY OF COGNITIVE DISSONANCE 3 (1957); Megan M. Thompson & John G. Holmes, *Ambivalence in Close Relationships: Conflicted Cognitions as Catalysts for Change*, in HANDBOOK OF MOTIVATION AND COGNITION 497, 500 (R.M. Sorrentino & E.T. Higgins eds., 1996).

201. FRITZ HEIDER, THE PSYCHOLOGY OF INTERPERSONAL RELATIONSHIPS 207 (1958); Tory E. Higgins, *Self-Discrepancy: A Theory Relating Self and Affect*, 94 PSYCH. REV. 319, 319–20 (1987).

202. See Higgins, *supra* note 201, at 333.

203. See Brown, *supra* note 8, at 62.

204. See Thompson & Holmes, *supra* note 200, at 500–03; Joseph R. Priester & Richard E. Petty, *The Gradual Threshold Model of Ambivalence: Relating the Positive and Negative Bases of Attitudes to Subjective Ambivalence*, 71 J. PERSONALITY & SOC. PSYCH. 431, 448 (1996); Michael F. Meffert et al., *Good, Bad, and Ambivalent: The Consequences of Multidimensional Political Attitudes*, in STUDIES IN PUBLIC OPINION: ATTITUDES, NONATTITUDES, MEASUREMENT ERROR, AND CHANGE 63, 64–66 (Willem E. Saris & Paul M. Sniderman eds., 2004).

205. Brown, *supra* note 8, at 62–63.

206. *Id.* at 63; Higgins, *supra* note 201, at 320–21.

discordance.²⁰⁷ Self-discrepancy theory sheds light on the potential impact of ambivalence on mental health where that ambivalence arises from dissonance between one's expectations and ideals on the one hand, and one's own experiences on the other.²⁰⁸

Robert Merton and Elinor Barber were the first to analyze ambivalence through a sociological lens in a 1963 article,²⁰⁹ laying the groundwork for future analysis of socially located ambivalences, meaning opposing expectations based on various roles and statuses in society.²¹⁰ Sociologists have adapted the concept to capture "the coexistence of opposing norms, values and expectations located in social structures and social roles."²¹¹ Sociological theory departed from the approach of psychologists in the way it focused "on social definition of role and statuses, not on the feeling-state of one or another type of personality."²¹²

Subsequent sociological theory on ambivalence has expanded the scope from "contradictions in social roles, values, norms and beliefs" to "include social relationships and power imbalances."²¹³ This approach to ambivalence suggests that "individuals experience ambivalence when their attempts to exercise agency conflict with structured arrangements that limit choices and specify normative behavior."²¹⁴ Conflicts between expectations and experiences are "imbedded in sets of structured social relations (e.g., class, age, race, ethnicity, gender) through which opportunities, rights, and privileges are differentially distributed."²¹⁵ As such, ambivalence is "an unstable phenomenon because people try to cope with it, which initiates

207. See Brown, *supra* note 8, at 63.

208. See Higgins, *supra* note 201, at 322; Brown, *supra* note 8, at 64 ("[D]iscrepancy between how one sees their actual and ideal selves (e.g. what kind of mother I am compared to what kind of mother I would like to be) can lead to increases in depression, whereas the discrepancy between one's own perception of actual self and other's perception of one's ought self (what kind of mother I am and what kind of mother others expect me to be) lead to social anxiety but not depression.").

209. See Robert Merton & Elinor Barber, *Sociological Ambivalence*, in *SOCIOLOGICAL THEORY, VALUES, AND SOCIOCULTURAL CHANGE* 91 (Edward A. Tiryakian ed., 1963). Merton and Barber wrote that sociological ambivalence refers to "incompatible normative expectations of attitudes, beliefs, and behavior assigned to a status or to a set of statuses in a society." *Id.* at 94–95.

210. See Brown, *supra* note 8, at 65.

211. *Id.* at 60; see also Lüscher, *supra* note 198, at 31.

212. Merton & Barber, *supra* note 209, at 7.

213. Brown, *supra* note 8, at 66 (first citing Connidis & McMullin, *supra* note 36, at 561; and then citing Lüscher, *supra* note 198, at 31).

214. Andrea E. Willson et al., *Ambivalence in Mother-Adult Child Relations: A Dyadic Analysis*, 69 *SOC. PSYCH. Q.* 235, 236 (2006).

215. Connidis & McMullin, *supra* note 36, at 565.

changes in not only ambivalence but also in the social structures that produce it.”²¹⁶ Notably, most of the sociology literature on ambivalence focuses on intergenerational caregiving.²¹⁷

2. The Social Science of Maternal Ambivalence

In contrast to punitive legal responses to maternal ambivalence, the social science literature casts a different light on the significance of maternal ambivalence at the individual and societal levels. As discussed previously, psychologists describe maternal ambivalence as the coexistence of loving and hating feelings in a mother toward her child.²¹⁸ It is both normal and healthy. Theorist Rozsika Parker finds that ambivalence, or the struggle with ambivalence, prompts mothers to work hard to understand their babies, which is valuable because “the capacity to think about the baby and child is arguably the single most important aspect of mothering.”²¹⁹ In this sense, ambivalence “represent[s] an important achievement”²²⁰ and “a developmental step in the achievement of the separation from the mother.”²²¹ Specifically, achieving ambivalence and “a mother’s awareness of the coexistence of love and hate for the baby can actually be *beneficial* as it promotes a sense of concern and responsibility toward the baby and a mother’s sense of self-autonomy.”²²²

Similarly, psychologist Daphne de Marneffe highlights the utility of maternal ambivalence, noting that while the “notion that powerful negative feelings toward our children might exert a creative force rather than a destructive one is quite alien to our usual way of thinking,” by “acknowledg[ing] our whole range of feelings” and “accept[ing] . . . contradictions . . . we can ultimately understand ourselves and our children even better.”²²³ However, “unmanageable ambivalence can develop into anxiety or depression due to the cultural idealization of mothers.”²²⁴ Psychologists understand the relationship between mother and child to be

216. Brown, *supra* note 8, at 69.

217. See, e.g., Lüscher, *supra* note 198, at 25.

218. See ALMOND, *supra* note 11; ROZSIKA PARKER, TORN IN TWO: THE EXPERIENCE OF MATERNAL AMBIVALENCE 73 (rev. ed. 2005).

219. ROZSIKA PARKER, MOTHER LOVE/MOTHER HATE: THE POWER OF MATERNAL AMBIVALENCE 6–7 (1995).

220. Brown, *supra* note 8, at 73 (citing PARKER, *supra* note 218, at 20).

221. *Id.*

222. *Id.* at 74.

223. DAPHNE DE MARNEFFE, MATERNAL DESIRE: ON CHILDREN, LOVE, AND THE INNER LIFE 137, 140 (2004).

224. Brown, *supra* note 8, at 74.

“shaped by social and cultural conditions of mothering and by the internalized image of a ‘good mother,’ which women try to achieve.”²²⁵ Experiencing anger and negative emotions toward one’s child does not comport with the good mother norm, such that “awareness of the contradictory feelings can increase the anxiety and guilt mothers feel about motherhood.”²²⁶

The sociological understanding of ambivalence as a concept that connects social structures with individual experience is particularly relevant to maternal ambivalence, where individual agency often collides with social institutions and the socially constructed norms that shape those institutions.²²⁷ One commentator notes the “plentiful conditions for ambivalence” created by motherhood, both due to the “presence of conflicting social norms and expectations and coexistence of discrepant identities and ideas about one’s self,” and because “mothers are engaged in the relationships of intimacy, dependence and caring, which can generate both positive and negative feelings.”²²⁸ Feminist writer Adrienne Rich highlighted how the lack of social support for mothers shapes motherhood itself, an experience lived largely in the isolation of nuclear family.²²⁹ Rich distinguished “between two meanings of motherhood, one superimposed on the other: the *potential* relationship of any woman to her powers of reproduction—and to children; and the *institution*—which aims at ensuring that the potential—and all women—remain under male control.”²³⁰ Maternal ambivalence can reflect both strong love for one’s own children and strong resentment about the demanding, often invisible work of being a mother to someone else.

The power of stigma can obscure important nuance about the types of conflicts that lead women to feel ambivalent about motherhood. For example, the era of intensive mothering emerged alongside an increase in the number of women working outside the home, which provides fertile ground for judgment about how different women choose to balance childrearing and work. Cultural discourse about whether stay-at-home or employed mothers are better at mothering led commentators to use the term “mommy wars” to

225. *Id.*

226. *Id.*

227. See Connidis & McMullin, *supra* note 36, at 562–63.

228. Brown, *supra* note 8, at 71; see also RICH, *supra* note 30, at 21 (“My children cause me the most exquisite suffering of which I have any experience. It is the suffering of ambivalence: the murderous alternation between bitter resentment and raw-edged nerves, and blissful gratification and tenderness.”).

229. RICH, *supra* note 30, at 34 (discussing how mothering in patriarchal society can lead to women’s contradictory feelings about motherhood).

