Laboring Under the Misconception of Rights: The Need for Legal Education on the Rights Surrounding Childbirth

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Introduction

Midwives are being denied the right to practice their trade; women are being denied access to vaginal birth after cesarean section; economically disadvantaged black women are being prosecuted for becoming pregnant while addicted to drugs; female soldiers are subject to court-martial for becoming pregnant in a war zone; women are being court ordered against their will to undergo cesarean sections; and women are dying at a higher rate during childbirth than in 40 other countries. All of these statements are true of the United States. Women can be denied their constitutionally protected fundamental rights to privacy, bodily autonomy, and the right to refuse medical treatment when they become pregnant and go into labor. Simultaneously, law school casebooks and courses concerning constitutional law, family law, feminist jurisprudence, and gender and the law are largely silent on the topic of birth.

Many of the legal problems that pregnant and birthing women face have developed relatively recently and there is not an overly large body of law available on any of the topics mentioned above.[1] Consequently, the legal community as a whole is largely unaware of the legal landscape that birthing women face. As long as the legal community, from law students to judges, remains largely unaware of the diminishing rights birthing women are afforded, women's right to privacy, bodily autonomy, and the right to refuse medical treatment will continue to be

[1] Beth A. Burkstrand-Reid, *The Invisible Woman: Availability and Culpability in Reproductive Health Jurisprudence*, 81 U. COLO. L. REV. 97, 145 (2010) (noting that "the number of identifiable compelled cesarean section cases is too small to make definitive generalizations). Michael A. Pike, *Restriction of Parental Rights to Home Births Via State Regulation of Traditional Midwifery*, 36 BRANDEIS J. FAM. L. 609, 612 (1998) (commenting on the brevity of "case law on the subject of home births and the use of midwives").

violated. Lawyers equipped with the tools to challenge the oppressive policies and laws surrounding childbirth are needed in the legal community. For these reasons gender discrimination, feminist jurisprudence, family law and constitutional law courses should include discussions of childbirth and birthing rights.[2] While such discussions are absent, the current state of the law will go unchallenged. Silence and inaction will not increase women's birthing choices, better the outcomes of labor, or improve the level of education about the fragility of the choices that remain available.[3] Law students need to be made aware of the current state of obstetrics, and the way the law is negatively impacting the situation so that when they become lawyers they will be equipped with the knowledge necessary to make positive changes in the laws concerning pregnant and birthing women.

Parts I and II contain the foundational information that should be presented in a birthing segment of a legal course. In order to alert students to the legal rights involved in birthing, part I addresses the manner in which courts are infringing upon women's citizenship and bodies. Subsection A outlines the right to privacy, bodily integrity, and the right to refuse medical treatment; with an exploration of how the courts have applied these right to birthing. To aid the students understanding of how violating such rights can lead to devaluation of pregnant and birthing women, subsection B gives three concrete examples of how women are punished for their natural ability to bear children. As many law students are not familiar with the business of birthing, part II defines multiple birthing methods and current accessibility to them. Subsection

[2] There should also be continuing legal education courses offered on how to protect the fundamental rights of birthing women.

[3] Angela D. Gilmore, *It Is Better to Speak, in* CRITICAL RACE FEMINISM; A READER 114, 116 (Adrien Katherine Wing ed., 2003)(discussing the uselessness of silence, "I do not achieve anything as a result of my silence. Silence does not cause the fear to disappear. Silence does not make me feel more secure. Silence does not dispel ignorance").

A discusses authoritative knowledge, and how mainstream American culture views birth. The birthing methods, as well as the legal constraints on them, that are addressed in subsections B- C include conventional births, homebirths and the use of midwives, cesarean sections, and vaginal birth after cesarean section (VBAC). Part II concludes with a discussion of key cases that explore some of the restriction on birthing women's rights. Such cases are indispensible to a course, or segment of a course that deals with the legal rights of birthing women.

After examination of the current state of affairs in American obstetrics it becomes clear that change is required. The required change can be facilitated by incorporating the issue of birthing rights into legal education. Part III addresses the details of how to implement the curriculum change. Subsection A examines the current treatment of birthing rights, and concludes that it is essential for the protection of the health, safety, and fundamental rights of women that reproductive and fundamental rights courses address birth and all that it entails. Subsection B urges the expanded curriculum to be taught via a feminist pedagogy, with the benefits and impediments to using such a pedagogy explored in subsection C. Subsection D advocates for the new curriculum to be taught under the umbrella of a feminist legal theory. The legal courses that address gender, feminism, family, or constitutional law need to include a discussion of where, when, and with whom birth happens and how the law is negatively affecting those choices.

I. Infringing Upon Women's Citizenship and Bodies

A. Limiting Fundamental Rights

> *"No right is held more sacred, or is more carefully guarded by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law."*

~ Justice Gray in 1891[4]

Women, along with all citizens of the United States, take for granted that they have certain inalienable rights. In constitutional law courses, students are taught that fundamental rights are constitutionally protected, that they are universal to all Americans, and are inalienable. Students come to expect these rights to set the parameters by which we live. A first year law student may well expect a pregnant or birthing woman to enjoy such rights as the right to privacy, the right to bodily autonomy, and the right to refuse medical treatment. Law students need to be aware that this is an inaccurate expectation in many circumstances. Many women are denied these rights when they go into labor. The state's interest in "protecting the potentiality of human life"[5] embodied in the fetus at the point of viability has, in many courts, worked to usurp women of several fundamental rights in situations separate from abortion.[6]

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[4] Union Pac. Ry. Co. v. Botsford, 141 U.S. 250, 251 (1891) (It seems that the male pronoun in this quote should be taken literally, to the exclusion of females).

[5] Roe v. Wade, 410 U.S. 113,162 (1973) (enumerating the states important and legitimate interests in preserving and protecting both the health of the pregnant woman, and the potentiality of human life embodied in the fetus. Unfortunately many courts when balancing the rights of the fetus against the right of the mother, focus only on the second state interest enumerated in Roe v. Wade; protecting the potentiality of life embodied in the fetus).

[6] See, e.g., Pemberton v. Tallahassee Mem'l Reg'l Med Ctr., Inc., 66 F. Supp. 2d 1247, 1251 (N.D. Fla. 1999) (summarily dismissing the mother's constitutional rights "to bodily integrity, a right to refuse unwanted medical treatment, a right to make important personal and family decisions . . . without undue governmental interference" in favor of the "interests of the State of Florida in preserving the life of the unborn child" in affirming a court ordered cesarean section); Bowland v. Municipal Court, 556 P.2d 1081, 1089 (Cal. 1976) (reasoning that the state's "interest in the life and well-being of an unborn child" can usurp the woman's own constitutional right to privacy in choosing "the manner and circumstances in which her baby is born").

Protected under the umbrella of privacy that was established in Griswold v. Connecticut[7] we count the right to marriage, abortion, procreation, and child-rearing.[8] Having the right to marry, the right to reproduce, the right to end a pregnancy, and the right to raise one's child as desired, child bearing women may assume that they will enjoy this right to privacy during birth. The right to privacy during birth would include the right to make decisions, such as what type of health care provider to use, without governmental intrusion. The Supreme Court case, Roe v. Wade[9] has been interpreted by some states to strip the right to privacy from birthing women after the point of viability.[10] The California Supreme Court, for example has used Roe v. Wade to conclude, in Bowland v. Municipal Court[11], that "the right of privacy has never been interpreted so broadly as to protect a woman's choice of the manner and circumstances in which her baby is born."[12] Other state courts have cited Bowland v. Municipal Court as persuasive authority for curtailing women's birthing rights in the same fashion.[13] This reasoning creates an odd result: a

[7] Griswold v. State of Connecticut, 381 U.S. 479 (1965) (Holding that a Connecticut law forbidding use of contraceptives unconstitutionally intruded on the right of marital privacy).

[8] Pike, *supra* note 1, at 613.

[9] See Roe v. Wade, 410 U.S. 113 (1973).

[10] Pike, *supra* note 1, at 611-625 (Citing Bowland v. Municipal Court, 556 P. 2d 1081 (Cal. 1976), and the persuasive effect it has had on several other jurisdictions in limiting a woman's choice over the manner and circumstances in which she gives birth. See note 12, infra, for more detail).

[11] See generally 556 P.2d 1081 (Cal. 1976).

[12] Pike, s*upra* note 1, at 613. (citing Bowland v. Municipal Court, 566 P.2d 1081, 1089 (Cal. 1976)).

[13] Leigh v. Bd. of Registration in Nursing, 506 N.E.2d 91 (Mass. 1987) (finding by the Supreme Judicial Court of Massachusetts that a woman's freedom to chose was not unconstitutionally impeded by a midwifery statute requiring them to practice in a licensed facility as part of a health care team); People v. Rosburg, 805 P.2d 432

woman can choose to employ a medical professional to end her birth, but she cannot employ a medical professional to attend her birth in the manner of her choosing.[14]

When courts curtail a woman's right to privacy in making decisions about her child's birth they substitute the court's judgment for the mother's. In narrowing the mother's right of privacy, courts reason that "a woman's freedom to choose must yield to the state's legitimate interest in protecting the health and safety of both the child and mother."[15] The assumption is seemingly made that the mother is not to be trusted with her own health and safety, or that of her child. In taking away the woman's right to privacy, courts will, for example, court order a woman to have a cesarean section rather than a vaginal birth. In other examples, statutes forbid the practice of direct entry midwives, essentially foreclosing on the option of homebirths for many women. Ironically the choices that courts make to protect women and babies are not proven to be safer for either of them. Statistics show that home births with lay midwives are as safe, if not safer than hospital births for the woman and the baby.[16] Further, cesarean sections are four times more likely to result in maternal death than vaginal delivery, and are far less likely to

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(Colo. 1991) (Colorado Supreme Court held that Colorado's statutory provision against practicing midwifery without a license was valid because the right to privacy has not been interpreted so broadly as to allow women the choice of how they give birth); State v. Kimpel 665 So. 2d 990 (Ala. Crim. App. 1995) (Court of Criminal Appeals of Alabama finding that midwifery statute did not interfere with parent or midwife privacy right in seeking to use a midwife, even though the state had not issued a midwife license in years).

[14] Pike, s*upra* note 1, at 614.

[15] *Id*. at 616. (citing Leigh v. Board of Registration in Nursing, 506 N.E.2d 91, 94 (Mass. 1987).)

[16] *Id*. at 622.

be performed in a planned home birth.[17] Finally, VBACs, as an alternative form of birth, are promoted in homebirths, which are also safer for the mother and baby than repeat cesarean sections in most situations.[18] There is a dissonance between what courts force women to do when birthing to protect the fetus, and what research is showing to be the safest option for the baby and mother. The violation of the right to privacy, and the resulting dissonance should be studied by present and future attorneys. There is too much at stake for the mother and baby to leave the current state of the law unexamined. Incorporating this topic into law classes would not be difficult. In constitutional law courses the right to privacy is discussed. The fact that a category of citizens are denied such a fundamental right as the right to privacy is important information that should not be left out of the curriculum. Family law courses also contain a discussion of the right to privacy, and children are the center of many topics in these courses. The legal factors that contribute to the decision of how a child is born, and the choices that a mother makes to facilitate the event have a legitimate and necessary place in family law. This issue also should be incorporated into feminism, and gender courses as it addresses an area in which the law affects the lives of women.

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[17] Michael J. Myers, *ACOG's Vaginal Birth After Caesarean Standard: A Market Restraint Without Remedy?*, 49 S.D. L. REV. 526, 527 (2004) (quoting ACOG Committee on Ethics' July 2003 press release: caesarean sections "significantly increase a woman's risk of experiencing a pregnancy-related death (35.9 deaths per 100,000 deliveries with a live-birth outcome) compared to a woman who delivered vaginally (9.2 deaths per 100,000)").

[18] CARL JONES, HEALTHY OPTIONS FOR YOU AND YOUR BABY: ALTERNATIVE BIRTH: THE COMPLETE GUIDE 19, 27-28 (Jeremy P. Tarcher, Inc. 1991) (Decrying the high rate of cesarean section in the United States as an unnatural birth method often accompanied by post-partum depression. Alternative birth options are discussed as dramatically reducing the chance of a cesarean section, and are much safer and more satisfying for the entire family).

Like the right to privacy, the right to bodily integrity is deeply rooted in our culture, is inferred from the bill of rights, and is recognized by the Supreme Court "as a fundamental right requiring heightened constitutional protection."[19] The right to be let alone, to be secure in our own person, and to determine what shall be done to our body, is central to our concept of liberty.[20] To illustrate how dear we hold this right the following examples are illuminative;

> "Robbery suspects cannot be forced to undergo surgery in order to remove critical evidence, such as a bullet, from their bodies. Persons suspected of drug dealing cannot be forced to undergo involuntary blood tests for [HIV]. *Parents cannot be forced to donate organs to their children, even if the child's life is at stake and the parent is the only appropriate donor.* One may not be forced to donate bone marrow to a cousin who is dying of bone cancer. Organs cannot even be taken from a cadaver without the prior consent of the dying."[21]

The right to bodily integrity in some jurisdictions can be taken away from a pregnant or laboring woman. One example of this can be found in cases where the court orders a cesarean section to be performed on a mother who has decided to give birth vaginally.[22] In such cases, the court's purpose in violating the mother's right to determine what is done to her own body is the protection of her unborn baby.[23] In Pemberton v.

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[19] Mary Koll, *Growth, Interrupted: Nontherapeutic Growth Attenuation, Parental Medical Decision Making, and the Profoundly Developmentally Disabled Child's Right to Bodily Integrity*, 2010 U. ILL. L. REV. 225, 237 (2010) (summarizing the long history of the right to bodily integrity, and the modern constitutional status of the right); Rochin v. California, 342 U.S. 165 (1952) (the Court determined that the Due Process Clause included the right to bodily integrity).

[20] JEANNE FLAVIN, OUR BODIES, OUR CRIMES: THE POLICING OF WOMEN'S REPRODUCTION IN AMERICA 39 (New York University Press 2009).

[21] *Id.* at 39-40 (emphasis added).

[22] Pemberton v. Tallahassee Mem'l Reg'l Med Ctr., Inc., 66 F. Supp. 2d 1247 (N.D. Fla. 1999).

