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## Note

### Born (Not So) Free: Legal Limits on the Practice of Unassisted Childbirth or Freebirthing in the United States

*Anna Hickman\**

On March 27, 2009, the newborn daughter of a leading Australian unassisted childbirth advocate died following an unassisted home water birth.<sup>1</sup> The mother, Janet Fraser, operates a homebirth website that encourages pregnant women to consider giving birth without a physician or midwife.<sup>2</sup> Fraser experienced a prior successful unassisted childbirth that she described in glorious terms on the website.<sup>3</sup> According to published reports, Fraser participated in a media interview during the early hours of her most recent labor, where she revealed she received no prenatal care and intended to give birth without an expert attendant.<sup>4</sup> She explained that she expected her labor to progress slowly,<sup>5</sup> expressing confidence that generally nothing goes wrong quickly during labor and there would be

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1. See Kara Lawrence, *Joyous Birth Advocate's Child Birth Death Tragedy*, DAILY TELEGRAPH (Sydney, Austl.), Apr. 6, 2009, at 5, available at <http://www.dailytelegraph.com.au/news/joyous-birth-advocates-child-birth-death-tragedy/story-elefreuy9-1225694610168>.

2. See Joyous Birth, Unassisted Childbirth, <http://www.joyousbirth.info/printouts/uc.html> (last visited Feb. 10, 2010).

3. See Joyous Birth, Janet's Freebirth, <http://www.joyousbirth.info/articles/janetsfreebirth.html> (last visited Jan. 25, 2010) ("I also heard the universe spinning and felt colourless light bursting into the pain in my body and filling me with a connection to birthing women through the aeons.")

4. See John Elder, *Tragic Sequel to Home Birth*, SUNDAY AGE (Melbourne, Austl.), Apr. 12, 2009, at 9, available at <http://www.theage.com.au/national/tragic-sequel-to-home-birth-20090411-a3hh.html>.

5. *Id.*

plenty of time to get to a hospital if necessary.<sup>6</sup> When asked whether she would alert a nearby hospital about her progressing labor, she responded: “[w]hen you go on a skiing trip, do you call the hospital to say, ‘I’m coming down the mountain, can you set aside a spot for me in the emergency room?’ I don’t think so.”<sup>7</sup> Unfortunately, five days after the interview, and five days into labor, someone from Fraser’s home made an emergency call.<sup>8</sup> Paramedics arrived to find a newborn girl in cardiac arrest.<sup>9</sup> They were unable to revive her.<sup>10</sup> The death is under investigation, as it is unclear whether the child was stillborn or died from complications of childbirth.<sup>11</sup>

This tragedy casts light on the small, but vocal and growing,<sup>12</sup> unassisted childbirth movement, which is gaining increased media attention in the United States<sup>13</sup> and worldwide.<sup>14</sup> First described in the 1950s, unassisted childbirth or “freebirthing” means to give birth without a physician<sup>15</sup> or

6. *Id.*

7. Ronda Kaysen, *Baby Dies in Unassisted Home Birth*, MOM LOGIC, Apr. 13, 2009, [http://www.momlogic.com/2009/04/home\\_birth\\_advocates\\_baby\\_dies.php](http://www.momlogic.com/2009/04/home_birth_advocates_baby_dies.php).

8. See Lawrence, *supra* note 1.

9. *Id.*

10. *Id.*

11. See *id.*

12. See, e.g., Linda Carroll, *More Women Choose Do-It-Yourself Births*, MSNBC.COM, Dec. 6, 2009, [http://www.msnbc.msn.com/id/34225823/ns/health-womens\\_health/from/ET](http://www.msnbc.msn.com/id/34225823/ns/health-womens_health/from/ET) (noting how a “small but growing number” of women are choosing unassisted childbirth).

13. See, e.g., Jeff Barnard, *DBY: Delivering Baby Yourself: Some Women Are Giving Birth at Home Without Midwives*, LEWISTON MORNING TRIB. (Idaho), Nov. 22, 2009; Kate Sikora, *Tough New Laws To Make Homebirths Illegal*, HERALD SUN (Melbourne, Austl.), June 19, 2009, at 13, available at <http://www.heraldsun.com.au/news/national/tough-new-laws-to-make-homebirths-illegal/story-e6frf716-1225737433691>. ABC’s 20/20 also recently aired a program on unassisted childbirth. See Donna Hunter & Sarah Netter, *Mothers-to-Be Saying No to Modern Medicine*, ABCNEWS, Dec. 10, 2008, <http://abcnews.go.com/Health/story?id=6424603&page=1>; Freebirthing.org, *An Unassisted Childbirth Documentary*, <http://freebirthing.org/> (last visited Feb. 10, 2010).

14. See, e.g., Charlotte Philby, *I Gave Birth Without Any Medical Help*, INDEPENDENT (London), July 11, 2009, (Magazine), at 8; Tory Shepherd, *Women Warn They’ll Risk Birth Without Midwives*, ADVERTISER (Adelaide, Austl.), Dec. 11, 2009, at 9, available at <http://www.adelaidenow.com.au/news/south-australia/women-warn-theyll-risk-birth-without-midwives/story-e6frea83-1225809212779>.

15. The terms “physician” and “obstetrician/gynecologist” (ob/gyn) are used interchangeably throughout this Note to refer to the medical professionals who attend the majority of labors. See BOSTON WOMEN’S HEALTH BOOK COLLECTIVE, *OUR BODIES, OURSELVES: PREGNANCY AND BIRTH* 19 (2008) [he-

midwife<sup>16</sup> in attendance.<sup>17</sup> The death of Fraser's daughter also highlights a greater issue: the fundamental tension between a pregnant woman's interest in choosing her labor location and attendant and the state's interest in protecting the lives of viable fetuses. In Australia, where Fraser's tragic labor occurred, the recently enacted Health Practitioner Regulation National Law Act 2009,<sup>18</sup> effectively bars all midwife-attended homebirths, which, ironically, will likely increase the number of unassisted childbirths because women will have no alternative to hospital births.<sup>19</sup> In the United States, the legality of unassisted childbirth is uncertain. Proponents generally believe that the practice is legal, or at minimum, that they will face no legal consequences for intentionally giving birth without medical or midwifery care.<sup>20</sup> Yet there is evidence that women may be both forced to accept medical care at the end of pregnancy<sup>21</sup> and

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reinafter BOSTON]. Both practice the "medical model" of maternity care, which focuses on the prevention, treatment, and diagnosis of pregnancy and birth complications. *Id.* at 16.

16. Certified midwives and direct-entry midwives are trained to provide prenatal care, labor and birth care, and follow-up care after birth. *See id.* at 18. They practice the "midwifery" model of maternity care, which minimizes interference with the normal birth process. *See id.* at 15. Certified nurse-midwives, who are nurses with advanced training in midwifery, are often criticized for practicing the medical model of maternity care. *See* MARSDEN WAGNER, *BORN IN THE USA: HOW A BROKEN MATERNITY SYSTEM MUST BE FIXED TO PUT MOTHERS AND INFANTS FIRST* 111 (2006); Rixa Ann Spencer Freeze, *Born Free: Unassisted Childbirth in North America* 267 (Dec. 2008) (unpublished Ph.D. dissertation, University of Iowa), available at <http://ir.uiowa.edu/cgi/viewcontent.cgi?article=1387&context=etd>.

17. *See Freeze, supra* note 16, at 43 (noting how women first began writing about unassisted childbirth in the 1950's).

18. Health Practitioner Regulation National Law Act, 2009 (Austl.).

19. *See Sikora, supra* note 13.

20. *See, e.g.,* Lucy Myers, *Is Unassisted Childbirth Legal?*, ASSOCIATED CONTENT, Sept. 15, 2007, [http://www.associatedcontent.com/article/373462/is\\_unassisted\\_childbirth\\_legal.html?cat=52](http://www.associatedcontent.com/article/373462/is_unassisted_childbirth_legal.html?cat=52) ("[U]nassisted childbirth is legal in the United States and all other countries. . . . Secondly, the laws that say unassisted childbirth is illegal are all unenforceable."); Laura Shanley, *Is Unassisted Childbirth Legal?*, BornFree!, <http://www.unassistedchildbirth.com/uc/legal.html> (last visited Apr. 2, 2010) ("[Unassisted childbirth] is legal in every state except Nebraska where it is a misdemeanor for a father to catch his baby in a non-emergency situation (it doesn't say anything about the mother catching the baby).").

21. *See Pemberton v. Tallahassee Mem'l Reg'l Med. Ctr., Inc.*, 66 F. Supp. 2d 1247, 1248-49 (N.D. Fla. 1999) (noting that the hospital was seeking to compel a cesarean section procedure on a non-consenting plaintiff); *In re Madyun*, Misc. No. 189-86 (D.C. 1986), reprinted as appendix to *In re A.C.*, 573 A.2d 1235, 1259 (D.C. 1990); *Jefferson v. Griffin Spalding County Hosp. Auth.*, 274 S.E.2d 457, 458 (Ga. 1981).

prosecuted for failing to seek professional care during labor and immediately afterwards.<sup>22</sup>

This Note considers the legality of unassisted childbirth and, specifically, whether freebirthers may face legal consequences when their newborn is injured as a result of an intentionally unassisted birth. Part I describes the freebirthing movement generally and addresses common reasons why women choose unassisted births. Part II introduces legal frameworks that apply to freebirthing, notably the state's interest in the welfare of viable unborn children and a parent's duty to provide medical care. It also analyzes whether the state should intervene in unassisted childbirths and concludes that it should not compel pregnant women to seek professional care during labor. Part III contends that the state's authority to compel parents to seek necessary medical care for their children after birth is sufficient to protect babies born to freebirthers. This Note ultimately concludes that state intervention or prohibition is unlikely to curtail the practice of freebirthing, but would instead lead to more unassisted births and potential complications. The legal duty to provide necessary medical care to newborn children is a preferable legal framework to address bad outcomes of unassisted births as it protects a woman's right to choose her birth location and attendant, yet permits the state to intervene when a newborn's health is at risk.

## I. FREEBIRTHING IN THE UNITED STATES

Ninety-nine percent of pregnant women in the United States receive medical maternity care and labor support.<sup>23</sup> A small minority, however, rejects the status quo and chooses to forego physicians and hospitals, opting instead for a birth at home or a freestanding birth center.<sup>24</sup> Of this one percent of

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22. *Goldsmith v. State*, 344 So. 2d 793, 799 (Ala. Crim. App. 1977); *State v. Collins*, 986 S.W.2d 13, 15 (Tenn. Crim. App. 1998).