230. O’Reilly, *supra* note 30, at 2.

capture conflict between different conceptions of the good mother.²³¹ The public judgment of women's choices regarding how to navigate career and family reflected in the "mommy wars" has contributed to some women's increased ambivalence about their mothering.²³² Beyond ambivalence, navigating the competing demands of work and parenting under intensive mothering ideology has a negative impact on women's health and well-being.²³³

In the first full sociological analysis of maternal ambivalence, sociologist Ivana Brown conducted a study analyzing race and class differences among new mothers experiencing maternal ambivalence.²³⁴ She theorizes maternal ambivalence "as socially and culturally produced," "rooted in the social pressures, constraints, and expectations mothers experience in structurally and culturally specific settings."²³⁵ Dominant "[c]ultural images of idealized motherhood contribute to [a] divergence between expectations and reality," which drives ambivalence among women about their roles as mothers.²³⁶ Brown's research started with a close reading of selected motherhood memoirs, in which she observed identity conflict among middle-class and upper middle-class women stemming from their "demotion to the low status of motherhood" and the "consequent devaluation of their social position once they become mothers."²³⁷ Based on the memoirs, she identified four categories of ambivalence for the purposes of measuring and analyzing distinctions along race and class axes: (1) competence ambivalence (or being good at mothering); (2) identity ambivalence; (3) attachment ambivalence; and (4) ambivalence about combining work and family.²³⁸

First, competence ambivalence reflects "conflict between the positive enjoyments of motherhood [and] the feelings of being overwhelmed by mothering responsibilities."²³⁹ Brown observes that competence ambivalence is linked to the feeling women express that they were not adequately prepared for the reality of new motherhood.²⁴⁰ Her study found that eight percent of

231. See MIRIAM PESKOWITZ, *THE TRUTH BEHIND THE MOMMY WARS: WHO DECIDES WHAT MAKES A GOOD MOTHER?* 20–21 (2005).

232. *Id.*

233. See Kristin Byron, *A Meta-Analytic Review of Work-Family Conflict and Its Antecedents*, 67 J. VOCATIONAL BEHAV. 169, 192 (2005).

234. Brown, *supra* note 8, at 300.

235. *Id.* at 5.

236. *Id.* at 33.

237. *Id.* at 44.

238. *Id.* at 110.

239. *Id.* at 111.

240. *Id.* at 110–11.

mothers were ambivalent about being good at mothering.²⁴¹ Second, identity ambivalence “result[s] from the feelings of restriction and self-sacrifice while enjoying the relationship with and presence of the child.”²⁴² It reflects the good mother norm of self-sacrifice along with the idea that women should not experience the self-sacrifice in negative terms.²⁴³ Identity ambivalence reflects the difficulty of losing one’s “pre-motherhood identity” even while enjoying motherhood generally.²⁴⁴ Brown found that over twenty-five percent of women were ambivalent about their identities as mothers.²⁴⁵

Third, attachment ambivalence reflects “difficulties in forming an immediate bond with the baby and falling in love with the child from the first moment.”²⁴⁶ This particular type of ambivalence captures “conflict between a mother’s personal experience of forming a bond with the child in contrast to the social norms about maternal bonding and socially prescribed relationship between a ‘good mother’ and her child.”²⁴⁷ Less than two percent of Brown’s sample reported attachment ambivalence.²⁴⁸ Finally, ambivalence about combining work and family refers to the coexistence of conflicted feelings about combining work outside the home with motherhood.²⁴⁹ Sociologist Mary Blair-Loy identified “career-devoted” and “family-devoted” schemas to categorize how women allocate their time and energy, finding that how women choose to balance these two schemas is related to whether they experience ambivalence about work and family divisions.²⁵⁰ Journalist Lisa Belkin introduced the term “opt-out revolution” to refer to the phenomenon of professional mothers leaving the workforce to care full-time for children after difficulty balancing career-devotion and family-devotion.²⁵¹

241. *Id.* at 281.

242. *Id.* at 111.

243. *Id.*

244. *Id.*

245. *Id.* at 281, 339.

246. *Id.* at 111.

247. *Id.* at 112.

248. *Id.* at 281, 339.

249. *Id.* at 112.

250. See MARY BLAIR-LOY, *COMPETING DEVOTIONS: CAREER AND FAMILY AMONG WOMEN EXECUTIVES* 1–2 (2003).

251. See Lisa Belkin, *The Opt-Out Revolution*, N.Y. TIMES MAG. (Oct. 26, 2003), <https://www.nytimes.com/2003/10/26/magazine/the-opt-out-revolution.html>. But opting out of paid work may not be an unconstrained choice; in many instances, it is the workplace that makes it difficult or impossible for women to balance work and family demands, in effect pushing out women who have significant childrearing obligations. See Brown, *supra* note 8, at 95.

In her study, Brown found that fifteen percent of women were ambivalent about combining work and family.²⁵²

The categories of ambivalence Brown identified are not the only way to theorize maternal ambivalence, nor do they capture all the scenarios where women may be perceived as ambivalent and punished as a result. Not only are her categories based on themes identified in motherhood memoirs, which are necessarily limited to a subset of experiences, but the study itself was designed to use an existing national dataset on children's development that also contains data capturing women's experiences of the transition to motherhood.²⁵³ However, Brown's ambivalence categories and research methods do shed light on important questions about how race, ethnicity, and social class shape women's experiences of ambivalence about motherhood.

Women do not navigate the challenges of balancing work and family in the same way across race and class differences. Scholars who study the meaning and practice of motherhood among Black women, as well as among low-income women, highlight differences in the norms that apply to mothering and to notions of what makes a good mother.²⁵⁴ For example, as discussed previously, because Black and low-income mothers have long been more likely to work outside of the home than white and middle-class mothers,²⁵⁵ Lonnae O'Neal Parker argues that "black mothers do not experience the same feelings of guilt about not being sufficiently devoted to their children—an argument that fuels the mommy wars—because of the ever-present history of women who labored under harsh circumstances and, if lucky, saw their children briefly in the evenings."²⁵⁶ For women in these circumstances, the good mother ideal may mean being a provider, someone

252. Brown, *supra* note 8, at 281. Brown notes that the analysis of ambivalence about combining work and family only included working mothers, so it is possible that other mothers who experienced this type of ambivalence had resolved the conflict by deciding to stay home or work only part-time. *Id.* at 287.

253. *Id.* at 127–35 (describing the dataset).

254. See Linda M. Blum & Theresa Deussen, *Negotiating Independent Motherhood: Working-Class African American Women Talk About Marriage and Motherhood*, 10 GENDER & SOC'Y 199, 206 (1996). Blum and Deussen note that the "normative model of exclusive mothering characteristic of white middle-class mothers is not applicable to other racial and ethnic communities or low-income families due to historical, cultural and economic reasons." Brown, *supra* note 8, at 103; see also PATRICIA HILL COLLINS, *BLACK FEMINIST THOUGHT: KNOWLEDGE, CONSCIOUSNESS, AND THE POLITICS OF EMPOWERMENT* 173 (2000); O'Reilly, *supra* note 30, at 5.

255. See BART LANDRY, *BLACK WORKING WIVES: PIONEERS OF THE AMERICAN FAMILY REVOLUTION* 5–6 (2000).

256. Brown, *supra* note 8, at 97 (citing PARKER, *supra* note 4); see also BELL HOOKS, *FEMINIST THEORY: FROM MARGIN TO CENTER* 134 (1984).

self-reliant and independent.²⁵⁷ In her study of Black feminism and African-American mothering, Patricia Hill Collins found that while Black women struggle to be good mothers in the face of normative definitions that implicitly identify them as bad mothers, motherhood also provides them with a sense of empowerment and self-actualization.²⁵⁸ She also highlights a different approach to kinship care common in African-American communities, including reliance on other women in the community to share responsibilities of mothering—with grandmothers, aunts, cousins, neighbors, and friends acting as “othermothers.”²⁵⁹ This conception of family and care relationships contrasts to the focus on exclusive maternal care that is central to dominant mothering norms shaped by white middle-class experiences.²⁶⁰

Variations in the meaning of motherhood also extend to class differences. For example, in their study of poor unmarried mothers, Kathryn Edin and Maria observe how motherhood constitutes an important part of young women’s identity, finding little discussion of ambivalence about motherhood.²⁶¹ Against the backdrop of economic struggle, a good mother is someone who is able to provide for their children and keep them safe.²⁶² As such accounts of differences in the social significance of motherhood across communities and socioeconomic statuses suggest, stereotypes that drive the stigmatization of maternal ambivalence are rooted in racialized and class-based assumptions about what it means to be a mother and what the work of mothering entails.

Accordingly, it is not surprising that Brown’s study found that women’s experiences of the transition to motherhood vary according to race and class, and race and class predict maternal ambivalence.²⁶³ White middle-class mothers experience more ambivalence than mothers of other social class and

257. See Blum & Deussen, *supra* note 254, at 203; Mary Blair-Loy & Gretchen DeHart, *Family and Career Trajectories Among African American Female Attorneys*, 24 J. FAM. ISSUES 908, 910 (2003).

258. See COLLINS, *supra* note 254, at 174–76.

259. *Id.* at 178.

260. See Brown, *supra* note 8, at 104–05. Compare HAYS, *supra* note 175, at 97–151 (detailing the ideology of intensive mothering), with COLLINS, *supra* note 254, at 178 (noting “fluid and changing boundaries often distinguish biological mothers from other women who care for children” in African-American communities).

261. See KATHRYN EDIN & MARIA KEFALAS, PROMISES I CAN KEEP: WHY POOR WOMEN PUT MOTHERHOOD BEFORE MARRIAGE 49 (2005) (“Children offer a tangible source of meaning, while other avenues for gaining social esteem and personal satisfaction appear vague and tenuous.”).