[23] *Id.*

Tallahassee, the court believed, based on doctor's counsel, that her baby would die unless it ordered a cesarean section to be performed.[24] It is puzzling that the right to bodily integrity does not protect a woman from such a major surgical procedure she does not want while she is in the process of giving birth[25] (in the name of saving the unborn child), when a father cannot be forced to undergo a surgical procedure to donate his organs in the name of saving the child's life once it is born.[26] Like the violation of the right to privacy, the violation of the right to bodily integrity produces an inconsistency that should be studied in legal courses. The topic of birthing in relation to the right to bodily autonomy should be taught in constitutional law, family law, feminist jurisprudence courses, and in gender and the law courses. The fact that women are being denied the fundamental right to bodily integrity is significant. Students and lawyers need to be taught about the full extent to which women are being denied their fundamental rights before they can act to protect those rights.

The right to refuse medical treatment, like the right to privacy and the right to bodily integrity, is a fundamental right in America.[27] However, birthing women find that the right is often "infringed upon by paternalistic physicians who . . . misunderstand or ignore the patient's liberty interest in freedom from coerced medical interventions."[28] The

[24] *Id.* at 1249.

[25] *Id.*

[26] FLAVIN, *supra* note 20, at 39.

[27] George J. Annas & Joan E. Densberger, *Competence to refuse medical treatment: Autonomy vs. Paternalism*, 15 U. TOL. L. REV. 561, 561 (1984).

[28] *Id*. at 561(alteration added).

right to refuse medical treatment or be free from bodily invasion is not an absolute right. The right can be outweighed by the state's interest in such things as the preservation of life, the ethical integrity of the medical profession, the protection of innocent third parties, safety and welfare, and public health.[29] Courts, when overriding a pregnant woman's health care decisions will cite the health and preservation of the fetus as the state interest that overrides the woman's right to bodily autonomy.[30] In doing so courts again rely on Roe v. Wade, but they only focus on one of three important decisions made in the case:[31] that the state has an "important and legitimate interest in protecting the potentiality of human life."[32] Little mention is made, however of the beginning of the sentence, which states; "We repeat, however, that the State does have an important and legitimate interest in preserving and protecting the health of the pregnant woman"[33] Nor is much made by courts, in the midst of overriding women's right to refuse treatment, of the fact that Roe v. Wade decided that the state's interest in a viable fetus can be

[29] April L. Cherry, *The Free Exercise Rights of Pregnant Women Who Refuse Medical Treatment*, 69 TENN. L. REV. 563, 592 (2002); Koll, *supra* note 19, at 239.

[30] See e.g., Pemberton v. Tallahassee Mem'l Reg'l Med Ctr., Inc., 66 F. Supp. 2d 1247, 1249-1251 (N.D. Fla. 1999) (Ms. Pemberton was forced, by court order, to have a caesarean section and brought a claim stating that her substantive constitutional rights and her right to procedural due process had been violated. Summary judgment was granted in favor of the hospital. The court stated "Whatever the scope of Ms. Pemberton's personal constitutional rights in this situation, they clearly did not outweigh the interests of the State of Florida in preserving the life of the unborn child").

[31] Cherry, *supra* note 29, at 594 (Citing to Roe v. Wade, 410 U.S. 113 (1973)).

[32] Roe v. Wade, 410 U.S. 113, 162 (1973).

[33] *Id*.

overridden by the mother's need to abort in order to preserve her own life or health.[34] Considering that cesarean sections are almost four times more likely to result in maternal deaths than vaginal deliveries,[35] the detriment of courts failing to consider all the tenants of Roe v. Wade, undermining the pregnant women's right to bodily autonomy and right to refuse treatment, is far from insignificant.

The topic of birthing, when integrated into a legal course would need to address these three significant fundamental rights discussed above. Outlining these basis rights and how they are violated in various ways by the medical and legal structures is fundamental to an understanding of the current state of obstetrics from a legal perspective. Not only do these violations deprive some women of the right to decide how they will birth, but they create a legal climate where the pregnant woman is devalued. Legally, the fetus is separated from its mother, the woman, and given the exclusive value. The woman is left with little legal importance or protection, and thus her rights are violated. From learning about the basic violation of rights, students can move to an understanding of how this climate is permissive of laws that punish the woman for her ability to carry the valued fetus in circumstances that the court views as less than optimal.

B. Punishing women's natural ability to reproduce

"The problem isn't that we do not value unborn children. The problem is that we do not value the lives of women who give them that life."
~ Lynn Paltrow,
Executive director and founder, National Advocates for Pregnant Women, 2007[36]

[34] *Id*. at 163 – 164.

[35] Myers, *supra* note 16, at 527.

[36] FLAVIN, *supra* note 20, at 95.

Women have the unique ability to carry a child inside their bodies and nurture it from a cellular level to a viable human being. For this reason it is difficult to entertain the notion of women without simultaneously considering the ability to bear children, or vice versa.[37] Because these two concepts are so closely linked, respect for a woman's reproductive capability "is also inextricably connected to respect for a woman's rights as a human being" independent of whether she does in fact, or is able to, reproduce.[38] It appears that the lack of respect for the fundamental rights of women as human beings[39] carries over into a lack of respect for the complexities of a women's reproductive capability. Stereotypes dictate that women will carry out pregnancy and motherhood in a very particular manner, with focus often resting on the fetus rather than on the person sustaining that fetus. Women can face loss of liberty for not mothering in the rigid manner society envisions. The natural ability of a woman to become pregnant or conversely, to have a miscarriage has been the focus of criminal prosecution in several arenas recently. A course focused on feminist jurisprudence, or gender and the law is amiss not to include the following issues in its curriculum.

Students should be aware that intersecting identities of race and socioeconomics have an effect on the way pregnant women are treated by the law. It is expected that women in our culture will act out their gender by getting married in their early twenties, and then having

[37] *Id*. at 3. (discussing that we are not born with gender, but that we learn how to behave as a man or a woman. Unlike for men, "for women the culturally and socially dominant standards of femininity against which they are measured are strongly tied to sexuality").

[38] *Id.*

[39] See generally Part I.A. *supra*.

babies.[40] Once a mother, one is more freely presumed to be a "good mother" if able to "conform to the white middle class standard of motherhood."[41] It has been suggested that the criminal justice system in our country punishes people for not only breaking the laws of the land, but also for not acting out socially constructed gender norms properly.[42] A profound example of this is "a woman who was sentenced to 10 years for becoming pregnant while using cocaine even though she gave birth to a healthy son."[43] Society has decided that women are to be self-sacrificing fetal containers, [44] and can pay a high price for deviation from this norm.

In 1989 that high price began manifesting in the form of jail time; women started being criminally prosecuted for being simultaneously pregnant and addicted to drugs, if the resulting newborn tested positive for drugs.[45] The fear of being detected as a pregnant drug addict, and consequently being prosecuted served to deter women from receiving help for their addiction, or seeking prenatal care, both of which would improve the health of the unborn child.[46] Such a

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[40] FLAVIN, *supra* note 20, at 3.

[41] Dorothy E. Roberts, *Punishing Drug Addicts Who Have Babies: Women of Color, Equality, and the Right of Privacy, in* CRITICAL RACE FEMINISM: A READER 167, 167 (Adrien Katherine Wing ed., 2003).

[42] FLAVIN, *supra* note 20, at 4.

[43] *Id.* at 2.

[44] Lucinda J. Peach, *From Spiritual Descriptions To Legal Prescriptions: Religious Imagery of Woman as "Fetal Container" in the Law*, 10 J.L. & RELIGION 73, 73 (1994). (Describing how religious images of women as fetal containers whose primary function is that of reproduction and childcare has persisted in the law. These characterizations the author argues have hindered the ability of women to secure equal rights and equitable treatment under the law.)

[45] Roberts, *supra* note 41, at 167.

[46] *Id.* at 168.

response does not serve the state's "important and legitimate interest in protecting the potentiality of life."[47] Prosecutions of this sort mostly involve the use of crack cocaine.[48] Because of the focus on crack cocaine rather than on other factors such as excessive alcohol consumption or marijuana use (both harmful to fetuses), it is suspected by some critics that the prosecutions are a way of targeting poor black women, thereby continuing the "legacy of racial discrimination that has devalued Black motherhood."[49]

Students must learn how to recognize unconstitutional practices as they pertain to pregnant women. History can demonstrate how to overcome such practices, and provide encouragement. In the case of prosecuting drug addicted mothers, critics argued that this treatment violated both the right to privacy and the equal protection clause of the Fourteenth Amendment.[50] By the mid-1990's protests by a variety of organizations had shifted attention in many states to a public health approach rather than a prosecutorial one.[51] In 2000 the United States Supreme Court[52] invalidated a program at the Medical University of South Carolina that was surreptitiously testing black pregnant and laboring women for drug use and then reporting them to the local

[47] Roe v. Wade, 410 U.S. 113, 162 (1973) (This is the standard used by courts to outweigh women's right to privacy, bodily autonomy, and the right to refuse treatment).

[48] Roberts, *supra* note 41, at 167.

[49] *Id.* at 169 – 170; Dorothy E. Roberts, *Representing Race: Unshackling Black Motherhood, in* FEMINIST LEGAL THEORY: AN ANTI-ESSENTIALIST READER 271, 271 (Nancy E. Dowd & Michelle S. Jacobs eds., 2003) (As of 1992, 75 percent of the prosecutions for being addicted to drugs while pregnant were brought against women of color).

[50] Roberts, *supra* note 41, at 170.

[51] *Id.* at 174 (noting that protest was "led by a coalition of women's groups, civil libertarians, and medical and public health organizations").

[52] Crystal M. Ferguson, et al. v. City of Charleston, et al., 532 U.S. 67 (2001).

police department. Upon being called, police officers would come and escort the women out of the maternity ward in handcuffs and leg shackles with a thick leather belt around their waste.[53] Of those escorted out of the hospital "[s]ome women were still bleeding from delivery."[54] It is interesting to note that the Supreme Court did not rely on the fundamental rights of women to privacy or bodily autonomy in deciding the case. The Court instead turned to the protections of the Fourth Amendment against unlawful searches.[55]

Civilians are not alone in facing punishment for becoming pregnant. Military women are also threatened with loss of liberty and other serious punishment for becoming pregnant while in a war zone. Yet, unlike civilians who are protected from unlawful searches, military personnel are required to submit to urine tests. At the end of 2009, on November 4, Major General Anthony Cucolo, commander of Multi-National Division-North in Iraq, added a pregnancy provision to general order number one that threatens court-martial, jail time, and dishonorable discharge for female soldiers who become pregnant, and the male soldiers who impregnated them, while deployed in the war zone under his command.[56] This punishment provides no exceptions for sexually assaulted soldiers who become pregnant, or for married soldiers who are deployed together.[57] There was a large outcry from women's advocacy groups calling the policy

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[53] Dorothy E. Roberts, *Representing Race: Unshackling Black Motherhood, in* FEMINIST LEGAL THEORY: AN ANTI-ESSENTIALIST READER 271, 272 (Nancy E. Dowd & Michelle S. Jacobs eds., 2003).

[54] *Id.*

[55] Roberts, *supra* note 53, at; Crystal M. Ferguson, et al. v. City of Charleston, et al., 532 U.S. 67, 68-69 (2001).

[56] Michael Gisick, Leo Shane III, & Teri Weaver, *Senators lead calls for revoking pregnancy policy*, STARS AND STRIPES MIDEAST EDITION, Dec. 23, 2009, available at http://www.stripes.com/article.asp?section=104&article=66832.

[57] *Id.*

"ridiculous"[58], and four senators requested that Cucolo rescind the amendment to general order number one, claiming that it "defies comprehension."[59]After meeting with Army Chief of Staff George Casey, Cucolo backed down, saying that he never intended to court-martial soldiers for becoming pregnant.[60] While the order may appear to affect male and female soldiers equally it will have a disparate impact on females. For a pregnant female soldier there is no way to deny pregnancy once it has been detected. Male soldiers however, will be able to avoid detection as the impregnating male in many ways. This disparity has already been realized; in the first eight weeks that the policy had been in force, four women and only three men had received letters of reprimand, none of them however were court-martialed.[61]

The topic of punishing women's reproductive capabilities is a very current issue that law students and attorneys should be aware of. Law students must be taught in their courses how to overcome punitive policies, statutes, and laws concerning pregnancy. The trend for punishing women's natural reproductive abilities, regardless of race or military status, continued into 2010 via the Utah legislature. Women in Utah avoided a limitation of their reproductive freedom by a slim margin in March of 2010. Rather than being punished for becoming pregnant however, the legislature sought to punish women for losing or ending their pregnancy. The state of Utah, in

[58] Sarah Netter & Luis Martinez, *Senators Demand General Rescind Order on Pregnant Soldiers*, ABC NEWS, Dec. 22, 2009, available at http://abcnews.go.com/WN/general-backs-off-threat-court-martial-pregnant-soldiers/story?id=9399604.

[59] Gisick, *supra* note 56 (citing that Democratic senators Barbara Boxer, Barbara Mikulski, Jeanne Shaheen, and Kirsten Gillibrand asked that the policy be rescinded).

[60] Joe Gould, *Commander Softens punishment for pregnancy*, ARMY TIMES, Jan. 3, 2010, available at http://www.armytimes.com/news/2010/01/army_cucolo_010310w/.

[61] Netter, *supra* note 58.

their 2010 general session recently received and considered a proposed bill for abortion amendments that would remove prohibitions against prosecuting a woman for killing her own unborn child or for committing criminal homicide of an unborn child.[62] When the bill was first introduced it also contained language that could "have opened a loophole that could allow women to be charged with murder if their reckless behavior causes miscarriages."[63] The language that could have allowed up to life in prison for a woman who miscarried was removed by its sponsor shortly after the bill was submitted and publicly criticized.[64] Language that did survive public scrutiny proposed that the Criminal homicide, and Aggravated murder provisions, along with the definition of "Abortion" and "Hospital" be changed.[65] The proposed bill narrowed the definition of abortion from including any act undertaken to miscarry or kill a live unborn child, to only medical procedures carried out by a physician to do the same.[66] The section goes on to further reiterate that abortion does not include the killing of an unborn child by a person other than a physician.[67] Title 76, Chapter 7 mandated that the killing of an unborn child that did not classify as an abortion would be punished as criminal Homicide.[68]

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[62] H.B. 12, 2010 Gen. Assem. (Utah 2010).

[63] Sarah Netter, *Utah Abortion Bill: Punishing Miscarriages or Preventing Crime?,* ABC NEWS, Mar. 1, 2010, available at http://abcnews.go.com/Health/utah-abortion-bill-punishing-miscarriages-preventing-crime/story?id=9955517.

