

# Motherhood and Apple Pie: A UK Perspective on Mothers Who Misuse Drugs

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In this commentary, I explore two questions raised by Angelotta and Appelbaum's study. First, I offer an English legal perspective on the protection of children from their mothers, looking at both civil (family) and criminal law. Second, I discuss the idealization of motherhood that is implied by the prosecution of pregnant women; the denigration of those who fail this ideal; and the way that idealization and denigration contribute to injustice for women. I conclude by offering comments on the implications for those assessing women accused of harming their unborn child.

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I am grateful to the Editor for asking me to comment on this thoughtful review by Drs. Angelotta and Appelbaum.<sup>1</sup> I have taken my title from that well known phrase: “As American as motherhood and apple pie,” and in this commentary want to suggest that when motherhood is idealized as fruitful, sweet, and made with love, then those who fail in this ideal will be severely punished. In the United Kingdom, the criminal prosecution of mothers who appear not to be taking care of their babies is not yet so familiar to psychiatrists; but it is our experience that where the United States leads, then the United Kingdom may follow.

## Family Courts and the Protection of Living Children

My experience of state scrutiny of mothers has not been in the criminal courts, but in the provision of expert testimony to the English family court in child protection cases. There are important ways in which the family court law differs from criminal law in its treatment of mothers who fail to take care of their children. In England and Wales, child protection services are provided by local authorities organized

geographically and funded by local government, with direct funds from central government as local taxes. When concerns are raised about child protection, social services investigate and then apply to the family court in what are called “care proceedings”: no doubt there are similar processes operated by child protection services in the United States.

Child protection services represent the state's interest in the protection of the vulnerable. Local authorities are empowered by law to remove children who are at risk of harm, and the burden of proof is on the local authority to show that a threshold of risk of harm has been crossed that would justify state intervention in the care of that child. A range of options are open to the courts, of which full removal into state care is only one: In 2014, 60,000 children were removed from their caregivers, 40,000 of whom had experienced proven abuse and neglect.<sup>2</sup> A recent study suggests that 17 percent of these proceedings are repeats (i.e., children have been previously removed from this caregiver).<sup>3</sup>

Nearly all of these failed caregivers are mothers, and the family courts seek to hear evidence about how and why these mothers struggle to care for their children or fail to protect them. Typically, prosecution services conclude that family law fact-finding does not attain the level of proof necessary for criminal prosecution, and criminal intent may be hard to make out. It is unusual for these cases to proceed to criminal charges. The family courts' burden of proof

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is a balance of probabilities, and the focus of the court is the welfare and best interests of the child. When criminal prosecutions proceed, it is usually because of the degree of harm caused or concurrent charges, such as fraud.

In my experience, the family court is increasingly interested in knowing and understanding the maternal mind and maternal function, about how psychiatric disorders impinge on a mother's ability to keep her children in mind, and what can be done to improve the mother's mental health. Attachment theory has proved useful for the family courts' understanding how a mother's own experience of abuse and neglect might then manifest as poor care for her off-spring.<sup>4</sup> Some family lawyers and judges have developed a sophisticated understanding of personality disorder and how it might affect relationships with dependent children and other family members. In relation to substance misuse, a recent development has been the setting up of family drug and alcohol courts (FDACs), where the same judge oversees cases where parental struggles with substance abuse are affecting their ability to care for their children. Evaluation of FDACs<sup>5</sup> suggests that having a dedicated court team and linked treatment service helps parents engage in substance misuse programs and improves outcomes. Such an approach seems altogether less punitive than the approach described by Angelotta and Appelbaum.

### Civil Law Liability

English civil law does not support maternal liability for harm to unborn babies, who are not regarded as persons in law until they are born alive, when their rights crystallize.<sup>6</sup> The only exception is (again) a pragmatic one; unborn children can sue for injuries caused by traffic accidents, because most mothers in this case will have insurance that can meet the claims. The English courts have not been sympathetic to claims for compensation for wrongful birth (i.e., the idea that a child might be compensated for being born unwanted or unplanned for). This tendency is of interest given that unwanted and unplanned pregnancy is a known risk factor for child maltreatment.

