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## Motherhood

Susan B. Boyd

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## **MOTHERHOOD**

By Susan Boyd

[boyd@law.ubc.ca](mailto:boyd@law.ubc.ca)

### **A Research Companion to Feminist Legal Theory**

*Edited by Margaret Davies & Vanessa Munro*

#### **Introduction**

An extensive feminist literature explores how law interacts with the social institution of motherhood and with the ideological frameworks that contribute to women's oppression in western, liberal states. This chapter's main concern is with feminist theories about law's role in relation to motherhood, which reflects both coercive and ideological aspects. That is, women can be coerced into normative ideals of motherhood and penalized for failure to conform, but women can also 'consent' or choose to conform to ideological norms, raising far more complex questions for feminists and for feminist legal strategy. The chapter also explores the degree to which law and feminist legal strategies reinforce and/or challenge dominant ideologies of motherhood, which are rooted in the histories of race, class, gender, and sexuality.

Another theme of this chapter is the differential impact of legal regulation, depending on whether a mother is working class or middle class, racialized or non-racialized, lesbian or straight, disabled or able-bodied, and so on. All women can be detrimentally affected by dominant legal norms, but women who depart from normative white, middle-class, heterosexual motherhood are likely to be scrutinized more heavily and treated more coercively than those who are able to conform. The question of law's differential impact on women whose social location differs also poses important questions about feminist legal strategies, including whether they lapse into essentialist or 'maternalist' modes of analysis.

This chapter proceeds on the premise that motherhood is socially constructed through the interaction of complex structures and ideologies. The first part explains this process and is then followed by two illustrative case studies on criminal law and family law. The risk of essentialism

is taken up in the next part on legal strategy. The last part of the chapter uses examples of ‘transgressive motherhood’ to suggest future directions for feminist legal theory and concludes with questions that continue to challenge feminist legal engagement with motherhood.

### **The Social Construction of Motherhood: Law’s Ideological Role**

Despite women’s biological potential to conceive, gestate, give birth and lactate, ‘[m]otherhood is not a natural condition’ (Smart 1996: 37). Numerous feminist scholars have shown how the *institution* of motherhood is socially constructed in different historical periods, yet is presented ideologically as a natural consequence of biological differences between women and men. Indeed, in their review of feminist approaches to motherhood, Katherine O’Donovan and Jill Marshall (2006: 107) found that social construction is the most common approach within second wave feminism’s analysis of motherhood. Adrienne Rich (1976) is often credited as the first feminist to have presented a scholarly analysis of motherhood as an institution and to deconstruct the notion of an inherent maternal instinct. Motherhood, mothering, and family structures are all shaped by social, economic and cultural contexts, which in turn are framed by the interlocking structures of gender, race, class, and sexuality. As Martha Fineman puts it, motherhood is a colonized concept, something physically occupied and experienced by women, but defined, controlled, and given legal content by patriarchal ideology (1995: 38).

Early feminist treatments of motherhood often drew on materialist feminist approaches to the family within capitalist patriarchy, including the work of sociologists and political economists about the (hetero)sexual division of labour within both public and private spheres that developed within the context of industrial capitalism (Boyd 1997). For instance, Michèle Barrett and Mary McIntosh (1982) showed that the traditional, nuclear, ‘anti-social’ or privatized family plays a particular role within capitalism as a socio-economic institution and an ideology. Among other things, the family provides ‘free’ reproductive labour by women in relation to the care of children and workers which, in turn, allows productive labour to be pursued on the assumption that the ‘private’ sphere of family is handling care work. Feminist historians have shown that as fathers became increasingly linked with the public world of paid work in the 19<sup>th</sup> and 20<sup>th</sup> centuries, and children became an economic cost to families, mothers were constructed as the

‘divinely appointed guardians of the family’ (Backhouse 1981: 239). Ironically, this idealized and deeply gendered role for mothers did not necessarily translate into legal rights in relation to children (Boyd 2003). These structural insights about the material basis for motherhood have been adopted by many authors (e.g. Fineman 1995), often combined with attention to the role of ideology.

The tool of ideology has been deployed to show how law both constructs and normalizes a set of ideas about motherhood, often distracting attention to its material roots, and facilitated an increasingly complex understanding of law’s roles in the social construction of motherhood. Ideology also assists in understanding the dynamics through which women are regulated by law across and through their differences and, specifically, how mothers are constructed as ‘good’ or ‘bad’, depending on their adherence to the expectations of the ‘normative mother’ (Boyd 1996; Fineman 1995; Kline 1989). Marlee Kline evocatively summarized the significance of ideology in the regulation of motherhood and highlighted its relationship to traditional family structures during a period of proliferation of literature on the ideology of motherhood (e.g. Fineman and Karpin 1995):

By the dominant ideology of motherhood, I mean the constellation of ideas and images in western capitalist societies that constitute the dominant ideals of motherhood against which women’s lives are judged. The expectations established by these ideals limit and shape the choices women make in their lives, and construct the dominant criteria of ‘good’ and ‘bad’ mothering. They exist within a framework of dominant ideologies of motherhood, which, in turn, intersect with dominant ideologies of family. (Kline 1993: 310)