23. See Nat'l Ctr. for Health Statistics, Ctrs. for Disease Control and Prevention, VitalStats-Birth, [http://www.cdc.gov/nchs/data\\_access/vitalstats/VitalStats\\_Births.htm](http://www.cdc.gov/nchs/data_access/vitalstats/VitalStats_Births.htm) (last visited Apr. 2, 2010) [hereinafter National Statistics] (choose the "Birth Tables" hyperlink; then choose the "2006 Birth Data—State Detail" hyperlink; create a name and password to log in; once logged in, expand "Medical Services Utilization;" choose "Birth Place" hyperlink) (showing that according to the most recent government data, of the 4,265,192 U.S. births that had a reported birth location 4,226,624 took place in a hospital).

24. *Cf. id.* (showing that 35,751 out of 4,265,192 reported births took place at a residence or freestanding birth center). A freestanding birth center is a "homelike" birthing institution, which is independent from a hospital, but

pregnant women, the majority use a midwife birth attendant.<sup>25</sup> A small minority prefer to birth without the presence of a physician or a midwife—an option dubbed unassisted childbirth or freebirthing.<sup>26</sup> In 2006, 7841 of the 4.2 million U.S. births were unattended by a physician or midwife.<sup>27</sup> Of these, it is unclear how many were planned freebirths since the statistics do not separate planned from unplanned births within this category.<sup>28</sup>

The choice to give birth without the aid of a professional birth attendant is both a practical and philosophical one.<sup>29</sup> The decision is often premised on several distinct, but complementary, rationales.<sup>30</sup> According to one survey of freebirthers the most common reasons for choosing unassisted childbirth were a belief that hospitals are dangerous and a desire to avoid unnecessary interventions in labor.<sup>31</sup> Choosing unassisted childbirth may also be a response to the unavailability of or undesirability of midwife care<sup>32</sup>—some states bar it,<sup>33</sup> others highly regulate

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which has established hospital transfer procedures. See BOSTON, *supra* note 15, at 25.

25. See National Statistics, *supra* note 23 (choose the “Birth Tables” hyperlink; then choose the “2006 Birth Data—State Detail” hyperlink; create a name and password to log in; once logged in, expand “Medical Services Utilization”; check the box next to the “Attendant” link; check the box next to the “Birth Place” link; click on the publish table icon (a small table sign with the star in the top left corner) to create the table; select “Publish Table,” then select “View Table”) (noting that of the 35,751 total births, midwives attended 24,415 and physicians attended 2731).

26. Freeze, *supra* note 16, at 43.

27. See National Statistics, *supra* note 23 (choose the “Birth Tables” hyperlink; then choose the “2006 Birth Data—State Detail” hyperlink; create a name and password to log in; once logged in, expand “Medical Services Utilization;” check the box next to the “Attendant” link; check the box next to the “Birth Place” link; click on the publish table icon (a small table sign with the star in the top left corner) to create the table; select “Publish Table,” then select “View Table”).

28. See *id.*; Freeze, *supra* note 16, at 7.

29. See Freeze, *supra* note 16, at 42–43.

30. See *id.* at 94.

31. *Id.*

32. *Id.*

33. Certified Nurse-Midwives are legal in every state. Susan Corcoran, Note, *To Become a Midwife: Reducing Legal Barriers to Entry into the Midwifery Profession*, 80 WASH. U. L.Q. 649, 657 (2002) (stating that all states regulate nurse-midwives). Certified midwives and direct-entry midwives, however, are barred in some states. See *id.* at 651 (stating that some states criminalize direct-entry midwifery); Midwives Alliance of N. Am., Direct-Entry Midwifery State-by-State Legal Status, <http://mana.org/statechart.html> (last visited Apr. 2, 2010) [hereinafter Midwives Alliance].

it.<sup>34</sup> While many women in the survey reported practical reasons for choosing unassisted childbirth, a large number cited intensely personal reasons as well.<sup>35</sup> These ranged from a profound trust in their bodies and the birth process to a desire for complete autonomy and control over their labor to a need for privacy in the comfort and peace of their home environment.<sup>36</sup> Overall, the women choosing unassisted childbirth appear to do so thoughtfully.

#### A. A DISTRUST OF HOSPITALS AND A FEAR OF UNNECESSARY MEDICAL INTERVENTIONS

Distrust of hospitals and fear of unnecessary medical interventions are common reasons a freebirther chooses unassisted childbirth.<sup>37</sup> This apprehension is not unfounded. Substantial evidence demonstrates that medical interventions are routinely overused in hospital births.<sup>38</sup> A striking example of this data is the cesarean section<sup>39</sup> “epidemic” in the United States.<sup>40</sup> U.S. women have more C-sections than women in any other industrialized country, accounting for 31.1% of all births according to the most recent government statistics.<sup>41</sup> In contrast, the World Health Organization recommends a national C-section rate of fifteen percent.<sup>42</sup> Another problem is that procedures that were developed for high-risk pregnancies are cur-

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34. See JENNIFER BLOCK, *PUSHED: THE PAINFUL TRUTH ABOUT CHILD-BIRTH AND MODERN MATERNITY CARE* 181 (2007) (noting the many legal challenges that midwives face, even in states where they are licensed).

35. See Freeze, *supra* note 16, at 94.

36. *Id.*

37. *Id.*

38. See BOSTON, *supra* note 15, at 16.

39. Cesarean, cesarean section, and C-section are used interchangeably to refer to surgical childbirth. See MAYO CLINIC, *GUIDE TO A HEALTHY PREGNANCY* 590 (2004).

40. See Sylvia A. Law, *Childbirth: An Opportunity for Choice that Should Be Supported*, 32 N.Y.U. REV. L. & SOC. CHANGE 345, 345 (2008).

41. *Id.* at 346; see also National Statistics, *supra* note 23 (choose the “Birth Tables” hyperlink; then choose the “2006 Birth Data—State Detail” hyperlink; create a name and password to log in; once logged in, expand “Medical Services Utilization”; choose “Method of Delivery Recode (revised)” hyperlink) (showing that 652,693 of 2,044,858 reported births were by C-section).

42. Guo Sufang et al., *Delivery Settings and Caesarean Section Rates in China*, 85 BULL. WORLD HEALTH ORG. 755, 755 (2007). See the discussion on the World Health Organization’s development of an optimal ten to fifteen percent C-section rate in WAGNER, *supra* note 16, at 47–48.

rently used on most or all laboring women,<sup>43</sup> whereas scientific evidence suggests that no more than twenty percent of pregnancies actually require medical intervention.<sup>44</sup> Ultimately, many women choosing unassisted childbirth hope to avoid unwarranted and risky interference in their labors.<sup>45</sup>

#### B. UNAVAILABILITY OF QUALITY MIDWIFE HOME BIRTH CARE

Although many freebirthers cited fear of hospitals and unnecessary medical interventions as reasons for choosing unassisted childbirth, others cited unavailability of quality home birth midwives.<sup>46</sup> The vast majority of nurse-midwives work in hospitals<sup>47</sup> and struggle to resist pressure to practice the medi-

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43. PEW HEALTH PROFESSIONS COMM'N & UNIV. CAL., S.F. CTR. FOR THE HEALTH PROFESSIONS, CHARTING A COURSE FOR THE 21ST CENTURY: THE FUTURE OF MIDWIFERY 2-5 (1999), available at [http://futurehealth.ucsf.edu/Content/29/1999-04\\_Charting\\_a\\_Course\\_%20for\\_the\\_21st\\_Century\\_The\\_Future\\_of\\_Midwifery.pdf](http://futurehealth.ucsf.edu/Content/29/1999-04_Charting_a_Course_%20for_the_21st_Century_The_Future_of_Midwifery.pdf); CAROL SAKALA & MAUREEN P. CORRY, EVIDENCE-BASED MATERNITY CARE: WHAT IT IS AND WHAT IT CAN ACHIEVE 4-5 (2008), available at <http://www.childbirthconnection.org/pdfs/evidence-based-maternity-care.pdf>. Research shows that most pregnant women experience multiple medical interventions in their labor. See generally EUGENE R. DECLERCQ ET AL., LISTENING TO MOTHERS II: REPORT ON THE SECOND NATIONAL U.S. SURVEY OF WOMEN'S CHILDBEARING EXPERIENCES 3 (2006), available at [http://www.childbirthconnection.org/pdfs/LTMII\\_report.pdf](http://www.childbirthconnection.org/pdfs/LTMII_report.pdf) ("Each of the following interventions was experienced by most mothers: continuous electronic fetal monitoring, one or more vaginal exams, intravenous drip, epidural or spinal analgesia, and urinary catheter. Half of the mothers experienced one or more methods of inducing labor.").

44. See Randi Hutter Epstein, *When Giving Birth, Opting To Go It Alone*, N.Y. TIMES, May 7, 2002, at 5 (quoting the President of the American College of Obstetricians and Gynecologists' statement that "20 percent of all previously normal pregnancies turn into complications and high-risk situations . . ."); WAGNER, *supra* note 16, at 108 (noting how medical procedures are needed in no more than twenty percent of pregnancies). The overuse of medical interventions in childbirth has many causes, including (1) the underlying philosophy of the medical model of care, see generally ALLEN B. BARBOUR, CARING FOR PATIENTS: A CRITIQUE OF THE MEDICAL MODEL (1995) (discussing and critiquing the medical model of care); (2) perverse financial incentives, see SAKALA & CORRY, *supra* note 43, at 15; and (3) the prevalence of defensive medicine, see David M. Studdert et al., *Defensive Medicine Among High-Risk Specialist Physicians in a Volatile Malpractice Environment* 293 JAMA 2609, 2609 (2005).

45. All medical interventions in childbirth carry some risk. Cf. BOSTON, *supra* note 15, at 179-84 (discussing risks of common medical interventions in childbirth).