262. See *id.* at 210–11.

263. See Brown, *supra* note 8, at iii, 14 (“[M]aternal ambivalence is a multidimensional experience with distinct presentations among mothers belonging to different social categories . . .”).

racialized backgrounds, but the extent to which this is true depends on how maternal ambivalence is conceived.²⁶⁴ Specifically, there are notable race and class differences along the dimension of identity ambivalence, with white middle-class mothers experiencing higher rates of ambivalence than Black mothers and lower-income mothers.²⁶⁵ Individual achievement in education and career (but not household income or social position) predicts higher maternal ambivalence among these mothers, reflecting more conflict between pre- and post-motherhood conceptions of self.²⁶⁶

When it comes to competence ambivalence, women with less education and lower incomes report more ambivalence than middle-class mothers and there is no significant difference between Black and white women.²⁶⁷ Young mothers and single mothers had higher rates of competence ambivalence than older mothers and mothers with partners.²⁶⁸ As income increases, women “feel less conflicted about being good mothers.”²⁶⁹ But further analysis reveals other individual characteristics that shape whether women experience maternal ambivalence and to what degree. For example, first-time mothers experience higher rates of ambivalence than women with more children, reflecting “greater conflict between enjoying mothering and feeling competent as mothers.”²⁷⁰ Mothers who perceive their children as difficult to soothe or who report that they or their children have health problems also experience maternal ambivalence at higher rates.²⁷¹ Mothers who work full-time experience less competence ambivalence than mothers who stay home—perhaps surprising given other findings about the stress associated with balancing work and family obligations.²⁷² Brown suggests this is because mothers who stay home face “more pressure to comply with the norms of intensive mothering than employed mothers, who may have forsaken the ideals of perfect mothering given the competing demands of their employment.”²⁷³ Controlling for individual characteristics like employment status and motherhood experience strengthens the relationship

264. *Id.* at 209.

265. *Id.* at 194; *see also id.* at 246 (“[W]hite middle-class mothers feel more conflicted than black and lower-class mothers about enjoying motherhood and time with their children while feeling trapped and limited by motherhood responsibilities.”).

266. *Id.* at 210.

267. *Id.* at 194.

268. *Id.* at 199.

269. *Id.* at 200.

270. *Id.* at 232.

271. *Id.* at 232–33.

272. *Id.* at 234.

273. *Id.* at 235 (noting stay-at-home mothers’ “undivided attention to motherhood and the importance they assign, presumably, to the motherhood role”).

between race and ambivalence; when comparing mothers with the same degree of strain due to employment status, number of children, health, the child's temperament, and the degree of partner support, white mothers report more ambivalence about being good at mothering than Black mothers.²⁷⁴

Brown's analysis of attachment ambivalence reveals further complexity when it comes to the relationship between ambivalence and race or class differences. Black mothers and low-income mothers experience more ambivalence than white and higher-income mothers.²⁷⁵ When categorized according to race, education, and income, white middle-class women score higher on attachment ambivalence, but when the various socioeconomic and social structural variables are treated separately, Black mothers experience more attachment ambivalence than white mothers.²⁷⁶ This finding suggests that "[r]ace and social class thus seem to have a different effect on *attachment ambivalence*, which shows the importance of not conflating social class and race effects."²⁷⁷ Ultimately, the most significant predictor of attachment ambivalence is becoming a mother while one is young,²⁷⁸ while mothers who receive more social support are less likely to report attachment ambivalence.²⁷⁹ Other than the temperament of the child, variables related to personal characteristics (such as number of children and employment status) do not seem to change how women experience attachment ambivalence.²⁸⁰

Finally, Brown found no race or class differences among mothers reporting ambivalence about combining work and family.²⁸¹ The only statistically significant differences are associated with household income when controlling for age, marital status, and education.²⁸² Mothers with health problems experience more ambivalence in this dimension, while mothers who receive more social support feel less ambivalent.²⁸³ Brown observes that the effect of social class on maternal ambivalence may cut in both directions. While mothers with higher education may be "more susceptible to cultural messages about good motherhood and thus perceive

274. *Id.* at 236.

275. *Id.* at 195–96 (finding that Black and white mothers seem to "feel different level[s] of conflict between their bonding with the baby and the social expectations about this bonding").

276. *Id.* at 204–05, 252.

277. *Id.* at 205.

278. *Id.* at 210.

279. *Id.* at 254.

280. *Id.* at 249.

281. *Id.* at 287.

282. *Id.* at 210.

283. *Id.* at 256, 258; *see also id.* at 260 ("Mothers thus experience less conflict about the strains and benefits of their employment for their families when they have more economic resources available.").

more ambivalence about combining work and family,” mothers with lower household incomes may also experience “higher levels of stress and depression due to economic distress, which makes obtaining reliable child care more difficult and possibly contributes to less stable familial situations.”²⁸⁴

Ultimately, Brown’s sociological research on maternal ambivalence suggests that “white, higher income, and college educated mothers experience more ambivalence about motherhood when it is defined as a conflict between feeling restricted by the motherhood role while enjoying the presence of the child” than Black women, lower-income women, and women without a college education.²⁸⁵ In addition, mothers with less income and education experience more conflict “about the overwhelming and surprising nature of motherhood” while still enjoying being a mother.²⁸⁶ Brown’s findings “challenge the common assumption that maternal ambivalence is limited to white middle-class mothers.”²⁸⁷ In fact, rather than tell a consistent and unidirectional story about how race, class, and other social statuses impact the likelihood of feeling ambivalent about motherhood, Brown’s study underscores the complexity of women’s lives. To understand why a particular woman feels ambivalent about motherhood, it is necessary to understand the circumstances under which she became a mother and is fulfilling the role of motherhood.

IV. NORMALIZING MATERNAL AMBIVALENCE

Social science research on maternal ambivalence reveals tremendous variation and nuance in the causes of ambivalence, as well as in how it manifests for individual women depending on their race, class, and other personal and social characteristics. This knowledge about individual experiences of maternal ambivalence and their connection to both social structures and culturally determined roles strongly cautions against allowing expressions of ambivalence to dictate how the law treats pregnant and parenting women. Punishing certain conduct related to pregnancy because a woman is perceived to deviate from the good mother norm constrains women’s ability to live their lives fully, perpetuates pernicious race- and

284. *Id.* at 261 (citing Chih-Yuan S. Lee et al., *Family Income and Parenting: The Role of Parental Depression and Social Support*, 58 FAM. RELS. 417 (2009)).

285. *Id.* at 284 (noting that these findings reflect the type of ambivalence discussed in the motherhood memoirs and in second-wave feminist writings about motherhood).

286. *Id.* at 196.

287. *Id.* at 283.

class-based stereotypes about what constitutes a good mother, and causes harm to individual women and their families. In short, maternal ambivalence should not play a role in determining who is investigated for an adverse pregnancy outcome, who gets charged after a pregnancy loss, or who loses custody of their children. A necessary first step is to reject the idea that maternal ambivalence is “an atypical *problem* to be overcome” rather than a “phenomenon to be understood.”²⁸⁸

A. Punishing Maternal Ambivalence Is Discriminatory and Causes Harm

Punitive action against women who express ambivalence about pregnancy or motherhood rests on a set of assumptions about what makes a good mother and what reflects deviance from the good mother norm. The concept of the ideal mother is culturally produced; as such, it is familiar to and internalized by people who live within that culture. In the United States, what constitutes a good mother is largely shaped by white middle-class norms, reflecting an intensive approach to parenting associated with mothers who do not also work outside the home.²⁸⁹ The good mother is also associated with a high degree of selflessness on the part of women who satisfy the norm. This particular conception of the good mother and her opposite, the bad mother—both of which drive decisions to report, investigate, and punish women perceived to fall short—reflects a form of sex stereotyping that is harmful and discriminatory.

The idea of sex stereotyping influenced the early architects of the legal movement to recognize sex discrimination as a violation of the Constitution’s equal protection guarantee.²⁹⁰ They found inspiration in the work of liberal nineteenth-century philosopher John Stuart Mill, who explored the social construction and enforcement of sex roles in his 1869 book, *The Subjection of Women*.²⁹¹ Mill rejected the idea that women and men have inherently different qualities, or that biology should limit what roles women and men

288. ADAMS, *supra* note 191, at 8.

289. *See generally* NORA DOYLE, MATERNAL BODIES: REDEFINING MOTHERHOOD IN EARLY AMERICA (2018) (describing how lower-class women and women of color came to be excluded from the identity of the good mother in American culture).

290. *See* Cary Franklin, *The Anti-Stereotyping Principle in Constitutional Sex Discrimination Law*, 85 N.Y.U. L. REV. 83, 91–114 (2010).

291. *Id.* at 92 (tracing anti-stereotyping theory within law to John Stuart Mill).

fulfill in society and family life.²⁹² As scholar Cary Franklin has observed, “Mill’s essay attacked this conventional wisdom with a simple question: If women are naturally inclined toward wife-and-mother-hood, why is ‘the whole of the present constitution of society’ aimed at compelling them to adopt these roles?”²⁹³ For Mill, “the aim of a liberal society should be to eradicate all of the legal and social forces that press individuals into particular molds and onto particular paths on the basis of their sex.”²⁹⁴

In the 1920s, writer Walter Lippman introduced the word “stereotype,” capturing the idea that people make sense of confusion in the world by “pick[ing] out what our culture has already defined for us” and “project[ing] upon the world . . . our own position and our own rights.”²⁹⁵ Several decades later, the pioneering civil rights lawyer Pauli Murray wrote about sex stereotyping as part of her effort to develop an equal protection theory of sex discrimination.²⁹⁶ She explained that rather than identical treatment, women were seeking “equality of opportunity for education, employment, cultural enrichment, and civil participation without barriers built upon the myth of the stereotyped ‘woman.’”²⁹⁷

Constitutional law has evolved over time to recognize that stereotyping based on sex roles is harmful, due in large part to the work of Murray, Ruth Bader Ginsburg, and the ACLU Women’s Rights Project where Ginsburg worked in the 1970s, arguing a series of ground-breaking sex discrimination cases before the Supreme Court.²⁹⁸ Notably, Ginsburg used male plaintiffs to

292. See JOHN STUART MILL, *THE SUBJECTION OF WOMEN* 77, 91–92 (1869) (“If women are better than men in anything, it surely is in individual self-sacrifice for those of their own family. But I lay little stress on this, so long as they are universally taught that they are born and created for self-sacrifice.”).