The key normative expectations associated with the ideology of motherhood are that (1) a woman must be a mother before she will be considered a proper adult woman, thus tying motherhood with femininity; (2) a ‘good’ mother will be selflessly available to her children, taking primary care of them; (3) a ‘good’ mother will do so in the context of a heterosexual, nuclear family model premised on privatized female dependence and domesticity. These expectations may shift over time and even countenance working mothers (Boyd 2003; Murphy

1998), but those who deviate may still be constructed as unfit, which in turn can compromise their legal ties with their children. At best, mothers may 'win' a legal claim, but in a manner that reproduces oppressive dominant norms about women and mothers. For instance, arguments from both prosecution and defence in relation to mothers who are charged with murdering their infants often reinforce dominant norms of motherhood (Cunliffe 2011). Whereas the prosecution typically attempts to portray the woman as a bad mother because she departs from those norms, the defence offers evidence of the woman's conformity with maternal ideals.

The requirement that mothers behave selflessly in relation to children in their primary care has important consequences, not least by limiting their ability to take up paid work. As well, mothers' rights are often constructed in opposition to the rights of their children, which may undermine 'the fundamental bond that exists between most mothers and their children' (Murphy 1998: 691). This oppositional treatment of mothers and children is manifested particularly in relation to child protection law, where women can be defined as failing to adequately protect their children even if the risk to the child is generated by other factors, such as poverty (Kline 1993). Even more acute are situations where a pregnant woman is positioned as a risk to the health of her fetus (Diduck 1993).

This example illustrates that law is not the only institution that reproduces the ideology of motherhood through its discursive power: 'discourses such as feminism, modern rationality, science, social work and psychology' interact with law 'in a kind of shifting hierarchy' and also 'are imbued with such factors as race, class and sexuality' (Diduck 1993: 462). In combination with other professional discourses, such as science or medicine or psychiatry, law can be particularly powerful in scrutinizing maternal conduct, particularly in relation to child protection and criminal law (Cunliffe 2011; Diduck 1993; Raitt and Zeedyk 2004). For example, state removal of children from mothers labeled as mentally ill reflects processes through which laws on mental health and child protection interact with the power of the psychiatric paradigm (Langer 2009; Mosoff 1997). In these processes, the ideology of motherhood can facilitate law's coercive aspect.

Mothers who are already marginalized, notably, as a result of poverty or race or aboriginality, are most vulnerable to being labeled 'unfit'. For instance, due to the correlation between race and poverty in the United States, which has a high percentage of poor Black families headed by women, a particularly pathological representation of Black single motherhood prevails: 'Ideologically, in America, single motherhood is Black' (Roberts 1993b: 25). Single and African-American mothers have been demonized in poverty and child welfare discourses, the mainstream solution often being a patriarchal one of locating absent fathers and returning them to the family, particularly to make a financial contribution (Fineman 1995).

Child protection disputes between a parent and state authorities graphically reveal the ways in which poverty and race are implicated in the regulation of motherhood. Modern child protection legislation relies on the assessment of risk, based on a belief in the ability to predict future harm to children. As Karen Swift (2010) has shown, the ideology of risk can distort and deflect attention away from the relations of race, class and gender that are structured into child welfare processes, stripping them of their ideological baggage. Single mothers especially are constructed as a 'risk class', 'who can legitimately be intruded upon, scrutinized indefinitely and held to account for their daily activities' (Swift 2010: 143). The experience of aboriginal mothers in Canada's child welfare system similarly highlights a history of colonialist and racist processes of regulation of indigenous families and yet simultaneously erases this history through the application of the best interests of the child standard (Kline 1993). Whether actual harm to children is effectively prevented through these intrusive regulatory processes is questionable.

As these examples suggest, it is not only individual mothers who may be deemed to have fallen short of ideological expectations; rather, entire groups of women may be judged as unfit for motherhood based on their social location (Kline 1993: 312). Moreover, as the historical antecedents of the ideology of motherhood (including highly problematic race and class-based eugenics-derived birth control discourses) have faded, its roots and its problematic impact on some groups of women are rendered invisible so that the construct of the 'bad mother' is presented as unbiased or 'innocent'.

That said, the normative frameworks surrounding motherhood are not static but shift in form and content through history and across cultures. The legal system has been one key way in which those norms have been communicated and reinforced and, sometimes, challenged. For example, although procreation by contemporary Black mothers is often devalued and discouraged, at earlier points in American history, procreation by Black slave women was desirable, albeit for problematic reasons (Roberts 1993b: 7-10). Their children replenished the master's supply of slaves yet slave mothers were deprived of any legal claim to their children. Although this severing of maternal ties was eventually abolished, parallels have been drawn with the modern system of state intervention in the homes of Black mothers, who are more likely to be under scrutiny and have their children removed (Murphy 1998: 708; Roberts 1993b: 13-15).

In addition to shifts in ideological frameworks, women's experiences of motherhood can vary widely. These variations may correlate to the interaction of factors such as class, race, sexuality, and immigration status, but also to women's different approaches to motherhood, including some women's resistance to normative expectations or to the experience of motherhood altogether (Arendell 2000). A mother's definition of her own experience may differ radically from the socio-legal construction of her mothering. For example, an 'unwed Black teenager...may experience motherhood as a rare source of self-affirmation, while society deems her motherhood to be illegitimate and deviant' (Roberts 1993b: 4).