46. Freeze, *supra* note 16, at 94.

47. See National Statistics, *supra* note 23 (choose the "Birth Tables" hyperlink; then choose the "2006 Birth Data—State Detail" hyperlink; create a name and password to log in; once logged in, expand "Medical Services Utilization"; check the box next to the "Attendant" link; check the box next to the "Birth Place" link; click on the publish table icon (a small table sign with the



cal model of maternity care.<sup>48</sup> Few of them attend homebirths,<sup>49</sup> so not all women have access to the certified or direct-entry midwives who attend the majority of homebirths in the United States. Today, only one percent of births occur at a woman's home,<sup>50</sup> despite evidence that homebirths attended by midwives are as safe as hospital births for most women.<sup>51</sup> Legal access to midwife-attended homebirth varies considerably by state, and the United States is the only nation in the world to allow its prohibition.<sup>52</sup> Currently, Alabama, Illinois, Indiana, Iowa, Kentucky, Maryland, Missouri, North Carolina, South Dakota, Wyoming, and the District of Columbia prohibit the practice of certified or direct-entry midwives, which, in turn, limits the availability of attended homebirth.<sup>53</sup> Certified or direct-entry midwives in those states risk criminal charges for practicing medicine or nursing without a license<sup>54</sup> and face substantial fines or even jail time if convicted.<sup>55</sup>

Even in the forty states in which midwifery is legal by statute or common law,<sup>56</sup> many of the statutory requirements are onerous. Some states require midwives to procure a supervising or "back-up" physician.<sup>57</sup> It is often difficult for a midwife to find a physician that supports her home birth practice.<sup>58</sup> State

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star in the top left corner) to create the table; select "Publish Table," then select "View Table").

48. See WAGNER, *supra* note 16, at 111.

49. National Statistics, *supra* note 23 (expand "medical services utilization tab;" check the box next to the "Attendant" link; check the box next to the "Birth Place" link; click on the small table sign with the star on it to create the table; select "Publish Table," then select "View Table") (showing certified nurse-midwives attended 3951 out of 24,970 home births).

50. See *id.*

51. See WAGNER, *supra* note 16, at 142-44 (discussing the results of the *British Medical Journal* study); Kenneth C. Johnson & Betty-Anne Daviss, *Outcomes of Planned Home Births with Certified Professional Midwives: Large Prospective Study in North America*, 330 BRIT. MED. J. 1416, 1416 (2005).

52. See BLOCK, *supra* note 34, at 213.

53. See Midwives Alliance, *supra* note 33.

54. See WAGNER, *supra* note 16, at 120; see e.g. *Hunter v. State*, 676 A.2d 968, 975 (Md. Ct. Spec. App. 1996).

55. See BLOCK, *supra* note 34, at 181 (discussing the conviction and sentencing of midwives).

56. See Midwives Alliance, *supra* note 33.

57. See, e.g., ARK. CODE ANN. § 17-85-107(b) (West 1987).

58. Cf. WAGNER, *supra* note 16, at 132 (stating that most obstetricians are opposed to home birth); Press Release, Am. Cong. of Obstetricians and Gynecologists, ACOG Statement on Home Births (Feb. 6, 2008), available at [http://www.acog.org/from\\_home/publications/press\\_releases/nr02-06-08-2.cfm](http://www.acog.org/from_home/publications/press_releases/nr02-06-08-2.cfm) (describing official opposition to home birth).

regulations also frequently limit the type of patients that midwives can serve.<sup>59</sup> For example, they are generally prohibited from attending “high-risk” births, which under the medical definition includes vaginal births after cesarean (VBACs), breech or multiple births, and the labor of any mother over the age of thirty-five.<sup>60</sup> Considering that nearly one-third of all pregnancies end in cesarean,<sup>61</sup> the VBAC ban alone substantially limits the number of women who may legally choose midwifery care. These requirements cause some midwives to forego licensing, either taking their practice underground or leaving practice altogether.<sup>62</sup> In sum, while some freebirthers’ concerns about hospital births and unnecessary medical inventions in childbirth would likely be alleviated through midwife-assisted homebirths,<sup>63</sup> many women cannot access home birth midwifery care. For others, access to midwifery care is not an issue; instead they have philosophical reasons for choosing unassisted childbirth.

### C. PHILOSOPHY OF FREEBIRTHING

Although the women who opt for unassisted childbirth have numerous practical reasons for their decision, many freebirthers also have philosophical motivations for forgoing medical or midwife care during childbirth.<sup>64</sup> From their perspective, any intervention in the childbirth process is unnecessary and undesirable.<sup>65</sup> Some consider birth to be an inherently natural process that does not require an expert attendant.<sup>66</sup> Others view it as a private process akin to sex between a man and woman.<sup>67</sup> Childbirth is also seen as an opportunity to convey

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59. See, e.g., FLA. STAT. § 467.015 (2007).

60. See BLOCK, *supra* note 34, at 181.

61. National Statistics, *supra* note 23 (choose the “Birth Tables” hyperlink; then choose the “2006 Birth Data—State Detail” hyperlink; create a name and password to log in; once logged in, expand “Medical Services Utilization;” choose “Method of Delivery Recode (revised)” hyperlink) (showing that 652,693 of 2,044,858 reported births were by C-section).

62. See BLOCK, *supra* note 34, at 177–212.

63. Freeze, *supra* note 16, at 80–81 (“Many [articles] mentioned women resorting to unassisted birth if home birth midwives were not available.”).

64. See *id.* at 66; Shanley, *supra* note 20; Joyous Birth, *supra* note 2.

65. See Freeze, *supra* note 16, at 66.

66. See *id.* at 50.

67. Kara Spak, *Families Take Birthing out of the Hospital: Doctor, Midwife Aren’t Part of the Process*, CHI. SUN TIMES, Feb. 29, 2008, at 37; Freeze, *supra* note 16, at 56.

independence and to express complete faith in a woman's ability to birth a child free from outside influence.<sup>68</sup>

Overall, freebirthers cite many reasons for giving birth unassisted. Some have pragmatic fears of unnecessary medical interventions in hospital births. Some live in states that prohibit the practice of midwifery, which they feel leaves them no other option. Many have personal, philosophical reasons for birthing alone. Whatever the reason, some women are making a conscious choice to give birth without a physician or midwife. Proponents believe that freebirthers risk no legal consequences. Yet there are two legal doctrines that may impede a woman's choice to give birth unassisted—the state's interest in the life of a viable fetus and the general parental duty to provide necessary medical care to one's children.

## II. THE LEGAL FRAMEWORK OF FREEBIRTHING

Although women have a constitutional right to marry,<sup>69</sup> procreate,<sup>70</sup> engage in consensual same-sex sodomy,<sup>71</sup> access birth control,<sup>72</sup> and abort a fetus in the first trimester of pregnancy,<sup>73</sup> no court has recognized a constitutional right to privacy in childbirth decisions. Courts recognize the “constitutional magnitude” of the right to refuse unwanted medical treatment,<sup>74</sup> but even when recognizing that right, courts admit that “truly extraordinary or compelling reasons”<sup>75</sup> may override an individual's right to refuse medical care, including the state's

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68. See Jared Jacang Maher, *Baby's Day Out: Childbirth Goes Solo*, DENVER WESTWORD, May 10, 2007, at News, Featured Stories; Freeze, *supra* note 16, at 64.

69. See *Loving v. Virginia*, 388 U.S. 1, 2 (1967) (holding that a Virginia statute criminalizing interracial marriages violates the Fourteenth Amendment).

70. *Skinner v. Oklahoma*, 316 U.S. 535, 538 (1942).

71. See *Lawrence v. Texas*, 539 U.S. 558, 578 (2003).

72. See *Griswold v. Connecticut*, 381 U.S. 479, 485–86 (1965) (holding unconstitutional a Connecticut statute criminalizing the use of contraceptives by married people).

73. See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 869–70 (1992) (holding that a woman has a right to terminate her pregnancy before the fetus is viable); *Roe v. Wade*, 410 U.S. 113, 163 (1973) (same).

74. See, e.g., *In re A.C.*, 573 A.2d 1235, 1244–45 (D.C. 1990) (listing cases where courts have found a constitutional right to refuse medical treatment).

75. *Id.* at 1247.

interest in protecting fetuses and children.<sup>76</sup> Thus, as the law currently stands, freebirthers do not have a recognized right to give birth unassisted. This Part discusses existing legal limits to the practice of unassisted childbirth. It also addresses the arguments for state intervention in freebirthing and concludes that the state should not intervene in the practice.

#### A. LEGAL LIMITS ON FREEBIRTHING

Supporters of unassisted childbirth insist that it is legal in the United States.<sup>77</sup> It is true that there are no statute currently bars the practice.<sup>78</sup> Yet, considering its rarity,<sup>79</sup> the lack of unassisted childbirth statutes is hardly surprising. Moreover, lack of statutes, of course, does not mean that freebirthers face no legal consequences for their actions. Two legal doctrines may limit the practice of unassisted childbirth.<sup>80</sup> The first doctrine is the state's interest in the life of a viable fetus<sup>81</sup> and the second doctrine is the generally recognized parental duty to provide necessary medical care for children.<sup>82</sup>

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76. *Id.* at 1246 (explaining that the state's interest in preserving life may in certain cases override a competent person's right to refuse medical treatment).

77. Myers, *supra* note 20; *see, e.g.*, Freeze, *supra* note 16, at 79 (asserting that unassisted birth is not currently illegal in North America).

78. *See* Shanley, *supra* note 20 (explaining that unassisted childbirth is legal in every state with the exception of Nebraska); *cf.* Spak, *supra* note 67 (explaining that some women in Illinois elect to have unassisted births because, in part, lay midwives are not allowed to practice in the state).

79. *See, e.g.*, Spak, *supra* note 67 (explaining that unassisted childbirths constitute only a small percentage of overall births in the United States).

80. A third doctrine, the unlicensed practice of medicine, nursing, and midwifery, could also potentially play a role in prosecuting family and friends who attend an unassisted childbirth. *See* Maher, *supra* note 68 (describing that two female family members who attended an unassisted childbirth in Florida were convicted of practicing midwifery without a license and sentenced to two-and-one-half years in prison); Spak, *supra* note 67 (explaining that lay midwives are not legally allowed to practice in Illinois).

81. *See, e.g.*, Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 869–70 (1992) (holding that the state's interest in preserving and protecting life overrides a woman's right to privacy after the fetus is viable); Roe v. Wade, 410 U.S. 113, 154 (1973) (same).

82. *See, e.g.*, Baruch Gitlin, Annotation, *Parents' Criminal Liability for Failure To Provide Medical Attention to Their Children*, 118 A.L.R. 5th 253 (2004).

