Pushing Back: Protecting Maternal Autonomy from the Living Room to the Delivery Room

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On the surface, technological advancements giving mothers-to-be the choice to have a C-section or schedule an induction without a medical reason\(^2\) and the continued legalization of Direct-Entry Midwifery appear to indicate that mothers are enjoying a greater amount of choice in selecting their method of childbirth. But a closer examination reveals that, despite “the social and cultural movement directed toward affording pregnant, laboring, and birthing women greater autonomy and control during this vital reproductive process,”\(^3\) limits on maternal autonomy still exist.\(^4\) As more women deliver their children using Direct-Entry Midwives, through elective C-sections, or through scheduled induction, these limits have the potential to grow more intense.

This perverse effect is the result of a flawed system,\(^5\) and changes can be made to protect maternal autonomy from the consequences of these flaws.\(^6\) Part II provides an overview of “new” delivery options available to pregnant women today. Part III examines how courts, legislators, health care providers, birth advocates, and insurers

\(^2\) This note will refer to C-sections requested and performed without a medical reason as “elective C-sections,” and induced labor scheduled without a medical reason as “scheduled induction.”


\(^5\) See WAGNER, supra note 4, at 4 (arguing that the fundamental flaw in American maternity care is that highly trained obstetricians are regularly attending normal and low risk pregnancies); BLOCK supra note 4 (highlighting several flaws in modern maternity care).

\(^6\) This note builds on the suggestions and recommendations of many commentators. See WAGNER, supra note 4, 205-09 (advocating for increased accountability and transparency throughout pregnancy); Sylvia A. Law, *Childbirth: An Opportunity for Choice That Should Be Supported*, 32 N.Y.U. L. REV. & SOC. CHANGE 345, 362 (2008) (arguing that, where professional opinion is in conflict and women bring different birth values to the birth experience, the voices of women should be given greater weight); Ketler, supra note 4, at 1055-56 (discussing informed consent); Margaret M. Donohoe, *Our Epidemic of Unnecessary Cesarean Sections: The Role of the Law in Creating It, the Role of the Law in Stopping It*, 11 WIS. WOMEN’S L.J. 197, 201-02, 238-40 (1996) (documenting the rise of unnecessary C-sections and arguing that government agencies should provide women with accurate, physician-specific information on hospital and individual physician’s C-section usage).
limit a mother’s ability to choose what she believes to be the best delivery option. Part IV argues that as more women begin to have home births, elective C-sections, and scheduled inductions, the limits on maternal choice will grow more intense. Part V suggests changes to combat these pressures and to protect a mother’s independence during labor. This portion achieves its goal by offering a three-tiered approach to empower women to make well-informed delivery choices. This three-tiered approach includes: (1) empowering the mother as a decision maker by providing her with more information and creating a system of disinterested health care provider education; (2) offering economic incentives to freestanding alternative birth centers and physicians, to make alternative services more appealing; and (3) reforming informed consent to facilitate greater dialogue between physician and patient.

II. “NEW” BIRTH OPTIONS

In the past, legal restrictions, financial considerations, or circumstances surrounding maternal or fetal health have limited the delivery choices a mother could exercise. In recent years, however, progressive legislative efforts and changing medical standards have given American mothers a growing number of options when deciding how they will give birth. While the number of women opting to exercise some of these options is small, it is possible that these methods will grow more popular. The following portion discusses several of these options.

A. Midwifery & Home Births

1. Midwifery—An Overview

Midwifery is becoming an increasingly acceptable delivery option for American mothers. Throughout much of the industrialized world, the practice is recognized

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7 For a discussion of home births, see infra Part II.

8 See infra Part III.

9 Nearly 100 percent of all births in the United States in 2000 took place in a hospital. See infra notes 11, 34, & 76 and accompanying text.

10 See infra notes 11, 34, & 76 and accompanying text.

11 As of July 10, 2007, twenty five states allow Direct-Entry Midwives to practice after obtaining some licensure or certification, ten states and the District of Columbia prohibit the practice, four states do not prohibit or regulate them, in two states the practice is legal but licensure is unavailable, and nine states allow the practice by judicial or statutory interpretation. Midwives Alliance of North America, Direct-Entry Midwifery State-By-State Legal Status, www.mana.org/statechart.htm (last visited Aug. 25, 2009); see also Christopher Rausch, The Midwives and the Forceps: The Wild Terrain of Midwifery Law in the United States and Where North Dakota is Heading in the Birthing Debate, 84 N. Dak. L. Rev. 219, 230-31 (2008); Bruce Hoffman, Minding the Gap: Legal Ideals and Strategic Action in State Legislative Hearings, 33 LAW & SOC. INQUIRY 89, 94-99 (2008). Dr. Marsden Wagner Reports that in the past ten years, Midwife attended births have increased from five to nine percent. WAGNER, supra note 4 at 10.
as an essential part of effective maternity care. In most industrialized nations, midwives attend low-risk births, while trained obstetricians only attend dangerous deliveries, where their advanced knowledge and skill can be put to use. Such a system does not exist in America today. The vast majority of deliveries in America today occur in hospitals under the supervision of trained obstetricians.

Midwives and physicians differ in their philosophical approach to pregnancy. Unlike physicians, who typically have a “disease oriented approach” to treatment, midwives typically apply a “wellness approach.” The “disease-oriented approach” focuses on the diagnosis and treatment of pregnancy complications and the “management of diseases affecting pregnant women and the fetuses they carry.”

When applied, this “no case is normal until it’s over” philosophy may be contributing to the ever-increasing number of obstetrical interventions throughout pregnancy. Midwives, on the other hand, apply the more holistic and hands-off “wellness approach,” wherein a great deal of trust is placed into the body’s ability to bring about a safe delivery and medical intervention is avoided until absolutely necessary. Some have suggested that this approach is not financially attractive to hospitals because it results in longer deliveries that lessen the number of potential patients, and does not provide hospitals the opportunity to make a profit through administering billable procedures.

12 In Australia, the Netherlands, Great Britain, all Scandinavian countries, Germany, Ireland, and other industrialized nations more than seventy-five percent of all births are assisted by trained midwives. Wagner, supra note 4, at 4.

13 In most European nations, obstetricians attend between ten to fifteen percent of births. Id. at 5.

14 Id. at 4-5.


17 Id.

18 Id. at 329-30 (citing to Judith Pence Rooks, Midwifery and Childbirth in America 4 (Temple University Press 1997)).

19 Id. at 331.

20 Id. at 332.

21 Block, supra note 4, at 66. At the same time, because midwives are paid less than physicians and the non-interventionist approach reduces the number of unnecessary medical interventions, the midwife model of care has been lauded as offering a significantly less expensive method of childbirth. Wagner, supra note 4 at 39, 121; Rausch, supra note 11, at 229. Some have asserted that the economic threat that out-of-hospital birth presents to the mainstream medical community is a factor contributing to restrictive midwifery laws. See Amy F. Cohen, The Midwifery Stalemate and Childbirth Choice: Recognizing Mothers-to-Be as the Best Late Pregnancy Decisionmakers, 80 Ind. L.J. 849, 854 (2005).
Regardless of their profit value, midwives have been providing birthing mothers with a valuable service for centuries. Midwife advocates boast that the practice is the oldest form of maternity care. But today’s midwives are much different from their old-world predecessors. Midwifery in America has evolved into a trade whose practitioners possess highly developed skills and training. As the practice has evolved, different midwifery classifications have developed.

The two primary midwife classifications are Certified Nurse Midwives and Direct-Entry Midwives. Every American jurisdiction permits Certified Nurse Midwives to practice within its borders. Certified Nurse Midwives are formally educated nurses who acquire a nursing degree and then complete further study in Obstetrics and Gynecology before passing a certification examination. Typically, a Certified Nurse Midwife will practice in an institutional setting under a physician’s direct control.

Unlike their formally trained counterparts, Direct-Entry Midwives often take less traditional routes to practice. Some Direct-Entry Midwives are educated through informal routes such as self-study or apprenticeship, rather than through a formal program. While many Direct-Entry Midwives can become certified through either the North American Registry of Midwives (NARM) or the American College of Nurse-Midwives (ACNM), “not all Direct-Entry Midwives are certified.” Some avoid certification because they view the training as harmful or irrelevant, while

22 Women have been aiding each other throughout birth since the early civilizations. M. Brucker, A History of Midwifery, http://www3.utsouthwestern.edu/midwifery/mdwfhistory.html (last visited Feb. 11, 2009); see also Rausch, supra note 11, at 224-225 (2008) (reviewing the history of midwives). Females dominated the practice through the eighteenth century, until gynecology and surgery began to be studied by academics. Id. (citing to BRIAN E. BURTCH, TRIALS OF LABOUR: THE RE-EMERGENCE OF MIDWIFERY 80 (1994)).

23 See generally Rausch, supra note 11, at 224.
24 Id. at 224-227.
25 See infra notes 26-33 and accompanying text.
26 See generally Noralyn O. Harlow, Annotation, Midwifery: State Regulation, 59 A.L.R. 4th 929, 932 (1988). Direct-Entry Midwives are also referred to as “lay” midwives, for the sake of uniformity, this Note will only use the term “Direct-Entry Midwives.”
27 Wagner, supra note 4, at 102.
28 Harlow, supra note 26.
29 Id. (citing to Debra Evenson, Midwives: Survival of an Ancient Profession, 7 WOMEN’S RTS. L. REP. 313, 314 (1982)).
30 See generally Harlow, supra note 26; Rausch, supra note 11, at 223.
32 Hermer, supra note 16 at 334.
others practice illegally in states that do not permit them to attend births. Finally, others simply lack the education, skills, or training needed to gain certification.33

2. A More Appealing Approach?

Despite their lack of formal training, more women are utilizing Direct-Entry Midwives.34 In applying the more holistic “wellness approach,” Direct-Entry Midwives offer mothers in low-risk pregnancies a birthing option that removes the mother from the hospital and gives her a great deal of freedom during labor.35 Unlike Certified Nurse Midwives, Direct-Entry Midwives typically attend home births.36 In a home birth, a laboring woman will usually deliver from her own house and will remain with her baby after the delivery.37 As Direct-Entry Midwifery becomes increasingly available, the number of women choosing home births appears to be increasing.38

The freedom offered by home births lies in stark contrast to what may be experienced in a hospital setting. In the hospital, once labor begins, mothers are often physically restricted to their hospital bed so that the fetal heart rate may be tracked using Electronic Fetal Monitors (EFMs).39 Despite little evidence supporting their efficacy, EFMs are the “presumptive standard of care”40 in the hospital.41 Two rationales support making EFMs the standard. First, EFMs are a more cost effective method for monitoring fetal heart rate,42 and second, they provide concrete evidence

33 Id. Many illegally practicing midwives could only learn the trade through apprenticeships, because these midwives have been successfully delivering children without formal education, some see no reason to reason to further their education. Id.

34 The midwife and home birth movement has grown increasingly popular in recent years. Julie Scelfo, Midwives Say Home Births Are Up, Despite Warnings, N.Y. TIMES, Nov. 12, 2008, available at http://www.nytimes.com/2008/11/13/garden/13birth.html?pagewanted=1&r=2 (last visited Nov. 23, 2008) (documenting the increased number of women choosing home births in New York City). Since 2007, a popular documentary and several books have been produced claiming to expose many problems with American maternity care and proposing that the solution for many women is to get out of the hospital and back into the home. See, e.g., THE BUSINESS OF BEING BORN (New Line Home Video 2007); BLOCK, supra note 4, at 268.