[64] Kirk Johnson, *Utah Anti-Abortion Bill Citing 'Reckless Act' Is Withdrawn*, N.Y. TIMES, Mar. 4, 2010 at A 15.

[65] *Id.* (It is also interesting to note that Utah has decided it is time to replace the male pronouns in the statute with gender neutral pronouns, such as "a person").

[66] H.B. 12, 2010 Gen. Assem. (Utah 2010).

[67] *Id.*

[68] *Id.*

The bill, removing the once provided protection of a woman from criminal liability and prosecution for seeking an abortion,[69] was passed 59-12 in the House, and 22 to 4 in the Senate.[70] The bill was vetoed by the Governor on March 8, 2010[71] with a spokesperson reported as saying the governor was "'aware that concerns exist about possible unintended consequences of the legislation.'"[72] The support of this bill by a vast majority of the Utah legislature should give cause for concern to those interested in protecting women's reproductive rights.

Women's reproductive capabilities are under regular and significant attack. Being legally punished for becoming pregnant while suffering from the illness of addiction, serving the country in a combat zone, or "recklessly" miscarrying are shocking examples of the disrespectful treatment of women and their ability to reproduce. While some of the most recent attempts, discussed above, to punish women's reproductive capabilities have proven unsuccessful, the fact that they are so often attempted deserves attention. The curriculum of feminist jurisprudence courses, and gender and the law courses should include a section not only detailing the numerous manners in which women's reproductive capabilities implicate their right to liberty, but how to overcome such policies and laws. Just as the law is used to deny women's fundamental rights, and limit circumstances in which women carry their children, part II addresses the laws function in limiting how, when, and where women give birth.

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[69] *Id.*

[70] Kirk Johnson, *Utah Bill Would Criminalize Illegal Abortions*, N.Y. TIMES, Feb. 28, 2010 at A16.

[71] H.B. 12, 2010 Gen. Assem. (Utah 2010). Available at http://le.utah.gov/~2010/htmdoc/hbillhtm/HB0012.htm (last visited March 27, 2010).

[72] Sarah Netter, *Utah Abortion Bill: Punishing Miscarriages or Preventing Crime?*, ABC NEWS, Mar. 1, 2010, available at, http://abcnews.go.com/Health/utah-abortion-bill-punishing-miscarriages-preventing-crime/story?id=9955517.

II. Limiting access to birthing methods

"It is my inalienable right to determine where, with whom, and how I shall bear my children so long as I do it within the realm of safety. Freedom of choice with all its implications cannot help but bring a new level of quality to family –centered care."

~ Elizabeth Hosford, CNM [73]

A. Conventional Birth versus Alternative Birth

Given their demographic as largely young, single, professional students, law students are unlikely to be familiar with the generalities or specifics of giving birth. For this reason background on both conventional and alternative forms of birthing should be provided in a birthing portion of a law course. This background is necessary in order for the students to firmly grasp why the laws banning certain methods of birth are problematic. Many textbooks in law school contain articles concerned with sociological aspects of the laws discussed.[74] The textbooks used in courses such as feminist jurisprudence should be amended to include a "Birthing Rights" section. In these sections articles should be included that educate the reader about the different forms of birth, the different types of attendants, and the physiological, physiological, and safety ramifications of each.

The common method of giving birth in the United States is on a hospital bed, with a doctor attending. Conventional birth is characterized by "regular invasive monitoring, blood work, and withholding of food and most fluids during labor, [with] . . . labor induced or contractions augmented should delivery not take place sufficiently promptly."[75] The medical theory driving

[73] Jones, *supra* note 17, at 25.

[74] See, e.g., RONALD JAY ALLEN ET AL., COMPREHENSIVE CRIMINAL PROCEDURE 1196 (2nd ed. 2005) (presenting an article by Milton Heumann titled Plea Bargaining: The Experiences of Prosecutros, Judges, and Defense Attorneys).

[75] Laura D. Hermer, *Midwifery: Strategies on the Road to Universal Legalization*, 13 HEALTH MATRIX 325, 326 (2003).

this practice, held by many hospitals and delivery doctors, is that "birth is a series of risks that medical doctors must systematize, control, and fit into an established time frame."[76] Although many women find this practice comforting and are satisfied with their care, an increasing number desire an alternate method of birth.

In the United States alternative methods of childbirth include, but are not limited to, being attended by a midwife[77] in any setting (or a midwife-doctor team), having a homebirth, having a waterbirth, giving birth in a childbearing center, or in a homelike setting in a hospital that practices non-interventive maternity care.[78] For the majority of women who give birth, pregnancy and labor are about wellness, not illness,[79] and thus they are not in need of many services offered by labor and delivery wards. In fact, for a healthy mother, a well planned alternative birth is safer for both mother and child, with few exceptions.[80] Women who have had an uncomplicated pregnancy, and do not have any risk factors for birth may desire an alternative birth method for several reasons. Among these reasons are the desires for a more humanized birthing event,[81] more control over their body during birth,[82] preventing unnecessary medical

[76] Pike, *supra* note 1, at 609.

[77] The term midwife is ambiguous as there are direct entry midwives and certified nurse-midwives. The distinction between the two is discussed in detail infra in Part II.c.

[78] CARL JONES, HEALTHY OPTIONS FOR YOU AND YOUR BABY; ALTERNATIVE BIRTH, THE COMPLETE GUIDE 2 (Jeremy P. Tarcher, Inc. 1991).

[79] *Id.* at ix.

[80] *Id.* at 28.

[81] *Id.* at 4-5 (discussing tendencies of hospitals to dehumanize birth, treat the mother like an ill patient; overusing medications and procedures that are harmful to the mother, baby, and family).

interventions,[83] and having the privacy to bond with their baby and establish a family bond immediately after birth.[84] Alternative birthing situations also create the mindset of birth as a healthy, normal event which the woman's body intuitively knows how to perform, putting the mother, not the doctor, at the center of attention.[85] This is desirable to many women as they are, after all, the one giving birth. These benefits are denied to many women, however via laws and statutes limiting access to providers and birthing methods.

B. Restricting Access to Midwives and Homebirths

"I feel very happy I was able to do it – complete it – and not be separated from my loved ones. I'm convinced that if I'd been in a hospital – they would never have let me push for five hours and would have sectioned me."
~ Myla (Massachussetts. . .Homebirth)[86]

"She was a home baby. She was born in our midst, in a loving way, in a very caring way, with people that we love."
~ Joanna[87]

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[82] *Id.* at 8 (citing some benefits of alternative birth: "freedom of mobility throughout labor. . . [and] to labor and give birth in the position of the mother's choice. . . freedom to eat and drink to satisfy the body's needs").

[83] *Id.* at 12 – 21 (discussing that women who chose alternative birth over a traditional birthing method use significantly less pain-relief medication, and avoid such interventions as shaving of the perineal area, receiving an enema, intravenous feeding, electronic fetal monitoring, artificial rupture of membranes, use of drugs to augment labor, and receiving an episiotomy. Women who chose alternative birth also have a dramatically reduced chance of a caesarean section).

[84] *Id.* at 21 – 25 (Those who choose alternative birth over traditional hospital birth are more able to breast feed whenever the baby needs to without being interrupted, remain with all members of their families at all times, and are less likely to experience the "baby blues").

[85] *Id.* at 38-39.

[86] NANCY WAINER COHEN & LOIS J. ESTNER, SILENT KNIFE: CAESAREAN PREVENTION AND VAGINAL BIRTH AFTER CAESAREAN (VBAC) 361 (Bergin & Garvey Publishers, Inc. 1983).

Just as law students are likely to be unfamiliar with the generalities of giving birth, they are equally unlikely to be familiar with the types of providers that can attend a birth. While some students may have a superficial understanding that doctors and midwives deliver babies, there are far more intricate distinctions to be made. These distinctions have a legal consequence for the prospective mother choosing a provider. For a student to be fully equipped to help a woman fight for her right to give birth in the manner of her choosing, the student will need to be aware of the distinctions between different types of midwives. A period of teaching should be dedicated to outlining these distinctions in law courses that contain a section of instruction on birthing.

There are two types of midwives in the United States; Certified Nurse-Midwives (CNM) and lay, or direct-entry midwives (DEM). DEM generally receive no formal training, learning instead through apprenticeships,[88] and are not legally permitted to practice in some states.[89] CNM are registered nurses with further education in midwifery (certified by the American College of Nurse-Midwives (ACOG))[90] and are legally permitted to practice in all 50 states.[91] DEM largely disappeared in the United States during the first part of the 20th Century thanks to a smear campaign by physicians[92], but re-emerged in the 1960s-1970s through a grassroots movement.[93]

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[87] PAMELA E. KLASSEN, BLESSED EVENTS: RELIGION AND HOME BIRTH IN AMERICA 97 (Princeton University Press 2001).

[88] Frank Adams III et al., *Occupational Licensing of a Credende Good: The Regulation of Midwifery,* 69 SOUTHERN ECONOMIC JOURNAL 659, 659 (2003).

[89] *Id.* at 663 (As of 1995 lay midwives were permitted to practice medicine in 36 states. See note 101 for current statistics).

[90] *Id.*at 660.

[91] *Id.*

[92] *Id.* at 659. See also ROBBIE E. DAVIS-FLOYD & CAROLYN F. SARGENT EDS., CHILDBIRTH AND AUTHORITATIVE KNOWLEDGE; CROSS-CULTURAL PERSPECTIVES 126 (University of California Press 1997) (Women are in part to blame for this shift to

DEM generally serve women who choose to birth at home or in a birthing center.[94] CNM can be found practicing under the supervision of a doctor in hospitals.[95] Midwifery "emphasizes a wellness orientation, holistic and individualized care, and shared responsibility between the midwife and the mother . . . emphasiz[ing] respect for the knowledge, resources, and capability of the mother . . ."[96] Midwives recognize that women are the primary decision makers regarding their care and their infant's care, and respect their autonomy to refuse treatment after being fully informed of their choices.[97] For these reasons some women prefer midwives to the medicalized care offered by some doctors.[98]

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physicians from midwives, trusting medicine and technology over their own innate knowledge of how to bear children. Many women feel that clinical technology must be employed to assure the safe delivery of their child). See also, PREGNANT IN AMERICA: A NATION'S MISCARRIAGE (Intention Media 2008) (discussing the effects of the shift to physician provided maternal care: rates of pregnancy interventions significantly rising Monday through Friday, and the focus during childbirth has been shifted from what is best for the woman and what her body is telling her, to the doctor's schedule and what is "safest" for malpractice insurance).

[93] Jo Anne Myers-Ciecko, *Evolution And Current Status Of Direct-Entry Midwifery Education, Regulation, And Practice In The United States, With Examples From Washington State*, 44 JOURNAL OF NURSE-MIDWIFERY 384, 384 (1999).

[94] *Id.* at 385.

[95] Adams, *supra* note 88, at 659-660.

[96] Myers-Ciecko, *supra* note 93, at 385 – 386.

[97] Midwives Alliance of North America, MANA Standards and Qualifications for the Art and Practice of Midwifery, http://mana.org/standards.html (last visited May 1, 2010) ("Midwives respect the woman's right to self-determination").

[98] It should be noted that not all doctors behave in the "conventional" manner, over-medicalizing birth.

In the early 1920's, when nurse-midwifery was just getting its start, there was a lot of opposition to the profession from physicians and nurses alike.[99] Today CNM are legally allowed to practice in every state and the District of Columbia, and can be found in a variety of institutions including hospitals, birth centers, health clinics, and home births services as well as in private practice.[100] While CNM are supervised by a doctor, the doctor is not necessarily present during deliveries.[101]

Students should be informed that the big battle associated with midwives is over the licensing of DEM. Although each state deals with the issue of regulating DEM differently, the professor can classify the states into three different groups to aid student comprehension: states that allow and regulate DEM, states that do not expressly permit or prohibit DEM, and states that do not allow DEM. Half of the states (25) do permit DEM to practice, and regulate that practice through licensure, registration, or certification. The breakdown is as follows: 19 states license DEM, Colorado requires registration, Delaware requires a permit, and four more states require

[99] LAURA E. ETTINGER, NURSE-MIDWIFERY: THE BIRTH OF A NEW AMERICAN PROFESSION 2-3 (The Ohio State University Press 2006). (Physicians alleged that nurse-midwives were not sufficiently trained, that they had too much independence, and sort to limit their work. Physicians "actively sought to limit where nurse-midwives worked, whom they served, and the types of care they could provide." The public were also leery of nurse-midwives, who associated them with immigrant or African American midwives who were seen as dirty, backward and ignorant thanks to the smear campaign of the early 1900's (pgs. 10-11).)

[100] American College of Nurse-Midwives, Frequently Asked Questions for Prospective Students, http://www.midwife.org/faq_for_students.cfm#q1 (last visited May 1, 2010).

[101] Adams, *supra* note 88, at 659-660. See also, California Occupational Guide, Certified Nurse-Midwives, http://www.i-train.org/lmi/imperial/g555.htm (last visited May 1, 2010).

certification.[102] Further, nine states allow DEM by judicial interpretation or statutory inference.[103] Additionally there are four states that neither legally regulate, nor prohibit DEM.[104] DEM in these states are constantly in fear that they will be prosecuted for practicing medicine without a license. A lawyer who would chose to represent a DEM in such a prosecution would be faced with uncertainty about the results.[105]

Finally are the states that prohibit DEM. There are 11 states that expressly prohibit DEM; in these states women who want to give birth at home have to do so either without a DEM or "clandestinely"[106] with one. Not only does such a situation (prohibiting midwives) curtail women's fundamental rights,[107] it is also more dangerous for the infant. It is telling to note that in 1993 "Five nations with the lowest infant mortality rates have 70 percent of all births attended by midwives."[108] As of 2009 the states that prohibit DEM include Alabama, the District of Columbia, Illinois, Indiana, Iowa, Kentucky, Maryland, North Carolina, Pennsylvania, South Dakota, and Wyoming.[109] In two more states, Georgia and Hawaii, DEM are legal by statute, but

[102] Midwife Alliance of North America, *Direct-Entry Midwifery State-by-State Legal Status* (as of July 10, 2009), http://mana.org/statechart.html (last visited May 1, 2010).

[103] *Id.*

[104] *Id*.

[105] Hermer, *supra* 75, at 356.

[106] *Id.*

[107] See part I, *supra*.