### 1. The State's Interest in the Life of a Viable Fetus

Under common law, nonpregnant competent adults may generally refuse treatment intended for their own benefit.<sup>83</sup> This right is based on the principles of bodily integrity and autonomy that underlie the common-law right to informed consent.<sup>84</sup> In most circumstances, medical treatment performed without proper consent may constitute a medical battery.<sup>85</sup> This right to refuse consent is not absolute. It may be abrogated by the state's interest in preventing suicide, preserving life, protecting innocent third parties, and maintaining the integrity of the medical profession.<sup>86</sup>

The Supreme Court in *Roe v. Wade* and *Planned Parenthood of Southeastern Pennsylvania v. Casey* similarly recognized the state's compelling interest in the welfare of a viable fetus.<sup>87</sup> In the abortion context, once a fetus is viable the state's interest in protecting fetal life outweighs a mother's privacy interest.<sup>88</sup> This reasoning may be extended to apply to unassisted childbirth since freebirthing implicates the state's interest in preserving the life of a viable fetus and protecting an innocent unborn child. Some courts, relying on *Roe*<sup>89</sup> and *Casey*,<sup>90</sup> have compelled a pregnant woman to accept unwanted medical treatment during childbirth.<sup>91</sup> Women in Florida,<sup>92</sup> Georgia,<sup>93</sup>

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83. See *Cruzan v. Dir. Mo. Dep't of Health*, 497 U.S. 261, 278 (1990) ("[A] competent person has a constitutionally protected liberty interest in refusing unwanted medical treatment . . ."). Moreover, nonpregnant competent adults generally have a common law right to refuse treatment even if that treatment is necessary to save the life of a third party. See *McFall v. Shrimp*, 10 Pa. D. & C. 3d 90, 91 (1978) ("[O]ne human being is under no legal compulsion to give aid or to take action to save another human being or to rescue.").

84. See Michelle Oberman, *Mothers and Doctors' Orders: Unmasking the Doctor's Fiduciary Role in Maternal-Fetal Conflicts*, 94 NW. L. REV. 451, 464-65 (2000).

85. See *Canterbury v. Spence*, 464 F.2d 772, 781 (D.C. Cir. 1972). ("[I]t is the prerogative of the patient, not the physician, to determine for himself the direction in which his interests seem to lie.").

86. *Superintendent of Belchertown State Sch. v. Saikewicz*, 370 N.E.2d 417, 425 (Mass. 1977).

87. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 869-70 (1992); *Roe v. Wade*, 410 U.S. 113, 154 (1973).

88. *Casey*, 505 U.S. at 878-79; *Roe*, 410 U.S. at 163.

89. *Roe*, 410 U.S. at 113.

90. *Casey*, 505 U.S. at 833.

91. See, e.g., Joel Jay Finer, *Toward Guidelines for Compelling Cesarean Surgery: Of Rights, Responsibility, and Decisional Authenticity*, 76 MINN. L. REV. 239, 240-42 (1991) (discussing court-compelled cesareans).

Pennsylvania,<sup>94</sup> and the District of Columbia<sup>95</sup> have received court-ordered C-sections—an invasive and risky surgical procedure.<sup>96</sup> Women in New York and New Jersey have been forced to submit to blood transfusions for the benefit of their viable fetuses.<sup>97</sup> These cases illustrate that a woman could be compelled to accept invasive medical treatment at the end of pregnancy. Correspondingly, women in those states could also be compelled to accept the clearly less invasive presence of professional care during childbirth if the court determines it is in the best interest of the viable fetus.

In contrast, other courts have refused to order pregnant women to accept unwanted C-sections and blood transfusions for the benefit of their fetuses.<sup>98</sup> The holdings of those cases are limited. For example, in *In re A.C.*,<sup>99</sup> a case often cited as a victory by advocates of a woman's right to make childbirth decisions,<sup>100</sup> the Court of Appeals for the District of Columbia held that "in virtually all cases the question of what is to be done is to be decided by the patient—the pregnant woman—on behalf of herself and the fetus."<sup>101</sup> Nonetheless, the court expressly said that it was not ruling on "whether, or in what circumstances, the state's interests can ever prevail over the interests of a pregnant patient."<sup>102</sup> The court pointedly stated that "ex-

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92. See, e.g., *Pemberton v. Tallahassee Mem'l Reg'l Med. Ctr., Inc.*, 66 F. Supp. 2d 1247, 1249 (N.D. Fla. 1999).

93. See, e.g., *Jefferson v. Griffin Spalding County Hosp. Auth.*, 274 S.E.2d 457, 460 (Ga. 1981).

94. See BLOCK, *supra* note 34, at 251–52 (describing the court order compelling Amber Marlowe to submit to a C-section).

95. See V. Chandis & T. Williams, *The Patient, the Doctor, the Fetus, and the Court-Compelled Cesarean: Why Courts Should Address the Question Through a Bioethical Lens*, 25 MED. & L. 729, 738 (2006) (citing *In re Madyun*, Misc. No. 189-86 (D.C. 1986), reprinted as appendix to *In re A.C.*, 573 A.2d 1235, 1259 (D.C. 1990)).

96. See WAGNER, *supra* note 16, at 44.

97. See *Raleigh Fitkin-Paul Morgan Mem'l Hosp. v. Anderson*, 201 A.2d 537, 538 (N.J. 1964); *In re Jamaica Hosp.*, 491 N.Y.S.2d 898, 900 (Sup. Ct. 1985); *Crouse Irving Mem'l Hosp., Inc. v. Paddock*, 485 N.Y.S.2d 443, 445 (N.Y. Sup. Ct. 1985).

98. See *In re A.C.*, 573 A.2d 1235, 1247 (D.C. 1990); *In re Brown*, 689 N.E.2d 397, 405 (Ill. App. Ct. 1997); *In re Baby Boy Doe*, 632 N.E.2d 326, 335 (Ill. App. Ct. 1994).

99. *In re A.C.*, 573 A.2d at 1235.

100. See BLOCK, *supra* note 34, at 254–55; WAGNER, *supra* note 16, at 176–78.

101. *In re A.C.*, 573 A.2d at 1237.

102. *Id.* at 1252.

traordinary or compelling reasons" may justify the state in overriding the wishes of a pregnant woman.<sup>103</sup> Thus, while the District of Columbia Court of Appeals was unwilling to order a woman to undergo a C-section, it reserved the right to override a pregnant woman's wishes in other circumstances.

In *In re Baby Boy Doe*,<sup>104</sup> the Illinois Court of Appeals also declined to force a woman to undergo a C-section for the benefit of her viable fetus, stating that "a woman's competent choice to refuse medical treatment *as invasive as a cesarean section* during pregnancy must be honored, even in circumstances where the choice may be harmful to her fetus."<sup>105</sup> On its face, that holding did not provide a right to refuse less invasive medical or midwifery treatment intended for the benefit of a fetus, and the court expressly contemplated that a pregnant woman may be forced to submit to a blood transfusion.<sup>106</sup> When the compelled blood transfusion issue appeared in *In re Brown*, however, the same court held that "the State may not override a pregnant woman's competent treatment decision, including refusal of recommended *invasive* medical procedures, to potentially save the life of the viable fetus."<sup>107</sup> It concluded that a blood transfusion was sufficiently invasive to constitute an impermissible intrusion on an adult's bodily integrity.<sup>108</sup>

In sum, following *Roe*<sup>109</sup> and *Casey*,<sup>110</sup> the state has a compelling interest in protecting the life of a viable fetus.<sup>111</sup> Case law indicates that states may force women to accept unwanted treatment at the end of pregnancy or during labor for the benefit of their fetuses and some states have acted on this authority.<sup>112</sup> Other states have not, declining to compel women to accept invasive procedures. Nonetheless, even those states reserved the right to do so if necessary.<sup>113</sup> Thus, if the state

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103. *Id.* at 1247.

104. *In re Baby Boy Doe*, 632 N.E.2d 326 (Ill. App. Ct. 1994).

105. *Id.* at 326 (emphasis added).

106. *Id.* at 333.

107. *In re Brown*, 689 N.E.2d 397, 405 (Ill. App. Ct. 1997) (emphasis added).

108. *Id.*

109. 410 U.S. 113 (1973).

110. 505 U.S. 833 (1992).

111. See *Casey*, 505 U.S. at 869; *Roe*, 410 U.S. at 154.

112. See *Pemberton v. Tallahassee Mem'l Reg'l Med. Ctr., Inc.*, 66 F. Supp. 2d 1247, 1249 (N.D. Fla. 1999); *Jefferson v. Griffin Spalding County Hosp. Auth.*, 274 S.E.2d 457, 460 (Ga. 1981); *Chandis & Williams*, *supra* note 95.

113. See *In re A.C.*, 573 A.2d 1235 (D.C. 1990); *In re Brown*, 689 N.E.2d 397; *In re Baby Boy Doe*, 632 N.E.2d 326 (Ill. App. Ct. 1994).

may compel a woman to accept invasive medical procedures, surely it could also compel her to accept the noninvasive presence of a professional childbirth attendant during labor.

## 2. Parents' Legal Duty To Provide Medical Care for Their Children

Following *Roe* and *Casey*, the state has a compelling interest in protecting the life of a viable fetus.<sup>114</sup> This interest could be used to compel a pregnant woman to accept medical treatment at the end of pregnancy.<sup>115</sup> It is also generally recognized that parents have a legal duty to provide necessary medical care for their children.<sup>116</sup> Failure to do so may result in both criminal sanctions against the parent<sup>117</sup> and court orders for specific medical treatment for the child.<sup>118</sup> The application of this duty to childbirth is an open question. Generally, for a mother to be prosecuted for the death of a child immediately following childbirth the state must prove that the child was "born alive" and the mother's criminal act or agency caused the death.<sup>119</sup>

Courts in at least six states have held that a mother has a duty to seek medical care for her child immediately after childbirth.<sup>120</sup> In *State v. Collins*, a teenager received no prenatal care and attempted to conceal her pregnancy from friends and

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114. *Casey*, 505 U.S. at 869; *Roe*, 410 U.S. at 154.

115. See *infra* notes 144–46 and accompanying text.

116. Gitlin, *supra* note 82; see, e.g., *Faunteroy v. United States*, 413 A.2d 1294, 1299–300 (D.C. 1980); *Eversley v. State*, 748 So. 2d 963, 969–70 (Fla. 1999); *State v. Staples*, 148 N.W. 283, 284 (Minn. 1914).

117. See, e.g., *Father on Trial in Girl's Faith-Healing Death*, MSNBC, July, 25, 2009, [http://www.msnbc.msn.com/id/32141869/ns/us\\_news-crime\\_and\\_courts/](http://www.msnbc.msn.com/id/32141869/ns/us_news-crime_and_courts/).