35 See infra notes 36-48 and accompanying text. In home births, mothers can set the environment according to their liking and freely move about without the fear of unnecessary medical intervention. This is in stark contrast to being constrained to a bed and hooked to Electronic Fetal Monitors (EFMs), as is the presumptive standard of care in hospitals.

36 Hermer, supra note 16, at 334; see also Rausch, supra note 11, at 223-25.

37 Scelfo, supra note 34.

38 Id.; Cf. BLOCK, supra note 4 at 268 (documenting the emerging birthing rights movement).

39 Law, supra note 6, at 361-62 (explaining the use of EFMs).

40 Id. at 362 (quoting H. David Banta & Stephen B. Thacker, Historical Controversy in Health Technology Assessment: The Case of Electronic Fetal Monitoring, 56 OBSTETRICAL & GYNECOLOGICAL SURV. 707, 714 (2001)).

41 Id.

42 Id.
should an accident occur.43 Home births are attractive, in part because they offer mothers the chance to deliver in the comfort of their own home, free from the restrictive EFMs, with little or no medication, and the freedom to move as they please.44

Freedom is not the only reason that some opt to deliver via home births.45 For many, choosing to deliver away from the hospital is a choice that reflects spiritual, religious, political, and feminist beliefs.46 It is important to understand how firmly some mothers hold these beliefs.47 Trivializing this important point creates misunderstandings between lawmakers, physicians, and patients.48

3. Concerns Surrounding Home Births

Despite the increased acceptance of home birth as a valid birth option, criticisms about its safety persist.49 Because midwives are not infallible and serious complications can turn low-risk pregnancies into high-risk deliveries with no warning,50 some suggest that the option needlessly risks the health and safety of both mother and child.51 Fetal injuries may occur because home births create distance between mothers, skilled obstetricians, and valuable hospital equipment.52 Others are concerned by Direct-Entry Midwives’ lack of formal education.53

44 Scelfo, supra note 34.
45 Cohen, supra note 21, at 858-62.
46 Id.
47 Id.
48 See, e.g., id. at 854-62, 880 (arguing that midwifery advocates have not clearly communicated the numerous facets of their beliefs about childbirth to other parties).
49 Whether or not these concerns are justified is unclear. The data concerning the safety of delivering with a midwife suggests that for low-risk births, delivering with a midwife is a safe choice. See generally Block, supra note 4, at 95,264; Wagner, supra note 4 at 35, 130; Hermer, supra note 16, at 339-48; Rausch, supra note 11, at 227-30.
50 Joseph Heyman, Letter to Editor, L.A. TIMES July 23, 2008 available at http://www.ama-assn.org/ama/pub/category/18830.html (last accessed Nov. 21, 2008). Dr. Heyman is Chairman of the Board of Trustees for the American Medical Association. See also Rausch, supra note 11, at 229-30. States have attempted to combat these dangers by requiring that Certified Nurse Midwives & Direct-Entry Midwives have written “supervisor” or “consultant” agreements with an obstetrician. Wagner, supra note 4, at 132.
51 Heyman, supra note 50.
52 Cf. Ramsay v. Good Samaritan Hospital, 808 N.Y.S.2d 374 (2005) (granting defendant-physician’s motion to dismiss because physician was not present at home delivery attended by midwife).
53 See Wagner, supra note 4, at 118-19 (documenting that at state legislative hearings considering legalizing Direct-Entry Midwifery, the common criticism lobbied against midwives was that delivering outside the hospital is “not safe.”).
Midwives often defend against health concerns by explaining that the option is only available to mothers in low-risk births. Studies have also demonstrated that the use of midwives is “just as safe, if not safer than medical care in low risk childbirth.” But at least some empirical evidence suggests that despite only taking on low-risk births, home births may be more dangerous than delivering in a hospital. This may be because no dependable method exists to predict if or when a low-risk pregnancy may turn dangerous.

4. Questionable Support

Even in states where Direct-Entry Midwifery is allowed, it is not always viewed favorably. In 2007, Missouri added its name to the growing number of states legalizing Direct-Entry Midwifery. The bill legalizing the practice, House Bill 818, passed in large part because of creative draftsmanship, and not because of genuine legislative support. House Bill 818, a 123-page bill dealing with health insurance, never once mentioned midwifery. Instead, Senator John Loudan buried language into the tail end of the bill permitting “any person who holds tocological certification … [to] provide services as defined in 42 U.S.C. § 1396-

54 Wagner, supra note 4, at 41; Rausch, supra note 11, at 229-30; Cohen, supra note 21, at 858-59.
55 Hermer, supra note 16, at 326; see also Rausch, supra note 11, at 227-229 (summarizing the statistical support for the safety of midwifery).
56 Mr. Rausch discusses several of these studies. See Rausch, supra note 11, at 229-30. Mr. Rausch highlighted that one study has shown that physicians are far more successful than midwives under certain circumstances. See id. (citing to Lewis Mehl-Madrona & Morgaine Mehl-Madrona, Physician and Midwife-Attended Home Births: Effects of Breech, Twin and Post-Dates Outcome Data on Mortality Rates, 42 J. Nurse Midwifery 91, 95 (1997)). That study showed that the infant mortality rate is over three times higher in home births involving post-date, twin, or breech deliveries. Id. Others have also reached the similar conclusions. See Amy Tuteur, New Wisconsin Statistics Continue to Show High Homebirth Death Rate, www.homebirthdebate.blogspot.com (citing to http://dhs.wisconsin.gov/wish/measures/inf_mort/long_form.html) (last visited Jan. 23, 2009). Dr. Tuteur examined statistics compiled by the state of Wisconsin and concluded that they suggest that the neonatal death rate for home births attended by lay midwives are nearly three times higher than those low risk births performed in hospitals.
57 Rausch, supra note 11, at 229. See also Scelfo, supra note 34 (quoting Dr. Erin Tracey).
61 Mo. H.B. 818.
62 Id.
The addition went unnoticed until shortly after the Missouri Congress passed the bill, at which point senators unsuccessfully attempted to nix the legislation before it was signed into effect. Following its enactment, Senator Loudan was briefly removed from his position as Chair of the Senate Small Business Committee and a lawsuit brought by several physicians’ associations was heard before the Missouri Supreme Court.

The frenzy surrounding Direct-Entry Midwives polarized many within Missouri. And while Direct-Entry Midwifery is now a legal practice, the battle fought over its legalization has contributed to the sometimes hostile relationship between doctors and midwives. As midwifery grows more popular, such relationships could diminish the quality of healthcare available to mothers.

B. Elective C-Sections

Physicians have been performing C-sections in emergencies for some time. While the procedure is major surgery, C-sections have become safe enough that

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63 *Id.* Sen. Loudan made certain that the meaning of this provision would not be easily determinable on first glance. 42 U.S.C. § 1396r-6(b)(4)(E)(ii)(I) (2008) permits for an additional six month extension of emergency medical assistance for services related to pregnancy. And “tocological certification” is a derivative of the Greek term “tokos,” meaning childbirth. Franck, *supra* note 60. “Tocology” is defined as the science of obstetrics and midwifery. *Id.*

64 Franck, *supra* note 60.

65 *Id.*

66 Mo. State Med. Ass’n v. State, 256 S.W. 3d 85 (Mo. 2007) (reversing trial court judgment finding the statute constitutionally invalid because the plaintiffs lacked standing to bring suit).

67 Franck, *supra* note 60.

68 See, e.g., Mo. State Med Ass’n, 526 S.W.3d at 86.

69 WAGNER, *supra* note 4, at 115.

70 Elena Conis, *Cesarean Section’s Ancient History*, LA Times, May 1 2006 at F-3, available at http://articles.latimes.com/2006/may/01/health/he-esoterica1 (last visited Feb 12, 2009). Early Chinese drawings depict newborns being removed from openings in their mother’s abdomen and ancient Roman law required babies to be surgically removed when the mother died before or during labor. *Id.* The procedure was generally performed only where the mother had little chance for survival or was already dead until the late middle ages. *Id.* Women began surviving the procedure with some regularity in the 18th century. *Id.* It has since become a common procedure throughout the civilized world. *Id.* Since the 1970’s, America’s high C-section rate has been the subject of much criticism. See generally BLOCK, *supra* note 4, at 109-13; Law, *supra* note 6 at 345-46. In 2007 America’s C-section rate rose for the eleventh consecutive year, reaching an all time high of thirty-one and eight tenths percent. See Ctrs. for Disease Control & Prevention, Nat’l Vital Stats. *Reports, Births: Preliminary Data for 2007,* available at http://www.cdc.gov/nchs/data/nvsr/nvsr57/nvsr57_12.pdf (last visited Aug. 25, 2009). International studies show that when the C-section rate is between ten and fifteen percent, the maternal mortality rate decreases. WAGNER, *supra* note 4, at 42, 47-48 (citing to and explaining the methodology leading to the World Health Organization’s conclusion and consistent recommendations that a ten to fifteen percent C-section rate is the optimal rate for maternal and fetal health).
physicians may give mothers the option to request that their child be delivered using this method without a medical reason. There is a professional consensus that, at a woman's request, it is medically acceptable and sometimes ethically responsible to perform C-sections without a medical reason. Although the number of women requesting elective C-sections is small, it is possible that more women will opt to deliver in this fashion.

A physician performs a cesarean delivery by making an incision in the abdominal wall and uterus (rather than through the vagina) the amniotic fluid is suctioned out and then the baby is delivered. American Pregnancy Association, Cesarean Procedure, http://www.americanpregnancy.org/labornbirth/cesareanprocedure.html (last visited Nov. 21, 2008). The normal cesarean procedure will take an average of forty-five minutes to an hour. The baby is usually delivered in the first five to fifteen minutes and the remainder of time is used for closing the incision. This is much quicker than the typical vaginal delivery. WAGNER, supra note 4, at 38-44.

The dangers presented by C-sections are well documented. See WAGNER, supra note 4 at 44-45. Dr. Wagner posits that women who choose C-sections do not appreciate the risk they are taking. Id. Despite the risks, Professor Law argues that elective C-sections are a justifiable choice for women to make. Law, supra note 6 at 346.

This position has garnered more acceptance in the past decade. In 2003, The American College of Obstetricians and Gynecologists (“ACOG”) stated that it was sometimes medically and ethically responsible for a physician to perform a C-section without a medical reason, and in 2006, the National Institute of Health (“NIH”) recognized that in some circumstances that elective C-section might be a reasonable alternative to planned vaginal delivery. See generally BLOCK, supra note 4 at 56; Law, supra note 6, at 347, 353. Professor Law offers a thorough discussion of the motives and rationales of those who choose to exercise this option. See id. at 347-54 (discussing the motivations and effects underlying the choice to undergo an elective C-section).

Law, supra note 6 at 353. Professor Law supports this position by explaining that the ACOG, the New England Journal of Medicine, and the National Institutes of Health have each reached this conclusion. Id. (citing to American College of Obstetricians & Gynecologists, Surgery and Patient Choice, Op. No. 289 11 (2003); Howard Minkoff & Frank Chervenak, Elective Primary Cesarean Delivery, 348 NEW ENG. J. Med. 946 (2003); Nat’l Insts. of Health, State-of-the-Science Conference Statement, Cesarean Delivery on Maternal Request, March 27-29, at 14). Professor Law further notes that surveys show that practicing physicians have a wide range of attitudes towards performing C-sections without a medical reason. Id. at 353.