Class too plays a key role in mediating the operation of the ideology of motherhood. Middle class women are exhorted to be stay-at-home mothers and criticized for engaging in work outside the home, but single mothers and the working poor receive contradictory messages; they might be expected to take paid work to avoid unemployment and being categorized as lazy, yet still be criticized for taking paid work (Gavigan and Chunn 2007: 749). Poor, racialized mothers in the United States have been caught in impossible situations under policies of no-fault evictions from public housing based on drug-related activity by their children, where mothers are held responsible for their children in circumstances offering them little material ability to rectify the problem (Austin 2002).

The social construction of motherhood is also related to concepts of men and masculinity, fatherhood, gender, heteronormativity, and the division of labour (Smart and Sevenhuijsen 1989). On the one hand, motherhood is held up as the ultimate definition of what it means to be a woman; on the other hand, for women who do not become mothers in the expected context, motherhood can be discouraged (Kline 1993). Even lesbian mothers, parenting intentionally outside the heterosexual mainstream, can be measured against (potentially contradictory) expectations that children should have fathers or that lesbian mothers should adhere to a nuclear family model (Kelly 2011).

Even as traditionalist ideologies on patriarchal authority within the family dissipated in the late 20<sup>th</sup> century and women entered the labour force in increasing numbers, dominant norms about motherhood were still reinforced in much popular culture and in the media, generating difficulties for individual women. Women continue to be expected to provide care for children and others, yet these expectations of ‘domesticity’ generate economic dependency in most mothers (Williams 2000). With the costs of ‘inevitable dependency’ being privatized within the family, and with women typically being allocated the burden of caring for inevitable dependency, a ‘derivative dependency’ arises in mother/caretakers (Fineman 1995: 161-4). Mothers become economically dependent on either a wage-earning partner or on (diminishing) state assistance. This dependency is not necessarily resolved when mothers participate in the workforce, where they tend to earn less money than other women and fathers, even controlling for the fact that they work fewer hours due to the demands of their care responsibilities: ‘being a mother is incompatible with being an ideal worker’ (Becker 2002: 60). The depression in mothers’ wages is lifelong, as are its consequences, including poverty among elderly women (Crittendon 2001).

Because ideological expectations have shifted over time, any clear dichotomy between good and bad mothers is now difficult to sustain. Ideological frameworks have been complicated as equality has become a dominant norm, as fathers have been expected to participate more fully in the lives of their children (Boyd 2003), and as mothers are expected to be responsible market citizens (Gavigan and Chunn 2007). The rise of gender symmetry in relation to legal parenthood must, however, be contrasted with the ongoing disproportionate responsibility that women still



bear for child care, and the extent to which ‘mother work’ has been rendered invisible in the face of legal trends promoting paternal rights (Fineman 1995).

Two case studies on criminal law and family law will next serve to illustrate the shifting nature of the social construction of motherhood.

### **Case Study: Criminalizing Mothers**

The ‘bad’ or ‘unfit’ mother is a powerful, yet over-simplified figure in Western law and literature, which identify her ‘as the woman whose neglectful, abusive, reckless, or murderous behaviors threaten or destroy her children’ (Ashe and Cahn 1993: 80). Dorothy Roberts (1993a) suggests that women’s criminal conduct can often be explained through a focus on their refusal to mother or failure to care properly for their children; these mothers are penalized largely for their violation of gender norms and studying them illuminates the mechanisms through which the institution of motherhood confines women and punishes them if they resist. The criminal law both contributes to the construction of dominant norms of motherhood and reveals the complexities of women’s struggle against a ‘self-annihilating role’ under which she must take on any risk to ensure her child’s safety (Roberts 1993a: 96, 100). For instance, the punishment of mothers who fail to protect their children from abuse by a male partner holds women, often battered themselves, responsible for violence in the family and enforces the notion that mothers must be selfless. Marie Ashe and Naomi Cahn (1993) argue for more contextualized accounts that counter portrayals of bad mothers as either autonomous, fully responsible evildoers or helpless victims.

Law coercively reinforced the notion that motherhood is an inevitable by-product of heterosexual activity by criminalizing women’s efforts to control their reproductive lives through the use of contraceptives and abortion (Smart 1996). Even once the coercive aspect of criminal law prohibitions are removed in relation, say, to abortion, women’s struggles to retain control over pregnancy and access to abortion services continue (Gavigan 1992), illustrating the intersection between law and other normative frameworks such as medicine. Racialized differences can also be identified in struggles for women’s reproductive autonomy: whereas white, middle class

women have historically concerned themselves primarily with contesting criminal laws that restrict their ability to choose *not* to become pregnant, such as contraception or abortion, poor women of colour are often more concerned with challenging restrictions that constrain their choices *to* procreate in a healthy, supported manner, including coercive measures such as sterilization (Roberts 1993a: 32-33).