118. See, e.g., Warren Wolfe, *Judge Keeps Firm Hand in Hauser Case*, STAR TRIB., June 24, 2009, at B5 (describing court-ordered treatment for childhood cancer victim, Daniel Hauser).

119. See *Singleton v. State*, 35 So. 2d 375, 378 (Ala. Ct. App. 1948); Francis M. Dougherty, Annotation, *Homicide: Sufficiency of Mother's Neglect of Infant Born Alive, in Minutes or Hours Immediately Following Unattended Birth, To Establish Culpable Homicide*, 40 A.L.R.4th 725 (1980). The "born alive" requirement, however, is not absolute. At least two courts have construed child abuse laws to include injuries to viable fetuses. See Monica K. Miller, *Refusal To Undergo a Cesarean Section: A Woman's Right or a Criminal Act?*, 15 HEALTH MATRIX 383, 383–84, 384 n.3 (2005).

120. See *Goldsmith v. State*, 344 So. 2d 793, 798 (Ala. Crim. App. 1977); *People v. Chavez*, 176 P.2d 92, 96 (Cal. Ct. App. 1947); *State v. Shephard*, 124 N.W.2d 712, 721–22 (Iowa 1963); *Commonwealth v. Pugh*, No. WOCR 2007–1323, 2009 WL 890988, at \*5–6 (Mass. Super. Jan. 26, 2009); *State v. Iacona*, No. CA 2891–M, 2000 WL 277911, at \*22–24 (Ohio Ct. App. Mar. 15, 2000); *State v. Collins*, 986 S.W.2d 13, 18–19 (Tenn. Crim. App. 1998).



family.<sup>121</sup> She secretly delivered her baby in a bathroom, and the baby drowned in the toilet.<sup>122</sup> A jury convicted her of second-degree murder for failing to get medical care during and following childbirth when the need for medical care was apparent.<sup>123</sup> A similar outcome occurred in *Goldsmith v. State*, in which the Alabama Court of Criminal Appeals convicted a woman of first-degree murder for the death of her infant after she concealed her pregnancy, gave birth alone in a motel room, provided no care to the infant following birth, and locked the child in a suitcase.<sup>124</sup> Other courts have reached similar conclusions based on similar facts.<sup>125</sup> Moreover, although little is written on the subject, one study of U.S. women charged with endangering newborns during unassisted childbirth concluded that courts consider unattended labor, whether intentional or unintentional, as evidence of criminal neglect of child.<sup>126</sup>

In contrast, courts in at least nine states have held that parents owe no duty to provide medical care to children during and immediately following birth.<sup>127</sup> In *Singleton v. State*, the Alabama Court of Appeals reversed the second-degree murder conviction of a mother whose dead newborn son was found covered in newspaper and abandoned in a cemetery.<sup>128</sup> It acknowledged that parents have a duty to provide medical care for children, but it found a "vast difference" between the acts of a parent who fails to seek aid for a sick child and the acts of an "unattended mother beset with the pangs and travail of child-

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121. *Collins*, 986 S.W.2d at 15.

122. *Id.*

123. *Id.* at 18–19.

124. *Goldsmith*, 344 So. 2d at 794, 798.

125. *See, e.g., Chavez*, 176 P.2d at 92–94, 96; *Shephard*, 124 N.W.2d at 715–16; *Pugh*, 2009 WL 890988, at \*8; *Iacona*, 2000 WL 277911, at \*1–2.

126. *See* Anna Lowenhaupt Tsing, *Monster Stories: Women Charged with Perinatal Endangerment*, in *UNCERTAIN TERMS: NEGOTIATING GENDER IN AMERICAN CULTURE* 282, 283 (Faye Ginsburg & Anna Lowenhaupt Tsing eds., 1990).

127. *See Singleton v. State*, 35 So. 2d 375, 375, 381 (Ala. Ct. App. 1948); *Williams v. State*, 77 S.E.2d 770, 771 (Ga. Ct. App. 1953); *People v. Weeks*, 450 N.E.2d 1351, 1352–55 (Ill. App. Ct. 1983); *Brown v. State*, 49 So. 146, 146–47 (Miss. 1909); *State v. Doyle*, 287 N.W.2d 59, 61–64 (Neb. 1980); *State v. Everhart*, 231 S.E.2d 604, 605–06 (N.C. 1977); *State v. Johnson*, 83 P.2d 1010, 1012–13, 1018 (Utah 1938), *overruled by State v. Crank* 142 P.2d 178 (Utah 1943) (overruling pertains to voluntariness of confessions); *Vaughan v. Comm.*, 376 S.E.2d 801, 802–03 (Va. Ct. App. 1989); *State v. Osmus*, 276 P.2d 469, 484 (Wyo. 1954).

128. *Singleton*, 35 So. 2d at 375, 381.

birth.”<sup>129</sup> It attributed this difference to the mother’s inability to develop “constructive criminal intent” during the “ignorance, pain, or physical incapacity”<sup>130</sup> of childbirth, particularly in cases in which the mother is “ignorant, uneducated, and unattended.”<sup>131</sup> The court also took note of the inherent dangers of childbirth, even when the mother has a professional attendant.<sup>132</sup> In *State v. Osmus*, the Wyoming Supreme Court also reversed a mother’s manslaughter conviction.<sup>133</sup> The mother testified that she was unaware she was pregnant and lost consciousness shortly after the baby was born.<sup>134</sup> When she awoke, she determined that the baby was dead.<sup>135</sup> She wrapped it in newspaper and abandoned it by the side of a highway.<sup>136</sup> The court held that a mother may not be convicted “unless she actually killed the infant.”<sup>137</sup> It concluded that the testimony failed to prove the mother killed the infant or that it died from something other than “natural causes.”<sup>138</sup> Many other state courts similarly reversed the convictions of mothers.<sup>139</sup> Many of the defendants claimed they fell asleep or lost consciousness sometime following the birth.<sup>140</sup>

Thus, although proponents of unassisted childbirth insist that the practice is legal in the United States,<sup>141</sup> there are at least two legal doctrines that may be used to either force women to seek professional care during childbirth or to prosecute women who intentionally give birth unassisted.

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129. *Id.* at 380.

130. *Id.*

131. *Id.* at 381.

132. *Id.* at 380.

133. *Osmus*, 276 P.2d 469, 484 (Wyo. 1954).

134. *Id.* at 471.

135. *Id.*

136. *Id.*

137. *Id.* at 484.

138. *Id.*

139. *See, e.g.*, *Williams v. State*, 77 S.E.2d 770, 771 (Ga. Ct. App. 1953); *People v. Weeks*, 450 N.E.2d 1351, 1352–55 (Ill. App. Ct. 1983); *Brown v. State*, 49 So. 146, 146–47 (Miss. 1909); *State v. Doyle*, 287 N.W.2d 59, 64 (Neb. 1980); *State v. Everhart*, 231 S.E.2d 604, 605–07 (N.C. 1977); *State v. Johnson*, 83 P.2d 1010, 1012–14, 1018 (Utah 1938), *overruled by State v. Crank* 142 P.2d 178 (Utah 1943) (overruling pertains to voluntariness of confessions); *Vaughan v. Commonwealth*, 376 S.E.2d 801, 801–02 (Va. Ct. App. 1989).

140. *See, e.g.*, *Weeks*, 450 N.E.2d at 1352 (defendant passed out after giving birth); *Johnson*, 83 P.2d at 1012 (defendant lost consciousness after giving birth); *Vaughan*, 376 S.E.2d at 802 (defendant fell asleep shortly after giving birth).

141. *See, e.g.*, *Shanley*, *supra* note 20.

## B. UNSATISFACTORY ARGUMENTS FOR STATE INTRUSION IN FREEBIRTHING

Freebirthers may be compelled to accept unwanted medical or midwifery care during labor. Some states require pregnant women to accept invasive medical care—typically cesarean sections or blood transfusions—for the benefit of their viable fetuses.<sup>142</sup> Those states, using the same reasoning, may also require a woman to seek noninvasive professional care during labor, which, in effect, would prohibit the practice of unassisted childbirth. Moreover, courts that recognize a pregnant woman's right to refuse invasive medical procedures during labor<sup>143</sup> declined to decide whether a birthing woman may be required to accept noninvasive interventions.<sup>144</sup> Thus, freebirthing could also be curtailed in those states because the mere presence of a trained physician or midwife is unlikely to be viewed as an invasive procedure. Despite unassisted childbirth proponents' beliefs to the contrary, it appears that women in the United States could be compelled to seek professional care during childbirth, which then raises the normative question of whether a state should do so. This Part now discusses and refutes various arguments for state intrusion in unassisted childbirth.

### 1. The Unproven Danger of Freebirthing

There are several arguments as to why a state should require women to seek professional care during labor. First, some argue that childbirth is a dangerous undertaking and, as such, the government, which has a duty to preserve life and protect innocent third parties,<sup>145</sup> should intervene on behalf of the fetus or child, just as it does in many other circumstances, such

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142. See *Pemberton v. Tallahassee Mem'l Reg'l Med. Ctr., Inc.*, 66 F. Supp. 2d 1247, 1248–50 (N.D. Fla. 1999) (cesarean section); *Jefferson v. Griffin Spalding County Hosp. Auth.*, 274 S.E.2d 457, 458–62 (Ga. 1981) (cesarean section); *Raleigh Fitkin-Paul Morgan Mem'l Hosp. v. Anderson*, 201 A.2d 537, 537–38 (N.J. 1964) (blood transfusion); *Crouse Irving Mem'l Hosp., Inc. v. Paddock*, 485 N.Y.S.2d 443, 444–46 (Sup. Ct. 1985) (blood transfusion); *In re Jamaica Hosp.*, 491 N.Y.S.2d 898, 899–900 (Sup. Ct. 1985) (blood transfusion); *Chandis & Williams*, *supra* note 95 (cesarean section).

143. See *In re A.C.*, 573 A.2d 1235, 1247–53 (D.C. 1990); *In re Brown*, 689 N.E.2d 397, 405 (Ill. App. Ct. 1997); *In re Baby Boy Doe*, 632 N.E.2d 326, 330–31 (Ill. App. Ct. 1994).