See Law, supra note 6, at 353 (citing to Childbirth Connection’s “Listening to Mothers” survey documenting that only one out of one thousand three hundred women reported requesting a C-section).

Evidence suggests that the number of women opting to have a C-section without a medical reason may be increasing. See BLOCK, supra note 4 at 52 (documenting that, in at least one hospital, physicians reported that one out of every approximately sixty women are making unprompted requests for elective C-sections); see, e.g., Barbara Bettes, et al, Cesarean Delivery on Maternal Request, 109 OBSTETRICS & GYNECOLOGY 57, 58, 61 (2007) (internal citations omitted) (documenting that more than half of American physicians have either performed a C-section on maternal request or would be willing to do so and in 2006 58% of obstetricians observed an increase in inquiries regarding elective C-section).
C. Induced Labor

American women may also elect to have their labor induced through physician-administered drugs prior to the child initiating the labor process. Labor is induced using intravenous medication, usually Oxytocin (or its synthetic form, Pitocin), that brings on contractions in the uterus. Other methods for inducing labor include rupturing the amniotic sac (breaking the water) or dilating the cervix. Today, approximately fifteen percent of babies born in America are delivered via induced labor. Although this practice is nothing new, the frequency with which physicians rely upon these medications is often criticized, and is an impetus behind the reaction against “medicalized” birth that is causing some mothers to deliver outside the hospital.

III. LIMITING MATERNAL AUTONOMY

To understand why exercising these options with greater frequency will lead to diminished maternal choice, it is first important to examine several problems with maternity care in America. A flaw in this “broken” system is the multitude of ways...
that maternal choice is limited by the government, health care providers, advocacy 
groups, and insurance companies. The following portion will examine several 
factors contributing to this broken system.

A. Legal Basis for Maternal Choice

Before discussing how maternal autonomy is being limited, it is first important to 
review what rights the law proscribes to pregnant women when determining how 
they will deliver their child. This section will discuss how physicians may coerce 
patients into undergoing certain medical procedures in an effort to protect fetal 
health. Generally, such coercion may infringe upon a woman’s right to refuse 
medical treatment or to be free from unwanted medical intrusion.

This section will also discuss how the government has implemented laws 
restricting midwifery and freestanding alternative birth centers. Several 
commentators have suggested that a mother’s right to choose alternative modes of 
childbirth is constitutionally protected. Although the Supreme Court has not yet 
found that such a right exists, Amy F. Cohen identifies several arguments to support 
the contention that a mother’s right to make alternative birth choices, like home birth 
with a Direct-Entry Midwife, is a fundamental right protected by the Fourteenth 
Amendment. First, because personal autonomy is at the root of the privacy right 
and childbirth decisions are intensely personal decisions that present “social, 
economic, and political, rather than merely medical issues,” the maternal right to 
choose different birth methods is strongly supported by the right to privacy.

85 See, e.g., Block, supra note 4 at 261.

86 See generally Pamala Harris, Compelled Medical Treatment of Pregnant Women: The 
pregnant woman may, for many reasons, refuse medical treatment that a physician regards as 
beneficial to the woman, the fetus, or in some instances, both.”).

87 In advocating for a woman’s right to select midwifery, Amy Cohen condensed these 
arguments into one place. See Cohen, supra note 21; see also Charles Wolfson, Midwives and 
Home Birth: Social, Medical and Legal Perspectives, 37 Hastings L.J. 909, 935 (1986); Harry 
M. Caldwell, Bowland v. Municipal Court Revisited: A Defense Perspective on Unlicensed 
Midwife Practice in California, 15 PAC L.J. 19, 29-30 (1983); Dale Elizabeth Walker, 
Comment, A Matter of Quality of Births: Mothers and Midwives Shackled by the Medical 
Establishment and Pennsylvania Law, 23 DUQ. L. REV. 171, 192-94 (1984); Barbara A. 
McCormick, Childbearing and Nurse-Midwives: A Woman’s Right to Choose, 58 N.Y.U. L. 

88 Cohen, supra note 21, at 869-875.

89 Id. at 870.

90 McCormick, supra note 87, at 686 (explaining further that denial of the right would 
impose psychological, physical, social, and financial burdens upon the woman).

91 Wolfson, supra note 87, at 941-42.

92 Cohen, supra note 21, at 869.
Second, the possibility of surgical invasion implicates the right to bodily integrity. Because bodily integrity is “the mainstay of any … privacy argument,” Ms. Cohen suggests this further supports maternal choice being a fundamental right. Finally, a woman’s parental authority to make decisions for the upbringing of her family also supports the conclusion that a woman has a fundamental right to choose alternative delivery methods.

As compelling as these arguments may be, whether the Court would recognize that such a right exists is not clear. The Court’s reluctance to recognize "new" fundamental rights may make establishing such a right unlikely. Ms. Cohen viewed the Supreme Court’s decision in Lawrence v. Texas, with its affirmation of the “expansive language on substantive due process, liberty, and the sweet mystery of life” quoted in Planned Parenthood v. Casey, as a harbinger that the Court may expand substantive due process to recognize the right to make alternative birth decisions (midwifery) as a fundamental right.

Since Ms. Cohen’s article, Gonzales v. Carhart has further illuminated the Court’s view on substantive due process. Carhart is “the most definitive statement to date from the Roberts Court of its approach to substantive due process methodology.” Northwestern University’s Professor Steven Calabresi reads Carhart as marking “a pointed retreat from Lawrence.” Professor Calabresi argues that Carhart demonstrates that “[Justice Kennedy] and four other Justices have recommitted themselves to the narrow, restrained approach of Glucksberg in substantive due process cases.” This affirmation of a “cautious, pro-judicial restraint approach suggests a greatly reduced role for the Court in inventing new constitutional rights that is dramatically opposed to the expansive language of Casey and Lawrence.” Consequently, it may be unlikely that the Court will find that such a right does exist.

Whether or not the Court will conclude that the right to make alternative childbirth decisions is fundamental is a valuable consideration. Should the Court

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93 McCormack, supra note 87, at 691.
94 Id.
95 Cohen supra note 21, at 872.
96 Id.
98 Cohen, supra note 21.
100 Calabresi, supra note 97, at 1520.
102 Calabresi, supra note 97, at 1517. In so reaching this conclusion, Professor Calabresi also points out that the Court never once cites Lawrence or the expansive language on substantive due process, liberty, and the sweet mystery of life that the Lawrence opinion quoted from Casey. Id.
103 Id. at 1520.
revert to the broad *Casey* conception of fundamental rights, as it did in *Lawrence*, then some of the restrictions discussed below may be in violation of this right. Moreover, recognizing that such a right exists could reduce physician paternalism that has been identified as causing unnecessary C-sections \(^{104}\) and pushing some women to deliver outside the hospital setting. \(^{105}\)

**B. Other Legal Interests Affecting Maternal Choice**

To comprehend fully why maternal choice is limited, it is necessary to examine briefly the legal interests that the government and health care providers have in a mother’s delivery decision. Physicians owe a duty of care to both the mother and her fetus, \(^{106}\) and the state has a compelling interest in fetal health. \(^{107}\) Sometimes, a mother’s refusal to receive medical treatment conflicts with these interests. \(^{108}\) When a physician believes the mother’s birth decision places fetal health at risk, doctors are faced with an ethical dilemma. \(^{109}\) The physician can either honor the woman’s refusal or “compel her to treatment by seeking a court order.” \(^{110}\) The consensus among medical professionals is that such actions are almost never appropriate. \(^{111}\) And while courts have held that the decision of whether or not to undergo medical treatment is one that must be honored, others have determined that the mother’s right to refuse medical treatment is not absolute, and must be balanced against the state or fetal interests. \(^{112}\) In some unusual circumstances, courts have compelled women to submit to medical intervention. \(^{113}\) Although interventions are rare, this Note posits

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\(^{104}\) Donohoe, *supra* note 6, at 235-36 (suggesting that doctors interpret the legal treatment of maternal and fetal rights as being in competition with one another, and, as a consequence receive a message that paternalism towards their patients is acceptable). If a mother’s right to make childbirth choices is given greater recognition, physician paternalism would conceivably be diminished, as physicians would receive a message that the mother’s right to choose is afforded greater legal significance that should not be subordinated to protect the fetus.

\(^{105}\) Cohen, *supra* note 21, at 858.

\(^{106}\) See Harris, *supra* note 86, at 140-43.

\(^{107}\) *Id.*

\(^{108}\) *Id.* See *infra* notes 151-176 and accompanying text.

\(^{109}\) Harris, *supra* note 86, at 140-43.

\(^{110}\) *Id.* at 134.


that as home births, and more generally the reaction against medicalized birth of which they are an outgrowth, become more popular, more women will refuse to consent to procedures during hospital deliveries. As more mothers do not consent to what physicians believe to be the appropriate delivery method, the delivery room will become a hostile environment. When conflicts arise in such a hostile environment, courts may be called upon to force mothers to submit to medical treatment. In light of the chaotic circumstances surrounding such deliveries, and the government’s propensity to protect the fetus from harm, this Note posits that an increase in court-compelled medical treatment may result.

C. Governmental Limitations

1. Generally

As pregnancy progresses, the number of government limitations on a mother’s birth options increase. Every state has the power to regulate the midwives who practice within its borders. Depending upon the state, the government may also restrict choice by limiting where a woman may choose to deliver her child, or by failing to require that certain information be made available for mothers to make birth decisions. The following portion discusses these restrictions before shifting its focus to explore ways that the government limits maternal autonomy to protect fetal health.