293. Franklin, *supra* note 290, at 95 (quoting MILL, *supra* note 292, at 49).

294. *Id.* at 97.

295. WALTER LIPPMAN, *PUBLIC OPINION* 81, 96 (1922); see also Franklin, *supra* note 290, at 106–07 (discussing Lippman’s conception of stereotyping).

296. Pauli Murray & Mary O. Eastwood, *Jane Crow and the Law: Sex Discrimination and Title VII*, 34 GEO. WASH. L. REV. 232, 239 (1965).

297. *Id.* More recently, scholars have explored the centrality of anti-stereotyping theory to eliminating conditions that keep women subordinated while also accounting for the unique circumstances related to pregnancy and childbirth. See, e.g., Mary Anne Case, “*The Very Stereotype the Law Condemns*”: *Constitutional Sex Discrimination Law as a Quest for Perfect Proxies*, 85 CORNELL L. REV. 1447 (1999); Reva B. Siegel, *You’ve Come a Long Way, Baby: Rehnquist’s New Approach to Pregnancy Discrimination in Hibbs*, 58 STAN. L. REV. 1871 (2006); David Fontana & Naomi Schoenbaum, *Unsexng Pregnancy*, 119 COLUM. L. REV. 309, 315–25 (2019) (discussing law on sex stereotyping and discrimination in the context of parenting and family life).

298. See, e.g., *Frontiero v. Richardson*, 411 U.S. 677, 684 (1973) (noting that laws based on sex stereotypes make distinctions that “put women, not on a pedestal, but in a cage”); see also

challenge sex discrimination, a decision lauded as a shrewd attempt to appeal to the male justices on the Supreme Court²⁹⁹ while also criticized as failing to tackle underlying structural inequality between the sexes.³⁰⁰ However, Franklin's scholarship challenges the traditional account of the foundational sex-based equal protection cases of the 1970s as concerned only with formal equality and identifies a "richer set of claims regarding the constitutional limits on the state's power to enforce sex-role stereotypes."³⁰¹ Specifically, anti-stereotyping theory "dictated that the state could not act in ways that reflected or reinforced traditional conceptions of men's and women's roles" with the goal of "direct[ing] courts' attention to the particular institutions and social practices that perpetuate inequality in the context of sex."³⁰²

By the late 1970s, "anti-stereotyping had become a key mediating principle in sex-based equal protection law," even as the rise of the "New Right" interfered with anti-stereotyping challenges to laws regarding pregnancy, abortion, rape, and sexuality.³⁰³ The doctrine continued to develop, notably in the Court's 1996 decision in *United States v. Virginia*,³⁰⁴ a challenge to the Virginia Military Institute's exclusion of women, in which "the Court suggested that the salient question in equal protection law is not whether men and women are biologically different, but whether the state is acting in ways that translate such differences into social inequalities and gender-differentiated sex and family roles."³⁰⁵ Seven years later, in *Nevada Department of Human Resources v. Hibbs*,³⁰⁶ the Court recognized "for the first time that the state's regulation of pregnant women and mothers can entrench sex-role stereotypes in ways that violate equal protection."³⁰⁷ In *Hibbs*, the Court rejected the idea that states can rely on gender stereotypes in the employment context to justify discrimination between men and women in the administration of leave benefits.³⁰⁸ In doing so, the Court recognized how "mutually reinforcing stereotypes created a self-fulfilling cycle of discrimination" in which social expectations of women as primary caregivers

Franklin, *supra* note 290, at 138 n.296 ("[T]he Court has never upheld a sex classification after determining that it reflects or reinforces sex stereotypes.").

299. See JANE SHERRON DE HART, RUTH BADER GINSBURG: A LIFE 217 (2018).

300. Franklin, *supra* note 290, at 129–30 (summarizing feminist critique of the evolution of equal protection law).

301. *Id.* at 86.

302. *Id.* at 88.

303. *Id.* at 90.

304. 518 U.S. 515 (1996).

305. Franklin, *supra* note 290, at 90.

306. 538 U.S. 721 (2003).

307. Franklin, *supra* note 290, at 90–91.

308. 538 U.S. at 730–31.

drove “employers’ stereotypical views about women’s commitment to work and their value as employees,” leading to “subtle discrimination that may be difficult to detect on a case-by-case basis.”³⁰⁹

Cases involving women who are criminalized or who lose their children due to perceived maternal ambivalence are typically not the result of explicit state policies, but they do rest on impermissible gender stereotypes about women as mothers and should therefore be disfavored as a matter of law and policy. The Supreme Court has made clear that when the state acts in ways that reinforce gender stereotypes, it runs contrary to the equal protection guarantee of the Constitution. Furthermore, punishing maternal ambivalence inflicts disproportionate harm on certain types of women who are at increased risk of falling afoul of the good mother norm. This includes Black women, who are more likely to be stereotyped as bad mothers due to anti-Black bias and the pathologization of Black families³¹⁰ and are also more likely to live in overpoliced communities.³¹¹ It includes low-income women, who are more likely to experience food and housing instability,³¹² have difficulty accessing regular health care,³¹³ and are at risk of having their poverty mistaken for child neglect by state actors.³¹⁴ Given that the good mother norm is largely based on the experiences and expectations of white middle-class women, it is a particularly perverse injustice that women of color and low-income women may find themselves at higher risk of ensnarement in the criminal legal or family regulation system for expressing ambivalence.³¹⁵ Other

309. *Id.* at 736.

310. See S. Lisa Washington, *Pathology Logics*, 117 NW. U. L. REV. 1523, 1531 (2023); Nicole Rodgers & Rashad Robinson, *How the News Media Distorts Black Families*, WASH. POST (Dec. 29, 2017), https://www.washingtonpost.com/outlook/2017/12/29/a374a268-ea6d-11e7-8a6a-80acf0774e64_story.html [<https://perma.cc/2ZY2-HSEH>]; MELISSA HARRIS-PERRY, *SISTER CITIZEN: SHAME, STEREOTYPES, AND BLACK WOMEN IN AMERICA* 114 (2011).

311. See M. Keith Chen et al., *Smartphone Data Reveal Neighborhood-Level Racial Disparities in Police Presence*, REV. ECON. & STAT. 1, 2–3 (2022).

312. See Christian King, *Food Insecurity and Housing Instability in Vulnerable Families*, 16 REV. ECON. HOUSEHOLD 255, 256 (2018).

313. See Michelle Long et al., *Experiences with Health Care Access, Cost, and Coverage: Findings from the 2022 KFF Women’s Health Survey*, KFF (Dec. 20, 2022), <https://www.kff.org/womens-health-policy/report/experiences-with-health-care-access-cost-and-coverage-findings-from-the-2022-kff-womens-health-survey> [<https://perma.cc/3PS5-9X26>].

314. See *supra* Section II.C.

315. At the same time, wealthy white women who use a surrogate for reasons other than infertility are not investigated or punished for their decisions, even though they may reflect ambivalence about pregnancy that could raise questions about their commitment to motherhood. See Jenny Kleeman, *‘Having a Child Doesn’t Fit Into These Women’s Schedule’: Is This the Future of Surrogacy?*, GUARDIAN (May 25, 2019), <https://www.theguardian.com/lifeandstyle/2019/may/25/having-a-child-doesnt-fit-womens-schedule-the-future-of-surrogacy> [<https://perma.cc/SJT7-GD2P>].

women who may suffer disproportionate harm as a result of the impulse to punish ambivalence include disabled women, whose strategies for managing their disabilities while parenting may be unfamiliar to medical and legal authorities and thus treated with suspicion,³¹⁶ or young women in foster care, who struggle to survive within the system and then transition out of foster care while caring for their own children.³¹⁷

Punishing maternal ambivalence causes both immediate and long-term harm. When women are incarcerated or children are removed from the home, there is a rupture to the family that may result in trauma for both parents and children.³¹⁸ It can take years for mothers to regain custody of their children after a neglect complaint, which disrupts bonds between parents and children, puts children at risk of harm in foster care, interferes with children's ties to extended family and community, and increases the likelihood of poor mental health and problems in school.³¹⁹ If a woman is pregnant when she is incarcerated, like Christine Taylor, lack of adequate nutrition, exercise, or access to healthcare can negatively impact her health and the well-being of her fetus.³²⁰ Not only does this pose a risk for the current pregnancy, but it can also cause health complications later in life and increase the risk of adverse outcomes in future pregnancies.³²¹

For someone who suffers a pregnancy loss, facing an intrusive investigation, criminal charges, and potentially a trial and conviction may compound existing trauma and interfere with obtaining necessary mental

316. See Monika Parchomiuk, *Social Context of Disabled Parenting*, 32 *SEXUALITY & DISABILITY* 231, 237–40 (2014).

317. See Karen M. Matta Oshima et al., *Pregnancy Risk Among Older Youth Transitioning Out of Foster Care*, 35 *CHILD. & YOUTH SERVS. REV.* 1760, 1763 (2013) (documenting “exceptional risk of pregnancy” among older youth transitioning out of foster care); Katherine Moore, *Pregnant in Foster Care: Prenatal Care, Abortion, and the Consequences for Foster Families*, 23 *COLUM. J. GENDER & L.* 29, 56 (2012) (discussing cases involving young women in foster care who have their children removed from their custody); Jennifer Manlove et al., *Teen Parents in Foster Care: Risk Factors and Outcomes for Teens and Their Children*, *CHILD TRENDS*, at 5 (Nov. 2011), https://cms.childtrends.org/wp-content/uploads/2011/11/Child_Trends-2011_11_01_RB_TeenParentsFC.pdf [<https://perma.cc/H5JC-M67G>] (discussing low prenatal care uptake among teens in foster care and high rate at which teen mothers in foster care are investigated for child neglect).