144. See *In re A.C.*, 573 A.2d at 1252; *In re Brown*, 689 N.E.2d at 401; *In re Baby Boy Doe*, 632 N.E.2d at 333.

145. See, e.g., *Superintendent of Belchertown State Sch. v. Saikewicz*, 370 N.E.2d 417, 425–26 (Mass. 1977).

as requiring parents to secure children in car seats.<sup>146</sup> An estimated fifteen percent of all births have a life-threatening complication;<sup>147</sup> the American College of Obstetricians and Gynecologists claims that unassisted childbirth is “dangerous”<sup>148</sup> and it “strongly opposes” the practice.<sup>149</sup> It also opposes homebirths generally on the grounds that childbirth complications can occur with little or no warning.<sup>150</sup> Even many stalwart homebirth advocates draw the line at unassisted childbirth.<sup>151</sup> Arguably, then, the state should intervene when a woman places her viable fetus in unnecessary danger by refusing to seek professional care during childbirth.

Nevertheless, there is a dearth of evidence to support the premise that planned unassisted childbirth in the United States is unsafe.<sup>152</sup> Opponents of the practice tend to focus on the unpredictable nature of childbirth itself.<sup>153</sup> Childbirth can, undoubtedly, be dangerous. Historically, many women died

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146. See, e.g., IOWA CODE § 321.446 (1997 & Supp. 2009) (providing that it is a misdemeanor offense not to secure children of a certain age and height with a seatbelt); MINN. STAT. § 169.685 (2008 & Supp. 2009) (providing that it is a petty misdemeanor offense for drivers not to secure children of a certain age and height with a seatbelt).

147. See, e.g., Anna Gosline, *Extreme Childbirth: Freebirthing*, NEWS SCIENTIST, Jan. 6–12, 2007, at 1, 42.

148. See Maher, *supra* note 68.

149. See Sandra G. Boodman, *Despite Risks That Range from Fetal Distress to Hemorrhage, Some Women Are Choosing To Give Birth Without Medical Assistance: Do-It-Yourself Delivery*, WASH. POST, July 31, 2007, at F1.

150. Am. Cong. of Obstetricians & Gynecologists, *supra* note 58.

151. See Gosline, *supra* note 147, at 43 (“Marsden Wagner, the WHO’s former director of Women and Children’s Health, says it is a step too far. ‘There are a very few cases when things go bad,’ he says. ‘Midwives are trained to know when things are going in the wrong direction.’”). But see WAGNER, *supra* note 16, at 189 (“Childbirth is a very personal, emotional phenomenon, analogous to sexual intercourse. Most people would balk at an expert coming in to tell them how to make love.”).

152. Although many claim unassisted childbirth is unsafe based on anecdotal evidence, there are no large studies to prove it. See Freeze, *supra* note 16, at 214. Some attribute the lack of a trained birth attendants to infant mortality in developing countries. See *id.* at 196. But studies show that the major cause of infant death in developing countries is prematurity, which is unrelated to birth location or attendant. Stephanie Holmes, *Why Women Still Die Giving Birth*, BBC NEWS, Oct. 18, 2007, <http://news.bbc.co.uk/2/hi/7049598.stm>; see also S. London, *In Developing Countries, Most Early Neonatal Deaths Are Caused by Prematurity*, 32 INT’L FAM. PLAN. PERSP. 214, 214 (2006).

153. See, e.g., Boodman, *supra* note 149; Maher, *supra* note 68.

from complications of childbirth<sup>154</sup> and many still die today—mostly in developing countries.<sup>155</sup> The United States, despite spending more money on childbirth than any other country, currently has one of the worst records for fetal and maternal fatality in the world.<sup>156</sup> This statistic is true even though nearly all births occur in a hospital and are attended by a physician or midwife.<sup>157</sup> The high rate of infant death in the United States has many causes, but it is largely attributed to a high number of preterm and low-birthweight births, which are often caused by inadequate prenatal care and improper use of cesarean section or medical labor induction.<sup>158</sup> A World Health Organization study found that the primary cause of maternal death in industrialized nations is complications from cesarean section and anesthesia,<sup>159</sup> both of which only occur in hospitals.

Many freebirthers believe that professional interference causes rather than mitigates childbirth complications.<sup>160</sup> Homebirth advocates and midwives tend to agree.<sup>161</sup> Homebirths attended by a midwife are statistically shown to be as safe, if not safer, than hospital births for most low-risk women,<sup>162</sup> but few statistics are available on the complications arising from planned unassisted childbirths specifically.<sup>163</sup> With a lack of

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154. See Druin Burch, *When Childbirth Was Natural, and Deadly*, LIVE-SCIENCE, Jan. 10, 2009, <http://www.livescience.com/history/090110-natural-childbirth.html>.

155. See Holmes, *supra* note 152. Some attribute this phenomenon to the lack of trained birth attendants. *Id.*

156. See Laura Blue, *Why Do U.S. Infants Die Too Often?*, TIME.COM, May 13, 2008, <http://www.time.com/time/health/article/0,8599,1736042,00.html>; Mike Stobbe, *More U.S. Women Dying from Childbirth Problems: Maternal Obesity, Caesarian Sections Partly To Blame, Experts Believe*, SAN MATEO COUNTY TIMES, Aug. 25, 2007, at News.

157. See National Statistics, *supra* note 23.

158. *E.g.*, Blue, *supra* note 156.

159. See BLOCK, *supra* note 34, at 119 (citing Khalid S. Khan et al., *WHO Analysis of Maternal Care: A Systematic Review*, 367 LANCET 1066, 1066–74 (2006)).

160. See Epstein, *supra* note 44, at 5.; Lucy Bulmer, *Freebirthing: Should Women Give Birth Alone?*, DAILY MAIL, Aug. 7, 2007, <http://www.dailymail.co.uk/health/article-473576/Freebirthing-Should-women-birth-alone.html>.

161. See INA MAY GASKIN, INA MAY'S GUIDE TO CHILDBIRTH 204–06 (2003); WAGNER, *supra* note 16, at 189–90.

162. See WAGNER, *supra* note 16, at 142–44 (discussing the results of the *British Medical Journal* study); Johnson & Daviss, *supra* note 51, at 1416.

163. *E.g.*, Epstein, *supra* note 44, at 5. *New Scientist* magazine found one small academic study of planned unassisted childbirth outcomes. Gosline, *supra* note 147, at 43. Another small anecdotal study found no complications or infant deaths out of 264 planned unassisted births. Ctr. for Unhindered Liv-

evidence, it is impossible to conclude that assisted births have better outcomes than unassisted births. In fact, it can be argued that unassisted childbirth is actually better because it minimizes the known risks of unnecessary medical interventions like preterm cesarean section and labor induction.<sup>164</sup> Moreover, many of the benefits attributed to midwifery care arise from midwives' practice of minimal intervention in childbirth.<sup>165</sup> This noninterventionist approach is also central to the practice of unassisted childbirth.<sup>166</sup> It is possible that the benefits conferred by the midwifery model of care may also be present in the unassisted childbirth context.<sup>167</sup> Therefore, the argument that freebirthing is dangerous fails for the basic reason that there is no evidence that planned unassisted childbirth is more dangerous than assisted childbirth in the United States. Accordingly, the argument that the state should intervene in the practice because freebirthing is inherently unsafe also fails.

## 2. The Emergency Medical Treatment and Active Labor Act: A Statutory Right to Receive Medical Care During Childbirth

A second argument as to why a state should prohibit the practice of unassisted childbirth arises out of a pregnant woman's statutory right to receive medical treatment in a hospital emergency room.<sup>168</sup> Under the Emergency Medical Treatment and Active Labor Act (EMTALA), a doctor or hospital may not turn away a woman in active labor, unless she is stable enough to be transferred to a different medical facility.<sup>169</sup> Arguably, this federal law illustrates that the government has a significant interest in ensuring that pregnant women get medical assistance during labor.

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ing, Unassisted Childbirth Statistics, <http://www.unhinderedliving.com/stats.html> (last visited Apr. 2, 2010); see also Adriana Barton, *Popularity of Do-It-Yourself Childbirth Keeps Growing*, ALAMEDA TIMES-STAR., May 21, 2007, at Bay Area Living Health ("[T]here are no large or recent studies on the outcomes of planned unassisted childbirth . . .").

164. Sarah J. Buckley, M.D., *Ecstatic Birth: Nature's Hormonal Blueprint for Labor*, <http://www.sarahjbuckley.com/articles/ecstatic-birth.htm> (last visited Apr. 2, 2010).

165. See SAKALA & CORRY, *supra* note 43, at 25–29.

166. See Freeze, *supra* note 16, at 1–2.

167. There are no long-term prospective studies on the safety of unassisted childbirth. See *id.* at 197.

168. 42 U.S.C.A. § 1395dd (West 2003).

169. See *id.*; *People v. Anyakora*, 616 N.Y.S.2d 149, 155 (Sup. Ct. 1993).

While EMTALA does show a government interest in the medical care of pregnant women during labor, the true purpose of EMTALA is to prevent “patient dumping,” in which a patient is transferred from one hospital’s emergency room to another for admission.<sup>170</sup> It was not intended to force women into hospital emergency rooms during childbirth.<sup>171</sup> In fact, few women enter a hospital through an emergency room during labor; most are admitted through the hospital maternity center.<sup>172</sup> Moreover, although EMTALA provides laboring women a statutory right to receive emergency childbirth care, it does not provide women with a means to pay for that care.<sup>173</sup> Thus, it should not be used to force women to seek emergency care they do not want or cannot afford, especially since financial constraints likely factor into a woman’s decision to choose unassisted childbirth.<sup>174</sup> EMTALA also fails to provide a right to emergency midwifery care,<sup>175</sup> which Congress should have included if it intended EMTALA to influence the childbirth choices of pregnant women. Ultimately, the statutory right for a woman to receive emergency medical care during childbirth does not mean the state should force her to seek it.

### 3. Fetal Rights

Finally, it may be argued that the state should require a pregnant woman to seek professional care during childbirth because the state’s interest in a viable fetus<sup>176</sup> creates independent fetal rights that the state must protect. According to this argument, once a woman chooses to continue a pregnancy past the point of viability, her rights and autonomy are necessarily

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170. See BARRY R. FURROW ET AL., HEALTH LAW 538 (5th ed. 2001).

171. Cf. *Gatewood v. Washington Healthcare Corp.*, 290 U.S. App. D.C. 31, 933 F.2d 1037 (D.C. Cir. 1991) (explaining the purpose of EMTALA is to prevent patient dumping); *Cleland v. Bronson Health Care Group, Inc.*, 917 F.2d 266, 272 (6th Cir. 1990) (same).