More complex are the laws on maternal neonaticide. ‘Draconian’ 17<sup>th</sup> century English laws on infanticide, later adopted in Canada, regulated women’s sexuality by applying only to unmarried mothers, working with a presumption of guilt and imposing capital punishment (Smart 1996: 43). Juries often refused to convict, however, acknowledging the lack of alternatives facing many women (see also Backhouse 1984). In the face of this juror leniency, lesser offences such as concealment were added as a way to secure convictions. In the 20<sup>th</sup> century, sex-specific offences were introduced in some jurisdictions, with a focus on a mother’s failure to fully recover from the effects of childbirth or lactation and a disturbance to the balance of her mind. Some (e.g. Smart 1996) see this modern incarnation as a medical-legal category that constructs women’s ‘deviance’ in bio-psychological terms rather than in relation to socio-economic difficulties facing women. Others challenge the notion that infanticide law straightforwardly reflects the medicalization of women’s crime or the construction of ‘bad’ mothers. Based in part on the fact that Canadian law created a separate offence rather than England’s mitigation approach, Kramar (2005) argues that this law recognized women’s unique experiences of pregnancy and childbirth, including socio-economic hardship.

Since the early 1990s, a moral panic has arisen and the medical-legal system has taken a more punitive approach to mothers whose children die. This harsher approach must be understood against the backdrop of women’s attainment of formal legal equality and enhanced reproductive rights, which inculcate a notion that women must be reproductively responsible for their actions in relation to newborns, who have become ‘wholly deserving victim[s]’ (Kramar 2005: 14). Indeed, a combination of adversarial legal processes, erroneous representations of relevant medical knowledge, and deviation from some normative expectations of motherhood likely combined to generate a wrongful conviction of an Australian mother for murdering her infants (Cunliffe 2011). Kathleen Folbigg was a competent mother, but her occasional resistance to

mothering overshadowed the positive indicia. Fiona Raitt and Suzanne Zeedyk (2004) similarly link wrongful convictions to assumptions that murderous mothers can be identified through their standard of childcare and their emotional reactions to children's death or illness. They also suggest that contemporary legal cases of unexplained infant deaths are haunted by the spectre of a diagnosis of Munchausen Syndrome by Proxy, under which mothers are suspected of deliberately causing harm to her child in order to gain attention. Mothers who are suspected of criminal behavior may well be subjected to more rigid standards (Cunliffe 2011: 203-204), with a 'retributive impulse' towards women labeled as 'bad' mothers (Langer 2009: 218).

### **Case Study: Child Custody Law**

Child custody law exemplifies the use of ideology to analyze a field that some view as *privileging* motherhood and also illustrates the relational nature of the ideology of motherhood with other ideologies, for example on fatherhood. Mothers have been constructed as the favoured darlings of the law when engaged in disputes over their children. However, whereas a mother who conforms to the ideological expectations of the middle class, heterosexual, stay-at-home mother might be favoured in an adjudication, her sister who, say, works outside the home and delegates aspects of her child's care to another might be viewed as a less worthy candidate because she selfishly placed her own interests above those of the child (Boyd 2003; Mason 1999; Murphy 1998). In some periods, mothers who betrayed their marriage vows by adulterous conduct or, worse still, for lesbian relationships, were assessed as unsuitable for custody.

By reading a child's best interests against the mother's degree of conformity to ideological norms, the legal system reinforces dominant expectations of mothers both in situations where a mother 'wins' custody and where she 'loses'. While this ideology quite clearly operates against the interests of women who fail to conform to it and has a particular impact on women whose mothering is viewed as marginal or threatening to dominant norms (e.g. lesbian mothers), it by no means privileges in any absolute manner women who appear to conform by being, say, heterosexual or able-bodied. Even when a form of maternal presumption dominated the legal system, it was easy for a woman to fall from grace (Boyd 2003: 41-101; Murphy 1998: 695). The ideology of motherhood structures and therefore limits the lives of all women: any woman who

appears at a given time to conform to the norms can lapse and lose a privileged status. This insight challenges any efforts to draw stark contrasts between ‘good’ and ‘bad’ mothers in reality, as opposed to ideology, and illustrates the disciplining effects of ideological norms on all mothers (Boyd 1996).

Child custody law also reveals the dilemmas of feminist inspired law reform. The apparently progressive move to emphasize a child’s best interests rather than parental conduct or assumptions about maternal care produced negative consequences for many mothers. The late 20<sup>th</sup> century focus on gender neutrality and no-fault divorce rendered less visible the social and economic forces that reinforce women’s responsibility for children (Boyd 2003; Fineman 1995; Mason 1999). Moreover, the rise of fathers’ rights advocacy was embedded in this formal equality approach to parenthood, contributing to the trend towards ‘gender symmetry’. As a result, the language of maternal care became discredited, depriving women of a legitimate voice with which to express their experience of caring for children. Fineman coined the term ‘the neutered mother’ to denote the multiple ways in which the concept of Mother has been taken out of context by being de-gendered, de-raced and de-classed (1995: 67). Although the dominance of the ideology of motherhood in earlier periods did not empower mothers as such, instead reinforcing an image of motherhood as selfless, pure, full-time carers of children within the heterosexual nuclear family, the resonance of this norm lost its power in law near the end of the 20<sup>th</sup> century, as mother love became an increasingly ‘exhausted script’ (Smart 1991: 486) and claims of ‘father love’ and fathers’ rights prevailed.

