In the

Court of Appeals of Maryland

September Term, 2019

No. 56

State of Maryland

Petitioner

v.

Muriel Morrison

Respondent

On Writ of Certiorari to
the Court of Special Appeals

***Amicus Curiae* Brief of**
The Women's Law Center of Maryland, Inc.
in Support of Respondent
(Filed With All Parties' Consent)

Michelle Daugherty Siri
Laure Ruth
THE WOMEN'S LAW CENTER OF
MARYLAND, INC.
305 West Chesapeake Ave, Suite 201
Towson, Maryland 21204
(410) 321-8761

Steven M. Klepper
Megan L. Micco
KRAMON & GRAHAM, P.A.
One South Street, Suite 2600
Baltimore, Maryland 21202-3201
(410) 752-6030
sklepper@kg-law.com

Counsel for Amici Curiae The Women's Law Center of Maryland, Inc.

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Statement of Interest

The Women's Law Center of Maryland, Inc. is a non-profit, membership organization established in 1971 with a mission of improving and protecting the legal rights of women, particularly regarding gender discrimination, employment law, family law and reproductive rights. Through its direct services and advocacy, the Women's Law Center seeks to protect women's legal rights and ensure equal access to resources and remedies under the law.

Argument

The State's invitation to create a "co-sleeping while intoxicated" felony, although well-intentioned, is deeply problematic.

Every parent makes mistakes that, if fortune is cruel enough, could kill their children. Statistically speaking, the most dangerous thing we do with our children is to drive them anywhere. Everyone knows speeding is illegal and increases the risk of a crash. Still, most parents do it anyway, especially when running late for school, daycare, or the pediatrician. When the worst happens, felony charges for involuntary manslaughter or reckless endangerment are rarely the answer. Perhaps there might be charges if the parent were driving drunk or drag racing with a child in the car. But speeding, standing alone, is not enough.

Co-sleeping, unlike speeding, is perfectly legal. And, although driving while intoxicated is illegal, there is no "co-sleeping while intoxicated" statute. The State essentially asks the Court to write new law deeming co-sleeping while

intoxicated so inherently dangerous that, standing alone, it is enough to prove the *mens rea* for involuntary manslaughter or reckless endangerment, without any further evidence that the mother consciously disregarded the risks.

Criminal liability depends on the presumption that everyone knows the law. *State v. Sewell*, 463 Md. 291, 314 (2019); *Steward v. State*, 218 Md. App. 550, 559 (2014). The State seeks to take that principle further, essentially creating a presumption that every mother knows the risks identified in publications of the National Institutes of Health and the American Academy of Pediatrics.

Imputing such knowledge to a mother, for purposes of criminal liability, is a value judgment, and a fraught one at that. As Professor Linda Fentiman explains:

> In the criminal setting, discretionary decisions are made when police officers choose to arrest or warn someone who has broken a law, prosecutors initiate or drop charges, juries convict or acquit, and judges affirm or overturn a conviction. Each occasion for individual choice is also an opportunity for unacknowledged prejudices and cultural norms (including those based on gender, marital status, class, and race) to affect not only how key legal requirements are framed but also judgment about whether those requirements are met in a particular case; frequently these biases and unarticulated norms are outcome determinative.

Linda C. Fentiman, BLAMING MOTHERS: AMERICAN LAW AND THE RISKS TO CHILDREN'S HEALTH (NYU Press 2017), Ch. 1.

Judge Battaglia, in a recent decision for the Court of Special Appeals, cited social science literature indicating that jurors and judges alike are often prone to

unconscious biases, particularly when it comes to motherhood. *See Azizova v. Suleymanov*, __ Md. App. __ (2019), slip op. at 10–11 & n.2. One manifestation of this dynamic is that mothers face criminal liability for injury to their children in ways that fathers rarely do. *See* Fentiman, BLAMING MOTHERS, Ch. 1 ("Mothers have been criminally prosecuted for child abuse, manslaughter, and murder for failing to act to protect their children from sexual abuse or violent assault by a husband or boyfriend. Yet fathers are rarely prosecuted when they fail to protect their children from similar abuse by a wife or girlfriend.").

Indeed, according to an empirical study of failure-to-supervise cases conducted by Professor Jennifer Collins, mothers were prosecuted, convicted, and sentenced at higher rates than were fathers or other relatives, demonstrating that society is "far more forgiving of paternal mistakes in childrearing than maternal ones." Jennifer M. Collins, *Crime and Parenthood: The Uneasy Case for Prosecuting Negligent Parents*, 100 NW. U. L. REV. 807, 825–828, 854 (2006).[1]

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[1] Professor Collins' article is noteworthy in several respects. Not only is it one of few pieces of literature to address how the criminal justice system treats parental negligence cases, but it also strikes an important balance between recognizing the difficulty of prosecuting parents for the loss of their child and the necessity of protecting children. Professor Collins ultimately concludes that prosecution of parents is warranted where gross negligence or recklessness is involved. She does not wholly denounce prosecution of negligent parents, but instead advocates that "simple negligence [of parents] should not result in intervention by the criminal justice system." Collins, *supra*, at 854. By extension, it is necessary for courts to preserve the distinction between parents' gross negligence and ordinary negligence.