An English Court of Appeal case addressed the question of harm to an unborn fetus by its mother. In this case,<sup>7</sup> it was claimed on behalf of an infant, C.P., that the child had been the victim of a crime while *in utero* because the mother abused alcohol while she

was pregnant, causing C.P. to be born with fetal alcohol syndrome (FAS). It was argued that the mother had been criminally negligent toward C.P., who could therefore claim compensation for this acquired injury. The claim was unsuccessful on the (now familiar) grounds that the infant was not a legal person *in utero*, and so could not be the victim of a crime before birth.

### Autonomy and Pregnancy

To date, the English civil courts seem to respect maternal autonomy and treat pregnancy like a medical condition, over which the mother has control in terms of treatment acceptance or refusal. This approach is in contrast to the procurement of an abortion at any time during pregnancy, which is still a criminal offense under the Offenses against the Persons Act of 1861. Abortion is only legally permitted under certain medical conditions, defined in law and delivered by medical practitioners.

However, the courts have had to address those situations where a mother's choice appears to threaten the welfare of a child who may be only hours (and inches) away from having full legal rights. In the case of M.B.,<sup>8</sup> the Ob-Gyn team felt that a C-section was essential to save the life of her child, but the mother refused to agree to this because she had a needle phobia. The hospital obtained a judicial declaration that it would be lawful to carry out the procedure without M.B.'s consent, and M.B. appealed. M.B. then changed her mind and agreed to the anesthetic that had been her main fear, and the infant was safely born by C-section. The Court of Appeal heard the case and upheld the judge's view that M.B. had lacked the capacity to make a competent treatment refusal, and therefore, in theory at least, she could have been compelled to have a C section. This operation would have been justified as being in her own best interests, not the welfare of the (nearly born) child.

A somewhat different approach was taken in the case of S.,<sup>9</sup> who was diagnosed with preeclampsia; and her Ob-Gyn team recommended urgent admission to the hospital and induction of labor to save her life and the life of her nearly born child. S. refused on the grounds that she wanted a natural birth and no medical intervention in her pregnancy. S. was assessed by a mental health team, who thought she had a mental disorder, and she was detained under the English Mental Health Act. A judge determined that

she was not competent to refuse treatment and she was compelled to have a C-section. She appealed, and the Appeal Court held that her right to respect for autonomy had been violated; that her detention under mental health legislation was unlawful as the 'treatment' she was receiving was not for a mental disorder but for preeclampsia; and that the judicial decision that authorized the C-section was based on false information. The court stated that a pregnant woman with full mental capacity had the right to refuse treatment, even if this could have harmful consequences for her unborn child.

There is a peculiarly English pragmatism about the S. case; in which S's failure to think about her nearly born infant's needs was seen as madness, not badness. There is no suggestion that S. was negligent or failing to care for her child. I am not aware that social services were involved in the case afterward, although it might be said that a mother whose fear overwhelms her capacity to think about the life of a nearly born baby may be a mother whose fear may overwhelm her capacity to think about a newly born baby. One wonders what would have happened legally if S.'s baby had not been delivered successfully. and how S.'s right to act in ways that threaten the life of an unborn child can be compared with the potential criminal prosecution of women who seek to terminate a pregnancy at any time.

Moral and legal arguments are often couched in purely adversarial terms, which pit the interests of one person against another. This approach seems both simplistic and unrealistic when the persons are not separate but are connected in a complex and dynamic relation that is both physical and psychological. Wilkinson *et al.*<sup>10</sup> discuss ethical and legal approaches to the protection of the unborn child, and sensibly observe that these cases are complex because the nature of the relationship between a woman and a fetus is complex, and because the identity of the fetus as a person is dynamic not static. They argue that some types of intervention to reduce harm to unborn children can and should be put in place, but these interventions are addressing the general health of women who seek to become mothers, not punitive responses to those who fail.