Carol Smart’s empirical work revealed that mothers more often express their taken-for-granted caregiving responsibility for children as ‘caring for’, whereas fathers talk about ‘caring about’ (loving) children, which ‘can produce a sentimental rush of concern and can be instrumental in producing legislative reforms’ (Smart 1991: 489). The evolving family law system values ‘caring about’ above ‘caring for’ in the moral register, meaning that fathers’ claims are heard positively while mothers’ claims appear self-interested. Moreover, mothers who fail to facilitate paternal contact with children after divorce have become identified as bad or vindictive mothers, giving birth to the image of the ‘no contact mother’, whose anxieties about contact are read as selfishness (Rhoades 2002). Being a ‘bad’ mother was never really about a mother’s relationship

with her child, but rather about her conduct in relation to norms about family; now an important aspect of a mother's role is her responsibility to foster a child's relationship with a father.

Having explored the social construction of motherhood and the role of ideology in legal processes, the next section turns to questions of feminist legal strategy.

### **Legal Strategy: Reinforcing or Challenging the Ideology of Motherhood?**

Feminists have debated whether feminist legal strategies reinforce or challenge dominant ideologies of motherhood. To the extent that legal arguments emphasize the uneven playing field between mothers and fathers, notably, women's ongoing responsibility for care of children and related economic difficulties, the ideology of motherhood can be reinforced, producing negative repercussions for mothers who cannot meet the normative model (e.g. Kline 1993; Mosoff 1997). This strategic impulse can also be charged with essentialism and 'fix[ing] women as second-class citizens in a patriarchal structure' (Mason 1999: 15). That said, the history of feminist engagement in this field illuminates why feminists often emphasize the specificity of motherhood rather than gender neutrality. To the extent that this strategy is rooted in an appreciation of the social construction of motherhood as embedded in stubbornly entrenched socio-economic structures, it can be viewed as realist rather than essentialist. Nevertheless, negative or unintended consequences can be identified.

Many 19<sup>th</sup> and early 20<sup>th</sup> century feminists embraced a maternal feminism that correlated motherhood with a special capacity for nurturing, but this approach was largely rejected in the campaigns for equal rights in the 1960s and 1970s (Fineman 1995: 36-37, 77). The liberal feminism that characterized the early second wave of the women's movement was optimistic about involving men as equal parents and moving mothers into the labour force. Gender-based assumptions related to parenthood should be eliminated and men should behave more like women – by participating equally in child care in the 'private' sphere of the family. A common argument was that gender specific statutory language, for instance, maternal presumptions in custody law, should be eliminated because they reinforced assumptions that mothers should care for children and fathers need not (Mason 1999: 3). Some feminists did, however, favour a joint

custody norm because it might better take account of the fact that some women parent within extended networks and recognize that mothers are differently located according to factors such as race and class (Bartlett and Stack 1986).

Optimism about eliminating sex roles through law reforms such as joint custody waned as feminists realized that significant social and economic forces impeded the equal sharing of parental responsibilities and shifting the public/private divide (Boyd 1997). A substantive equality analysis emerged both to explain the apparent failure of formal equality and to argue for a more nuanced understanding of women's inequality in relation to family and child care; an inequality that too often leads to poverty (Becker 2002). The sexual division of labour prevails not only in heterosexual families, but in workplace practices favouring workers who are unimpeded by care responsibilities. Feminists began to argue more strenuously for jobs to be restructured to accommodate mothers and for more systemic changes to acknowledge the 'derivative dependency' of mother/caregivers (Fineman 1995). Rena Uviller recognized early on that the move towards equal custody rights for fathers could result in equality with a vengeance against mothers: 'under the guise of sex-neutrality, women who want their children may be at a distinct disadvantage in custody disputes due to their inferior earning capacity and an enduring social bias against working mothers' (Uviller 1978: 109). In addition, when the economic roles of mothers are considered, an (often false) assumption of equality quickly comes into play based on a notion that women can compete equally in the workplace. When applied to both financial responsibilities such as child support and child custody decisions, mothers are placed in a bind: they are penalized in child custody assessments for working outside the home and yet are expected to financially provide on an equal basis for their children (Boyd 2003: 115-120; Murphy 1998).

In child custody law, a strategy focused around a primary care presumption emerged (e.g. Mason 1999; Smart and Sevenhuijsen 1989), with arguments for a revamped maternal presumption being in the minority (Mason 1990-91; Uviller 1978). Under a primary care presumption, the parent who was the primary caregiver in the past should obtain custody in contested cases, unless proven unfit, or if all other factors were equal. This ostensibly gender neutral feminist focus on primary care has been the subject of much debate due to its potential to reinforce problematic

assumptions about women's essential capacity for caregiving. As Jane Murphy notes (1998: 692), 'protecting children is often best achieved by protecting their caretaker parent – their mother', but this strategy can reinforce maternal stereotypes. Proponents of the care presumption do not promote essentialism per se, yet their work can be read as buttressing the sexual division of labour because it seeks acknowledgement of women's more onerous responsibilities. Mary Anne Case (2001) even argues against policies such as enhanced support for caregivers from government or employers, in part because increasing such benefits would generate more discrimination against women in the labour force. Her proposed solution is a formal equality approach to parenting and services directed to children rather than parents. Others defend the care argument on the grounds that it is necessary to highlight a key source of women's inequality and is sometimes transgressive (e.g. Becker 2002; Kessler 2005).