318. See Trivedi, *supra* note 126, at 531.

319. *Id.* at 527–52.

320. See Wang, *supra* note 112.

321. NAT'L ACADS. OF SCIS., ENG'G, & MED., *BIRTH SETTINGS IN AMERICA: OUTCOMES, QUALITY, ACCESS, AND CHOICE* 85–112 (2020) (discussing epidemiology of clinical risks in pregnancy and childbirth); Emily Harris, *Pregnancy Complications Tied to Higher Risk of Death Decades Later*, 331 *JAMA* 1883, 1883 (2024) (discussing the long-term increase in mortality rates of women who suffered a pregnancy complication).

health treatment.³²² Women whose healthcare providers report them to law enforcement or CPS as a result of perceived ambivalence about pregnancy or parenting are less likely to seek medical care, including prenatal care, in the future and less likely to trust their healthcare providers.³²³ More broadly, knowledge that one's identity or behavior is stigmatized and fearing risk of criminalization can cause emotional and psychological harm.³²⁴ In instances involving the criminalization of ambivalence, the fear of punishment can reproduce stigma, further entrenching good mother stereotypes and encouraging socially unproductive responses to conflicted feelings about pregnancy and motherhood.³²⁵

A central challenge for advocates who challenge the criminalization of pregnancy and family policing is getting system actors to understand how the punitive actions they take are driven by harmful stereotypes about good/bad mothers. Because the good mother norm is so pervasive, it can be difficult even for well-intentioned people to see how their judgments of ambivalent mothers are culturally constructed, overly harsh, and ignore the difficulty of embracing one's role as a mother in a society that devalues reproductive and childbearing labor. When a woman expresses conflicted feelings about her children or engages in unexpected behavior after a pregnancy loss, the discordance between the reality of that woman's experience and what an observer expects of a good mother can be profoundly discomforting.³²⁶

322. See Iris M. Engelhard et al., *Posttraumatic Stress Disorder After Pregnancy Loss*, 23 GEN. HOSP. PSYCHIATRY 62, 64 (2001) (reporting that 25% of women developed posttraumatic stress disorder in the month after pregnancy loss, which also increased the risk of developing depression).

323. See HOWARD, *supra* note 21, at 1–3; GOODWIN, *supra* note 49, at 187; COMM. ON HEALTH CARE FOR UNDERSERVED WOMEN, AM. COLL. OF OBSTETRICIANS & GYNECOLOGISTS, SUBSTANCE ABUSE REPORTING AND PREGNANCY: THE ROLE OF THE OBSTETRICIAN-GYNECOLOGIST (2011), <https://www.acog.org/-/media/CommitteeOpinions/Committee-on-Health-Care-for-Underserved-Women/co473.pdf?dmc=1&ts=20200129T1657455808>.

324. Compare Katarina Bogosavljević & Jennifer M. Kilty, *Prosecuting and Propagating Emotional Harm: The Criminalisation of HIV Nondisclosure in Canada*, 38 CANADIAN J.L. & SOC'Y 109, 110–11 (2023) (exploring emotional harm in the context of criminalization of HIV nondisclosure), with Brian Calabrese, *Fear-Based Standing: Cognizing an Injury-in-Fact*, 68 WASH. & LEE L. REV. 1445, 1447–51, 1449 n.15 (2011) (discussing instances when courts recognize fear-based standing, including injury-in-fact that “may simply be the fear or anxiety of future harm”).

325. Bogosavljević & Kilty, *supra* note 324, at 109.

326. In commenting on how difficult it is to dismantle gender stereotypes, Ruth Bader Ginsburg noted that even people who are “generally sympathetic to the elimination of impediments to equal opportunity for women find the notion of a central home and family role for men disquieting. *The idea evokes a feeling of strangeness and the resistance that often attends the unfamiliar.*” Ruth Bader Ginsburg, *Gender and the Constitution*, 44 U. CIN. L. REV. 1, 34 (1975) (emphasis added).

Challenging the punitive impulse is complicated by the fact that the punishment of maternal ambivalence can arise in a variety of types of cases with differing facts. Ultimately, this makes the work of normalizing maternal ambivalence all the more imperative. To start, employing the language of maternal ambivalence to explain why women like Anne Bynum, Christine Taylor, and M. all face punitive state action helps to bring conceptual coherence to a diffuse set of cases.³²⁷ In addition, by characterizing the punishment of maternal ambivalence as a form of gender stereotyping, advocates can draw on well-established legal theory to show how use of state power to enforce good mother norms is pernicious, discriminatory, and harmful.

B. Legal Interventions to Normalize Maternal Ambivalence

Sanctioning women for ambivalence about childbearing or childrearing is discriminatory and exacerbates existing inequities, but the stigma associated with maternal ambivalence is strong and the impulse to punish is widespread. Counteracting these powerful norms requires a shift in attitudes about maternal ambivalence such that society understands it as common, normal, and healthy. Reducing the stigma of maternal ambivalence and ultimately normalizing this phenomenon will foreclose punitive responses within the criminal legal and family regulation systems, easing the burden on women who are mothers and advancing reproductive justice.

There are a variety of social policy initiatives that could shift attitudes about maternal ambivalence away from stigmatization and the impulse to punish towards a neutral or, ideally, more compassionate posture. One version of this would require policymakers first to recognize that, for some, maternal ambivalence reflects the immense strain mothers experience when performing the majority of childrearing duties with few social supports, before mobilizing the political will to pass paid family leave legislation, make affordable childcare available nationwide, and introduce robust employment protections for pregnant women and working parents—including for parents of sick and disabled children. Doing so would necessitate acknowledgement of the failures and shortcomings of previous legislative efforts, such as the

327. Discussing—and objecting to—the punishment of maternal ambivalence in these terms may also bring relief to individual women who fear the consequences of expressing ambivalence. While societal condemnation of maternal ambivalence can be harsh, it is also highly relatable to many women who have experienced their own ambivalence about pregnancy, parenting, or motherhood, and may even have been stigmatized for sharing their conflicted feelings.

Family and Medical Leave Act,³²⁸ the Pregnancy Discrimination Act,³²⁹ and even the recently passed Pregnant Workers Fairness Act.³³⁰ Another version of attitude-shifting policymaking, more modest in scope, could target social supports for the perinatal period and immediate postpartum, sometimes referred to as the fourth trimester.³³¹ This might include universal access to prenatal, childbirth, and postpartum doula support regardless of insurance coverage or ability to pay;³³² universal access to high-quality lactation support regardless of insurance coverage or ability to pay;³³³ and Finnish-style newborn starter kits provided to all families regardless of income.³³⁴ Whether more ambitious or modest in scope, the adoption of such policies to ease the burden on parents, particularly mothers, would acknowledge the challenges of motherhood while also targeting factors that drive women's conflicted feelings about motherhood, reflecting both important symbolism and meaningful practical change.

Yet another approach to shifting attitudes about maternal ambivalence through social policy could entail introducing a counseling benefit for all pregnant and postpartum women to provide individualized support for the transition to motherhood or the addition of another child to the family. A universal benefit to such counseling would normalize the idea that many women experience conflicts between pre-pregnancy identity and the social expectations of motherhood, helping women prepare for, recognize, and navigate conflicted feelings about motherhood should they arise. The demand

328. 29 U.S.C. §§ 2601–2654. *See generally* Pamela S. Quinn & Sarah E.S. Stone, *Taking Stock of the Family and Medical Leave Act After Thirty Years: Lessons from Intersectional Feminism*, 47 HARV. J.L. & GENDER 1 (2025).

329. 42 U.S.C. § 2000(e)(k). *See generally* Judith G. Greenberg, *The Pregnancy Discrimination Act: Legitimizing Discrimination Against Pregnant Women in the Workforce*, 50 ME. L. REV. 225, 225–26 (1998).

330. 42 U.S.C. § 2000gg to § 2000gg-6. *See generally* Eli Y. Adashi et al., *The Pregnant Workers Fairness Act—A Bipartisan Step Forward*, 5 JAMA HEALTH F. 1, 1–2 (2024) (noting limitations on accommodations available under the PWFA and the exclusion of certain workers due to employer size or length of employment).

331. *See* Saru M. Matambanadzo, *The Fourth Trimester*, 48 U. MICH. J.L. REFORM 117, 117 (2014) (applying the concept of the fourth trimester, extending three to six months postpartum, to anti-discrimination law).

332. *See* Elizabeth Kukura, *Birthing Alone*, 79 WASH. & LEE L. REV. 1463, 1470–71, 1530–35 (2022) (describing different types of doulas and arguing for expanded access to doula support).

333. *See* Emily R. Seiger et al., *Barriers to Providing Lactation Services and Support to Families in Appalachia: A Mixed-Methods Study with Lactation Professionals and Supporters*, 112 AM. J. PUB. HEALTH S797, S800–01 (2022) (discussing continued barriers to receiving lactation support despite expanded insurance coverage of lactation support services).

334. Helena Lee, *Why Finnish Babies Sleep in Cardboard Boxes*, BBC (June 4, 2013), <https://www.bbc.com/news/magazine-22751415> [<https://perma.cc/Q6NM-587F>].

for counselors or clinical social workers to deliver such support would also help develop a subspecialty in this area, driving research, cultivating demand for expertise, and validating the idea that maternal ambivalence is common and normal.