2. Birth Centers

Birth centers offer women a delivery choice other than hospitals or the home. Generally, these centers can either be “freestanding” or run in conjunction with a hospital. Freestanding alternative birth centers are establishments run by midwives with permanent facilities that operate independent of any hospital affiliation, and provide prenatal care only to low-risk child bearing women. Freestanding alternative birth centers are not available everywhere. Presently state
regulations specifically governing how birth centers can operate may limit birth center location\textsuperscript{121} or the number of centers permissible in one geographic region.\textsuperscript{122} Despite these restrictions, as of 2006, 160 freestanding alternative birth centers existed in the United States.\textsuperscript{123} But a number of these centers are struggling to stay open, in part because compliance with additional statutory requirements\textsuperscript{124} and high insurance premiums make operating for profit difficult.\textsuperscript{125}

To accommodate maternal demand for a less sterile and more homely atmosphere, some hospitals have also begun to offer their own birth centers.\textsuperscript{126} Unfortunately, these options are subject to many of the same criticisms as hospitals.\textsuperscript{127} Hospitals have also tried to accommodate for these demands by offering home-like birth suites.\textsuperscript{128} Even if a mother wishes to deliver in a birth suite, she may not be able to do so because delivering in one can be costly\textsuperscript{129} and reserving a suite does not guarantee that delivery will take place within.\textsuperscript{130}

\begin{footnotesize}
\begin{itemize}
  \item 121 CAL HEALTH & SAFETY CODE § 1204.3 (Deering 2009) (requiring alternative birth centers to be located within 30 minutes in both time and distance from a facility with the capacity to manage obstetrical and neonatal emergencies).
  \item 122 210 ILL. COMP. STAT. 3/30(a-25) (2009) (requiring that “[t]here shall be no more than 10 birth center alternative care models . . . .”). That section further limits the number of birth centers located throughout the state according to population. \textit{Id}.
  \item 123 WAGNER, supra note 5, at 137.
  \item 124 \textit{Id}. at 132 (discussing the “supervisor” and “consultant” relationships that some states require midwives to be engaged in with a practicing physician in order to practice legally); \textit{See}, e.g. Kelly Dunleavy, \textit{Sacramento’s Alternative Birth Options Dwindle}, Sacramento Business Journal, October 5, 2007, available at \url{http://sacramento.bizjournals.com/sacramento/stories/2007/10/08/focus2.html} (last visited Feb. 14, 2009) (documenting the closing of a Sacramento birth center, which is required by law to have “supervising” agreements between doctors and midwives, and noting that no area physicians were willing to work with the closed birth center).
  \item 126 WAGNER, supra note 4, at 133.
  \item 127 \textit{Id}. Unlike in freestanding alternative birth centers, “where the mother has the final say about everything that happens to her,” hospital birth centers are staffed by obstetricians whose disease oriented approach makes medication and intervention just as likely as in a normal hospital. \textit{Id}.
  \item 129 As of Dec. 1, 2008, a birth suite at Cedars Sinai Medical Center in Los Angeles costs from $1,869 to $2,646 per day. \textit{Id}.
  \item 130 \textit{Id}.
\end{itemize}
\end{footnotesize}
3. Maternal Information Statutes

Commentators consistently argue that empowering women is the best way to solve many maternity care problems.\textsuperscript{131} Despite this consensus, only two states are attempting to give mothers the appropriate information to make their delivery decisions by requiring that hospitals make their C-section and induction rates available to potential patients.\textsuperscript{132} New York requires that every hospital and birth center prepare and distribute to every prospective maternity patient, upon request, an informational leaflet explaining the treatments available.\textsuperscript{133} Included in that pamphlet must be the annual C-section rates performed at the facility.\textsuperscript{134} In contrast to the more specific requirements in New York, many states simply require that hospitals keep some records of all C-sections performed, and that these records be submitted to an appropriate agency.\textsuperscript{135} By failing to require that specific information be made available to mothers, governments are inhibiting a mother’s ability to make the best possible decision for herself and her child.\textsuperscript{136}

4. Protecting the Fetus

Much has been written about the continued expansion and recognition of fetal rights by American courts and legislatures.\textsuperscript{137} Before the landmark case \textit{Roe v.}

\begin{enumerate}
\item Donohoe, \textit{supra} note 6 at 237-40; Wagner, \textit{supra} note 4, at 11, 205-208; see, e.g. Law, \textit{supra} note 6, at 362 (arguing that mother’s opinions ought to be given greater weight in the labor process).
\item Block, \textit{supra}, note 4 at 270; Donohoe, \textit{supra} note 6 at 237; Transcript, \textit{What to Expect: Legal Developments and Challenges in Reproductive Justice}, 15 \textit{Cardozo} J. L. Gender 503, 513 (2009). It appears that states are making more information available to the public through the internet. See http://thebirthsurvey.com/dev/Results/learn_state.shtml (last visited Aug. 25, 2009) (compiling the information available for all 50 states and providing links to individual state websites). A review of state websites shows that C-section and intervention rates may be organized by county, mother’s age, race, or sometimes hospital. \textit{Id}. As helpful as this information may be, the information some hospitals may provide could be inaccurate or outdated. Wagner, \textit{supra} note 4, at 11, 206; see, e.g., Betsy Gotbaum, \textit{A Mother’s Right to Know, New York City Hospitals Fail to Provide Legally Mandated Maternity Information}, (July 2005), available at http://pubadvocate.nyc.gov/policy/documents/AMothersRighttoKnow.pdf.
\item See, e.g., Wagner, \textit{supra} note 4, at 24; see O.C.G.A. § 31-7-280(c)(13)(C) (2009) (requiring that all hospitals operating in the state keep records of the C-section rate by number and as a percentage of deliveries, and submit those records annually to the Department of Community Health).
\item Donohoe, \textit{supra} note 6 at 237-39; Wagner, \textit{supra} note 4 at 205-206.
\item See generally Harris, \textit{supra} note 86, at 139-40 (examining expanding fetal rights); Amy Lotierzo, Comment, \textit{The Unborn Child, A Forgotten Interest: Reexamining Roe in Light of Increased Recognition of Fetal Rights}, 79 Temp. L. Rev. 279 (2006) (discussing expanding fetal rights in federal legislation, family law, tort law, property law, and family law).
\end{enumerate}
Wade,138 “[i]n areas other than criminal abortion, the law [was] reluctant to endorse any theory that life . . . begins before live birth or to accord legal rights to the unborn except in narrowly defined situations and except when the rights are contingent upon live birth.”139 Operating off this understanding of the law’s treatment of fetal rights, the Roe Court reasoned that the unborn acquired legal rights only at birth.140 In accordance with this rationale, Roe limited the state’s interest in protecting the rights of the unborn.141

Since Roe, “there has been an increasing recognition and expansion of the rights of unborn children in various areas of the law.”142 Probably the broadest protections afforded to the fetus are given by state legislatures adopting laws declaring that a fetus is a person from the time of fertilization and implantation.143 These laws give courts the opportunity to protect the fetus or those who have a stake in its health through tort, family, and property law.144 Other state protectionist laws aim to protect the fetus from criminal harms inflicted by others.145 The federal government has also taken an active role in protecting the fetus from criminal harms.146


139 Id. at 161.

140 Id.

141 However, as others have pointed out, when the Court ruled in Roe, the shift to laws further recognizing the rights of the unborn had already begun. See Bradley Aron Cooper, Essay, The Definition of “Person:” Applying the Casey Decision to Roe v. Wade, 19 Regent U. L. Rev. 235, 241 (2006). In supporting this assertion, Mr. Cooper notes that the Roe Court acknowledged that some states had already begun to pass wrongful death statutes permitting parents to bring suit where prenatal injuries caused still births. Id.; see also Roe, 410 U.S. at 162. A fetus is viable when it is capable of living outside the womb. BLACK’S LAW DICTIONARY (8th ed. 2004).

142 Lotierzo, supra note 137, at 279.


144 See Lotierzo, supra note 137, at 279-81. These protections are not just limited to mothers, as male interests in fetal health are also recognized. See Farley v. Sartin, 466 S.E. 2d 522 (W. Va. 1995) (permitting bereaved father to bring a cause of action under West Virginia’s wrongful death statute for the death of his wife and her nonviable fetus).

145 Currently, thirty-five states have passed legislation recognizing that, in some circumstances, the unlawful killing of an unborn child is a homicide. See National Right to Life Committee, State Unborn Victim Laws, available at http://www.nrlc.org/Unborn_Victims/Statehomicidelaws092302.html (last visited Jan. 29, 2009). It merits mentioning that New York’s statutes are conflicting. Under New York statutory law, the
More unsettling than the above protections are those policies that aim to protect the fetus from harms that have not yet occurred.¹⁴⁷ Under the auspices of enforcing the state’s interest in protecting fetal health, courts have forced mothers to undergo C-sections¹⁴⁸ and have used “incarceration, detention, orders of hospital confinement, and threats thereof, to compel pregnant women to access prenatal care and to submit to their physicians’ directions regarding medical treatment for the benefit of fetal health.”¹⁴⁹ Judges have also used such threats to "encourage" the mother to bring her fetus to term.¹⁵⁰

### i. Compelled Medical Treatment

The right to refuse medical treatment is not absolute,¹⁵¹ and where a mother refuses to undergo medical treatment, some courts have performed a balancing test to decide whether a compelling state interest exists to override the competent mother's refusal of medical treatment.¹⁵² Where the judge has determined that the state’s interests outweigh the mother’s right of bodily autonomy, a court will subvert maternal rights to protect the fetus.¹⁵³ Although only a few forced medication cases have ever occurred, it is plausible that changes in how women are perceiving birth


¹⁴⁷ Cf. Cherry, supra note 113.

¹⁴⁸ See In Re A.C., 533 A.2d 611 (D.C. 1987) (forcing terminally ill cancer patient to undergo C-section); Jefferson, 274 S.E.2d at 457 (affirming lower court order compelling a woman to submit to C-section and other procedures allegedly necessary to save the fetus’s life); Pemberton, 66 F. Supp.2d at 1247 (discussed below).

¹⁴⁹ Cherry, supra note 113, at 148.

¹⁵⁰ Id.


¹⁵³ The likelihood that such a petition will be granted is unclear. Numerous commentators have argued that such court orders are unacceptable. See generally Harris, supra note 86, at 161; Cohan, supra note 112. at 896 n.213 (highlighting multiple law review articles that discuss the maternal fetal rights debate); but see Daniel R. Leavy, The Maternal-Fetal Conflict: The Right of a Woman to Refuse A Cesarean Section Versus The State’s Interest In Saving The Life of The Fetus, 108 W. Va. L. Rev. 97, 98-99 (2005) (arguing that a state should be able to require a woman to undergo a C-section based on a duty to rescue due to the special relationship formed between the mother and fetus by the time of viability).
(most dramatically represented by the home birth movement), will give rise to more situations where the judiciary will be called upon to resolve delivery decisions.\footnote{See infra part IV; Cf. Leavy, supra note 153.}

In \textit{Pemberton v. Tallahassee Mem'l. Reg. Med. Cir., Inc}, Florida’s Second Judicial Circuit granted permission to Tallahassee Memorial Medical Center to forcibly perform a C-section on Laura Pemberton because attempting vaginal delivery constituted too great a risk to fetal health, given her physical condition.\footnote{Pemberton, 66 F. Supp.2d at 1256.} The scar from Ms. Pemberton’s previous C-section posed such a threat to her unborn child’s life that no doctor or midwife would attend a vaginal delivery.\footnote{Ms. Pemberton’s scar “extended well beyond the traditional low vertical incision up into the thickened myometrium.” Id. at 1249. Initially, a physician did support a vaginal birth, but the physician withdrew his support when Ms. Pemberton was twenty-five weeks pregnant. Block, \textit{supra} note 4, at 249. The court’s opinion differs from Block’s account in that it does mention that a midwife was attending during the labor. Pemberton, 66 F. Supp.2d at 1249.} Yet, Ms. Pemberton remained convinced that vaginal delivery was the safest way to deliver her child.\footnote{Block, \textit{supra} note 4, at 249.} Ms. Pemberton ignored all medical advice and ordered medical supplies so that she and her husband could deliver their child alone.\footnote{Id.} After laboring for two days, Ms. Pemberton checked into Tallahassee Memorial requesting IV fluids.\footnote{Id.} While at Tallahassee Memorial, three separate physicians determined that a cesarean was medically necessary.\footnote{Pemberton, 66 F. Supp. 2d at 1249. All tests, indicated that the fetus was healthy and birth was progressing safely, albeit slowly. Block, \textit{supra} note 4, at 251.} Rather than undergoing a C-section, Ms. Pemberton fled Tallahassee Memorial.\footnote{Block, \textit{supra} note 4, at 250.} That decision resulted in police forcibly returning Ms. Pemberton to Tallahassee Memorial, where doctors proceeded to forcibly execute a C-section after determining that the state’s interest in delivering a healthy baby superseded Ms. Pemberton’s interest in refusing a C-section.\footnote{Block, \textit{supra} note 4, at 250.}