[108] California State Legislature, 1993, Certified Nurse-Midwives and Licensed Midwives California Occupational Guide Number 555 Interest Area 13 1995, http://www.i-train.org/lmi/imperial/g555.htm (last visited May 1, 2010).

[109] Midwife Alliance of North America, *supra* note 102.

licensure is unavailable.[110] Essentially, in 13 out of the 50 states the only way to legally have an attended homebirth would be to convince a doctor or nurse-midwife to leave the hospital and attend your birth at home. While doctors, in theory, could attend home births it is very unlikely to happen; doctors are already leery about serving as a backup for midwives due to malpractice liability and negative professional peer pressure.[111] It is in these states that lawyers could be the catalyst for the most dramatic change. Law students should be taught how to use persuasive arguments to overcome the negative precedent concerning the ability of DEM to practice their trade in these states.

An example of such negative precedent in states that do not articulate a ban on DEM is embodied in Sammon v. New Jersey Board of Medical Examiners.[112] Here, the federal court decided that no fundamental rights were at issue with midwifery licensing statutes that were alleged to make it practically impossible for DEM to obtain licensing.[113] Therefore the court

[110] *Id.*

[111] Pike, *supra* note 1, at 614 (stating, "[d]octors already are leery of offering assistance as a "backup" physician to traditional midwives for a number of reasons, including malpractice liability concerns and the risk of being ostracized by their professional colleagues" [alteration added]); American Congress of Obstetricians and Gynecologists, http://www.acog.org/from_home/publications/press_releases/nr02-06-08-2.cfm (last visited May 1, 2010) (February 6 2008 press release on Home births states that ACOG does not support "programs that advocate for, or individuals who provide, home births. Nor does ACOG support the provision of care by midwives who are not certified by the American College of Nurse-Midwives (ACNM) or the American Midwifery Certification Board (AMCB)").

[112] 66 F.3d 639 (3d Cir. 1995).

[113] *Id.* at 645.

applied rational basis review.[114] The Third Circuit found no substantive due process violation because the state identified a legitimate interest (the health and safety of both mother and child) that could rationally be found to be served by the statute (requiring extended training (1,800 hours of instruction) and a physician's endorsement for each midwife).[115] The rational basis review is a very difficult standard for a complainant to overcome as the court cannot question the facts that the legislature relied on, even if the plaintiff has contradictory evidence. In addition the "law need not be in every respect consistent with its aims to be constitutional. It is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it."[116]

Through cases such as Sammon v. New Jersey Board of Medical Examiners, the courts are creating a hollow right to DEM.[117] Students should be informed of the predicament that precedent such as this put parents in. By upholding state statutes that make it difficult or impossible for DEM to gain licensure, parents are forced to either employ a provider they do not want and give birth away from home, or to break the law by employing an unlicensed midwife to attend a home birth. Parents are unlikely to disobey the law, or help the midwife to break the law by attending their birth, knowing that the midwife may be subject to prosecution for practicing

[114] *Id.* at 645.

[115] *Id.*

[116] *Id.*

[117] Pike, *supra* note 1, at 621 ("Parents wishing to utilize the services of traditional midwives perhaps will have the right to do so, but it will be a hollow right, because authorized traditional midwives will no longer exist").

medicine without a license.[118] Students should be challenged to consider what type of law would best replace the present regulation. Some regulation of DEM is desirable in order to ensure that DEM are held to certain standards of knowledge, skill and care. While states that prohibit DEM seriously infringe on women's right to choose their birthing method, the women in states that neither expressly allow nor prohibit DEM are perhaps in the most danger as midwives could be inadequately trained. The ideal regulation would be significant enough to ensure expertise, but not so restrictive that DEM could not obtain licensure.

By informing students about this dilemma, and educating them about the benefits of alternate birth, students will come to understand the need for zealous advocates in this area of the law. Courts have not denied the right to homebirth, and some think that a statute doing so would be struck down, but by making it difficult for DEM to practice legally, the effect is a decrease in homebirths.[119] The right to a home birth is without use if there is no way to practice the right. Students aware of this situation and equipped with the tools to question and challenge the law will hopefully do so once they become attorneys.

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[118] *Id.* at 622; Christopher Rausch, *The Midwife and the Forceps: The Wild Terrain of Midwifery Law in the United States and Where North Dakota is Heading in the Birthing Debate*, 84 N.D L. REV. 219, 221 (2008) (discussing criminal prosecution of midwives in North Dakota, "midwives have both been prosecuted for circumventing state statutes or practicing medicine without a license. . . [mothers are] concerned that attacks on lay midwives are synonymous with attacks on home births").

[119] Pike, *supra* note 1, at 623 (arguing that "parents. . . have a fundamental constitutional right to home births". Stating also that the "indirect limitation on traditional midwifery, the method preferred by home birth participants however, forces home birth proponents to choose to exercise their right to home births unassisted or to encourage a traditional midwife to break the law").

i. Homebirth

In advocating for the fading right to give birth at home, some history and context may be helpful to students in mentally framing the issue. Home births were the norm in this country since its founding, but since the 1950's the vast majority of women have decided to give birth in hospitals instead of at home.[120] In the United States today, about one percent of women give birth at home every year.[121] One path by which students may advocate for women's right to home birth is to represent a midwife charged with the unlicensed practice of medicine, along with the parents who chose to have the midwife attend their birth.[122] A survey of the women who give birth at home reveals some of the characteristics students could expect in clients: most are not having their first child, are likely to be married and white, are unlikely to have smoked or drunk alcohol during their pregnancies, are likely to be religious, and have less formal education than a woman who chooses to give birth in a hospital.[123] It is important that as an advocate, attorneys are able to understand their clients. Students should be knowledgeable of the reasons women and their partners desire home births. For women who choose to give birth at home, they insist that place matters; "the physical and metaphorical meanings of home intertwined to make the home a place to encounter sacredness in its many forms."[124] Women who wish to give birth at home believe, and find that their bodies are able to respond to labor differently when in the

[120] Julie Scelfo, *Baby, You're Home*, N.Y. TIMES, November 12, 2008, at D1.

[121] Klassen, *supra* note 87, at 19.

[122] An example of such a case is, People ex rel. Sherman v. Cryns, 786 N.E.2d 139 (Ill. 2003), concerning the prosecution of a DEM for the unlicensed practice of nursing and midwifery.

[123] Klassen, *supra* note 87, at 19.

[124] *Id*. at 97.

comfort and safety of their own home.[125] Giving birth at home gives many women the sense that they are continuing to enrich their homes with the stories of their lives. As they wonder the rooms of their homes they are able to point to the place where their child was born, remembering the emotions of the moment.[126]

After providing students with context in which homebirths occur, law professors should alert students that some organizations are strongly opposed to home births, as it is important to be cognizant of where powerful adversaries could emerge. Two examples of powerful organizations in the field of obstetrics are ACOG and the American Medical Association (AMA). Both had hostile reactions to the release of The Business of Being Born, a documentary extolling home birth and midwifery.[127]

In a February 6, 2008 news release, the first significant organization in obstetrics, ACOG reiterated its belief that homebirths are unsafe because "complications can arise with little or no

[125] *Id.*

[126] *Id.* at 99.

[127] THE BUSINESS OF BEING BORN (Barranca Productions 2007) (In 2008 the documentary film, The Business of Being Born produced by Ricki Lake and directed by Abby Epstein, was released. As a documentary the film encourages parents to be knowledgeable of all their options and to keep an open mind to the natural choices available to them. While the film does recognize and respect the need for medical intervention, and even caesarean sections for some births, it urges women to avoid needless medical interventions during pregnancy and specifically labor. The documentary portrays homebirths to be a safe, natural, and fulfilling experience, giving respect to DEM. Since its New York premiere on January 9, 2008[127], the film has been controversial in the medical community).

warning even among women with low-risk pregnancies."[128] Within the 2008 release was a rather pointed, yet short cited comment. ACOG stated, "Childbirth decisions should not be dictated or influenced by what's fashionable, trendy, or the latest cause célèbre."[129] While clearly meant as a retort to the following the documentary film "The Business of Being Born" received, it ignores the fact that since the dawn of time, women have been propagating the race without the help of hospitals or ACOG - approved doctors.[130] In June of 2008, the second major organization in obstetrics, the AMA, at the House of Delegates Annual Meeting, decided that the Association would break its silence on the issue, and decry homebirths as unsafe for the first time. In a follow-up status report it was stated that

> "The ARC has communicated to all state and specialty societies that it supports the American College of Obstetricians and Gynecologists' (ACOG) statement on home births and that *it will work with states to support state legislation that helps to ensure safe deliveries and healthy babies by acknowledging that the safest setting for labor, delivery and the immediate post-partum period is in the hospital*, or a birthing center within a hospital complex, that meets standards jointly outlined by the American Academy of Pediatrics and ACOG, or in a freestanding birthing center that meets the standards of the Accreditation Association for Ambulatory Health Care, The Joint Commission, or the American Association of Birth Centers."[131]

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[128] American Congress of Obstetricians and Gynecologists, http://www.acog.org/from_home/publications/press_releases/nr02-06-08-2.cfm (last visited May 1, 2010).

[129] *Id.*

[130] Granted childbirth is far safer these days, but for all our shiny hospitals, American women still die during childbirth at a higher rate than women in 40 other countries according to a recent Amnesty International report. AMNESTY INTERNATIONAL, DEADLY DELIVERY: THE MATERNAL HEALTH CARE CRISIS IN THE USA: SUMMARY 3 (Mar. 2010).

[131] AMERICAN MEDICAL ASSOCIATION, IMPLEMENTATION OF RESOLUTIONS AND REPORT RECOMMENDATIONS (I-08) AND FOLLOW-UP IMPLEMENTATION CHART (A-08) 38 (2009) (emphasis added), available at, http://www.ama-assn.org/ama1/pub/upload/mm/475/a-09-status-charts.pdf.

This statement by the AMA should be cause for great concern for those advocating for a woman's rights to chose how, where, and with whom she will give birth. The AMA could prove to be a powerful adversary to a lawyer working towards state legislation that is more permissive of direct entry midwives, and thus homebirths.

Lawyers are needed to protect the rights of women who want to give birth at home, with a DEM attending. To this end, students should be taught in law courses that include sections on birthing rights, what the legal landscape is and how the negative aspects of that landscape can be changed. The right to home birth is being seriously curtailed by statutory licensing restrictions that make it difficult for midwives to obtain licensure. With fewer DEM being able to become licensed, fewer are available to attend home births. Without DEM to attend their births, many women are not comfortable birthing at home. Some women feel that a home birth is the optimal environment to relax and give birth with as few interventions as possible. Trained lawyers are needed to protect the rights of women to give birth in the manner of their choosing.

C. Caesarean Sections and Vaginal Birth After Caesarean Sections (VBAC)

> *"My doctor told me that the next time I had a baby I'd 'come in like a lady' (and have a repeat caesarean). Of course I switched doctors. I came in like a lady, all right – yelling and having a baby. The VBAC was wonderful."*
> *~ Sheryl (Massachusetts)*[132]

> *"Birth is a miracle, a rite of passage, a natural part of life. But birth is also big business."*[133]

It is important for Americans in general to be aware of the sobering state of obstetrics in this country. More specifically, lawyers (who are in a position of power, by way of their education, to prompt change) need to be aware of what is happening in hospital maternity wards around the

[132] Wainer, *supra n*ote 85, at 349.

[133] The Business of Being Born, http://www.thebusinessofbeingborn.com/about.php (last visited May 1, 2010).

country. The somber state of affairs is that despite being one of the wealthiest and "sophisticated" countries in the world the United States is one of the most dangerous places to give birth in the industrialized world.[134] With this aforementioned wealth the United States "spends more than any other country on health care, and more on maternal health than any other type of hospital care."[135] Despite this unprecedented investment in maternity care, Amnesty International recently released a report revealing that women in 40 other countries around the world have a better chance of surviving pregnancy-related complications than American women do.[136] Put another way, the probability of an American women dying in childbirth is "five times greater than in Greece, four times greater than in Germany, and three times greater than in Spain."[137] Within the United States the situation worsens for black women, who are at four times the risk of dying due to pregnancy-related complications than white women are.[138] It should be noted that the maternal mortality rate is on the rise in the United States, doubling from 1987 to 2006, with half of the deaths deemed preventable.[139] Partly to blame for these numbers are "overuse of risky interventions like inducing labor and delivery via caesarean section."[140]

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[134] Myers, *supra* note 16, at 527.

[135] AMNESTY INTERNATIONAL, DEADLY DELIVERY: THE MATERNAL HEALTH CARE CRISIS IN THE USA: SUMMARY AMR 51/007/2010 3 (Mar. 2010), available at http://www.amnestyusa.org/dignity/pdf/DeadlyDeliverySummary.pdf.

[136] *Id.*

[137] *Id.*

[138] *Id.*

[139] *Id.*

[140] Jennifer Block, *Too Many Women Dying in U.S. While Having Babies*, TIME, Mar. 12, 2010, http://www.time.com/time/health/article/0,8599,1971633,00.html#ixzz0hz6oVBwD.

Law students need to be aware of the obstetrical landscape, and trained in the relevant legal underpinnings, in order to be prepared to challenge the laws that are perpetuating the high maternal mortality rates in this country once they become lawyers. In America the high maternal mortality rate is blamed on interventions, which often lead to cesarean sections.[141] A cesarean section is "a surgical operation through the walls of the abdomen and uterus for the purpose of delivering the young of a human."[142] This procedure is performed with alarming regularity in the labor and delivery wards around the United States. The World Health Organization (WHO) advises that no more than 15 percent of births should be caesarean sections, yet in 2007 the rate of caesarean sections in the United States was at 32 percent.[143] It is suspected that this high rate is attributable to a panoply of reasons including, but not limited to: doctors fearing lawsuits if something should go wrong with the vaginal birth and therefore opting for the more controllable surgical procedure, women wanting the social convenience of knowing when their baby will arrive, strong encouragement to have a repeat cesarean section after having an initial cesarean, and inductions of labor becoming more common, which increases the chance of doctors needing to resort to cesarean sections when inductions fail.[144]

Some place a large amount of blame for the sky high caesarean section rate on the American Congress of Obstetrics and Gynecology (ACOG). Health care, after all, is a business in this country, and the more skeptical critics describe ACOG as "the largest trade union for

[141] Block, *supra* note 140.

[142] WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY UNABRIDGED 367 (2002).

[143] Denise Grady, *Caesarean Births Are at a High in U.S.*, N.Y. TIMES, Mar. 23, 2010, at A13.