Under Martha Fineman's vulnerability theory, the legislature would be mandated "to be responsive to vulnerability, which would result in a more nuanced sense of what constitutes equal opportunity" and reconceive the types of policy initiatives discussed above as structural changes necessary for equality.³³⁵ However, given recent conservative electoral victories and ongoing partisan gridlock in Congress, the best prospects for advancing public policy that will positively influence attitudes about maternal ambivalence lie at the state level, where it would take effect on a smaller scale and thus have less symbolic power. Nevertheless, there are still opportunities for legal interventions to shift social understanding of maternal ambivalence, promoting the twin goals of destigmatization and normalization.³³⁶ The remainder of this Section will discuss three potential starting places for legal advocates to advance this goal.

First, repealing vague concealment statutes would eliminate a path to punishing maternal ambivalence for zealous prosecutors emboldened by *Dobbs*. Foreclosing the punishment of perceived ambivalence through concealment crimes would not only make it harder for prosecutors to bring and win weak cases due to broad statutory language, but the symbolism of repeal would help to de-link women's conflicted feelings about motherhood from the idea of culpability more generally. Second, targeting healthcare providers with more robust health data privacy training would increase provider understanding about privacy protections under the Health Insurance Portability and Accountability Act ("HIPAA"), including disclosure exceptions; about the limits of their mandatory reporter obligations; and about the damaging consequences for patients when providers choose to involve law enforcement. Preventing unnecessary and harmful disclosure of patient confidences that include details about reproductive uncertainty or conflicted feelings about motherhood could reduce the stigma associated with maternal ambivalence by keeping it outside the realm of criminal law. Finally, applying evidentiary rules to exclude evidence of maternal

335. Fineman, *supra* note 12, at 20.

336. Beneventano & Manwell, *supra* note 27, at 166 (highlighting the opportunity lawyers working in the family regulation system have to normalize their clients' maternal ambivalence by speaking about the "countless other parents who have expressed similar feelings of ambivalence . . . thus reducing the shame and anxiety that comes with feeling ambivalence" about one's children).

ambivalence from the criminal or family courtroom would advance the goal of normalizing such ambivalence by sending a clear message that women should not be punished for having conflicted feelings about motherhood. Although the initial mechanism for excluding such evidence may require showing how its prejudicial nature outweighs any probative value, thus seeming to reinforce existing stigma, severing the link between ambivalence and punishment would ultimately eliminate an important source of social stigma. None of these approaches is a panacea, but each would contribute to the overall goals of destigmatizing and normalizing maternal ambivalence.

1. Foreclosing Paths to Prosecution Through Statutory Reform

As discussed previously, a number of states make concealing a birth or the death of a fetus a crime.³³⁷ These laws were modeled after English law and served in early American history to prevent and punish infanticide as a means to cover up evidence of premarital sex.³³⁸ While no longer used for this purpose, these laws are broadly drafted and expose women to criminal liability for having a miscarriage or stillbirth.³³⁹ When a pregnant woman attracts law enforcement attention for acting in unexpected or unfamiliar ways, or for doing something that seems to fall short of the good mother norm, the concealment statutes provide prosecutors with mechanisms for punishment. Repealing these laws would be an important step toward normalizing maternal ambivalence within the legal system by foreclosing one avenue for future prosecution. Even if the overall number of women prosecuted under such statutes to date is small, the symbolic message about the undesirability of such prosecutions conveyed by repeal would be powerful.

Statutes that criminalize concealment are particularly damaging vehicles for punishing the perception of ambivalence because their vagueness makes it easy to run afoul of such a law. The statutes vary in exactly what conduct they proscribe,³⁴⁰ and even the word “conceal” is subject to differing

337. *See supra* Section II.A.

338. *See* Chandra, *supra* note 78, at 169–70; CHUSED & WILLIAMS, *supra* note 80, at 290 (noting reference to “bastard children” in the prefatory language of the Massachusetts concealment statute).

339. *See* Chandra, *supra* note 78, at 169–70.

340. *See, e.g.*, WASH. REV. CODE ANN. § 9.02.050 (West 2024) (“Every person who shall endeavor to conceal the birth of a child by any disposition of its dead body, whether the child died before or after its birth, shall be guilty of a gross misdemeanor.”); WIS. STAT. ANN. § 948.23 (West 2014) (providing that a person is guilty of a felony if he or she “[c]onceals the corpse of

interpretations. One might assume, given the history of these statutes, that concealment requires the digging of a clandestine grave or disposal of the corpse concealed among garbage. However, someone who delivers a baby stillborn at home and wraps the fetal remains in a blanket in order to transport them subsequently to the hospital could be considered to have concealed the corpse. In fact, the prosecutor in Anne Bynum's case argued that putting the wrapped fetal remains in her car until she was ready to go to the hospital supported conviction under a statute that prohibits "hid[ing] the corpse of a newborn child," even though her action seems to be a reasonable and responsible choice for someone who wants to safeguard fetal remains.³⁴¹

Furthermore, the concealment prohibitions are typically not accompanied by specific requirements about when or to whom someone must report their pregnancy outcome in order to avoid violating the law. Anne Bynum did not report her stillbirth to the police, but she did share the information with other people in her life, including her priest. In fact, few people are aware of concealment statutes related to pregnancy, birth, and fetal death, making it unlikely they would think it necessary to call the police in the event of a miscarriage or stillbirth. There is no government agency to which individual women report their pregnancy outcomes, though recently introduced federal legislation would create a centralized database for pregnant people across the United States.³⁴² While some women choose to go to the hospital for an examination in the wake of a pregnancy loss, others may not be able to access medical care at a hospital due to geography, lack of transportation, lack of insurance coverage, or fear of discrimination and mistreatment by healthcare providers. Still others may wait to see their OB/GYN or midwife in a clinic

any issue of a woman's body"); COLO. REV. STAT. ANN. § 18-8-109 (West 2024) ("Any person who conceals the death of another person and thereby prevents a determination of the cause or circumstances of death commits a class 1 misdemeanor. For the purpose of this section only, 'another person' includes a fetus born dead."); ARK. CODE ANN. § 5-26-203 (West 2025) ("A person commits the offense of concealing birth if he or she hides the corpse of a newborn child with purpose to conceal the fact of the child's birth or to prevent a determination of whether the child was born alive.").

341. ARK. CODE ANN. § 5-26-203 (West 2025); see *supra* Section II.A.

342. See Nicole Karlis, *Republicans Want a Database of Pregnant People. In Many Ways, Abortion Surveillance Is Already Here*, SALON (May 17, 2024), <https://www.salon.com/2024/05/17/want-a-database-of-pregnant-people-in-many-ways-abortion-surveillance-is-already-here> (discussing a Republican legislator's proposal to create pregnancy.gov database). State vital statistics agencies and the CDC coordinate to collect data on births, as well as abortions, but this information is provided by health care providers, not individual patients. See *Abortion Reporting Requirements*, GUTTMACHER, <https://www.guttmacher.org/state-policy/explore/abortion-reporting-requirements> (last updated Feb. 1, 2025); *National Vital Statistics System (NVSS)—Birth Data*, FED. COMM. ON STAT. METHODOLOGY, <https://nces.ed.gov/fCSM/nvssbd.asp>.

setting, especially after a miscarriage, and may not think—or even be able—to secure the fetal tissue in order to avoid violating the concealment statute.³⁴³

Given that such statutes were conceived at a time when knowledge of the female reproductive system and fetal development was much less developed, the lack of precision in state concealment crimes could potentially ensnare significant numbers of women suffering pregnancy loss. For example, because Colorado’s prohibition on concealing the death of another person defines “another person” to include “a fetus born dead,” it could potentially include not only stillbirths but also early miscarriages.³⁴⁴ Miscarriage is common, affecting ten to twenty percent of people who know they are pregnant.³⁴⁵ Approximately eighty percent of miscarriages occur in the first trimester.³⁴⁶ Many pregnancies end before a person is aware they are pregnant and, even well into the first trimester, a woman whose periods are typically irregular might mistake a miscarriage for a heavy period.³⁴⁷ The vagueness of concealment statutes makes them powerful tools for state actors seeking to signal disfavor of certain women with seemingly legitimate prosecutions, putting pregnant women in states with such laws at greater risk of punitive action.

The concern that states will use the expansiveness of concealment statutes to target behavior they were not originally intended to criminalize is well-founded given the history of pregnancy criminalization in the United States. A study of pregnancy-related arrests and deprivations of liberty from 1973 to 2005 found that in 86% of cases, “pregnant people faced prosecution through the use of existing criminal statutes intended for other purposes.”³⁴⁸ A subsequent study of pregnancy criminalization from 2006 to 2022 identified more than three times as many cases in half the time; like the earlier study, women were prosecuted under statutes that had not been enacted with the intent to prosecute pregnant women, such as chemical endangerment.³⁴⁹ While they remain on the books, concealment statutes pose a threat to women who express ambivalence about pregnancy or parenting and especially to

343. Zawn Villines, *What Does a Miscarriage Look Like?*, MED. NEWS TODAY (June 24, 2024), <https://www.medicalnewstoday.com/articles/what-a-miscarriage-looks-like> (discussing the appearance of fetal tissue passed during a miscarriage and the similarities between early miscarriage and periods).

344. COLO. REV. STAT. ANN. § 18-8-109 (West 2024).

345. *Miscarriage*, MARCH OF DIMES <https://www.marchofdimes.org/find-support/topics/miscarriage-loss-grief/miscarriage> (last visited Feb. 28, 2025).

346. *Id.*

347. *Id.*; Zawn Villines, *Pregnancy Loss or Period? How to Tell*, MED. NEWS TODAY (May 25, 2023), <https://www.medicalnewstoday.com/articles/pregnancy-loss-or-period>.