Ms. Pemberton’s case is often cited as an example of the government overstepping its bounds and hospitals refusing to let birth proceed naturally.\footnote{Block, \textit{supra} note 4, at 250.} But in light of the government’s propensity to protect the fetus from harm, it also provides a warning sign to mothers participating in home births. Like Ms. Pemberton, many mothers that decide to forego hospital births have done so based on strong personal beliefs about childbirth.\footnote{See Cohen, \textit{supra} note 21, at 855-57.} As the home birth movement and the reaction against medicalized birth grow in popularity, mothers will continue place greater faith in their body’s natural ability to deliver safely. As anti-intervention convictions grow stronger, more circumstances may arise where doctor and patient
strongly disagree about the appropriate delivery method. More disagreements could lead to court compelled medical treatment.\textsuperscript{165}

\textit{ii. Detention, Incarceration, and Child Abuse}

Courts may also take a mother into custody to protect the fetus from potential harm. Professor Cherry explains that some courts may use their \textit{parens patriae} power to take mothers into custody and “compel state-sanctioned maternal behavior deemed necessary for the health or life of fetuses.”\textsuperscript{166} Some courts have relied on provisions in state child welfare laws to support taking custody of the fetus.\textsuperscript{167} Others have taken an aggressive role in fetal protection where there exists a high potential that fetal harms will arise from poor maternal choices.\textsuperscript{168} This is especially true where a woman’s criminal actions have put fetal health at risk.\textsuperscript{170} Implicit in these policies is a belief that alcohol or drug dependent mothers are unfit to make decisions about what is best for the life and well being of their fetuses.\textsuperscript{171}

The judiciary’s distrust of maternal decision-making in some circumstances and its willingness to enforce child abuse statutes against drug dependent mothers could begin to affect mothers who simply possess anti-intervention convictions. At least one trial court has determined that a mother’s refusal to consent to a C-section was a “major consideration” when terminating a mother’s parental rights.\textsuperscript{172} In that case,

\begin{footnotesize}
\textsuperscript{165} Because the government has taken a greater role in protecting the fetus, and decisions may have to be made in an instant, it is possible that the courts will determine that compelled medical treatment is acceptable. \textit{See infra} Part IV.

\textsuperscript{166} The state regarded as a sovereign; the state in its capacity as provider of protection to those unable to care for themselves. \textit{BLACK’S LAW DICTIONARY} (8th ed. 2004).

\textsuperscript{167} Cherry, \textit{supra} note 113, at 159.

\textsuperscript{168} See Wisconsin ex rel Angela M.W. v. Krueziki, 561 N.W. 2d. 729 (Wis. 1997).

\textsuperscript{169} Mothers have faced murder and child endangerment charges for using drugs while pregnant. \textit{See} State v. McKnight, 576 S.E.2d 168 (convicting mother of murder after it was shown that mother’s use of cocaine caused fetal death); Whitner v. South Carolina, 492 S.E.2d 777 (1997), \textit{cert denied}, 523 U.S. 1145 (1998) (charging mother with child endangerment after child tested positive for cocaine after birth); Grodin v. Grodin, 301 N.W.2d 869, 870 (Mich. Ct. App 1980) (allowing child to sue mother for taking drug during pregnancy that may have caused the child’s teeth discoloration); Curlender v. Bio-Science Labs., 165 Cal. Rptr. 477, 488 (1980); \textit{See generally} Cherry, \textit{supra} note 113 (discussing the detention and confinement of pregnant women for the sake of fetal health); Brown, \textit{supra} note 143, at 91.

\textsuperscript{170} Courts in more than thirty states have heard attempts to prosecute women for using drugs or alcohol during pregnancy. \textit{Shenea Meredith, Policing Pregnancy, The Law and Ethics of Obstetric Conflict} 78 (Ashgate 2005) (citing to Cynthia Cooper, Ford Foundation Report, \textit{Pregnant and Punished}, available at \texttt{http://www.fordfound.org/publications}).

\textsuperscript{171} Cherry, \textit{supra} note 113, at 152-53.

\textsuperscript{172} \textit{See} New Jersey Div. of Youth & Fam. Servs. v. V.M. and B.G., 408 N.J. Super 222, 249 (2009) (Charchman, J. Concurring). In affirming the trial court’s approval of the New Jersey Division of Youth and Family Services plan for termination of parental rights, the per curiam opinion declined to decide the issue of whether refusal to consent to a C-section can be considered an element of abuse and neglect because “substantial additional evidence of abuse and neglect supported the ultimate findings.” \textit{Id.} at 224.
\end{footnotesize}
the mother’s combative behavior during labor (including thrashing, screaming and refusing to consent to a C-section or fetal scalp stimulation) resulted in an emergency competency evaluation.173 Following an initial conclusion that she had the capacity for informed consent with regard to the C-section, the mother successfully delivered vaginally without incident.174 Subsequent investigations into the mother’s mental state and her actions during those investigations resulted in termination of her parental rights based upon New Jersey’s child abuse and neglect statute.175 Court decisions like this will affect maternal decision-making.176

D. Limits During Labor

Delivering a baby is dangerous. A relatively mundane delivery can transform into an outright emergency in an instant.177 Add a team of nurses awaiting instruction, labor pains, and general excitement to an already hectic environment and it is easy to see why the physician needs to play an authoritative role in the delivery room. Fairly or unfairly, this authority makes mothers vulnerable to coercion.178 Because a physician has economic, legal, and personal interests in how a child is delivered, much of the criticism levied against the current maternity care system surrounds how this authority affects delivery outcomes.179 The solutions offered within this Note presume that such criticisms have merit.180

173 Id. at 227-28.
174 Id. at 228.
175 Id. at 224. Although the mother’s actions after delivery may justify the court’s decision, her parental rights may not have been threatened had she consented to the C-section. See, e.g. id. at 228-34.
176 By refusing to consent to a C-section or other procedures, mothers may be subject to unnecessary mental health examinations, or their refusal could weigh against their favor in a future parental rights dispute. Perhaps more pervasive than these hypothetical circumstances is the chilling effect that court decisions like V.M. will have on maternal choice; as they could result in maternal submission to unwanted medical treatment for fear of similar adverse consequences. From an alternative perspective, decisions like V.M. also provide aggressive advocates within the home birth movement with another opportunity to demonize mainstream medical care. See infra Part IV.E. Such demonization could contribute to a hostile relationship between patient and physician.
177 Cf. Heyman, supra note 50.
178 See generally Block, supra note 4, at 261; Wagner, supra note 4, at 130-32.
179 The following section is a summation of a major criticism levied against physicians. See Wagner, supra note 4; Block, supra note 4, at 17, 42, 45-55; Hermer, supra note 16. The author does not suggest that these criticisms are completely correct or applicable to all doctors; however, considering the amount of attention the subject has received from the popular media as well as academic sources, the author believes that presenting the criticism to the reader to demonstrate the ways that a mother may have her choice limited is warranted.
180 At least some evidence suggests that mothers may be pressured into having C-sections. See Law, supra note 6, at 354 (citing a 2006 “Listening to Mothers” survey finding that almost 10% of women surveyed reported feeling pressured to have a C-section); Block, supra note 4, at 17 (noting that a 2005 survey reported that one in ten women reported being pressured to induce).
1. Pushed Births

More than ever before, mothers are having C-sections and receiving medical assistance when delivering their children. Medical malpractice law undoubtedly contributes to this environment of intervention. “Obstetricians and gynecologists have historically been targets of lawsuits more often than other physicians. ... [They] are more likely than any other kind of physician to lose a malpractice trial— and they pay correspondingly high insurance premiums.” Physicians are well aware of this and this knowledge may influence their chosen treatment methods.

Performing C-sections provides an opportunity to protect against lawsuits. In general, malpractice suits concerning C-sections focus on two types of negligence allegations: failure to perform a necessary C-section and negligent performance of a C-section. Choosing to perform a C-section allows a physician to avoid the potential liabilities that may arise from a “failure to perform a necessary C-section” suit and permits them to complete the procedure in non-emergency situation, which lowers the likelihood that harm will occur. In many circumstances, C-sections are just as safe and can be performed in a much shorter time than vaginal childbirth. C-sections, therefore, arguably allow a physician to maximize the efficiency and profitability of his or her practice without compromising maternal or fetal health.


182 James Gibson, Doctrinal Feedback and (Un) Reasonable Care, 94 VA. L. REV. 1641, 1673 (2008) (internal citations omitted).

183 Gibson, supra note 182, at 1674 (citing to Russell Localio et al., Relationship Between Malpractice Claims and Cesarean Delivery, 269 JAMA 366 (1993); Sheldon Brown III, Lawsuit Activity, Defensive Medicine and Small Area Variation: The Case of Cesarean Sections Revisited, 2 HEALTH ECON. POL’Y & L. 285 (2007)). Dr. Wagner suggests this conclusion as well. See WAGNER, supra note 4, at 154. Professor Law notes that others have suggested that physician fears surrounding malpractice liability may be exaggerated. Law, supra note 6, at 370 (citing to Margaret Lent, The Medical and Legal Risks of Electronic Fetal Monitoring, 51 STAN. L. REV. 897, 816-17).

184 Gibson, supra note 182, at 1674 (documenting that a “substantial majority” of obstetricians respond to the legal exposure by increasing the number of cesarean deliveries they perform).

185 Hilary E. Berkman, A Discussion of Medical Malpractice and Cesarean Section, 70 ORE. L. R. 629 (1991) (identifying and discussing both malpractice claims).

186 Id.

187 WAGNER, supra note 4, at 41.

188 See supra note 72.

189 WAGNER, supra note 4, at 38.
But what could be interpreted as physicians opting to provide one of two “equally reasonable alternatives,” others suggest is demonstrative of a more disturbing trend. In addition to the factors Professor Sylvia A. Law identifies as contributing to the high C-section rate, critics argue that doctors are allowing the desired outcome of a quick, cost-effective, and liability free delivery, instead of medical necessity, determine how laboring mothers will deliver their children. Too often, these critics allege, doctors will use their disproportionate power to “push” their patients into undergoing unnecessary procedures or taking unnecessary medication without giving proper respect to the mother’s wishes or her body’s natural ability to safely deliver a child.

Reducing the risk of malpractice liability is not the only reason that critics suggest a push may occur. Others propose that certain personal factors also contribute to physicians ignoring the medical evidence and coercing mothers into undergoing intrusive and unnecessary procedures. For example, less time is required for a C-section, thereby freeing up more time for other activities, such as sleeping (nighttime delivery) or increasing income by seeing other patients. Dr.

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190 Law, supra note 6, at 362. This Note agrees with Professor Law that “the voices of women should be given greater weight, particularly in circumstances such as those . . . where professional opinion is in conflict and women bring different values to the birthing experience.” Id.

191 Professor Law concisely summarizes four factors contributing to unnecessary and unwanted C-sections: namely Electronic Fetal Monitoring, C-section for breech birth, failure to progress, and vaginal birth after C-section. See id. at 354-62.