[144] *Id.*

obstetricians and gynecologists in the United States."[145] A look at the costs of certain procedures quickly explains how critics could arrive at the conclusion that ACOG functions as a trade union, responsible for the rise in cesarean sections. As of 2004, a "Cesarean produce[d] hospital revenues of $14,000 - $17,000 each, while vaginal deliveries produce[d] $6,000 to $8,000 each."[146] As mentioned above, the unprecedented rise in cesarean sections was influenced, in part, by the growing number of repeat caesarean sections.[147] After having a baby via caesarean section, many doctors and hospitals push women to have scheduled, repeat cesarean sections with their subsequent children. There is a growing trend among women to resist this course of action and request a VBAC instead. Unfortunately many hospitals, doctors, and insurance companies force women to have a repeat cesarean section or go elsewhere, which often is not an option for women who live in rural areas.

The increase in repeat cesarean sections are argued to be directly related to a July 1999 statement by ACOG in Practice Bulletin Number 5, urging hospitals and doctors not to perform a VBAC unless there are "facilities and personnel, including obstetric, anesthesia, and nursing personnel immediately available to perform emergency cesarean delivery when conducting a

[145] Myers, *supra* note 17, at 527. Also of some interest on this point is the phrase included at the bottom of a 2008 ACOG press release: "The American College of Obstetricians and Gynecologists is the national medical organization representing over 52,000 members who provide health care for women." Available at, http://www.acog.org/from_home/publications/press_releases/nr02-06-08-2.cfm.

[146] Myers, *supra* note 17, at 528.

[147] *Id.* at 535 (discussing how the induction of labor begins a snowballing effect that leads to cesarean sections, which in turn lead to later births being performed via repeat, scheduled cesarean).

trial of labor for women with a prior uterine scar [result of a previous caesarean section]."[148] In July 2004 Practice Bulletin Number 5 was replaced by Practice Bulletin Number 54.[149] This second Bulletin however, still recommends that a physician be "immediately available throughout active labor capable of monitoring labor and performing an emergency cesarean delivery. . . [and that] anesthesia and personnel for emergency cesarean delivery" also be available.[150] These recommendations make it difficult for a doctor to conduct office hours while supporting a laboring patient's VBAC trial of labor as they have to be immediately available to her.[151]

Law students, soon to be attorneys, who are contemplating advocating for a lift of a VBAC ban must be aware of the power structure that is providing incentives to the doctors and hospitals who care for laboring women. Advocacy will be far less likely to succeed without an understanding of the motivations behind the doctor's and hospital's choices. ACOG's guidelines create a clear incentive for doctors to dissuade their patients from planning a trial of labor. This is so even though ACOG acknowledges that 60-80 percent of VBAC trials of labor result in successful vaginal birth,[152] and that caesarean sections "significantly increase a woman's risk of experiencing a pregnancy-related death (35.9 deaths per 100,000 deliveries with a live-birth

[148] Myers, *supra* note 17, at 528 (alteration added).

[149] AMERICAN CONGRESS OF OBSTETRICIANS AND GYNECOLOGISTS, ACOG PRACTICE BULLETIN: CLINICAL MANAGEMENT GUIDELINES FOR OBSTETRICIAN-GYNECOLOGISTS NUMBER 54(REPLACES PRACTICE BULLETIN NUMBER 5, JULY 1999) 2 (2004) (alteration added), available at, http://www.acog.org/acog_districts/dist9/pb054.pdf.

[150] *Id.*

[151] Myers, *supra* note 17, at 528.

[152] AMERICAN CONGRESS OF OBSTETRICIANS AND GYNECOLOGISTS, *supra* note 149, at 3.

outcome) compared to a woman who delivered vaginally (9.2 deaths per 100,000)."[153] In addition to being safer for the mother to deliver vaginally, VBAC are also safer for the baby than undergoing a cesarean section. There are fewer risks of complication for babies who are born via VBAC than via planned caesarean section; "neonates born after elective repeat cesarean delivery have significantly higher rates of respiratory morbidity and NICU-admission, and longer length of hospital stay."[154]

Law professors should encourage their students to remain abreast of the news concerning obstetrics. Recent years have seen a flurry of press concerning being pregnant, and birthing in America. Such coverage may prove useful in many ways while advocating for women's rights.[155] Recently for example, The National Institutes of Health (NIH) has recommended a lift on the ban against VBAC that many doctors and hospitals have adopted over the past decade.[156] The NIH panel of medical experts, basing their findings on technical reports and presentations by experts, found that "'the use of VBAC is certainly a safe alternative for the majority of women

[153] Myers, *supra* note 17, at 527 (quoting ACOG Committee on Ethics' July 2003 press release).

[154] Beena D. Kamath et al., *Neonatal Outcomes After Elective Cesarean Delivery*, 113 OBSTETRICS & GYNECOLOGY 1231, 1231 (2009), available at http://journals.lww.com/greenjournal/Fulltext/2009/06000/Neonatal_Outcomes_After_Elective_Caesarean_Delivery.7.aspx.

[155] For example, if a lawyer were representing a woman who was appealing a court-ordered cesarean section and was in need of an expert on the safety of VBACS, articles such as the one discussing the NIH (infra, note 155) would provide a good lead in finding an expert who would support their case.

[156] Denise Grady, *Panel Urges New look at Caesarean Guidelines*, N.Y. TIMES, Mar. 10, 2010, at A17 (Discussing the panel that convened in March 2010 to consider how to reverse the trend of difficulty in acquiring a VBAC).

who've had one prior' Cesarean, provided that the incision was horizontal and low on the uterus."[157] The NIH panel stated that approximately 70 percent of women are good candidates to try a VBAC.[158] The panel urged "two medical groups" to reassess their guidelines requiring immediate availability of surgical and anesthesia teams during the trial of labor.[159] Students need to be aware, however, that the safety of mother and baby may not be a sufficiently compelling argument to convince doctors to allow a trial of labor. Health care is a business, and doctors are reluctant to perform VBACs in part, because of malpractice lawsuits and already high insurance premiums that companies are threatening to increase if doctors perform VBACs.[160]

Law school courses that address birth should include background information about the current state of obstetrics in America. This background is needed in order to advocate effectively for the rights of pregnant women to procedures such as VBAC, and to uphold their right to refuse treatments such as unnecessary interventions, up to and including cesarean section. Law students and lawyer alike need to know what is driving these policies so that they can more effectively challenge them. Professors should present the challenges as well as novel ways to overcome them.[161] There is a need for attorneys who have been educated about the many facets involved in

[157] Grady, *supra* note 156, at A17 (Quoting Dr. F. Gary Cunningham, conference chairman and professor of obstetrics and gynecology at the University of Texas Southwestern Medical Center).

[158] *Id.*

[159] *Id.*

[160] *Id.*at A17 (If a patient attempting a VBAC were to have a uterine rupture, and the baby dies, hospitals have lost lawsuits resulting in $35 million payouts for the parents. Doctors can already pay $275,000 premiums a year for medical malpractice insurance).

[161] Myers, *supra* note 17, at 537 (suggesting that a remedy for this violation of women's health interests during birth is to file an Anti-trust law suit against the physicians, or "sellers", of the market good, the service of delivering

VBAC bans so that women are not left with only one option: cesarean section. Including this type of education in law courses under the larger subject of birthing rights will equip law students with a solid base of information. This base will put new attorneys at an advantage in challenging policies that contribute to the soaring rate of cesarean sections in America.

D. Court Ordered Cesarean Sections

More disconcerting than the soaring rate of cesarean sections in the United States is the fact that courts will order cesarean sections to be performed on women who wish to give birth vaginally. Not only have women been physically forced to have cesarean sections, they have also lost custody of their child based initially on refusal to have a cesarean section.[162] The majority of law students and lawyers are unaware of this overwhelming violation of the right to refuse treatment, the right to bodily integrity, and the right to privacy.[163] Law students should be educated about these cases in their family law, constitutional law, feminist jurisprudence, and gender and the law courses. Women are in need of advocates who have received education on the rights implicated by court-ordered cesareans, the existing precedent, and persuasive arguments, to represent them in their appeals of court orders that result in an unwanted cesarean section.

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a baby. The ideal affected "buyer" would be a woman who desired a VBAC but was forced to have a repeat caesarean section because of ACOG guidelines and suffered physical harm to herself or her baby as a result. This harm is compounded by the higher medical bills incurred due to a caesarean delivery rather than a vaginal one).

[162] Burkstrand-Reid, *supra* note 1, at 141 (citing N.J. Div. of Youth and Family Servs. V. V.M., 974 A.2d 448, 449 (N.J. Super. Ct. App. Div. 2009).

[163] Fundamental rights discussed *supra* in Part I.

In a particularly salient case involving a court ordered cesarean section, Pemberton v. Tallahassee,[164] Ms. Pemberton was at full-term and attempting to have a vaginal home birth with a midwife. Ms. Pemberton decided to labor at home as she was unable to find a physician who would attend her in a hospital VBAC delivery.[165] After laboring at home for over a day she had become dehydrated and went to the emergency room of defendant Tallahassee Memorial Regional Medical Center in order to receive an intravenous infusion of fluids (IV).[166] A hospital doctor refused to give Ms. Pemberton an IV, instead informing her that she needed a cesarean section.[167] When Ms. Pemberton refused a cesarean, the doctor informed hospital administrators, who contacted the hospital attorney, who in turn contacted the State Attorney.[168] After surreptitiously leaving the hospital with her husband, Ms. Pemberton was ordered back to the hospital by a judge, and escorted by a law enforcement officer, against her will, to the hospital where a short hearing was held in her hospital room followed by a judge's order to perform a cesarean section.[169] After the operation was performed Ms. Pemberton filed suit alleging

[164] 66 F. Supp. 2d 1247 (N.D. Fla. 1999).

[165] *Id.* at 1249.

[166] *Id.*

[167] *Id.* (The doctor was concerned about a previous caesarean scar on Ms. Pemberton's uterus. The doctor felt that as it was a vertical scar, extending well into the thickened myometrium, there was a greater risk of Ms. Pemberton and her child suffering the effects of uterine rupture. The hospital sought four additional opinions on Ms. Pemberton's condition, and the doctors all agreed that a caesarean was medically necessary.)

[168] *Id.*

[169] *Id.* at 1249-1250.

violation of her substantive constitutional rights and her right to procedural due process.[170] Summary judgment was granted to the hospital.[171]

In a relatively short portion of the court's decision, the court did not deny that Ms. Pemberton's case implicated important constitutional interests.[172] After recognizing Ms. Pemberton's constitutional rights the court states, "Whatever the scope of Ms. Pemberton's personal constitutional rights in this situation, they *clearly* did not outweigh the interest of the State of Florida in preserving the life of the unborn child."[173] The court bolsters its opinion by stating that there was a strengthened state interest by virtue of the fact that the mother was not attempting to avoid birth, "only to avoid a particular procedure for giving birth."[174] The courts language indicates a belief that different ways of giving birth are equal. Different methods of birthing are far from equal on a physiological level, in terms of safety, or on a psychological level.[175] The court, in opining on Ms. Pemberton's unreasonableness in wanting to give birth via VBAC, stated that the fact that she "was unable to locate a single physician willing to attend the birth [demonstrated] just how widely held was the view that this could not be done safely."[176] A

[170] *Id.* at 1249.

[171] *Id.*

[172] *Id.* at 1251.

[173] *Id.* (emphasis added).

[174] *Id.* at 1251.

[175] JONES, *supra* note 18, at 28 (Discussing the mind body connection that is present throughout labor. "Mind and body are inextricably linked during labor. Giving birth involves the whole being – body, mind, and emotions. As labor progresses, the laboring woman experiences profound psychological changes. Her consciousness is altered and passionate emotions are released"). See also, Ruth Malik's account of birth, *infra.*

[176] Pemberton v. Tallahassee Mem'l Reg'l Med Ctr., Inc., 66 F. Supp. 2d 1247, 1253 (N.D. Fla. 1999).

law student equipped with knowledge about the effects and safety of different forms of birth, and the many factors involved in VBAC bans would be able identify false assumptions in this opinion which contributed to the serious violation of Ms. Pemberton's rights. Among these presumptions are that birthing method is an aesthetic choice, and that availability of certain types of care are determined solely on their safety for the patient. Once these assumptions are removed, the final assumption is that the interests of the fetus in living (claimed to be protected by the State of Florida, and claimed to be in dire risk if vaginally delivered) and the interests of the mother in her fundamental rights are at odds. The court in Pemberton balances these rights and determines that the mother's rights should be usurped by the right of the fetus not to be subject to a chance of dying upon the diminutive possibility of uterine rupture.[177]

Not all jurisdictions perform the balancing of the mother and baby's interests to the same end. Nor do all jurisdictions treat appeals from court-ordered cesarean sections with summary judgment for the hospital. By learning about how other courts have decided the issues surrounding court-ordered cesarean sections in favor of pregnant women, students will learn how to craft persuasive arguments in favor of respecting women's fundamental rights. In stark contrast to the federal treatment of Ms. Pemberton, Illinois upholds a pregnant woman's right to

[177] *Id.* at 1253 (the *substantial* risk of uterine rupture discussed by the court, which justified overriding Ms. Pemberton's fundamental rights was testified to by several doctors. The chance of uterine rupture ranged from two, to six, to ten, to sixty percent depending on the doctor who was testifying. It was on this inconsistent evidence that the court based its opinion that the fetus needed to be protected from the chance of rupture associated with vaginal delivery and ordered a cesarean section).

refuse medical treatment in the form of both blood transfusions and cesarean sections, even if believed to have a lifesaving or beneficial effect for the fetus.[178]

The Illinois Appellate court in, In re Brown,[179] balanced the state's interests in preservation of life,[180] maintaining the ethical integrity of the medical profession,[181] and the State's interest in protecting the viable fetus, against the mother's right to refuse medical treatment (a blood transfusion), and her right to personal liberty and autonomy. Although the court cited Roe v. Wade, it distinguished the present case from Roe's holding as the case at bar was not an abortion case. The court also rejected infant neglect as an applicable theory to the case as Illinois legislature had failed to define a fetus as a minor. After the court struggled with the competing

[178] See In re Baby Boy Doe, 632 N.E.2d 326 (Ill. App. Ct. 1994) (Holding that "a woman's competent choice in refusing medical treatment as invasive as a caesarean section during her pregnancy must be honored, even in circumstances where the choice may be harmful to the fetus." The court derived this right from the woman's "right to privacy, bodily integrity, and religious liberty. . . right to refuse invasive treatment. . . the Stallman court explicitly rejected the view that the woman's rights can be subordinated to fetal rights" Id. at 332); See also, In re Brown, 689 N.E.2d 397 (Ill. App. Ct. 1997) (recognizing the "common law right of competent adults to refuse medical treatment based on "doctrine of informed consent" which requires physicians to obtain consent before performing any medical surgery or procedure upon patient." Id. at 402).