348. KAVATTUR ET AL., *supra* note 21, at 12 (discussing Paltrow & Flavin, *supra* note 54).

349. *Id.* at 12, 24, 38; *see also* HOWARD, *supra* note 21, at 46.

Black women, who are disproportionately likely to suffer stillbirth.³⁵⁰ They should be repealed, challenged as void on vagueness grounds, or at the very least, amended to set forth clearly limited circumstances involving infanticide in which they would apply.

2. Preventing Provider Referrals to Law Enforcement

Cases involving the punishment of maternal ambivalence implicate a range of privacy concerns, especially the confidentiality of private health information shared with clinicians, as in the case of Christine Taylor, who spoke about her pregnancy uncertainty with a nurse who was treating her.³⁵¹ It is well-documented that healthcare providers play a significant role in conveying information about their pregnant patients to law enforcement and child protective agency officials.³⁵² The primary source of protection for patients' health information is HIPAA and, more specifically, the HIPAA Privacy Rule promulgated by the Department of Health and Human Services as directed by the statute.³⁵³ HIPAA is far from comprehensive as a source of data privacy protection.³⁵⁴ It is, however, a source of misunderstanding and misconception about the scope of health information privacy. On the one hand, many individuals overestimate the extent of protection it provides while, on the other hand, health care providers do not understand how the disclosure exceptions operate and over-interpret the circumstances under which it is appropriate to disclose patients' health information.³⁵⁵

350. *Data and Statistics on Stillbirth*, CTRS. FOR DISEASE CONTROL AND PREVENTION (May 15, 2024), <https://www.cdc.gov/stillbirth/data-research/index.html> (reporting that in 2021, non-Hispanic Black women had stillbirths “two times more often than non-Hispanic Asian or Pacific Islander and White women”). American Indian, Alaska Native, and Native Hawaiian women were also disproportionately likely to experience stillbirth. *Id.* fig. 2.

351. See *supra* Section II.B. For discussion of other informational privacy concerns, particularly in light of increased abortion restrictions since *Dobbs*, see Carmel Shachar & Carleen Zubrzycki, *Informational Privacy After Dobbs*, 75 ALA. L. REV. 1, 8–10 (2023); Wendy A. Bach & Nicolas Terry, *HIPAA v. Dobbs*, 38 BERKELEY TECH. L.J. 609, 622–23, 625 (2023).

352. See GOODWIN, *supra* note 49, at 80; KAVATTUR ET AL., *supra* note 21, at 46.

353. 42 U.S.C. § 1320d to d-9; 45 C.F.R. §§ 160.101–.552, 164.102–.106, 164.500–.535 (2024).

354. See Bach & Terry, *supra* note 351, at 633–40 (discussing HIPAA gestalt and HIPAA reality); Carmel Shachar et al., *HIPAA Is a Misunderstood and Inadequate Tool for Protecting Medical Data*, 29 NATURE MED. 1900, 1900–01 (2023).

355. See, e.g., Philip Bump, *That's Not How Any of This Works*, Marjorie Taylor Greene, WASH. POST (July 21, 2021), <https://www.washingtonpost.com/politics/2021/07/21/thats-not-how-any-this-works-marjorie-taylor-greene> (asking about a representative's personal vaccine history is not a HIPAA violation); Jesse Pines et al., Opinion, *10 Times HIPAA May Not Apply*,

The HIPAA Privacy Rule only applies to “covered entities,” which refers to health plans, health care clearinghouses, and health care providers who electronically transmit health information as defined by the rule; it also covers business associates who transact with a covered entity.³⁵⁶ The Privacy Rule only pertains to “protected health information” (“PHI”).³⁵⁷ Covered entities (and their business associates) may not disclose PHI unless authorized by the patient or unless the Privacy Rule permits or requires disclosure.³⁵⁸ Examples of permissive disclosures for which HIPAA does not require patient authorization include disclosures for treatment, payment, and health care operations;³⁵⁹ to legally designated authorities for public health activities;³⁶⁰ and to family, friends, and patient-designated individuals involved with a patient’s care.³⁶¹ HIPAA does not protect the privacy of patients’ health information beyond the narrow circumstances laid out in the Privacy Rule.

Among the permissive disclosures under HIPAA, the Privacy Rule provides that health care providers may disclose patient information to law enforcement for limited purposes or to report child abuse or neglect.³⁶² When it comes to reporting patients to law enforcement, HIPAA allows for certain disclosures but does not require them, and yet providers regularly report patients to the police and may even do so under an arrangement of inter-professional courtesy and cooperation.³⁶³ As discussed above in Section II.B such reporting interferes with the patient’s trust in all health care professionals, signaling to patients that health care professionals are hostile authorities to be guarded against rather than care providers who owe them a duty.³⁶⁴ Law enforcement reporting by health care providers is “antithetical

MEDPAGE TODAY (Sept. 8, 2015), <https://www.medpagetoday.com/opinion/epmonthly/53455> (noting that HIPAA is often misunderstood and misapplied in healthcare settings, which can limit patients’ access to information and care).

356. 45 C.F.R. §§ 160.102–.103, 164.502(e), 164.504(e) (2024).

357. *Id.* § 160.103.

358. *Id.* §§ 164.502(a), 164.508.

359. *Id.* § 164.506(c).

360. *Id.* § 164.512(b)(1)(i).

361. *Id.* § 164.510(b)(1)(i).

362. *Id.* §§ 164.512(f), 164.512(b)(1)(ii).

363. See LAURA HUSS ET AL., IF/WHEN/HOW, SELF-CARE, CRIMINALIZED: AUGUST 2022 PRELIMINARY FINDINGS 3 (2022), https://ifwhenhow.org/wp-content/uploads/2023/06/22_08_SMA-Criminalization-Research-Preliminary-Release-Findings-Brief_FINAL.pdf (finding in a study on the criminalization of self-managed abortion that 39% of cases were reported to law enforcement by health care providers).

364. See Flavin & Paltrow, *supra* note 123, at 212; Raz, *supra* note 123, at 2.

to care and misaligned with medical ethics and public health principles.”³⁶⁵ Furthermore, health care professionals are typically not trained lawyers and are not equipped to evaluate whether criminal investigation and charges are warranted. When it comes to reproductive health care, the stigma of abortion and biases related to reproductive health care decision-making increase the chances that information disclosed to law enforcement by health care providers will be misused.³⁶⁶

When it comes to health care providers reporting their patients to child protective agencies, similar dynamics drive overzealous reporting. Providers may not adequately understand their duties as mandatory reporters, overestimating both the circumstances in which reporting is required and the risks of not reporting.³⁶⁷ They do not understand the burdens of involvement in the family regulation system—especially for Black women, other racially minoritized women, and low-income women—and place unwarranted trust in CPS caseworkers to sort out the truth if the facts do not support child abuse and neglect.³⁶⁸ They overestimate the system’s ability to protect children and underestimate the harm to women and their families of making a report to CPS when a woman expresses ambivalence about motherhood or otherwise acts in ways that seem unfamiliar to the health care provider.³⁶⁹

As rapid technological changes both enable greater use of technology to improve health outcomes and expose vulnerable health systems and patients to misuse of their data, HIPAA provides inadequate privacy protection. The federal framework for health privacy needs to be updated not only to meet the data privacy challenges of the twenty-first century but also to reflect current knowledge about the dangers of cooperation between medical providers and law enforcement.³⁷⁰ Until that time, health care providers should receive ongoing training about the difference between permissive and

365. Jamila Perritt & Jill E. Adams, *Don’t Report Your Abortion Patients to Law Enforcement*, MEDPAGE TODAY (Nov. 5, 2022), <https://www.medpagetoday.com/opinion/second-opinions/101581>.

366. *Id.* (noting in the context of abortion, that “investigations and arrests typically involve overzealous prosecutors misusing criminal laws that aren’t meant to apply to self-managed abortion”).

367. See Foreman & Bernet, *supra* note 121, at 190.

368. See Trivedi, *supra* note 126, at 534–36.

369. See Raz, *supra* note 123, at 3.

370. See I. Glenn Cohen & Michelle M. Mello, *HIPAA and Protecting Health Information in the 21st Century*, 320 JAMA 231, 231–32 (2018); Swathi Arekapudi, *ER Physicians and Police Collaboration*, 5 AMA J. ETHICS 45, 46 (2003) (reporting that 64% of primary care physicians and 25% of emergency room physicians in California would refuse to comply with a mandatory reporting policy “because of concerns for patient safety, patient confidentiality, patient autonomy, and the integrity of the patient-physician relationship”).

mandatory disclosures of PHI under HIPAA. The training should highlight the impact on patients when a trip to the hospital leads to involvement in the criminal legal or family regulation systems,³⁷¹ especially for marginalized people whose identities make them vulnerable to over-policing.³⁷² When it comes to reporting to CPS, variations in state mandatory reporting disclosure rules may cause moral distress for providers who struggle to understand the rules of different jurisdictions and ensure compliance, leading them to err on the side of caution by over-reporting their patients. Trainings that educate providers on their obligations and on the harms to patients that flow from over-reporting can ease this pressure on providers and better align their risk calculations with medical ethics. In addition, existing trainings that target implicit bias in health care settings should explicitly address the perception of maternal ambivalence, including how bias leads to faulty assumptions about ambivalence, and should draw on social science research to counteract the idea that maternal ambivalence is the sign of a bad mother who should be scrutinized and may deserve punishment.