192 Wagner, supra note 4, at 39-41.

193 Perhaps the most extreme example of this “push” can be seen in the instance of vaginal birth after C-section (hereinafter “VBAC”). More than 9 out of 10 births after an initial C-section are also C-sections. Pamela Paul, The Trouble With Repeat Cesareans, TIME, Feb. 19, 2009, available at http://www.time.com/printout/0,8816,1880665,00.html (last visited Aug. 27, 2009). Many of these C-sections may not be the result of maternal choice, but are instead a consequence of physicians and hospitals refusing to attend VBAC deliveries. Id.; Law, supra note 6, at 357-60, 368 (explaining that the VBAC ban in many hospitals stems from a “misunderstanding of the law”). Others have documented that to protect against possible liability from attending such deliveries, doctors may be providing skewed information to mothers about the safety of VBACs. See Paul, supra note 193. Physicians may be “pushing” mothers towards intervention for other reasons as well. Wagner, supra note 4, at 95-96. For example, a baby may be deemed “too big” or may remain in the uterus too long. Id.

194 Wagner, supra note 4, at 39. Whatever the cause, some critics point to federal studies analyzing birth certificates to give merit to their claim. Id. (citing to Ctrs. For Disease Control & Prevention, Nat’l Vital Stats. Reports, Births: Method of Delivery, available at www.cdc.gov/nchs/birth (last visited Dec. 4, 2008). The certificates show that the percentage of births and emergency C-sections that happen Monday through Friday between nine and five is rapidly increasing relative to weekends and nighttime hours. Id. Wagner suggests that this evidence indicates that physicians are influencing the time of delivery so they will not be inconvenienced by having to work beyond typical working hours. Id. at 29, 27.

195 Wagner, supra note 4, at 40-41.

196 Id. at 38-41.
Marsden Wagner argues that other contributing factors include: a desire to control the most unpredictable portion of professional life, a belief in the trustworthiness of machines over a woman’s understanding of her own body, and a need to look for problems when none exist. Lastly, Dr. Wagner asserts that doctors may perform procedures as a means to solidify their importance within a medical community that is beginning to recognize the utility of delivering with a midwife.

Regardless of the validity of these criticisms, they will not be disappearing in the near future. The factors indicating that a C-section is necessary are not based on objective criteria; instead, physicians must rely on their own judgment when determining whether a C-section is warranted. So long as the economic, legal, and personal motivations continue to exist, so too will the criticisms about physician motivations for intervening with natural labor. As these criticisms intensify in the mainstream media, and the reaction against such intervention tactics becomes stronger, the number of physician-patient conflicts may grow more frequent, and could produce undesirable results.

2. Informed Consent

Physicians may be making improper promises or inadequate disclosures regarding the dangers of C-sections and inductions. In a recent study, less than one-third of the women surveyed after delivery were familiar with the risks posed by C-sections. That same study showed that less than half the women surveyed could correctly identify the risks of induction. The doctrine of informed consent explains that:

Every human being of adult years and sound mind has the right to determine what shall be done with [their] own body; and a surgeon who performs an operation without [their] patient's consent commits an assault, for which he is liable in damages . . . This is true except in cases of

197 Dr. Wagner is a former director of Women’s and Children’s Health at the World Health Organization. Id. at viii-ix.
198 Id. at 38-41.
199 Id. at 39.
200 MEREDITH, supra note 169, at 71; Paul, supra note 193.
201 MEREDITH, supra note 169, at 71; Paul, supra note 193.
202 See infra part IV.C.5.
203 Cf. BLOCK, supra note 4 at 262 (documenting “informed dissent” and teaching women the concept of saying “no” to interventions).
204 Cf. MEREDITH, supra note 169, at 71; WAGNER, supra note 4, at 45 (asserting that “the fact that women are choosing C-sections strongly suggests they are not being told the truth about all the risks to themselves and to their babies”); Paul, supra note 193.
205 BLOCK, supra note 4, at 153-54.
206 Id. at 154.
emergency where the patient is unconscious and where it is necessary to
operate before consent can be obtained.207

If women cannot identify the risks associated with a procedure, their consent may
not be truly informed.208

What exactly a physician must disclose varies significantly from jurisdiction to
jurisdiction.209 Roughly half of the jurisdictions in America require a physician to
provide information that a "reasonable medical practitioner" would provide in the
same or similar circumstances.210 The remaining U.S. jurisdictions have abandoned
this standard in favor of a "reasonable patient" standard,211 which requires the
physician, on the basis of his medical training and experience, to objectively disclose
what a reasonable patient expectably would deem material in making her decision.212

In obtaining a mother’s informed consent, a physician may be able to comply with
informed consent standards while papering over risks that may concern reasonable
mothers.213

Even if an individual physician does not believe that C-sections or inductions
have a great potential for harm, the risks must still be clearly conveyed to mothers
when making decisions. Because "[a] compelled surgical intrusion into an
individual's body . . . implicates expectations of privacy and security" of great
magnitude,"214 it is paramount that a physician comply with the requirements of
informed consent before performing a C-section. Informing a mother of these risks
may change her feelings towards undergoing a C-section or induction.215

There are also disagreements about the relative benefits and dangers posed by
induced labor. Physicians differ in their opinions regarding how dangerous Oxytocin
is and exactly how cautious a doctor should be before administering it.216 A

208 Only seventeen percent of women who received an episiotomy reported having a
choice in the matter. Block, supra note 4, at 154. An episiotomy is a surgical incision used to
enlarge the vaginal opening to help deliver the baby. American Pregnancy Association,
Episiotomy, available at http://www.americanpregnancy.org/labornbirth/episiotomy.html (last
209 Ketler, supra note 3, at 1045 (citing to Richard A. Heinemann, Note, Pushing to the
Wis. L. Rev. 1079, 1082(1997)).
210 Id.
211 Id.
213 Block, supra note 4, at 165, 253, 257.
124 (1992)).
215 Dr. Wagner suggests that mothers who elect to have a C-section without a medical
reason do not have an understanding of the risks inherent in the procedure. See Wagner,
supra note 4, at 45. Professor Law notes that the medical profession has done a commendable
job of attempting to reduce the appearance of coercion by requiring that doctors only discuss
the possibility of elective C-sections after mother raises the issue. Law, supra note 6, at 367.
216 1 Am. Jur. 3d Proof of Facts 1.
fundamental question deals with how rapidly the starting dose should be increased when the patient fails to respond. Oxytocin has been administered under circumstances that later proved to be inappropriate, resulting in asphyxiation of the fetus, severe neurological damage to the baby, mental retardation, and a general lack of motor function and coordination. Furthermore, inducing birth does not always work and a C-section may still be required.

Induction also presents a unique problem that physicians may not make known to their patients. This threat is known as the cascade of intervention. Pitocin produces stronger and more frequent contractions. Once the induction process begins, these stronger and more frequent contractions cause pain in the increasingly sensitive uterus. Because the contractions are more painful, more anesthetics are required. As more anesthetics are required, additional medications are required to combat the side effects of those medications. A mother may not appreciate the pain that comes along with induced labor. If she is made aware of the possibility that additional medications may be needed, she may not exercise this option.

Lastly, it has also been suggested that some courts have wrongfully assumed that the “elevated level of anxiety that laboring patients experience renders unnecessary and even harmful the usual requirements of informed consent, because in their state of anxiety, laboring patients are unable to make the rational choices that are a key reason for obtaining informed consent in the first place.” Dr. Suzanne K. Ketler further identified that some courts have subscribed to the idea that labor and birth are a process that happen without choice or decision, and consequently informed consent is not required.

However, informed consent law in the labor and delivery sphere continues to evolve. As Dr. Ketler highlighted, Schreiber v. Physicians Ins. Co. of Wisconsin

217 1 Am. Jur. 3d Proof of Facts 1 (citing to GABBE, supra note 78; J. Seitchik et al., Amniotomy and Oxytocin Treatment of Functional Dystocia and Route of Delivery, 155 AM. J. OF OBSTETRICS AND GYNECOLOGY 585, 592 (1986)).

218 1 Am. Jur. 3d Proof of Facts 1 (citing Low v. United States, 795 F.3d 466 (5th Cir. 1996)); Moore v. Grandview Hospital, 495 N.E.2d 934 (Ohio 1986)).

219 If a mother’s water breaks but her cervix fails to dilate despite receiving the drugs containing prostaglandins, she probably will need a c-section due to the risk of infection. 1 Am. Jur. 3d Proof of Facts 1.

220 WAGNER, supra note 4, 78-79.

221 BLOCK, supra note 4, at 139.

222 Id.

223 Id. Each medication carries with it its own side effect and own risks. Id.


225 BLOCK, supra note 4, at 139-40.

226 Ketler, supra note 3, at 1045.

227 Id. at 1040-44.

228 588 N.W.2d 26 (Wis. 1999) (finding a breach of statutory duty to conduct second informed consent discussion with patient who revoked consent to vaginal delivery and requested C-section).
changed the process and timing of informed consent to a more patient centered approach.229 Rather than end with a physician’s specific disclosure, Dr. Ketler notes that Schreiber essentially requires physicians to conduct ongoing informed consent discussions with laboring patients whenever there is a “substantial change in circumstance, either medical or legal.”230 This approach is not without its ambiguities or shortcomings,231 but in light of the criticisms levied against the medical profession,232 applying this standard could curb criticisms of physician coercion and potentially foster a more cooperative doctor-patient relationship.233

E. Aggressive Advocates

Arguments for home births and midwifery can be quite persuasive.234 In addition to voicing the benefits of vaginal birth with a midwife, advocates are quick to criticize physicians, hospitals, and the practices used within.235 Home birth proponents often draw a stark contrast between the soothing environment that a mother can create when she decides to give birth at home and the sterile, sometimes harsh, hospital environment.236 In espousing an aggressive, anti-physician position, these advocates may be guiding some mothers towards making unsafe birth choices.

Midwife and home birth advocacy resources often cite to personal stories of women who, having opted for hospital births, lost control of the entire process before undergoing what they believed were unnecessary C-sections or other needless procedures.237 These advocates allege that home birth promises a more rewarding

229 Ketler, supra note 3, at 1031.
230 Id. at 1053.
231 Id. at 1054-56. Dr. Ketler notes that this process “encroaches . . . on the physicians’ decision making ability and fails to provide physicians with reasonable guidelines for making medically necessary decisions . . . .” Id. at 1032. Moreover, Dr. Ketler criticizes the process as resulting in treatment on demand. Id. at 1052. Dr. Ketler proposes that statutory amendments be enacted to clarify when such additional discussions are needed. Id. at 1055. The author agrees with this recommendation and believes that such changes ought to be clearly delineated and then taught to mothers through the patient education process suggested by this Note. See infra part V.
232 See Part III.D (outlining physician coercion).
233 Although Dr. Ketler cautions that adopting this standard would contribute to the physician’s decreasing professional autonomy, a more patient centered approach could facilitate better communication and consequently result in more effective care.
234 See generally Wagner, supra note 4; Block, supra note 4. There is even a national campaign aggressively advocating for uniform regulation and licensure for Direct-Entry Midwives. See The Big Push For Midwives, www.thebigpushformidwives.org (last visited Dec. 2, 2008).
235 Cf. Wagner, supra note 4, at 20-27 (criticizing the “tribal” culture of the hospital setting and suggesting that some doctors have a desire to harm women).
236 Id.
237 Block, supra note 4, at 45-70.
delivery experience. In addition to explaining those benefits, some advocates go further, encouraging home births because natural childbirth may increase the likelihood that a woman will receive a “love cocktail” of chemicals released by the body during labor. Such a chemical rush, they posit, forges a stronger, deeper bond between mother and child.