The idea that we ought to protect and support maternal health and well-being, especially during pregnancy, is not new. There is extensive law and policy that generally takes the view that it makes more sense to support mothers than to prosecute

them. However, these legal and policy systems may not operate justly. As Goodwin<sup>11</sup> observes, white middle class women who take opiate medication for back pain throughout their pregnancy are not criminally prosecuted. Black or minority ethnic women are prosecuted, especially if they are poor, unemployed, and have no health insurance and little access to well-being programs, including access to good contraceptive advice and discussions of sexual health. Prosecution and incarceration are not only potentially disastrous for these pregnant mothers, but also for any other children at home, who are then deprived of maternal care. Thus, by punishing a woman for not caring for her unborn child, the criminal court unwittingly makes her an "offender" in relation to her other children.

### **Mothers: Madonna or Whores?**

It is hard not to think that the criminal jurisdictions described by Angelotta and Appelbaum reflect a cultural attitude in which the maternal role is highly idealized. Such idealization reflects an immature defense against anxiety and is usually associated with harsh denigration and punishment of the woman who is seen to fail in this role. Welldon<sup>12</sup> argues that there are social constructions of motherhood that are frankly perverse in the way that they oscillate between two dichotomous poles of idealization and denigration. Such constructions make it hard for women to express ambivalence about being pregnant, becoming a mother, or caring for the needy and dependent. Motz<sup>13</sup> describes how women internalize these constructions and so deny any ambivalent feelings, or experience defensive fear and shame in relation to them. Denied or split feelings may be acted out in abusive behavior toward a child, so the woman becomes the awful mother she fears being.

This commentary does not have the scope to review the current evidence about the impact of trans-generational trauma and attachment insecurity on the capacity to be a parent, or why the experience of unresolved fear and loss experiences goes some way toward explaining why women get pregnant in mindless ways, and the extent of their ambivalence about their identity as mothers while pregnant. What Angelotta and Appelbaum's review suggests to me is that there is a social refusal to take maternal ambivalence seriously and that the courts are enacting a demand that women always put their children's

needs before their own and never feel hostile toward them or reject them. Women must be good mothers who do nothing that would put their child at risk (note that there is no onus on either the male begetters or the state to help them with this task: they alone must do this). The medicolegal scene is set as an adversarial battlefield between a bad mother and a helpless child. This scenario is the stuff of nightmares and fairy tales, which, as Marina Warner observes, have such powerful cultural currency and influence at both conscious and unconscious levels.<sup>14</sup>

Judith Jarvis Thompson describes this idealistic expectation of women from a philosophical perspective in her famous defense of abortion.<sup>15</sup> She challenges traditional debates about abortion which center on the personhood of the fetus, which engages in a clash between an unborn child and its mother. Jarvis Thompson suggests that a pregnant woman should be seen, not as a Good Samaritan (with all the saintliness that this implies), but as a Minimally Helpful Samaritan, who can offer help and assistance to a fetus, but is not morally mandated to do so. She raises an interesting question about context; if a woman has deliberately brought a fetus into being, then she may have more duties to protect and support it than the woman who gets pregnant without consent or by chance. This view would fit with the intuition that abortion can be offered to women who are pregnant by rape, but does not address the moral response toward women who get pregnant in an apparently careless (or what I could call a mindless) way. These women often meet hostility and anger when they seek an abortion, and they may be more likely to not take care of themselves in pregnancy or (by extension) to take care of the unborn child. Their sexuality is seen as whorish, not creative.

## Conclusion

What might assist the debate is some attention to the voices and experience of the women who seem to struggle with the maternal role, who want to be good mothers but do not want to give up the drugs and alcohol that make them feel calm, who fear their partners but also depend on them, who know that they are really too young to have a baby but do not see how or why they should be different from their own mothers. I am thinking here of Carol Gilligan's

important work<sup>16</sup> in which she described how young women think and talk about the decision to terminate a pregnancy. Gilligan's vital contribution was to set the scene for a more relational account of ethics (and by extension legal) dilemmas, one that would complement a purely rights-based account. The danger of a right-based account is that it can be reduced to an adversarial struggle between the good person and the bad; the weak, victimized person and the strong cruel perpetrator; a struggle that does not offer possibilities of cooperation, support, and reparation. If the end game is to protect an unborn child, then it is hard to see how prosecuting and jailing mothers is going to do this.

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