Feminists who adopt a care approach can also be charged with failure to take account of differences related to race, sexuality, and class – overlooking differences among women as mothers and men as fathers. The primary care presumption is critiqued for its reinforcement of maternal care within the nuclear family, its failure to recognize alternative family structures of care such as extended families, and its potential to permit challenges to custody claims by mothers with disabilities, given they can easily be cast as unfit or unable to take primary responsibility for care (e.g. Mosoff 1997). The presumption can also be portrayed as regressive in comparison to liberal feminist and fathers' rightists' claims for equal roles for men and women as parents.

Fathers' rights advocates have taken up the formal equality argument for equal treatment of mothers and fathers, suggesting that law is biased in favour of mothers and rests on sexist stereotypes (Boyd 2003: 102-129). They have demanded legal presumptions of joint custody and, more recently, have successfully challenged laws related to the (sur) naming of children, which in turn is often based on whether a father is named by a mother on the birth registration. As Hester Lessard (2004) demonstrates, the apparently benign construction of mothers and fathers as formally equal draws on a bio-genetic model of parenthood that erases the deeply political and ideological nature of the legal ordering of parent-child, and parent-parent relationships.

Despite such insights, feminist approaches to motherhood have not had marked impact on legal policy, perhaps because the arguments are complex and can be misunderstood as reinforcing gendered roles within the family. In many countries, shared parenting has won the day as the dominant normative framework, with an attendant, heteronormative emphasis on gender symmetry between fathers and mothers (Boyd 2010). That said, it is difficult to see what better strategy might have been pursued. Arguably, feminist discourse in this field has been misunderstood in a climate that reflects a ‘backlash’ to social and legal initiatives that appear to favour mothers (Sheldon 2001).

The next section asks whether a focus on transgressive mothering can enrich feminist legal scholarship on motherhood.

### **Transgressive Motherhood**

We have seen that normative expectations of mothers are tied to the notion that proper motherhood occurs within the context of the white, heterosexual, nuclear, middle class family and to gender roles. Lively debates continue about how feminists should approach motherhood. Legal moves to encourage gender symmetry before socio-economic forces enable it have been aptly critiqued (e.g. Boyd 2003; Fineman 1995). Nevertheless it is risky for feminists to be perceived as resisting men's equally involvement with children or to argue for maternal autonomy in fields where children's interests are central (Boyd 2010).

Feminists who focus on care and motherhood have, however, importantly complicated liberal individualist approaches to autonomy by emphasizing the nexus between relationships and autonomy (Boyd 2010; Nedelsky 1989; O'Donovan and Marshall 2006). Specifically, the care relationships between mothers and children enable children to become autonomous persons. Yet, due to still powerful societal expectations that mothers will provide primary care and the strong sense of responsibility that many/most mothers feel towards their children, child-rearing imposes significant material constraints on female autonomy. Women's ‘pregnant embodiment’ (Young 1990: 160) – their more continuous physical experience in relation to children as a result of



pregnancy, breastfeeding, and care responsibility – prevents them from being able to opt in and out of involvement with children as men can choose to do. Despite long-standing feminist calls for men to share parenting and for society to support work-life balance, this constraint remains entrenched. While care is not inevitably women's work, the choices that most women make to embrace motherhood, despite the disincentives (Becker 2002), imply ongoing gendered consequences into the future. The challenge is how to recognize the gendered dynamics of care without overemphasizing heteronormative birth and genetic ties and ignoring the significance of social parenting and families of choice.

Gender asymmetry persists in both the social realities of parenthood highlighted above and the social construction of genetic ties, and mothers are by no means favoured. Many feminists have cautioned about an increasing emphasis on the genetic tie (Lessard 2004), which seems to be invoked more easily in favour of legal fatherhood, especially to enforce financial obligations (Sheldon 2001), but also in other contexts. Whereas in earlier periods, mothers had exclusive rights and responsibilities in relation to 'illegitimate' children and fathers garnered legal rights mainly through marriage to a birth mother, that degree of maternal autonomy has been eroded (Smart and Sevenhuijsen 1989: 8-9). Although reproductive technologies open opportunities to move beyond traditional notions of filiation and the two parent hegemony, maternity remains a naturalized concept that too often fuses genetic, gestational, and caregiving roles (Mykitiuk 2001). As a result, maternal legal status tends to be accorded to women only if they fulfill both biological and behavioural requirements. For instance, a birth mother's failure to properly care for a child 'denaturalizes' her, rendering her unfit. Yet a lesbian non-biological co-mother is often not viewed as a legal parent, despite her care and intention (Kelly 2011; Millbank 2008) even if she is a caregiver.

This part of the chapter explores whether a focus on 'transgressive motherhood' can disrupt the over-emphasis on genetic ties and imprisonment of many feminist conversations about motherhood within tropes of heteronormativity, including the notion that fathers should be equal parents. Kessler (2005) argues that feminists have been overly critical or pessimistic about the relationship between caregiving and women and notes that 'transgressive caregiving' can be a form of political resistance, even a subversive practice. This idea holds potential because it

focuses on elements of resistance within a traditionally gendered terrain. Lessons can be drawn from feminist work on women who transgress the normative ideals of motherhood, for instance, lesbian, surrogate, Black, single, and criminalized mothers.