172. Cf. *El Camino Hospital Mountain View, Maternity Admissions*, [http://www.elcaminohospital.org/Womens\\_Hospital/For\\_Patients\\_Families/Maternity\\_Admissions/](http://www.elcaminohospital.org/Womens_Hospital/For_Patients_Families/Maternity_Admissions/) (last visited Feb. 15, 2010) (showing that only after-hours patients are admitted through the hospital emergency room); *Yale-New Haven Hospital, Maternity Services*, <http://www.ynhh.org/maternity/labor/index.html> (last visited Feb. 15, 2010) (same).

173. 42 U.S.C.A. § 1395dd.

174. Cf. *Freeze*, *supra* note 16, at 118 (discussing the role of finances in the childbirth decisions of freebirthers).

175. 42 U.S.C.A. § 1395dd.

176. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 857–60 (1992); *Roe v. Wade*, 410 U.S. 113, 154–56, 159, 162–65 (1973).

abrogated to the state's interest in her child.<sup>177</sup> The fetus itself has independent rights and the mother must act for the best interests of the fetus.<sup>178</sup> Assuming medical or midwifery care during childbirth is beneficial to the fetus, the state should compel her to seek professional care and also punish her for failure to do so.<sup>179</sup>

This argument has two flaws. First, the premise that professional care improves birth outcomes is unproven. There is simply too little data from which to draw that conclusion and there is a strong argument that the benefits conferred by midwives' non-interventionist approach are also present in planned unassisted childbirths.<sup>180</sup> In addition, the fetal rights argument for compelled assisted childbirth is also susceptible to the oft-discussed slippery slope argument that allowing a state to force a woman to seek particular medical treatment at the end of pregnancy means that the state would essentially exert complete control over a pregnant woman after the fetus reaches viability.<sup>181</sup> If the state could force women to perform the affirmative act of using a physician or midwife birth attendant, it may also demand that a pregnant woman perform other activities that it deems necessary to protect the well-being of the fetus. She may be required to eat a certain number of fruits and vegetables a day, take a prenatal vitamin, wear a seatbelt, and do thirty minutes of exercise a day. The state could also conceivably curtail a host of activities that may be injurious to a viable fetus. Pregnant women could be prohibited from drinking alcohol; smoking cigarettes; eating junk food; soaking in a hot tub or Jacuzzi; or participating in sports that may result in injury, such as skiing, rollerblading, or horseback riding. Although not yet considered in the unassisted childbirth context, courts have historically been reluctant to prosecute women for

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177. See Jeffrey P. Phelan, *The Maternal Abdominal Wall: A Fortress Against Fetal Health Care?*, 65 S. CAL. L. REV. 461, 477-78 (1991).

178. Janet Gallagher, *Prenatal Invasions & Interventions: What's Wrong with Fetal Rights*, 10 HARV. WOMEN'S L.J. 9, 41-43 (1987); Phelan, *supra* note 177.

179. See Gallagher, *supra* note 178, at 41-43.

180. See *supra* notes 152-67 and accompanying text.

181. This argument is addressed extensively in the context of drug testing of pregnant women. See, e.g., Krista Stone-Manista, *Protecting Pregnant Women: A Guide to Successfully Challenging Criminal Child Abuse Prosecutions of Pregnant Drug Addicts*, 99 J. CRIM. L. & CRIMINOLOGY 823, 846-47 (2009).



acts or omissions that negatively affect their fetuses because of slippery slope concerns.<sup>182</sup>

Overall, there are arguments supporting a state mandate of professional care during childbirth—namely, that childbirth is a dangerous undertaking, federal law illustrates the state's interest in mandating professional childbirth care, and the fetus has independent legal rights that must be protected. These arguments are unconvincing because planned unassisted childbirth is not proven to be unsafe, EMTALA was not intended to force women to seek professional care during childbirth, and the fetal rights argument triggers significant slippery slope concerns.

### C. THE UNDESIRABILITY AND INEFFECTIVENESS OF STATE INTERVENTION IN FREEBIRTHING

Even if there were a compelling argument to require women to seek physician or midwife care during labor, such a mandate would have the undesirable social consequence of discouraging freebirthers from getting prenatal care. Moreover, it would be ineffective in stopping the practice because women could easily avoid prosecution for planned unassisted childbirth by claiming that it was unplanned.

#### 1. Undesirable Incentive for Freebirthers to Forego Prenatal Care

Although there is no proof that planned unassisted childbirth in the United States correlates to greater infant mortality rates,<sup>183</sup> lack of prenatal care is clearly linked to increased risk of infant death.<sup>184</sup> Women who choose unassisted childbirth are already susceptible to going without prenatal care.<sup>185</sup> Janet

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182. See *Reinesto v. Superior Court*, 894 P.2d 733, 736–37 (Ariz. Ct. App. 1995); *Kilmon v. State*, 905 A.2d 306, 311 (Md. 2006); *State v. Wade*, 232 S.W.3d 663, 665–66 (Mo. Ct. App. 2007); *State v. Deborah J.Z.*, 596 N.W.2d 490, 494–95 (Wis. Ct. App. 1999).

183. There are no long-term studies on the safety of unassisted childbirth. See Epstein, *supra* note 44 (“No statistics are available on complications after unassisted births, because many women do not tell their doctors that they are delivering their own babies.”); Freeze, *supra* note 16, at 214.

184. See WAGNER, *supra* note 16, at 243; Anthony M. Vintzileos et al., *The Impact of Prenatal Care on Neonatal Deaths in the Presence and Absence of Antenatal High-Risk Conditions*, AM. J. OBSTETRICS & GYNECOLOGY 1011, 1016 (2002).

185. See, e.g., Freeze, *supra* note 16, at 122–28 (stating that many freebirthers perform their own prenatal care).

Fraser had no prenatal care.<sup>186</sup> Neither did Laura Shanley, the United States' most vocal freebirthing advocate,<sup>187</sup> who also lost a child following a planned unassisted birth.<sup>188</sup> Some freebirthers believe that their bodies are able to safely birth a baby without any special preparation.<sup>189</sup> Many others believe they can provide themselves with prenatal care that is as good as or better than professional prenatal care.<sup>190</sup> And some merely want to avoid arguing with a physician or midwife over the progression of the pregnancy.<sup>191</sup> Thus, there is already a risk that a woman choosing unassisted childbirth will forgo professional prenatal care,<sup>192</sup> despite its link to decreased infant mortality.<sup>193</sup> Compelling women to accept unwanted medical or midwifery care during childbirth would merely be another reason for freebirthers to avoid prenatal care because of fear of prosecution for planned unassisted childbirth.

Small studies indicate that around half of freebirthers do use some type of medical or midwifery prenatal care.<sup>194</sup> It is better to increase the appeal of prenatal care than to decrease the appeal of unassisted childbirth because prenatal care is clearly linked to better birth outcomes,<sup>195</sup> while unassisted childbirth is not clearly linked to negative birth outcomes.<sup>196</sup> Prenatal care increases the chance of high-risk factors being identified during a pregnancy,<sup>197</sup> which may then discourage women with those risk factors from attempting an unassisted childbirth. Moreover, a positive prenatal experience with a physician or midwife may actually encourage freebirthers to

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186. John Elder, *Tragic Sequel to Home Birth*, SUNDAY AGE, Apr. 12, 2009, at 9.

187. WebMD, *Giving Birth the Old Way: Unassisted Childbirth*, <http://www.webmd.com/baby/features/giving-birth-old-way> (last visited Mar. 12, 2010).

188. Barnard, *supra* note 13.

189. Freeze, *supra* note 16, at 122.

190. *Id.* at 122–23.

191. *Id.* at 123–24.

192. *Id.* at 122–28.

193. See WAGNER, *supra* note 16, at 243.

194. Freeze, *supra* note 16, at 122; Ctr. for Unhindered Living, *Unassisted Childbirth Statistics*, <http://www.unhinderedliving.com/stats.html> (last visited, Mar. 12, 2010).

195. See WAGNER, *supra* note 16, at 243; Vintzileos et al., *supra* note 184, at 1016.

196. See Epstein, *supra* note 44; Freeze, *supra* note 16, at 197.

197. See Office of Women's Health, U.S. Dep't of Health and Human Serv., *Prenatal Care*, <http://womenshealth.gov/faq/prenatal-care.cfm#b> (last visited Feb. 15, 2010) (describing how prenatal care is used to identify and treat pregnancy issues).

have a physician or midwife in attendance during labor since prenatal care provides the opportunity for a trusting relationship to develop between mother and caregiver. At minimum, prenatal care would give a mother guidance on how to protect her fetus and give birth safely.<sup>198</sup> It is simply bad public policy to prohibit unassisted childbirth and essentially force freebirthers to avoid prenatal care.

## 2. A Prohibition Would Not Stop the Practice

A prohibition on unassisted childbirth would not end the practice for two reasons. First, although it is possible that fear of prosecution will scare some women away from planned unassisted childbirth, most freebirthers would be unfazed by a legal prohibition. Many believe the practice is legal, yet fear a social service investigation after the birth,<sup>199</sup> which indicates freebirthers have some understanding that they may face legal consequences for birthing unassisted. Yet few seem dissuaded from the practice; rather, many swap ways to conceal the fact that their unattended birth was planned from state authorities.<sup>200</sup> For example, it is often suggested that a woman lie about the circumstances of the birth and claim the midwife did not arrive in time.<sup>201</sup> Thus, women who choose unassisted childbirth will not necessarily be influenced by a state prohibition on the practice.

Moreover, a freebirthing prohibition would be virtually impossible to enforce. Any prohibition would necessarily require an exception for unplanned unassisted births, for example, when a woman gives birth in a taxi on the way to the hospital. It could be argued that any prohibition should not have an exception for unplanned unassisted births because a complete prohibition would encourage pregnant women to be vigilant for the signs of impending labor and seek care immediately. In other words, there should not be unplanned unassisted deliveries because pregnant women should be cautious and ensure that maternity care is always within a reasonable distance. Such an argument is weak, however, because some women are

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198. Cf. MedlinePlus, U.S. Nat'l Library of Med., Prenatal Care, <http://www.nlm.nih.gov/medlineplus/prenatalcare.html> (last visited Feb. 15, 2010) (describing prenatal care as providing "basic skills" on how to care for a newborn).