Amidst these promises of a more fulfilling delivery and encouragement for mothers to trust their bodies’ natural abilities to correct minor pregnancy problems, most midwifery proponents openly admit that the option is not safe for every mother. However, strong advocacy for the many positives of “natural” delivery may dilute warnings regarding the safety risks involved in childbirth and could potentially lull mothers or midwives into a false sense of confidence regarding the likelihood that a safe delivery will ensue.

These critics, justified or not, also lobby harsh criticisms about the utility, motives, and qualifications of the mainstream medical community. They paint hospitals as sterile, cold, environments, run by a “tribe” of inhuman physicians who are brainwashed into believing that patient choice is subordinate to convenience and financial well-being. Such characterizations are unfair and can foster a combative

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239 See Law, supra note 6, at 350.

240 See THE BUSINESS OF BEING BORN, supra note 34.

241 Id.

242 BLOCK, supra note 4, at 95, 264; WAGNER, supra note 4, at 35, 195; Hermer, supra note 4, at 344.

243 At least some parents that are selecting home births underestimate the potential risk involved. Wolfson, supra note 87. There are numerous reported examples of women in the medically high-risk category who have opted for home birth. Id. A mother’s strong desire to deliver outside the hospital, coupled with a trust in the body’s capability to deliver safely, could result in high-risk mothers delivering outside the hospital. When that confidence is supported by a midwife, who may attend labors that others consider “too risky” due to an error in judgment regarding the “screen-out” process or the consequences of the economic pressures inherent in maintaining a viable midwifery practice (high malpractice premiums, low-usage, etc.), the result could be that dangerous deliveries are attempted outside the safety of the hospital setting. Cf. Dunleavy, supra note 124 (highlighting the economic difficulties of maintaining a viable midwifery practice). Admittedly, such a choice is each mother’s to make, but when the decision is influenced by a demonization of mainstream medical practices, the perception that a hospital birth is robbing the mother of one of life’s most fulfilling experiences, and that such a choice could result in a weaker connection between mother and child, mothers may be improperly pushed towards taking an unnecessary risk.


245 WAGNER, supra note 4, 13-36. Dr. Wagner and others openly admit that such generalizations do not apply to all physicians. See id. at 42; BLOCK, supra note 4, at 264.
relationship between doctor and patient. As these criticisms become well known through the mainstream media there may be an increase in patient refusal to consent to physician-recommended procedures.

The alternative birth movement is not alone in using the media to warn against the dangers presented by other birth choices. The medical community is frequently criticized for everything from ignoring scientific facts regarding the safety of midwifery & home births, to employing scare tactics to control doctors and hospitals. The medical lobby’s media use not only affects individual mother’s delivery decisions, but also plays a major role in influencing the legality of midwifery.

Taken together, the aggressive advocates on both sides of the debate have created an environment where determining what constitutes a safe delivery choice is a challenging task. The home birth movement plays upon strong emotional desires for a satisfying delivery outside the hospital, a sense of empowerment, and a distrust of physicians to create strong willed mothers who may not easily submit to necessary medical intervention. On the other side of the spectrum, mothers who afford too much weight to the medical lobby’s distrust of out of hospital births are at risk for experiencing needless medical interventions because they choose to deliver in a hospital, rather than another available locale.

246 When emergencies require obstetrical intervention, such a relationship can jeopardize maternal or fetal health.

247 See supra note 34.

248 Cf. Block, supra note 4, at 262 (documenting the “informed dissent” process, teaching women to say no to electronic fetal monitoring, induced labor, etc.). Ultimately, if such knowledge grows more common, the result could be more court ordered medication or termination of parental rights. Cf. Cohen, supra note 21, at 861 (explaining the idea that there has begun to be a turn on the nation’s long, unquestioning deference to doctors, and noting that some have begun to realize that decisions that women have turned over to doctors must be reclaimed because they directly affect personal dignity and definitions of self).

249 See Wagner, supra note 4, at 45, 150-51.

250 Id. at 27, 150.

251 Id. at 35,118-19,124 (documenting mainstream medical associations’ actions at legislative hearings considering legalizing Direct-Entry Midwifery); Cohen, supra note 21, at 854 (documenting that a standard explanation for the stalemate on midwifery reform is the medical lobby’s attempt to “preserve its economic share of the birthing business by preventing midwifery regulation and utilizing its traditional influence over courts.”).

252 These complications demonstrate the need for an educational source that will offer non-biased information to expecting mothers. This Note is not alone in suggesting that increased maternal education is necessary to improve maternity care in America. See Wagner, supra note 4, at 207-09; Donohoe, supra note 6, at 230 (“only through information and education will women be able to create market forces that will slow the cesarean epidemic”). Part V will propose that maternal education be provided by a disinterested collection of midwives & physicians who can evaluate each mother’s unique risks and explain the benefits of each delivery option.
F. Insurers Limiting Choice

For some women, a harsh reality of childbirth is that their insurance coverage may limit the options they have in delivering their child. “A woman who selects a mode of delivery based on what she is told her insurance will reimburse is not exercising choice based on the best interests of her child and self.”253 Mothers who wish to have their delivery attended by a midwife may have trouble obtaining coverage for the procedure. Although the Federal Government has rewritten its insurance plans to allow midwives to be paid,254 some insurance companies do not cover home births,255 and not all state Medicaid programs reimburse Direct-Entry Midwives.256 Additionally, recent cost-cutting efforts have precluded some mothers who receive Medicaid from delivering in freestanding alternative birth centers.257 On the caregiver side, high malpractice insurance premiums cause physicians and hospitals to refuse to admit mothers with previous C-sections to attempt vaginal deliveries,258 discourage physicians from providing legally required backup services

253 Law, supra note 6, at 376.


256 The American Association of Birth Centers reports that “about 9 or 10 state Medicaid plans pay Direct-Entry Midwives.” See American Association of Birth Centers, Medicaid and Birth Centers: Background Information, available at http://www.birthcenters.org/legislative-alerts/index.php?id=17 (last visited Aug. 26, 2009); See also Midwifery Alliance of North America, Direct Entry Midwifery State-by-State Legal Status, supra note 11 (reflecting that 11 states have Medicaid reimbursement).

257 See American Association of Birth Centers, Judge Rules Against Birth Centers, available at http://www.birthcenters.org/news/breaking-news/?id=83. (last visited Aug. 25, 2009) (documenting that the Center for Medicare and Medicaid Services is beginning to disallow federal matching funds to states that pay birth center facility fees). The American Association of Birth Centers reports that as many as 50-95% of some birth center’s patients are Medicaid enrollees. Id.

258 Wagner, supra note 4, at 29, 178 (documenting that, in some states, malpractice insurance companies will no longer cover claims resulting from VBAC); Law, supra note 6 at 356-59, 368-70 (discussing the factors that gave rise to the VBAC ban in many hospitals & noting that hospital and physician perceptions about risk and malpractice liability reflect a “misunderstanding of the law”). See generally Paul, supra note 193 (documenting that a 2006 survey reporting that 26% of physicians had stopped VBAC deliveries because insurance was unaffordable or unavailable). Evidence suggests that some mothers are interested in attempting VBAC in areas where it is commonly denied. Id. (citing to a New York survey documenting that 57% of mothers would be interested in attempting vaginal delivery); Law, supra note 6, at 357 (asserting that “when VBAC is commonly denied, many women who would prefer vaginal birth are denied that choice”); Block, supra note 4 at 261(documenting the plight of women who, as a result of VBAC bans, have their delivery options limited to C-section at a hospital or homebirth with a midwife).
to freestanding alternative birth centers, and make it difficult for alternative birth centers and Direct-Entry Midwives to practice. 259

IV. “NEW” OPTIONS PROVIDE A GREATER CHANCE FOR LIMITATION

The government, insurance companies, and health care providers may limit a woman’s delivery options.260 In considering these limits alongside the government’s growing propensity to protect the fetus, and a distrust of different birth methods, it appears that maternal independence during labor will begin to erode. The following portion will show how elective C-sections, elective induction, and home births further contribute to a decline in maternal autonomy.

A. Home Births

As home births grow in popularity, it is possible that more situations will arise where physicians call upon courts to resolve delivery room conflicts. Pemberton261 was examined above in detail because it is illustrative of the type of conflict that may arise as home births increase in popularity. Like Ms. Pemberton, many mothers that opt for home births have done so because they trust their natural ability to safely deliver children and prefer to deliver outside of a hospital.262 These strong beliefs, coupled with a distrust of physicians arguably created by aggressive home birth advocates, could increase the number of women who do not wish to undergo any medical intervention during labor. When these women call upon the hospital because delivery stagnates or an emergency arises, they may be more averse to undergoing the physician’s recommended treatment. As more situations like this arise, it is possible that more of those rare circumstances will develop where doctors solicit the courts to compel medical treatment. In light of the government’s growing propensity to protect the fetus,263 the commonly misunderstood maternal desire for natural delivery,264 and other commentators suggesting that compelled medical treatment is justifiable,265 more courts may conclude that compelled medical treatment is acceptable.266

259 WAGNER, supra note 4 at 228-29; see also supra notes 124-25.

260 See supra Part III.

261 Pemberton, 66 F. Supp. 2d at 1247.

262 See supra Part II.A.2.

263 See supra Part III.C.

264 Cohen, supra note 21, at 858.

265 See Leavy, supra note 153, at 98-99 (2005) (arguing that a state should be able to require a woman to undergo a C-section “due to the special relationship formed between the mother and the fetus by the time of viability”).

266 Janet Gallagher has identified several commonalities in forced medications cases: medications are often initiated shortly before birth or during labor, the mothers rarely testify directly, and misinformation is common. See Cohen, supra note 21, at 866 n.75 (citing to Janet Gallagher, Prenatal Invasions & Interventions: What’s Wrong With Fetal Rights, 10 HARV. WOMEN’S L.J. 9, 48-54 (1987)). Many of these commonalities would be present in situations where a mother who chooses to deliver at home seeks minor medical assistance while in the throes of labor.
The home birth movement will also affect mothers choosing to deliver in the hospital. The distrust of physicians and the desire to avoid medical intervention cultivated by the home birth movement could cause women to distrust a physician’s determination that medical intervention is necessary. Such beliefs, when coupled with “informed dissent” programs, will lead to combative behavior in the delivery room that could have undesirable consequences.267

Wherever the option is legal, regardless of safety, the choice to have a home birth attended by a midwife is a choice every mother can make.268 So long as the option remains available, interested parties’ concerns that home births needlessly risk fetal health269 will always be present. Accordingly, steps should be taken to protect a mother’s choice to deliver where she sees fit, without fear of judicial intervention or the adverse consequences of her decision. This Note proposes such steps in Part V.