Lesbian motherhood clearly disrupts the focus on genetic ties, given that most lesbian birth mothers rely on sperm donors for conception, yet donors rarely act as social parents. Very often, a lesbian co-mother without a genetic tie assumes that role (Kelly 2011; Millbank 2008). Lesbian co-mothering also challenges any automatic connection between birth mothers and primary care, with empirical studies on lesbian mothers revealing a focus on intentional and care relationships rather than genetic ties (e.g. Kelly 2011). At a more general level, O'Donovan and Marshall suggest, drawing on Ruddick (1989: 51) that all women who choose to mother might be regarded as 'adoptive', in the sense that even birth mothers must make a commitment to protect, nurture, and train a child after the act of birth (2006: 109). Given still strong expectations that birth mothers undertake mothering, they argue that the distinction between birthing and mothering must be more clearly drawn, noting that it is even less acceptable now than it once was for an unmarried mother to 'give away' her child. A distinction might accordingly be drawn between birthing labour and mothering, as well as sperm donation and parenting.

The challenge is how to devise a system that recognizes care relationships and under which donors are not automatically regarded as legal parents, unless intended, and also to recognize intended lesbian co-mothers. Ruthann Robson (1992) suggests that legal arguments in relation to (lesbian) motherhood can have a deeply problematic 'domesticating' effect and that the very category of 'mother' as a *legal* category may domesticate lesbians under the power of law and restrict lesbian choice. Indeed, early innovative efforts to use the idea of functional parenthood to recognize lesbian mothers (e.g. Polikoff 1990) often resulted in legal outcomes contrary to their original intention (Millbank 2008). In other words, the transgressive potential of lesbian motherhood has been difficult to translate in the legal realm. Both Kelly (2011) and Millbank (2008) propose reforms that rely on intentionality rather than functionality to ascribe legal parentage. Presumptions of legal parenthood would be made upon the occurrence of certain events, such as consent by a non-birth mother to her partner's attempt to conceive through assisted conception. Consensual opt-in methods would exist for third parties, thus disrupting the

nuclear model. This line of thought is reminiscent of Fineman's proposal (1995) to place the mother/child relationship at the centre of socio-legal policy, but allow for opt-in relationships. The marital unit is displaced in favour of an emphasis on care relationships, using the metaphor of the mother/child dyad, which could be expanded via contract.

Possibly in tension with the emphasis on intention in determining legal parenthood is surrogate motherhood, given earlier feminist support for the birth mother when considering whether surrogacy contracts should be honoured (e.g. Shanley 1993). They were concerned that surrogate mothers could not give meaningful consent prior to birth, that the potential for exploitation was significant based on factors such as age, class, and race as well as emotional vulnerability, and that exchange of money for women's reproductive services would commodify women and children. More recently, these concerns have been tested against empirical research and found to be largely unfounded (Busby and Vun 2010). The focus has shifted to regulatory measures that can ensure women's autonomy and minimize the potential for exploitation and commodification, yet women's unique capacity for pregnancy has not been erased. As in adoption statutes, birth mothers might retain the right to reverse a decision to relinquish a child within a short period after birth (Busby and Vun 2010: 89). The specificities of pregnancy and birth are taken into account even as the ability of women to exercise reproductive autonomy is honoured. Both forms of maternal labour – birthing and (intentional) mothering – are respected, but distinguished (O'Donovan and Marshall 2006).

As we have seen, the history of Black motherhood also challenges dominant constructions of motherhood, with women often having to fight to control their fertility and for legal rights to their children. As well, the practice in many African-American communities is for 'othermothers' to assist blood mothers (Kessler 2005; Roberts 1993a: 132-33). Othermothers need not be blood relatives so, as with practices of parenting within some indigenous communities, their role in parenting challenges the nuclear family model (Kline 1993). As with intentional parenting, these practices highlight relationships in parenting and downplay biological connections. Similarly, single mothers by choice often rely on support networks outside family ties (Kelly 2012; Kessler 2005: 24-25). The challenge for feminists is how to recognize this direction while not erasing women's role in pregnancy and birth.

Laura Kessler suggests that law could recognize multiple parenthoods, but other feminists suggest risks in using this method to disrupt the nuclear model. Many mainstream law reforms over-emphasize the need to find fathers for children, with particular consequences for the families of single, divorced, and lesbian mothers (Fineman 1995; Kelly 2011; Robson 1992). Proposals to move in this direction must be done carefully, with respect both for birth mothers and for intentional parenting relationships. Still, not all legal parents need to be designated as primary (Kessler 2005).

Placing single motherhood, another form of transgressive mothering, at the heart of feminist analysis can assist and potentially build bridges across racial divides. Despite social-legal efforts to persuade Black women to marry, ‘white mothers’ lives are becoming structurally more similar to the lives of Black mothers’ (Roberts 1993b: 27), with unmarried single motherhood on the rise. Black single motherhood can be seen as an example of resistance against suggestions that a return to patriarchal family structures will improve the welfare of women and their children.