[179] 689 N.E.2d 397 (Ill. App. Ct. 1997).

[180] *Id.* at 403 (This is a concern for preserving the life of the decision maker, here the mother. The state's interest in the life of the decision maker is weakened when the decision maker has "competently decided to forgo the medical intervention").

[181] *Id.* (explaining that because the AMA "recommends that '[j]udicial intervention is inappropriate when a woman has made an informed refusal of a medical treatment designed to benefit her fetus'" this factor did not weigh strongly in the state's favor).

interests, stating, "we cannot separate the mother's valid treatment refusal from the potential adverse consequences to the viable fetus"[182] it decided in favor of the mother. In Illinois the state "may not override a pregnant woman's competent treatment decision . . . to potentially save the life of the viable fetus."[183]

In Illinois Appellate case, In re Baby Boy Doe[184], doctors sought an order for Ms. Doe to undergo caesarean section at approximately 36 weeks due to a decreased supply of oxygen to the fetus and "close to zero" chance that the fetus would survive natural delivery.[185] In denying the sought order, the court stated that "[a] woman is under no duty to guarantee the mental and physical health of her child at birth, and thus cannot be compelled to do or not do anything merely for the benefit of her unborn child."[186] The court found that a woman's right to refuse medical treatment, such as a cesarean is "derived from her rights to privacy, bodily integrity, and religious liberty, [and] is not diminished during pregnancy."[187] Similarly "the District of Columbia has held that a woman's competent choice regarding medical treatment of her pregnancy must be honored, even under circumstances where the choice may be fatal to the

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[182] *Id.* at 405.

[183] *Id.*

[184] 632 N.E.2d 326 (Ill. App. Ct. 1994) (This case was criticized in Pemberton v. Tallahassee , 66 F. Supp. 2d 1247, 1252 (N.D. Fla. 1999), "to the extent. . . [it] suggests a medical procedure can never be forced on a citizen even if the importance of the procedure clearly outweighs the intrusion on the citizen's interests, the court was simply wrong").

[185] *Id.*at 328 (The baby was later born vaginally, apparently normal and healthy, although somewhat underweight. *Id.* at 329).

[186] *Id.* at 332 (alteration added).

[187] *Id.*

fetus."[188] Although these Illinois and District of Columbia decisions are not binding in other jurisdictions, an attorney could consider using them as persuasive authority.

Access to alternative forms of birthing is being limited by statute and case law across the country. Women's right to chose how, when, and with whom they give birth is being restricted. Furthermore, pregnant women's rights to privacy, bodily autonomy, and refusal of medical treatment are being violated by court-ordered cesarean sections. As it cannot be assumed that law students have even a basic understanding of birth and everything it entails, course textbooks that deal with birthing rights should provide articles that explain the different forms of birth, the different types of attendants, and the physiological, physiological, and safety ramifications of each. Only through an appreciation for the process of birth, and an understanding of the laws and policies that affect that process, can an attorney offer effective advocacy to pregnant women. Effective advocates for pregnant women are desperately needed to stem the violations of women's rights and reestablish access to birthing methods. For this reason, it is necessary to incorporate a study of birthing rights into the legal curriculum.

III. Implementing Curriculum Change

A. The Present Treatment of Birth in the Legal Curriculum

Once the current state of the law protecting birthing women, or lack thereof, is examined, the fact that the "top three casebooks used in law school courses dedicated to gender and the law, [do not] address the issue of childbirth or midwifery"[189] defies comprehension. Similarly, most

[188] *Id.* (discussing In re A.C., 573 A.2d 1235 (D.C. 1990) (en banc)).

[189] NATIONAL ADVOCATES FOR PREGNANT WOMEN, WRITING CONTEST TO ADVANCE FEMINIST LEGAL SCHOLARSHIP ON THE IMPORTANCE OF BIRTHING RIGHTS IN THE DISCUSSION OF GENDER EQUALITY AND FEMINIST JURISPRUDENCE 1 (2010) (Citing

gender jurisprudence and gender discrimination courses have a glaring gap in their curriculum; they go from the right to have an abortion straight to the gendered construction of parenthood, without making any mention of birth.[190] When a student enrolls in a law school course that addresses constitutional rights or reproductive rights, and issues of birth aren't discussed it is likely to send a message that either there is no legal recourse for women whose rights have been violated, or that the violations simply are not important. It is difficult to speculate what effect the omission of birth has on law students, but reason dictates that they do not leave the class armed with the legal tools to defend a woman's right to the birthing method she desires. Additionally, if students have previously been exposed to attitudes that the choice in "birth attendant, location of birth, and agency in what medical procedures are used merely reflect the 'woman's interest in an aesthetically pleasing or emotionally satisfying birth'",[191] omission of birth from feminist jurisprudence courses will leave such opinions unchallenged at best, and reinforced at worst.

The reason for the omission of birthing rights in reproductive or constitutional rights course material is largely inexplicable. It seems that the notion of childbirth has been intellectually disassociated from the idea of reproductive rights. Of the topics that are discussed, abortion receives a substantial amount of coverage. It seems that abortion is too big a topic,

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KATHERINE T. BARTLETT & DEBORAH L. RHODE, GENDER AND LAW: THEORY, DOCTRINE, COMMENTARY (4th ed. 2006); D. KELLY WEISBERG, FEMINIST LEGAL THEORY (1996); and HERMA H. KAY & MARTHA S. WEST, CASES AND MATERIALS ON SEX-BASED DISCRIMINATION (6th ed. 2005)).

[190] *Id.*

[191] *Id.* at 2. (Quoting John A. Robertson, Procreative Liberty and the Control of Conception, Pregnancy and Childbirth, 69 Va. L. Rev. 405, 451 (1993)).

leaving no room for discussion of other topics relating to reproductive rights. It is clear that in this country "reproductive rights have remained narrowly associated with abortion."[192] Perhaps casebook authors[193] feel that the right to abortion is tenuous, and needs the attention of young attorneys to maintain its hold in the law. While abortion is admittedly an important reproductive rights issue, the above discussion indicates that other areas of reproductive rights are in great peril and need prompt legal attention. The undivided focus on abortion is not limited to the classroom; "while abortion is uninterruptedly conspicuous in American politics, the country's record-high caesarean rate receives little attention in the lay press."[194] Not only does the incessant focus on abortion limit the discussion of other reproductive rights issues, it also limits women's choices beyond abortion. When abortion advocates framed the issue in terms of choice, claims of "reproductive rights and women's bodily sovereignty"[195] were replaced solely by access to abortion. Sole focus on abortion ignores the realities of women's lives in relation to their reproductive capabilities. Focusing on abortion to the exclusion of birth is not proportionate to the life experiences of women. Although about one-third of American women will have an

[192] JEANNE FLAVIN, OUR BODIES, OUR CRIMES: THE POLICING OF WOMEN'S REPRODUCTION IN AMERICA 23 (New York University Press 2009).

[193] Of the top three casebooks mentioned above, all have authors with feminine names. Therefore, the assumption is made that they are women. Of the three casebooks two have multiple authors. From personal observation, it is true that women in legal academia have children. Ergo, it is a vaguely safe assumption that at least some of these authors, have themselves, given birth, further mystifying the absence of birth in the casebooks dedicated to gender and the law.

[194] Myers, *supra* note 17, at 526.

[195] FLAVIN, *supra* note 192, at 20.

abortion by the age of 45, 60 percent of those women are already mothers.[196] Pregnancy terminating in birth is a far more common experience for women in this country than those pregnancies which are terminated by abortion. Of all the pregnancies among American women, only 22 percent (excluding miscarriages) are aborted.[197]

Upon consideration of the statistics and listening to women's stories "the problem of reducing reproductive rights to just the single right of a safe and legal abortion"[198] becomes clear. Law students need to receive an education about women's reproductive rights in all of their complexities. Only then will students be able to advocate for women in all areas concerning their reproductive abilities. In the past "rights discourse and the assertion of rights has enabled women, as individuals and as a group, to vindicate their self-worth."[199] Pregnant women's worth is currently being diminished by the courts and is in need of more respect. By discussing and learning about the rights that women are denied (while pregnant and in labor) the goal is to "dismantle the unjustified power of physicians over the lives of pregnant women."[200] The power of physicians over the lives of pregnant women is evident in the cases of forced caesarean sections. In this age of technology and medicalized pregnancy and birth, society has "separated milk from breasts, mothers from babies, fetuses from pregnancies, sexuality from procreation,

[196] NATIONAL ADVOCATES FOR PREGNANT WOMEN, WRITING CONTEST TO ADVANCE FEMINIST LEGAL SCHOLARSHIP ON THE IMPORTANCE OF BIRTHING RIGHTS IN THE DISCUSSION OF GENDER EQUALITY AND FEMINIST JURISPRUDENCE 2-3 (2010); Allan Guttmacher Inst., *In Brief: Facts about Induced Abortion*, July 2008, http://www.guttmacher.org/pubs/fb_induced_abortion.html.

[197] *Id.*

[198] FLAVIN, *supra* note 192, at 20.

[199] Cherry, *supra* note 29, at 567.

[200] *Id.*

[and] pregnancy from motherhood."[201] There is a need for "a legal principle that can reunite women and their wombs under the law and provide a more effective shield from state interference."[202] Legal education that includes a discussion of birthing rights is the first step towards the conception of a legal principle that can reunite women and their wombs.

When silence about the violations of women's rights during birth is transformed into language, action will be the result. While taking action will inevitably change the norm and can be dangerous, it is not as dangerous as remaining silent, as letting personal stories and knowledge be lost, or as having fundamental rights violated.[203] If doctors and insurance companies continue to decide how women will give birth, driving the theory and policy, "then it is easy for real needs to be rendered invisible or blamed on marginalized women as the consequences of their faults."[204] By including the topic of birth, and the rights associated with it, in legal courses, law students - soon to be lawyers, will have the tools necessary to question the status quo and protect the rights of pregnant and birthing women.

In the United States of America, birth as a social and business concept needs to be revamped. As is demonstrated above, women are losing precious options and important rights in

[201] ROBBIE E. DAVIS-FLOYD AND CAROLYN F. SARGENT, CHILDBIRTH AND AUTHORITATIVE KNOWLEDGE: CROSS-CULTURAL PERSPECTIVES 315 (University of California Press, 1997) (quoting Barbara Katz Rothman, *Plenary Address, Midwives' Alliance of North America Conference, New York City, November 1992*).

[202] Christyne L. Neff, *Woman, Womb, and Bodily Integrity* 3 YALE J.L. & FEMINISM 327, 328 (1991).

[203] Gilmore, *supra* note 3, at 117 (discussing the danger of self-revelation and speaking out about the ways law schools silence students, yet urging action to avoid the more significant danger of remaining silent).

[204] Nancy E. Dowd and Michelle S. Jacobs Eds., FEMINIST LEGAL THEORY: AN ANTI-ESSENTIALIST READER 189 (New York University Press 2003).

this arena at an alarming rate. In commenting on the current state of obstetrical health, one expert observed, "there are two ways to improve the obstetrics, one way is education and the other way is litigation."[205] By including discussions of birth in the curriculum of courses such as Feminist Jurisprudence, Constitutional Law, and Family Law professors will be both educating, and encouraging those students, once they become practitioners, to litigate birthing matters. Courses that include a discussion of constitutional law, family law, and reproductive rights need to expand their syllabus to include a discussion of birth and everything it entails: midwives, home birth, natural birth, right to refuse treatment, right to VBAC, right to bodily autonomy, and the right to privacy.

B. The Need for a Feminist Pedagogy

Pedagogy has been described as "the art, science, or profession of teaching: the study that deals with principles and methods of formal education."[206] Feminist pedagogy seeks an egalitarian, student-empowering classroom[207] that recognizes the value in each student's point of view.[208] Adopting a feminist pedagogy in the classroom facilitates student learning. In contrast to feminist pedagogy, "'When a teacher becomes the star of the show, does all the talking, and otherwise takes over all of the activity, it is almost certain that he is interfering with the learning of the class members.'"[209] Feminist pedagogy avoids the interference with student learning,

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[205] PREGNANT IN AMERICA: A NATION'S MISCARRIAGE (Intention Media 2008).

[206] WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY UNABRIDGED 1663 (2002).

[207] Joshua S. Baron, *Feminist Pedagogy at a Religious School? An Assessment of BYU Law School's Approach To Teaching*, 21 BYU J. PUB. L. 353, 354 (2007) (describing the tenants of feminist pedagogy).

[208] *Id.* at 363.

[209] *Id.* at 353 (quoting Asahel D. Woodruff).

instead facilitating the learning of all members. It is important for everyone to feel comfortable enough to speak out, to break the silence, and share their realities. When everyone participates, the learning experience is enriched with many different viewpoints that serve to deepen understanding of any given topic. Only when everyone feels included can all participants experience the best environment for learning and consequently use the knowledge gained to further women's rights.

In sharp contrast to the inclusive nature of a feminist pedagogy is the Socratic Method, which is traditionally used by law school professors in their classrooms.[210] The Socratic Method has been described as an intellectual cage. It should be noted that pure Socratic Method is seldom employed in law schools today, leaving some room to roam about the aforementioned cage.[211] However, room to roam or not, in law school classrooms that employ some version of the Socratic Method those who are not male, white, or heterosexual often experience a sense of dissonance and discomfort.[212] For these reasons, law school has a silencing affect on many who are not "gentlemen."[213] Included in the feminist critique of the Socratic Method are the following characteristics: "the hierarchical, authoritarian relationship between students and professors; the competitive ethos of class participation and evaluation; and the effects of these dynamics when

[210]Ryan Patrick Alford, *How Do You Trim The Seamless Web? Considering The Unintended Consequences of Pedagogical Alterations,* 77 U. CIN. L. REV. 1273, 1273 (2009) (discussing the Socratic Method and its use in the law school classroom).

[211] Deborah L. Rhode, *Missing Questions: Feminist Perspectives on Legal Education*, 45 STAN. L. REV. 1547, 1555 (1993).