3. Applying Evidentiary Rules to Exclude Maternal Ambivalence

Finally, a third proposal for legal interventions to advance the normalization of maternal ambivalence suggests tackling an important source of the problem, namely the ability of prosecutors and CPS attorneys to rely on evidence reflecting maternal ambivalence in proving their cases. Specifically, I advocate the application and, where necessary, revision of evidentiary rules to limit the reliance on statements or other evidence reflecting ambivalence on the part of mothers facing conviction or child removal.³⁷³ If judges and juries cannot hear evidence on purported

371. Some organizations are conducting such trainings in the aftermath of the *Dobbs* decision to advance healthcare provider understanding of the legal implications for their patients of law enforcement and child welfare reporting. See *For Health Care Providers*, IF/WHEN/HOW: LAWYERING FOR REPRODUCTIVE JUSTICE, <https://ifwhenhow.org/get-involved/for-health-care-providers> (“Health care providers can help stop criminalization before it starts.”) (last visited Mar. 1, 2025).

372. Better training for health care professionals on the scope of HIPAA could be accompanied by know-your-rights training for women of childbearing age about the limits of confidentiality in health care settings. While it remains important to foster trust in the treatment relationship so that patients disclose all information relevant to their treatment, it is also important to help pregnant patients avoid exposing themselves to unnecessary risk.

373. Prosecutors may object that maternal ambivalence evidence is necessary to establish culpability and thus should not be regulated in this manner, but cases that turn on expressions of maternal ambivalence without other evidence are likely weak prosecutions that should not have

ambivalence, law enforcement is less likely to investigate in instances where perceived ambivalence is what initiates a report or complaint to state officials. Weak cases without evidence of actual wrongdoing will fail or never be brought in the first place. Curtailing the introduction of such evidence in court will also prevent further stigmatization of mothers who express conflicted feelings about pregnancy and parenting.

The courts of each state follow their own rules of evidence, though many draw heavily on the Federal Rules of Evidence (“FRE”) as models for state rules. In particular, the FRE aim to protect parties from unfair prejudice. FRE 403 provides that the “court may exclude relevant evidence if its probative value is substantially outweighed by a danger of . . . unfair prejudice,”³⁷⁴ which means “an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one.”³⁷⁵ Courts must balance “the probative value of and need for the evidence against the harm likely to result from its admission.”³⁷⁶ Where states follow FRE 404 regarding character evidence, the exception in subsection (b) allows evidence of “any other crime, wrong, or act” to “prov[e] motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident.”³⁷⁷ The Notes Advisory Committee on Proposed Rules explains that the “determination must be made whether the danger of undue prejudice outweighs the probative value of the evidence in view of the availability of other means of proof.”³⁷⁸ States could clarify that evidence of reproductive uncertainty, conflicted feelings about pregnancy or parenting, or other perceived maternal ambivalence should be excluded under these rules because the danger of undue prejudice outweighs any probative value such statements could provide. This interpretation is supported by the social science research on maternal ambivalence and the high degree of stigmatization that attaches to such ambivalence. In dependency hearings in family court, where evidentiary standards tend to be more lenient, attorneys representing mothers should vigorously challenge the relevance of evidence about ambivalence, given its highly prejudicial nature and the heavy reliance on hearsay to bring such statements before the court.

been pursued in the first place. If there are cases where maternal ambivalence evidence is deemed necessary by the court, its admission should be as an exception to the default norm that statements expressing ambivalence about motherhood are not proper evidence.

374. FED. R. EVID. 403.

375. FED. R. EVID. 403 advisory committee’s note to 1972 proposed rule.

376. *Id.*

377. FED. R. EVID. 404(b).

378. FED. R. EVID. 404 advisory committee’s note to 1972 proposed rule.

State courts could also consider how their rules governing the qualification of expert witnesses enable or preclude courts from hearing relevant information about maternal ambivalence in cases involving pregnancy loss or other pregnancy-related prosecutions. If evidence about a highly stigmatized topic is accessible to prosecutors, the court should have the appropriate tools—provided by experts in psychology or sociology who can explain the phenomenon of maternal ambivalence accurately—to evaluate what expressions of ambivalence about motherhood do or do not reveal about culpability or fitness to parent.³⁷⁹ Advocates should also consider how they might use jury instructions to educate legal decision-makers about the realities of maternal ambivalence and its legal significance.³⁸⁰

In an article directed at lawyers representing parents in the family regulation system, Lisa Beneventano and Colleen Manwell—a social worker and an attorney, respectively, with experience in family defense work—advised parents’ attorneys not to “let a tone of negative judgment go unchallenged” and to use tone and language “to normalize parental ambivalence and promote the narrative that expression of such ambivalence is not inherently neglectful.”³⁸¹ Normalizing maternal ambivalence undermines the power of good mother/bad mother stereotypes and increases the likelihood that the judge can focus on the central question of whether there is actual harm or imminent risk of harm to the child.³⁸²

Ultimately, the use of evidence about a woman’s feelings of ambivalence regarding pregnancy or parenthood should be regulated, if not entirely restricted, in criminal and child protection contexts. It is clear that unrestricted and unqualified discussion of maternal ambivalence can be misleading, discriminatory, and prejudicial. Given broad prosecutorial discretion, structural incentives for prosecutors to bring cases that attract media attention, and the particular zeal some prosecutors exhibit when it comes to enforcing the good mother stereotype by bringing charges related to adverse pregnancy outcomes, there is potential to reduce harm within the legal system by limiting when and how prosecutors and CPS attorneys can rely on evidence of ambivalence. Regulating the use of evidence in such cases will advance the goal of normalizing maternal ambivalence within the legal

379. Beneventano & Manwell, *supra* note 27, at 162 (noting in passing the opportunity to cross-examine expert witnesses who are psychiatrists or therapists on the scholarship about maternal ambivalence “to help educate the court on ambivalence”).

380. Thanks to Professor Katie Kronick for this suggestion.

381. *Id.* at 160–61.

382. *See, e.g.*, N.Y. FAM. CT. ACT §§ 1012(f)(i), 1022(a)(i)(B)–(C)(v) (McKinney 2025); *Nicholson v. Scoppetta*, 820 N.E.2d 840, 852 (N.Y. 2004) (detailing the requirement of harm or imminent risk of harm that justifies removing a child from their parent).

system, not by attempting to deny or minimize it, but instead by “refram[ing] the statement/behavior in the context of the parent’s situation, so there is no need to hide from it.”³⁸³ Future work will explore in greater detail potential options for using evidentiary rules to correct misunderstandings about maternal ambivalence in courtroom proceedings, helping to normalize such ambivalence and reduce the harm inflicted upon women who experience it.³⁸⁴

V. CONCLUSION

It is possible that encouraging the normalization of maternal ambivalence risks reifying the very idea of a good mother, perversely strengthening the very norms that such efforts seek to dismantle.³⁸⁵ However, given the entrenchment of good-mother stereotypes, the powerful stigma that is currently attached to maternal ambivalence, and the way that stereotypes and stigma combine to drive punitive responses, it seems worse to leave our current approach to maternal ambivalence unchallenged rather than advocate for the embrace of maternal ambivalence as normal and push for greater nuance in public discourse about motherhood.

The view of social scientists that maternal ambivalence is a normal, healthy response to the conditions of modern life—and might even be a productive emotion as the relationships between mothers and children evolve—should lead state authorities and the medical actors who collaborate with them to understand ambivalent feelings with greater nuance and less judgment. Despite the prevalence of maternal ambivalence, it is clear that too many women face punitive state action as a result of their conflicted feelings about pregnancy and parenting.

Not only is the use of state power to punish ambivalence discriminatory and harmful—furthering stigma, separating families, and causing unnecessary trauma—but we are also missing an opportunity to use maternal ambivalence to inform public policy in ways that promote thriving families. In particular, the idea in psychology that maternal ambivalence reflects healthy child development suggests that society should view ambivalence as potentially protective of children’s well-being. If policymakers paid attention to what ambivalent mothers say about the sources of their conflicted feelings, including the lack of social supports for parents in the United States, they would find a roadmap for the types of interventions that would help fragile

383. Beneventano & Manwell, *supra* note 27, at 163–64.

384. See Elizabeth Kukura & Anibal Rosario-Lebrón, *Maternal Ambivalence, Prejudice & the Rules of Evidence* (forthcoming).

385. Thanks to Professor Margaret Johnson for this important observation.

families instead of harming them through separation and parental incarceration. This aligns with contemporary scholarship that “look[s] to reconceptualise maternal ambivalence as a structural framework that can, in fact, present a different, ethical way of being in relation with others and the world we inhabit.”³⁸⁶ This might lead us to “embrace [] ambivalence as the basis for transformation and resilience.”³⁸⁷

As many states adopt enhanced surveillance of reproductive decision-making in the wake of *Dobbs* and increase their reliance on criminal prosecution to enforce traditional gender norms, it is important to resist stereotypes that advance reproduction-as-destiny for women and silence narratives about the burdens of motherhood, starting with the destigmatization and normalization of maternal ambivalence.

386. WILLIAMSON, *supra* note 182, at 8. *See also* ADAMS, *supra* note 191, at 5 (arguing that “ethical ambivalence is morally productive” and that maternal ambivalence in particular “brings human interdependence into relief while also affirming our independent (and often conflicting) interests”).

387. WILLIAMSON, *supra* note 182, at 179. *See also* Sarah Pinson, *Loving and Struggling: How Ambivalence Shapes the Motherhood Experience*, MOTHERHOOD CTR. OF N.Y. (2024), <https://themothhoodcenter.com/blog/2024/11/05/loving-and-struggling-how-ambivalence-shapes-the-motherhood-experience> [<https://perma.cc/DF7W-VYPA>] (“Ambivalence, when acknowledged, can actually serve as an opportunity for growth.”).