Prosecution rates were also significantly higher for parents who could be classified as part of a lower socioeconomic status. *Id.* at 831.

Judgments about co-sleeping, in particular, are intertwined with questions of gender, race, and class. "The diversity of co-sleeping is truly remarkable" and is the product of a culmination of factors, including an individual child's needs, the family context, and cultural background. James. J. McKenna & Thomas McDade, *Why Babies Should Never Sleep Alone: A Review of the Co-Sleeping Controversy in Relation to SIDS, Bedsharing and Breast Feeding*, 6 PAEDIATRIC RESPIRATORY REVS. 134, 142, 148–149 (2006).

It can be difficult to get pediatric advice on how best to co-sleep because it is generally disfavored in Western culture. Yet, according to Professor James McKenna, an anthropologist and authority on mother-infant co-sleeping, "so variable is the range of 'factors' associated with one type of co-sleeping i.e. bedsharing ... which so significantly influences outcomes in different families, no single recommendation to bedshare (as one form of co-sleeping) ... is appropriate; but neither is it appropriate to recommend in an unqualified way against any and all bedsharing." *Id.* at 141. Rather, "[p]ediatricians need to recognize the cultural environments in which children live and how cultural beliefs and values interact with the needs of the individual child and with the biological characteristics of his or her sleep patterns." *Id.* at 149 (quoting Oskar G. Jenni &

Bonnie B. O'Connor, *Children's Sleep: An Interplay Between Culture and Biology*, 115 PEDIATRICS 204 (2005)) (internal quotation marks omitted).

To be clear, we take no position on whether co-sleeping is good, bad, or neutral. Rather, we urge the Court to recognize that criminal law is a poor way to address the controversy over co-sleeping.

Conversely, imposing criminal liability in this situation does not advance "the goals of the criminal justice system," which are "punishment, deterrence, and rehabilitation." *Phillips v. State*, 219 Md. App. 624, 634 (2014) (Hotten, J.) (quoting *Ridenour v. State*, 142 Md. App. 1, 11 (2001)). The State emphasizes Ms. Morrison's response to the police officer's efforts to console her: "I killed my baby. I got drunk. I killed my baby." E.68 (quoted at State Br. 6, 29). These are not the words of a person who needs to be convicted of a felony to punish her, to deter others from taking similar risks, or to rehabilitate her.

Parents—especially mothers—often blame themselves for their children's deaths, regardless of their actual fault. *See* Grace H. Christ et al., *Bereavement Experiences After the Death of a Child*, in WHEN CHILDREN DIE: IMPROVING PALLIATIVE AND END-OF-LIFE CARE FOR CHILDREN AND THEIR FAMILIES (2003), *available at* https://www.ncbi.nlm.nih.gov/books/NBK220798/. In an era when children "are expected to live to adulthood," the "greatest stress, and often the most enduring one, occurs for parents who experience the death of a child." *Id.*

Any loving mother or father would spend the rest of their lives saying "I killed my baby" if, for example, they ran a red light and caused a crash that killed their child.

A ruling for Ms. Morrison does not diminish the State's ability to prosecute parents in cases that further the criminal law's goals of deterrence, punishment, or rehabilitation. There is a wide array of evidence competent to establish *mens rea*, such as a pattern of "other acts" that prove "knowledge" or "absence of mistake or accident." Md. Rule 5-404(b). But the Court should reject the State's invitation, well-intentioned as it may be, to make "co-sleeping while intoxicated" sufficient proof of the state of mind necessary for involuntary manslaughter or reckless endangerment.

Conclusion

The Court should affirm the decision of the Court of Special Appeals.

Certification of Word Count and Compliance With Rule 8-1121

1. This brief contains 1,594 words, excluding the parts of the brief exempted from the word count by Rule 8-503.2.

2. This brief complies with the font, spacing, and type size requirements stated in Rule 8-112.

Steven M. Klepper

Certificate of Service

I hereby certify that, on February 18, 2020, two paper copies of the foregoing brief were sent by first-class mail, postage prepaid, to:

Haley Licha
Office of the Public Defender
Appellate Division
6 St. Paul Street, Suite 1302
Baltimore, MD 21202
Counsel for Petitioner

Cathleen C. Brockmeyer
Assistant Attorney General
Criminal Appeals Division
Office of the Attorney General
200 Saint Paul Place
Baltimore, MD 21202
Counsel for Respondent

Steven M. Klepper