[212] Gilmore, *supra* note 3, at 114.

[213] Lani Guinier, *Of Gentlemen and Role Models*, *in* CRITICAL RACE FEMINISM; A READER 106-111 (Adrien Katherine Wind ed., New York University Press 2003).

other status inequalities such as race and gender are also present."[214] To avoid the negative consequences that the Socratic Method has on many students, courses that are taught about birthing rights should be taught via a feminist pedagogy.

C. Benefits and Impediments to Employing a Feminist Pedagogy

Many female law professors keep important parts of themselves out of the classroom, hesitant to share personal information. This may be, in part because they are modeling the pedagogical decisions of their own law professors, or it could be that they are trying to adhere to the "myth of objectivity."[215] Many professors also never ask students to share their personal stories or knowledge. Professors may keep these important parts of people out of the law classroom, even when they are quite willing to share in other areas of their profession and scholarship.[216] Some law professors have found that adding personal narratives to their reproductive rights classes "has added incredible depth to my understanding of the issues. . . and has also served to help me and my students better understand the ways in which the legal landscape regarding abortion relates to women's lives, including and beyond their need for reproductive autonomy."[217] Despite the benefits of improved understanding, learning, and student comfort that can result from employing a feminist pedagogy, many professors are stymied by the risks associated with it.

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[214] Rhode, *supra* note 211, at 1555.

[215] Pamela D. Bridgewater, *Transforming Silence: The Personal, Political, and Pedagogical Abortion Narrative*, *in* CRITICAL RACE FEMINISM; A READER 149, 150 (Adrien Katherine Wing ed., 2003).

[216] *Id.*

[217] *Id.* at 151-152.

Turning away from the traditional Socratic Method is daunting to many, especially untenured, professors. As an untenured professor student evaluations are critical.[218] Professors have discovered that first year students, in masochistic fashion, expect and desire the hazing of the Socratic Method, lashing out via evaluations if they do not receive it.[219] The problem becomes amplified for a professor straying away from the Socratic Method if they have any minority identities such as homosexuality,[220] being female, or being of color.[221] If school administration is very traditional, yet another significant risk is added for a professor to adopt a feminist pedagogy in the classroom. This is so because "power and politics are not separate and different from teaching. They are at the heart of it. We cannot avoid the nastiness of politics, because schools are the places where ideas are most likely to be contested."[222] Considering the

[218] Robert S. Chang & Adrienne D. Davis, A*n Epistolary Exchange Making Up Is Hard To Do: Race/Gender/Sexual Orientation In the Law School Classroom*, 33 HARV. J. L. & GENDER 1, 7 (2010) (noting that over a third of tenure evaluation is turned over to student's evaluations without any critical assessment).

[219] *Id.* at 4 ("Many students expect Socratic experiences, particularly in the first year. . . some feel cheated if they do not receive it. . . . Pedagogy be damned, whip me harder, sir!"); Darren Rosenblum, *A Little More Mascara: Response to Making Up Is Hard To Do*, 33 HARV. J. L. & GENDER 59, 64 (2010) ("I began my first semester at Pace thinking that I'd run a 'nice' first year course – an egalitarian seminar. . . . this must have struck them as exposing my weakness").

[220] Rosenblum, *supra* note 219, at 64 (discussing recent studies that suggest bias against sexual orientation is identifiable in student evaluations).

[221] Chang, *surpa* note 218, at 14 (discussing the cognitive dissonance that occurs for students, who presumed that a black female was a cafeteria worker, when they see that same woman step up to the podium and begin teaching).

[222] Deborah Waire Post, *The Politics of Pedagogy: Confessions of a Black Woman Law Professor, in* CRITICAL RACE FEMINISM: A READER 131, 137 (Adrien Katherine Wing ed., New York University Press 2003).

risks to career and obtaining tenure, student learning, and relationships with administration, it is the brave teacher who strays from the Socratic Method.

The benefits associated with adopting a feminist pedagogy outweigh the risks of doing so in many circumstances. If a professor has tenure and does not already use a feminist pedagogy they should experiment with doing so. Second and third year classes, as well as smaller classes may be safer proving grounds for experimentation with a feminist pedagogy than first year courses. The benefits of enriched learning and a deeper understanding of the way the legal landscape affects women's lives can be deeply rewarding and beneficial to all involved. Some professors may need to seriously consider the climate of their institution, and their standing with the faculty, weighing it against the benefits to increased learning and understanding for the students in their classes. Whether a professor chooses to take advantage of the benefits offered by a feminist pedagogy at the beginning of their career, they should convert to it as they become more senior faculty members so that they and their students can enjoy the educational benefits associated with it.

D. Suggested Classroom curriculum

In addition to adopting a feminist pedagogy in the classroom, law professors should conduct the exploration of birth in legal courses under a feminist legal theory. Like the word "feminist", the term "feminist legal theory" has several different definitions.[223] Although feminist legal theory defies a single definition it can generally be said to explore the systemic

[223] MARTHA CHAMALLAS, INTRODUCTION TO FEMINIST LEGAL THEORY xx-xxi, 1 (2nd ed. Aspen Publishers 2003) (1999) (discussing the significant and numerous ways in which feminist legal writers differ, and the how the term 'feminism' is hotly debated).

nature of women's inequality, or subordination under the law.[224] Most feminists in the field of jurisprudence work from the assumption that the status quo of the law treats women unequally[225] and needs to be changed. [226] By employing a feminist legal theory to study the intersection of birth and the law, students will be provided with analytical tools that will stand them in good stead once they begin advocating for birthing women's rights. Martha Chamallas, in her book, Introduction to Feminist Legal Theory, has detailed *five opening moves* designed to guide the study of legal issues from a feminist perspective.[227] These five moves include Women's Experience, Implicit Male Bias, Double Binds and Dilemmas of Difference, Reproducing Patterns of Male Domination, and Unpacking Women's Choices.[228] Below, a method of including critical thinking about the interaction of birth and the law in the curriculum is explored via the moves that reoccur in feminist scholarship as outlined by Chamallas's five opening moves.

i. The First Move

[224] *Id.* at xx.

[225] *Id.* at xx, 1 (Focusing on inequality in the context of pregnancy and birth clearly creates a problem when exploring the legal landscape of pregnancy and birth. As men cannot bear children, or give birth to them, it is impossible for pregnant and/or birthing women to be treated unequally to men. This does not mean that women are treated properly by the law as it stands. Women are still negatively affected by "bias that takes the form of gender stereotyping, devaluation of women and their activities, and the use of biased prototypes that distort women's injuries and experiences").

[226] *Id.* at 1.

[227] *Id*. at 4 - 14.

[228] *Id.*

The first *move,* Women's Experience, emphasizes the importance of listening to women's stories.[229] Once personal experience is validated, recognized as systematic, and defined as oppressive, the work of ending unjust legal treatment can begin. Feminist legal scholarship must be grounded in women's experience.[230] It is not enough to assume what women's experiences are, based on observation or society's stereotypes. To learn about the best ways to advocate for birthing rights, we need to hear the stories of women who have given birth.[231] Feminist legal scholarship requires going to the grassroots and listening to women share the knowledge that is born of their experiences, and what the ramifications of those experiences and knowledge are.[232]

It should not be assumed that students, regardless of their age, gender, race, socioeconomic background, or level of education are aware of the current state of obstetrics in this country. Until the age of 26, when I watched the eye-opening documentary "The Business of Being Born,"[233] I assumed that child birth was done one way: in a hospital, on your back,

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[229] *Id*. at 4-5 ("women were encouraged to express their subjective responses to everyday life and discovered that their personal problems also had a political dimension. . . validation of personal experience has much to offer marginal groups who lack the power to have their understanding of the world accepted as the way things are.").

[230] *Id.* at 5.

[231] While the traditional law school female has not given birth this should not stand in the professor's way of having birthing stories heard in the classroom. A professor would not have to look far to find a credible woman at the University who had given birth and was willing to talk about it. If a person could not be found to serve as a guest lecturer in the class, there are several films that document women's personal birth stories that could be shown to the class. See e.g., THE BUSINESS OF BEING BORN (Barranca Productions 2007), and PREGNANT IN AMERICA: A NATION'S MISCARRIAGE (Intention Media 2008).

[232] Chamallas, *supra* note 223, at 5-6.

[233] THE BUSINESS OF BEING BORN (Barranca Productions 2007).

looking like you were in a lot of pain. I realize now that my skewed perception of childbirth came from images that mass media promulgates. After watching "The Business of Being Born" I felt like a whole new world of possibilities had opened up to me; I was dumfounded by my lack of awareness about this topic. Now, after giving birth to my first child, I realize what a monumental occasion giving birth is. I feel fortunate to have had a nurse-midwife who respected my autonomy throughout the experience of pregnancy and labor.

Not all women, as extensively detailed in part I and II, are afforded care that respects their autonomy. While the facts and background information provided in cases such as Pemberton v. Tallahassee provide the basic facts leading to a law suit, they do not attempt to explore the emotions women face as a consequence of their birthing experience or the impact it has on their lives and families. While court decisions are not the appropriate venue for such narratives, future lawyers should understand what is at stake when they litigate for or against unwanted interventions. Such narratives can be elicited from women at the University, women in the community, or from films, books, and online sources. Ruth Malik, founder of Birth India, describes the traumatic experience of birthing her first child that led her to advocate for natural birth;

> "Two children later, the experience of birth shattered my life, like that of countless women globally. My son was born without the onset of labour, by Caesarean section under general anaesthesia and he was away from me for 24 hours in the nursery. Not because it was necessary, only because it was the hospital policy. I spent the night pressing the buzzer and asking for my baby. I felt as if I had been knocked over the head and something ripped from me. When I first saw my son, I looked at him and fell back in the bed. His birth was an out-of-body experience. I simply had no feelings for him. My response to my child shocked me. Despite the huge painful gash across my abdomen, and the

> exhaustion of an awful depression, I struggled to bond and mother. This mood clung to me for three years."[234]

Malik was not educated or fully informed of her choices prior to delivering her first child (or her second), and she regrets the outcome.[235] All women should have the chance to decide for themselves how they would like to give birth. The attending medical personnel should make sure that birthing women understand the risks and benefits to all procedures offered, and to the alternatives as well. Birth decisions should not be based on anything other than the health, happiness, and desires of the mother and baby, as decided by the mother.

The more law students, as future lawyers, who are aware of the current state of affairs in labor and delivery wards, from a birthing mother's perspective, the more law students will be likely to take action. This phenomenon will work on two levels with most law students: on a personal level, and on a professional level. Typically gender and feminist courses are composed largely of females. Upon learning about the variety of birthing methods, and the attendant risks of each, they will be more informed consumers should they one day bear their own child. Professionally, these lawyers will understand the impact such court decisions and policies have on women's lives and therefore understand the need for zealous and competent legal representation. Should sections on the legal rights of birthing women be included in family law and constitutional law courses, the impact will be far greater. Not only will more women be educated but vast numbers of men will be educated as well. Men will care about this topic as the

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[234] Life Positive; Your Complete Guide To Holistic Living, http://www.lifepositive.com/Body/Health/Birthing_Rights82008.asp (last visited May 2, 2010) (quoting Ruth Malik).

[235] *Id.*

mother of their future children's health, and their children's health will be dependent upon the issues discussed.

ii. The Second Move

The second *move*, Implicit Male Bias, helps to explain how women's stories have come to be ignored.[236] Although many laws, rules, and policies seem to be neutral on their face, an in-depth examination of how they affect women reveals that they are beneficial to men, and detrimental to women.[237] To overcome implicit male bias the woman must be placed at the center of the inquiry; the question should always be asked, how does this affect women?[238] Feminists find androcentrism in most substantive areas of the law and life.[239] It is important to be

[236] Chamallas, *supra* note 223, at 6 (discussing that even though women constitute a numerical majority of the population, male bias and male norms in facially neutral rules and laws are still disadvantaging women and fitting male needs, social biographies, and life experiences).

[237] *Id.* at 6-8 (Chamallas uses the example of the 40 hour work week to demonstrate implicit male bias. Although the definition of full time versus part time work, and all that it entails, seems neutral, it disadvantages women. There are numerous benefits associated with being a full time worker (higher base pay, health insurance, vacation time, access to positions or types of work), that part time workers do not enjoy. While it is the norm for men to work a 40 hour work week, and so enjoy all of the privileges, women make up the great majority of part-time workers, hence disadvantaging them).

[238] *Id.*at 7.

[239] *Id.*at 8 ("Men's physiology defines most sports, their needs define auto and health insurance coverage, their socially designed biographies define workplace expectations and successful career patterns, their perspectives and concerns define quality in scholarship, their objectification of life defines art, their military service defines citizenship, their presence defines family, their inability to get along with each other – their wars and rulership – defines history, their image defines god, and their genitals define sex.").

aware of male-centered norms, for until they are visible, nothing can be done to change them. Students should be challenged by the law professor throughout the course to find the male bias in the laws and policies that control birth and pregnant women's bodies. For example, male bias can be found in the construction of motherhood, Major General Cucolo's general order number one, and the court's use of the state's interest in the potentiality of life embodied in the fetus.

Motherhood itself is a social construct.[240] As a construct, motherhood often takes place within the family, which has been described as "'the most gendered of our social institutions.'"[241] From conception to childrearing, society has an ideal of how a woman should act out the role of mother. Women who vary from the script of motherhood, in either volitional (being in the military) or non-volitional (being a poor black woman) ways can face criminal prosecution.[242] The laws that enable such prosecution are imbued with the implied male bias for the "idea mother": white, middleclass, and self-sacrificing in every way for the good of the fetus.

General order number one[243] is another example of implicit male bias. While on its face it threatens to prosecute both male and female soldiers who violate the order by having sexual intercourse that results in a pregnancy, it will be far more difficult to detect the culpable male soldier, than it will the female. Once it becomes clear that a female soldier is pregnant there is no way to refute that she did engage in intercourse that led to pregnancy. If a pregnant soldier

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[240] *Id.* at 284 (discussing how the law, dominant ideology, and cultural images have constructed mothers, motherhood, and ideas of family).

[241] *Id.* (quoting Martha Albertson Fineman, *The Neutered Mother, the Sexual Family and Other Twentieth Century Tragedies* 149 (1995)).

[242] See *supra* Part I. A. b.