B. C-Sections & Induced Labor

Elective C-sections and scheduled inductions will adversely affect the independence of mothers hoping to avoid medical intervention.270 It has been asserted that patient-choice C-sections lower or entirely remove the threshold for when a C-section becomes medically necessary.271 Because of this lower threshold, doctors may begin to determine that the criteria indicating that intervention is appropriate exist sooner in the delivery process, thereby making mothers more likely to experience a C-section or induction.272 Also, it is possible that a doctor’s views about the acceptability of such procedures will be altered by the increasing number of mothers requesting these procedures.273 The effects of this lower threshold could be further exacerbated by the economic, legal, and personal benefits that physicians receive when they opt to perform a C-section.274

267 This could result in termination of parental rights. See supra notes 172-176 and accompanying text. Even if a mother does not aggressively resist certain treatment methods, the chilling effect from previous court decisions may cause her to consent to procedures she does not desire out of fear that combative behavior may result in undesirable consequences. See supra note 176.

268 See, e.g., supra Part III (explaining that a mother’s right to choose her delivery option is a fundamental right protected by the Constitution).

269 See supra Part II. Fetal injuries can occur in the home birth setting because it places distance between mothers, skilled obstetricians, and valuable hospital equipment. Also because there is no absolute method that can readily predict if or when a seemingly low-risk pregnancy will turn into a high-risk one, determining that a mother is “low-risk” does not guarantee that the mother will not need skilled medical assistance. Rausch, supra note 11, at 229.

270 Professor Law shares this concern. See Law, supra note 6, at 380 (suggesting that elective C-sections may lead to diminished maternal choice. “It would be tragic if respect for those choices led to an increase in the number of women pressured to have C-sections.”)

271 Block, supra note 4, at 125 (quoting Howard Minkoff, Chair of Obstetrics and Gynecology at Maimonides Medical Center, Brooklyn, NY).

272 See Law, supra note 6, at 380

273 Id.

274 See supra Part III.D.
V. Resolution

No delivery method can guarantee a safe and healthy baby. In most births, these “new” delivery options are safe choices that a mother can justifiably exercise. However, economic, legal, ideological, personal, and professional interests influence a mother’s choice. As more women deliver using “new” options, it seems possible that these interests will unfairly influence delivery decisions.

Numerous scholars have concluded that the mother is the best person to decide how to deliver her child, and legal and medical standards are often in accord with this position. But making the appropriate decision in light of numerous influences and limitations can be challenging. A culture of physician distrust and uncertainty about the safety of home births leaves some mothers without desirable options. For some, the choice boils down to delivering in the hospital and risking unnecessary intervention or injury, or delivering outside the hospital and risking injury because skilled physicians and instruments are not readily available. Consequently, some mothers are forced into choices that could result in physical and emotional injuries. And while the circumstances underlying these problems cannot be totally eliminated, the state can take several steps to ensure that delivery decisions are well-informed, made free from coercion, and without fear of negative repercussions.

A. Empowering the Mother as A Decision Maker

1. Increase the Information Available

The first way to protect mothers against the adverse effects of these “new” delivery options is to increase the information made available to mothers. As discussed above, only two states currently require that hospitals disclose their C-section and induction rates. In the past, concerted efforts to enact similar legislation in other states have been stymied by powerful medical lobbies. Margaret Donohoe has suggested that information be physician specific, as a means to curb unnecessary C-sections. Ms. Donohoe posits that making this information available would help create market forces that could influence hospitals away from C-section overuse and help women understand that C-sections are not always necessary or appropriate. In furthering Ms. Donohoe’s suggestion, caregiver-

275 Law, supra note 6, at 346.

276 See generally Cohen, supra note 21, at 854 (arguing that, given the mother’s strong privacy interests and parental rights to the developing child, the mother-to-be is the best childbirth decision maker); Harris, supra note 86; Law supra note 6, at 362; WAGNER, supra note 4, at 205-07.

277 BLOCK, supra note 4, at 261.

278 Injuries could occur in either the delivery or the home birth setting.

279 Donohoe, supra note 6, at 237; WAGNER, supra note 4, at 205-09.

280 See supra note 132.

281 Donohoe, supra note 6, at 238; WAGNER, supra note 4, at 11.

282 Donohoe, supra note 6, at 238-39.

283 Id. at 237.
specific information should also be made available for Certified Professional and Direct Entry Midwives.284 Having this information available on a midwife-specific level would result in a better public understanding of the safety of out-of-hospital midwife delivery, both for individuals considering delivery with a midwife and for legislators looking for evidence regarding midwife safety. A better understanding of midwife safety could result in fewer women being subject to unnecessary in-hospital procedures. At the same time, making safety information available to the public might deter midwives from attending risky deliveries that should take place in the hospital.

Additional beneficial information could also become available by documenting the number of “pushed births” at a given hospital. In 2005, Florida approved a constitutional amendment giving patients access to records related to “adverse medical incidents.”285 This amendment “represents one of the most sweeping changes in law and public policy ever adopted in [Florida].”286 Amendment 7’s purpose is to “create a constitutional right for a patient or a potential patient to know and have access to records of a health care facility’s or provider's adverse medical incidents, including medical malpractice and other acts which have caused or have the potential to cause injury or death.”287 A Florida court has defined “adverse medical incidents” to mean “medical negligence, intentional misconduct and any other act, neglect, or default of a health care facility that caused or could have caused injury or death to a patient . . . .”288 It could be argued that compelling mothers to undergo unnecessary procedures constitutes an adverse medical incident worthy of documentation.289 By attempting to document the number of “pushed births,” mothers angered with the way their delivery was managed would have a formal avenue to voice their discontent, the public would have a way to investigate the coercive nature of physicians, and physicians would be further dissuaded from coercing mothers into undergoing unnecessary interventions.

2. Encouraging Disinterested Involvement

It is well settled that the government “has an interest in protecting the integrity and ethics of the medical profession.”290 If the criticisms about physicians pushing patients into invasive procedures or misleading mothers about their choices are

284 Hospital transfer rates, documentation of adverse medical outcomes, etc.
285 FL. CONST. art. X § 25.
286 J.B. Harris, Riding the Red Rocket: Amendment 7 and the End to Discovery Immunity of Adverse Medical Incidents in the State of Florida, 80 FLA. BAR. J. 20 (2009).
287 Id. at ¶ 6 (citing to Advisory Opinion to the Attorney General re: Patient’s Right to Know About Adverse Medical Incidents, 880 So.2d 617, 619 (Fla. 2004)).
288 Id. at ¶ 10 (citing to Florida Hospital Waterman, Inc. v. Buster, 932 So. 2d 344, 350 (Fla. 5th Dist. Cr. App 2006)).
289 Accusations would first have to be reviewed for merit.
290 Washington v. Glucksberg, 521 U.S. 702, 731 (1997); see also Barsky v. Board of Regents of Univ. of N. Y., 347 U.S. 442, 451, (1954) (indicating that the State has a "legitimate concern for maintaining high standards of professional conduct in the practice of medicine").
valid, then some health care providers have brought the medical profession’s integrity into question. To restore and protect this integrity, a state-supported, disinterested maternal education program should be developed to encourage disinterested physicians and midwives to cooperatively educate individual mothers about the particular risks and benefits of their available delivery options and rights. By requiring mothers early in pregnancy to consult with a state supported physician-midwife panel that is not ultimately responsible for her care, the state could negate the effects of aggressive birth advocates, eliminate concerns that physicians are providing mothers with inadequate or improper information, and expose mothers who had never considered delivery with a midwife an opportunity to interact with a caregiver who applies a different philosophical approach to childbirth. Additionally, more education may result in greater maternal independence in the delivery room, because mothers may be able to communicate better with their physicians, and physicians may have a greater respect for the mother’s delivery choice. Likewise, home births will be safer because mothers will better appreciate the risks of delivering outside the hospital, and will have more knowledge to draw upon that will enable them to recognize and appreciate signs of trouble.

B. Incentivize More Appealing Birth Conditions

A second way to protect mothers against the adverse effects of these “new” delivery options is to offer economic incentives to make all labor options more appealing. Freestanding alternative birth centers offer some mothers the freedom they desire, but are not available everywhere. Where they are, high malpractice premiums and changes to Medicaid are making it difficult for poorer mothers to exercise the option. Currently, bills to amend Title XIX of the Social Security Act to require coverage for freestanding alternative birth centers under the Medicaid program are before both the United States Senate and House of Representatives. Passing this legislation would make freestanding alternative birth centers more accessible to mothers with strong anti-intervention beliefs, but who cannot afford the option without governmental aid. Furthermore, additional economic incentives should be directed towards subsidizing the high malpractice premiums that

291 See supra notes 124-25 and accompanying text.

292 The medical community has made commendable strides to ensure that coercion does not occur. See Law, supra note 6, at 367. Nevertheless, criticisms of physician coercion persist. Cf. Paul, supra note 193. By having disinterested, qualified physicians & midwives cooperatively educate mothers, criticisms regarding coercion would be greatly reduced.

293 The midwife approach requires the mother to take more responsibility for her own care and education. Hermer, supra note 16. This Note does not contend that mothers are currently uneducated, but instead suggests that hands on education with a trained obstetrician and midwife during pregnancy will only further benefit the mother.

294 WAGNER, supra note 4, at 133, 137.

295 See, e.g., BLOCK, supra note 4, at 106, 267.

296 See supra notes 124-25 and accompanying text.

physicians must pay when they allow mothers to attempt to deliver vaginally after a C-section or when they provide backup services to a freestanding alternative birth center.\textsuperscript{298}

\textbf{C. Rethinking Informed Consent}

A final way to protect mothers against the potential adverse effects of these “new” birth options involves adopting a reshaped perception of informed consent in the childbirth arena. Adopting the conception of informed consent articulated in Schreiber\textsuperscript{299} will foster a more cooperative physician-patient relationship. Such a continual, dialogue-driven informed consent process is consistent with the overall progression towards greater maternal autonomy throughout pregnancy,\textsuperscript{300} and Professor Law’s conclusion that women’s voices be given greater weight in birthing decisions.\textsuperscript{301} This approach, when coupled with the education proposed within this Note,\textsuperscript{302} can help eliminate coercive physician treatment, facilitate maternal trust in physician decision-making, and aid in restoring the integrity of the medical profession.

\textbf{VI. CONCLUSION}

As mothers are given more freedom to make their delivery choices, problems with the current maternity care system and the legal protections afforded fetus have the potential to diminish maternal independence. At one end of the spectrum, the home birth movement and reactions against “medicalized” birth have the potential to create physician distrust and a greater resistance to medical treatment. This resistance, when coupled with an expansive view of fetal rights may result in compelled medical treatment, injury, or the loss of parental rights. At the other end of the spectrum, elective C-sections and inductions will diminish the likelihood that mothers who wish to avoid medical intervention will be able to do so.\textsuperscript{303} Somewhere in between, the fears surrounding birth are precluding mothers from exercising viable options from the living room to the delivery room. A three-part solution has been proposed to alleviate these problems. Taken together, these three prongs will empower women to make better-informed birth decisions, hold physicians and midwives more accountable, and create a more cooperative relationship between physician and patient.

\textsuperscript{298} See supra notes 124-25 and accompanying text.

\textsuperscript{299} Schreiber, 588 N.W.2d at 26.

\textsuperscript{300} See Ketler, supra, note 3.

\textsuperscript{301} Law, supra note 6, at 362

\textsuperscript{302} The state can teach patients precisely what situations trigger the legal or medical change in circumstances that necessitate further informed consent when it educates mothers through the solution proposed herein.

\textsuperscript{303} This Note agrees with Professor Law in reaching this conclusion.