Taking this resistance further may be difficult, in part because the overt nature of patriarchal definitions of motherhood has given way to more ‘innocent’ mechanisms. Gavigan and Chunn (2007) dispel any notion of an evolutionary progression away from a stigmatized treatment of single mothers. Having once been regarded as the most deserving recipients of public assistance, sole-support mothers have been rendered undeserving during the restructuring of welfare law in most liberal states. Single mothers might have had to meet difficult eligibility hurdles (being a ‘fit and proper’ person to care for children) or attempt to obtain support from putative fathers, but the original welfare system was designed to compensate – minimally – for the failure or inability of a male breadwinner to provide. With the rise of neo-liberalism, however, single mothers are constructed as employable market citizens with responsibility for their own support. Meanwhile the unpaid labour performed by mothers ‘becomes less visible and less articulated’ (Gavigan and Chunn 2007: 767) and single mothers who do not engage in paid are constructed as a drain on the public purse.

Despite these disincentives and the fact that women's ability to define legal motherhood autonomously from men is constrained by the impetus to 'find fathers' for children, planned single motherhood is on the rise (Kelly 2012). This form of transgressive mothering also raises questions about the discourse of neo-liberal responsibility. Many single mothers by choice have planned their motherhood, often using assisted reproduction or adoption, in what might be regarded as a 'responsible' manner. Many are well-educated, middle-class, and financially secure. Despite their relative privilege, the legal system has not made it easy for these single mothers to establish themselves as the sole legal parent of a child or to escape accusations that they are depriving children of fathers (Kelly 2012). In the future, a challenge may be for feminists to ensure that arguments for social and legal support for single mothers do not favour only the more privileged or responsible women, just as some progressive legal changes accommodated only exemplary lesbian mothers (Robson 1992: 177-8).

Dorothy Roberts has said that '[i]t may be in the lives of those most outcast by patriarchy that we will catch a glimpse of a liberated motherhood' (1993b: 28). When mothers who have harmed their children are brought into the frame, more difficult but important transgressive mothering issues arise. Roberts sees child abuse inflicted by mothers as connected to the contradictory role of children as both the source of mothers' vulnerability, with their children being held hostage to both individual men and to society, and also a source of their power and resistance. For instance, slave women sometimes committed crimes against their children in an attempt to defy their masters' exploitation of their reproduction (Roberts 1993a: 134). An approach to liberated motherhood that identified with (some) criminal mothers, with a focus on oppositional actions that are subversive and liberatory rather than subjugating of children, would not excuse all mothers who hurt their children, but rather ask feminists to confront the complexity of women's subordination and the radical measures required to eradicate it (Roberts 1993a: 141).

Marie Ashe and Naomi Cahn (1993) similarly emphasize consideration of the figure of the 'bad' mother, including taking seriously the fact that some mothers harm their children. In resisting a notion that mothers must inevitably be good, and avoiding a polarized view of women as either fully responsible moral agents or the victims of individual men and patriarchy, these authors put mothers who engage in child abuse into context. For instance, maternal abuse must also be seen

against the backdrop of women's disproportionate care responsibilities as well as their own abuse by male partners. Ashe and Cahn ask how lawyers who defend mothers who have fallen short of the ideals of motherhood can find moral worth in their clients, challenging feminists to always place a woman's acts and choices into context. As always, the problem is that more ambivalent and complex accounts of motherhood are not necessarily comprehensible in law or legal advocacy. Nevertheless, many criminalized mothers have struggled with material constraints, including poverty and their own abuse, on their ability to provide for or protect their children.

These contextual insights raise a final point highlighted by many feminists: that it is more crucial than ever in neo-liberal times favouring a shrunken state, to emphasize that care is a public good and that material support for mothers is necessary. To the extent that mothers continue to carry and suffer the consequences of disproportionate responsibility for care (Boyd 2003; Fineman 1995; Kessler 2005), public recognition and compensation for care labour is required. In the longer term, revisioning the relationship between labour in the home and the public sphere of work and politics (including adequate childcare choices, a sort of public 'othermothering') remains necessary in order to support the choices that women as mothers ought to be able to make – and yet, so rarely are able to in a world that relies on their unpaid care labour. Nancy Hirschmann (2010) suggests that the call for state and employer support for family and care responsibilities must be taken with a grain of salt, and that gender equality relies on men sharing equally in child rearing. This point may hold water for heterosexual mothers in relationships, but public support remains essential for transgressive mothers who do not have partners. Making it possible for women to undertake mothering outside of traditional relationships empowers all mothers and allows them to explore non-oppressive ways of parenting.

## **Conclusion**

Despite the joys and transgressive potential that it offers, motherhood remains an institution that contributes to women's systematic inequality and, therefore, forms a crucial site of debate and struggle for feminists engaged with law. Many questions persist. How can more robust social and economic supports for the work of motherhood be sought without falling into essentialist

reductions of women to motherhood, or mothers to mothering? What space for autonomy exists for mothers, in an historical period where the importance of fathers to children's well-being is regarded as key? Should all women's choices be honoured in feminist legal strategies, even if a choice (e.g. to be a stay at home mother) embeds a woman in oppressive social formations? Do women's differences as mothers outnumber what they hold in common and can a common legal strategy be contemplated? Can anti-essentialist approaches be recognized without undermining feminist struggles to legally recognize the significance of maternal relationships with children? Does a focus on care-giving or intentional relationships rather than bio-genetic ties provide a constructive direction or is a combination of the two needed? No one feminist theory can answer all such questions, but the literature reviewed in this chapter provides a basis for addressing them in the future.

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