[243] See *supra* note 56.

refuses to identify the male that impregnated her, or is unable to do so, a lot more work is required to identify and punish that soldier. With potentially hundreds of male soldiers in a company, and thousands in an area of operation, the costs of DNA testing would likely be prohibitive, leaving the female to receive punishment alone.

Finally, there is an argument to be made that the balancing test performed by the appellate court in Pemberton v. Tallahassee is imbued with implicit male bias. The court summarily dismissed Ms. Pemberton's constitutional rights, including the right to refuse medical treatment, in favor of preserving the life of the fetus.[244] While men do not carry or give birth to children, there are situations in which they can preserve the life of their born children by undergoing surgery. Yet, courts do not force parents (male or female) to donate organs to their children, "even if the child's life is at stake and the parent is the only appropriate donor."[245] This is based on the long standing right that competent adults have to exercise control over their bodies.[246] By being trained to recognize the implied male bias in facially neutral laws and statutes law students/lawyers will be better equipped to advocate for the demise of male bias in the laws that govern the lives of all Americans.

iii. The Third Move

[244] 66 F. Supp. 2d 1247, 1251 (N.D. Fla. 1999).

[245] FLAVIN, *supra* note 20, at 40.

[246] Robert W. Griner, *Live Organ Donations between Siblings and Best Interest Standard: Time for Stricter Judicial Intervention*, 10 GA. ST. U.L. REV. 589, 589 (1993-1994) (citing Union Pac. Ry. V. Botsford, 141 U.S. 250, 251 (1890)).

The third *move,* Double Binds and Dilemmas of Difference, deals with two related phenomena that hurt women's progress toward equality.[247] Double binds are situations where two conflicting demands are being made on a woman, who is forced to make the choice she thinks will be least harmful.[248] The dilemma of difference addresses the bind that institutions often find themselves in when trying to correct past exclusion of minorities.[249] Either focusing on gender, or ignoring it, when trying to move towards inclusion can be harmful.[250] Focusing on gender emphasizes the difference between men and women, and because men are considered the norm, women are considered different, which is equated with inferiority.[251] Ignoring gender is equally as dangerous as focusing on it due to the fact that most institutions are steeped in implicit male bias and so women will be disadvantaged.[252] These phenomena need to be kept in mind when proposing changes in laws that affect birthing or stating a cause of action on behalf of a pregnant or recently pregnant client.

The choice a woman faces when a doctor tells her she needs a cesarean section is an example of a double bind. The woman is first faced with considerations for her own personal safety during birth, which an informed consumer knows is decreased significantly by a cesarean

[247] CHAMALLAS, *supra* note 224, at 8-10.

[248] *Id.* at 9 (Discussing the double bind through the example of a female employee who performs excellently, but fails to be promoted because she is not feminine enough. To be promotable an employee is expected to have masculine qualities (aggressive, abrasive, macho), but for a woman to be promotable she also has to be viewed as feminine (timid, agreeable, delicate). Clearly it would be tremendously difficult to be both).

[249] *Id.* at 9-10.

[250] *Id.*

[251] *Id.* at 10.

[252] *Id.*

section. The woman is then also faced with the safety of her unborn child, which is also very important to the majority of women. The fact that the woman is in this situation will be discussed in the fifth *move*. Ms. Pemberton was in a double bind when choosing a provider for her second pregnancy. She was faced with either giving birth in a hospital and being forced to submit to a scheduled cesarean section, or being attended by a midwife and giving birth at home without the immediately available emergency care required should her uterus rupture. Due to the desire for a VBAC, Ms. Pemberton chose giving birth at home, the better of the two less-than-ideal situations for her. The law should not force these double binds on women. Students should be trained to recognize these double binds and dilemmas of difference. Professors should highlight instances of this phenomenon throughout the course, and encourage discussion about the situations that produce the phenomenon. Professors can motivate students to learn to identify double binds and dilemmas of difference by including them on examinations, or requiring a paper on the issue.

iv. The Fourth Move

The fourth *move*, reproducing patterns of male domination, encourages awareness of reoccurring subordination repackaged in more socially acceptable forms.[253] Unfortunately the adage, 'the more things change, the more things stay the same' seems to hold true for gender equality.[254] The goal of this move is to uncover "how male domination is reproduced and how new rationales and discourses develop to justify the continuing gender disparities."[255] For

[253] *Id.* at 10-11 (explaining the importance of awareness of male bias as it contributes "to the resiliency of sexism [through] . . . reproduction – in altered or updated forms – of patterns of male dominance").

[254] *Id.* at 10.

[255] *Id.* at 11

example, in the employment field it is not enough to be allowed into a profession if jobs within that profession are then divided, with the more prestige and pay going predominantly to men.[256] This move may be difficult for students to articulate in the field of birth at first. There are, however, examples of the trend of repackaged subordination where birth and the law intersect. In order to stretch students to recognize such trends in the field of obstetrics, and hence internalize the move, professors could assign a project requiring analysis of a form of subordination from the past in the area of birthing rights that has been repackaged in a more socially acceptable form today. One example of this trend is the medical separation of the mother from the birthing experience.

In the early 1900's women were giving birth under the influence of scopolamine and morphine, popularly referred to as "twilight sleep."[257] Twilight sleep separated mothers from the birthing experience. Not only does scopolamine cause amnesia, it also has negative effects on the recipient.[258] One nurse described the effects of the drug; "the women were really out of their minds. . . They were really animalistic, and it was awful."[259] Women of the time however were pleased with their labors under twilight sleep as they are unable to remember any of the pains associated with labor.[260] Twilight sleep is in sharp contrast with the "feminist stress on being

[256] *Id.* at 10.

[257] Judith Walzer Leavitt, *Birthing and Anesthesia: The Debate over Twilight Sleep*, 6 SIGNS 147, 147 (1980), available at http://www.jstor.org/pss/3173972.

[258] Ettinger, *supra* note 99, at 1. (relaying a conversation had with Sister Theophane about her pioneering work as a nurse-midwife).

[259] *Id.*

[260] Walzer Leavitt, *supra* note 257, at 147.

awake, aware, and in control during the birthing experience."[261] A century later the majority of women are awake and aware during labor. However the separation continues for those mothers who give birth via cesarean section. During most cesarean sections the woman lies on her back with a sheet hanging across the bed, over her chest, obstructing her view of the birth of her child. Due to the major surgery that is occurring, mothers who give birth via cesarean section are also given pain medication so that they cannot feel their babies being born. Thus, 32 percent of American women whose pregnancies result in cesarean section[262] are still separated from the birthing process and experience by medicine.

Another example of reproducing patterns of male domination in the field of birth concerns the use and availability of physicians (overwhelmingly male[263]) over that of midwives (overwhelmingly female[264]). One study of maternal mortality rates from the United States, Wales, England, and Sweeden showed that between 1890 and 1950 "maternal mortality rates were lowest for home deliveries undertaken by trained and supervised midwives with no

[261] *Id.*

[262] AMNESTY INTERNATIONAL, DEADLY DELIVERY: THE MATERNAL HEALTH CARE CRISIS IN THE USA: SUMMARY AMR 51/007/2010 9 (Mar. 2010), available at http://www.amnestyusa.org/dignity/pdf/DeadlyDeliverySummary.pdf.

[263] Catherine Arnst, *Are There Too Many Women Doctors?,* BLOOMSBERG BUSINESSWEEK, Apr. 15, 2008, available at http://www.businessweek.com/magazine/content/08_17/b4081104183847.htm. (reporting that today one third of doctors are women, and half of students in medical schools are women. Women are more represented in primary care, pediatrics, and obstetrics).

[264]Deanna Pilkenton, *Midwifery: A career for men in nursing*, MEN IN NURSING, Feb. 2008, available at http://www.nursing.vanderbilt.edu/msn/pdf/nmw_midwiferyformen.pdf (noting that male midwives are rare – less than one percent).

exceptions."[265] In contrast to the low mortality rates of births performed by midwives, "maternal mortality rates were very high in countries, state, regions, or areas where most deliveries were performed by physicians, especially in the hospital."[266] Today the majority of American women give birth in hospitals, and the United States has one of the highest maternal mortality rates in the industrialized world. It seems that although the overall maternal mortality rate has dropped significantly since the 1930's,[267] the trend of physician attended hospital births being less-than-optimal has persisted. Yet, women in some states are denied access to DEM altogether, keeping women, in most cases, from their best birthing scenario.

v. The Fifth Move

The fifth *move*, Unpacking Women's Choices, focuses on society's tendency to blame women for their inequality (rather than the sexist structure of society) based on the "choices" that those women have made.[268] Feminist scholarship finds the word "choice" to be a misnomer for many of the decisions women are faced with.[269] While women do ultimately make a choice when

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[265] Irvine Loudon, *Maternal Mortality in the past and its relevance to developing countries today*, 72 AMERICAN JOURNAL OF CLINICAL NUTRITION 241, 242 (2000), available at http://www.ajcn.org/cgi/content/full/72/1/241S.

[266] *Id.*

[267] *Id.*

[268] CHAMALLAS, *supra* note 223, at 11-13.

[269] *Id.* at 12-13. (Highlighting the fact that choices are not made in a vacuum, but that cultural and institutional structures play a choice in guiding women's "choices." By way of example women in blue-collar work are discussed. A woman who is looking for employment and is only qualified for blue-collar jobs may "choose" not to work. When the dominant cultural attitudes, hostility towards women in blue-collar fields, and virulent harassment of women who try to break into these fields is considered, it seems like less of a choice on the woman's part, than

faced with decisions, it should not be assumed that they had any preferable alternatives to chose from.[270] This phenomenon is closely related to double binds. Lawyers and judges are not immune from the tendency to blame women for what are perceived to be their choices. Therefore, it is important that students are trained to identify situations in which women did not have a preferable alternative to chose, but yet are being punished for the choice they made. Once this behavior is recognized, members of the legal community can move from blaming the woman for her own "choices" and begin advocating for changes that produce preferable alternatives. As with the other moves, professors should be vigilant throughout the semester to highlight situations in the course material that represent false choices.

As a woman traversing the obstetric landscape in America today, there are many "choices" that are far from desirable. Most of the choices associated with childbirth are highly determinate upon what the woman's health care will cover. The "choice" to pay entirely for prenatal care, labor and delivery costs, and postpartum care without the help of insurance is an option available to very few American women due to the high price of health care services. A woman's choices are further restricted once a woman arrives at the hospital, should her labor not progress with satisfactory speed.[271] If a woman is not giving birth for the first time, and has had a previous cesarean section, her options yet again are severely limited in many areas of the country. For these women it is likely that they will have no choice other than a scheduled

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on society's part; See also, NORTH COUNTRY (Warner Brothers, 2005) (providing a powerful fictionalized depiction based on a true story about the harassment some women faced to support their families by working in the iron mines in 1989).

[270] *Id.* at 12.

[271] THE BUSINESS OF BEING BORN (Barranca Productions 2007) (discussing the routine decision to "Pit" (administer pitosin to increase contraction strength and frequency) a patient after a certain amount of time has passed).

caesarean section if she chooses to give birth in a hospital. It is likely that the highly educated medical staff involved in her prenatal care will bombard such women with the risk associated with a VBAC, and understandably most pregnant women will feel that a scheduled cesarean section is the only safe and responsible course of action.

Blaming women for their "choices" is often accompanied by a subsequent denial of remedies. Failing to unpack women's "choices" can lead to Judges using what Law Professor Beth Burkstrand-Reid has termed the "culpability tool."[272] Judges use this retrospective and judgmental tool to assert that "if the woman had made a different decision at an earlier time, access to the health service desired would have been available."[273] There are two points in time that Judges using this tool point to, to demonstrate that the woman limited her own options by "choice". First is the point of viability in the pregnancy when the woman made the decision not to procure an abortion.[274] In Planned Parenthood v. Casey the court stated that "a woman who fails to act before viability has consented to the State's intervention on behalf of the developing child."[275] This assertion of narrowing choices is made, despite the fact that the woman is simultaneously asserting her constitutional right to bear children.[276] The Second point is when a woman voluntarily chooses a birthing method that the "court perceives to be unsupported by health care providers."[277] If a woman failed to take advantage of an available service (such as a

[272] Burkstrand-Reid, *supra* note 1, at 137-138.

[273] *Id.* at 137.

[274] *Id.* at 138.

[275] *Id.* at 139 (quoting Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 870 (1992)).

[276] Burkstrand-Reid, *supra* note 1, at 140.

[277] *Id.* at 139.

scheduled cesarean section), and the doctor disagrees with the woman's desired course of action, judges are inclined to accept the doctor's assessment of the risks involved, over the woman's.[278] While this is understandable on its face – the woman presumably has no medical training – the examination in part I and II of the current medical climate in obstetrics finds it a questionable inclination.

Not all judges use the culpability tool to the detriment of the woman involved.[279] The cases discussed supra, In re Brown and In re Baby Boy Doe, demonstrate that some judges take the implications of the court's decision on the woman's health and autonomy very seriously, rather than using the culpability tool. Whether women's choices concerning birthing method are unpacked can have a profound effect on the outcome of a case. For this reason it is imperative that law students/lawyers are taught to unpack these choices, and represent them to the court in such a persuasive manner as to impede the infringement on women's rights.

Conclusion

There is a need in the legal community for recent graduates who are not only aware of the current state of obstetrics in America, but who have also been educated about the legal implications of pregnancy and birth. Textbooks and course syllabi need to be amended to include background information on the state of obstetrics, current precedent, and implicated legal theories. It is imperative that the legal community become more aware that women in America

[278] Id. at 140.

[279] *Id.* at 145 ("The culpability tool is not always used, even in cases where access to given reproductive health services is severely limited. Some cases. . . focus instead on a detailed analysis of women's health issues at the time of delivery").

are denied fundamental rights when they become pregnant, and specifically, when they go into labor. This deprivation of fundamental rights produces an atmosphere which tolerates criminal prosecution of reproduction. In addition to facing criminal charges for becoming pregnant in certain circumstances, women's choices generally are limited concerning when, where, and how they will give birth. Women can be denied access to both the method of birthing they desire, and the attendant they want present at their births. Further, courts have gone as far as to disregard women's rights to bodily integrity, privacy, and the right to refuse treatment in ordering them to undergo cesarean sections. Lawyers educated in the legal rights of birthing women are needed to reclaim birthing rights, and stop the encroachment on women's fundamental rights. Gender discrimination, feminist jurisprudence, family law and constitutional law courses should all include discussions of childbirth and birthing rights. Through education will come awareness and action; through action will come hardier protection of women and the birthing rights they should enjoy.