199. Freeze, *supra* note 16, at 139–44.

200. *Id.*

201. *Id.* at 140–41.

unaware they are pregnant until the baby delivers<sup>202</sup> and some labors progress so quickly that the birth occurs en route to the nearest hospital despite the woman's best efforts to get there in time. Furthermore, courts are reluctant to punish women whose unassisted childbirth was unintentional.<sup>203</sup> In fact, case law shows that courts tend to be forgiving of mothers who claim to be unaware they were pregnant or who were unable to seek professional care during the labor.<sup>204</sup> Accordingly, any prohibition on freebirthing must necessarily include an exception for unplanned unassisted births. It is this necessary exception that may be exploited by women planning an unassisted childbirth. Freebirthers may easily claim that the labor occurred so suddenly there was no time to seek expert care, and it would be difficult to prove that assertion was false. In fact, that technique is often implicitly and explicitly recommended on freebirthing websites.<sup>205</sup> Therefore, even if unassisted childbirth were explicitly prohibited, it would be impossible to enforce.

Ultimately, despite proponents' beliefs to the contrary, there are legal limits on the practice of unassisted childbirth. States could prohibit the practice completely, based on their interest in preserving the lives of viable fetuses and protecting newborn children. An outright prohibition on freebirthing, however, would be both undesirable and ineffective. It would discourage freebirthers from seeking prenatal care and would be unlikely to discourage women from intentionally giving birth unassisted. Thus, the state must consider alternative devices to protect the well-being of babies born to freebirthers.

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202. This phenomenon was the subject of the Discovery Health Channel Show "I Didn't Know I Was Pregnant." See *I Didn't Know I Was Pregnant: Meet Your New Brother* (Discovery Health television broadcast May 26, 2009); see also Associated Press, *Washington Woman Unaware of Pregnancy until Day Before Baby Is Born*, FOX NEWS, Nov. 2, 2006, <http://www.foxnews.com/story/0,2933,226983,00.html>.

203. See, e.g., *People v. Weeks*, 450 N.E.2d 1351, 1354–55 (Ill. App. Ct. 1983) (describing the reversal of the conviction of a mother who lost consciousness during labor); *State v. Everhart*, 231 S.E.2d 604, 605–07 (N.C. 1977) (describing the reversal of the conviction of a mother who did not know she was pregnant until the baby was delivered).

204. Compare *State v. Osmus*, 276 P.2d 469, 484 (Wyo. 1954) (describing the reversal of a mother's conviction who denied knowledge of her pregnancy), with *State v. Collins*, 986 S.W.2d 13, 18–19 (Tenn. Crim. App. 1998) (describing evidence sustaining the conviction of a mother who verified her pregnancy through a home pregnancy test).

205. Freeze, *supra* note 16, at 140; Shanley, *supra* note 20 ("[I]t is almost impossible to prove that a birth was intentionally unassisted ('We tried to get to the hospital but the birth just happened so quickly!').").

### III. A COMPROMISE SOLUTION: ENFORCING A PARENT'S DUTY TO PROVIDE NECESSARY MEDICAL CARE TO CHILDREN

The state has a compelling interest in the well-being of viable fetuses.<sup>206</sup> Therefore, it may prohibit unassisted childbirth, but it should not for three reasons. First, physician or midwife care is not proven to improve birth outcomes in the United States; thus the state would not necessarily be effectuating its interest in protecting the lives of viable fetuses or newborn children.<sup>207</sup> Second, prosecuting freebirthers would have the undesirable consequence of discouraging them from seeking professional prenatal care, which itself is strongly correlated to positive birth outcomes.<sup>208</sup> Finally, and perhaps most importantly, a prohibition would not curtail the practice; rather, freebirthers would merely claim the unassisted birth was unplanned, effectively exploiting a necessary exception to any prohibition.<sup>209</sup>

Still, the state has an important interest in protecting the well-being of newborns and must have a means to punish mothers who harm their children as a result of unassisted childbirth. The preferable legal framework is to prosecute women who unnecessarily injure their newborn as a result of failure to provide the child basic medical or midwifery care immediately after birth. When a birth has a preventable bad outcome,<sup>210</sup> the wrongdoer should face legal consequences. If an attending physician or midwife is at fault, the tort system provides a remedy to the injured child and parents. In the unassisted childbirth context, it is unlikely that the mother will be sued by the child or other parent. Therefore, the state must intervene.

Enforcing a parent's legal duty to provide medical care for children would permit the unavoidable practice of freebirthing and compel freebirthers to learn basic childbirth preparation skills and seek additional medical or midwifery care imme-

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206. See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 857-60 (1992); *Roe v. Wade*, 410 U.S. 113, 154-56, 159, 162-65 (1973).

207. See *supra* Part II.B.1.

208. See *supra* Part II.C.1.

209. See *supra* Part II.C.2.

210. For example, a negligent or intentional death or injury of mother or baby.

diately after birth.<sup>211</sup> Fear of prosecution for failure to seek care would encourage freebirthers to give birth close to emergency services or to even allow a midwife or physician to be nearby (albeit not in the room) as they give birth. It would also encourage women planning unassisted childbirth to seek basic training on how to care for an infant after birth, for example, learning how to safely sever and tie an umbilical cord and how to prevent the infant from experiencing shock, which in turn would improve birth outcomes.

Additionally, the state is more likely to be successful in prosecuting a freebirther for failing to get necessary medical or midwifery care for the infant immediately after childbirth. A woman may easily avoid prosecution for planned unassisted childbirth by claiming it was unintentional. Infant death attributed to the mother's failure to seek care following birth, however, is a common factor in nearly all successfully prosecuted unassisted childbirth cases.<sup>212</sup> Moreover, after childbirth, the state's interest in the newborn child is even more compelling than the state's interest in a viable fetus because the child is clearly an independent third party;<sup>213</sup> consequently, waiting until the child is born to criminalize the conduct avoids the risk that a court will find the mother's privacy and autonomy interests paramount.<sup>214</sup>

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211. Some freebirthers believe they must avoid prenatal and postnatal care out of fear of a social service investigation resulting from their unassisted birth. *Cf. id.* 139–44 (discussing freebirthers' efforts to evade state interference).

212. *Goldsmith v. State*, 344 So. 2d 793, 794–95 (Ala. Crim. App. 1977) (infant death caused by shock resulting from "baby not being cleaned or having his air passages cleared and from not being kept warm"); *People v. Chavez*, 176 P.2d 92, 93 (Cal. Ct. App. 1947) (infant bled to death from untied umbilical cord); *Williams v. State*, 77 S.E.2d 770, 771 (Ga. Ct. App. 1953) (infant died after being left unattended next to hot stove); *State v. Shephard*, 124 N.W.2d 712, 722 (Iowa 1963) (infant died after mother left it unattended on a cold floor); *State v. Iacona*, No. CA 2891-M, 2000 WL 277911, at \*12 (Ohio Ct. App. Mar. 15, 2000) (infant death caused by mother's failure to seek medical care for infant after birth). *But see Commonwealth v. Pugh*, No. WOCR 2007-1323, 2009 WL 890988, at \*4 (Mass. Super. Jan. 26, 2009) (infant died as a result of mother forcibly pulling infant out during labor).

213. *Cf. Stone-Manista*, *supra* note 181, at 846 n.142 ("[I]t appears that the born-alive rule would have specifically excluded acts of the mother during pregnancy, as it required 'a showing that an infant was completely expelled from the mother's womb and possessed a separate and independent existence from the mother.'" (citing *BLACKS LAW DICTIONARY* 1628 (8th ed. 2004))).

214. *See, e.g., In re A.C.*, 573 A.2d 1235, 1237 (D.C. 1990) ("We hold that in virtually all cases the question of what is to be done is to be decided by the patient—the pregnant woman—on behalf of herself and the fetus.").

It may be argued that the failure to have a professional birth attendant necessarily means that medical or midwifery care would not be available immediately after childbirth and, therefore, all planned unassisted childbirths could be prosecuted under this standard. However, this argument fails for the basic reason that the vast majority of unassisted childbirths will not be the subject of legal action. The cases that result in criminal prosecution are the ones in which the newborn was harmed as a result of the unassisted childbirth.<sup>215</sup> Infant deaths or injuries that were unpreventable and would have occurred regardless of the presence of a professional attendant are unlikely to be prosecuted.<sup>216</sup> In sum, the inadvisability of requiring all women to seek professional care during labor does not mean the state is powerless to prosecute mothers who harm their newborns immediately after birth. Enforcing the general parental duty to provide medical care to children is a powerful state tool. It may be used in cases where a freebirther is unprepared for the basic needs of her newborn—for example, failing to safely cut and tie the umbilical cord or failure to take basic steps to protect the child from shock. It also creates the positive incentive for freebirthers to seek guidance on basic childbirthing skills, which would likely correlate to safer unassisted births. Finally, waiting until the child is born increases the likelihood of a successful state prosecution because doing so circumvents any judicial balancing of a mother's autonomy and privacy interests against the state's interest in the life of a viable fetus.

### CONCLUSION

Supporters of unassisted childbirth herald its beauty, safety, and legality. The practice appears to be a growing trend and it is receiving increased media attention. Yet its legality in the United States is unclear. Proponents boast of the lack of statutes on topic, but there are at least two doctrines that may limit the practice and enforce legal consequences on women

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215. See, e.g., *Goldsmith*, 344 So. 2d at 794–95; *Chavez*, 176 P.2d at 93; *Williams*, 77 S.E.2d at 771; *Shephard*, 124 N.W.2d at 722; *Iacona*, 2000 WL 277911, at \*12.

216. For example, Laura Shanley, a vocal proponent of unassisted childbirth who has birthed all five of her children unassisted, lost a child shortly after birth from a congenital heart defect. Barnard, *supra* note 13. Despite the publicity surrounding her, she has never faced prosecution. Cf. Shanley, *supra* note 20 (“I am more powerful than any government official.”).

whose children are injured as a result of intentional freebirthing. The state may completely prohibit the practice based on its interest in protecting the lives of viable fetuses and newborn children. A prohibition, however, would be both undesirable and ineffective. Planned unassisted childbirth in the United States has not been proven to increase risk of injury or death in childbirth. Moreover, a prohibition on the practice would actually discourage women from seeking prenatal care, which is clearly linked to improved birth outcomes. A prohibition would also be impossible to enforce since it would require an exception for unplanned unassisted births—a loophole that could easily be exploited by women choosing to give birth unassisted. Fortunately, there is an alternative to forcing all women to seek professional care during labor. Parents have a legal duty to provide necessary medical care for children. This doctrine may be used effectively to encourage freebirthers to seek prenatal care and learn basic child-birthing skills, as well as punish mothers whose children are injured as a result of their mother's failure to seek necessary medical or midwifery care after childbirth.