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# UNSHACKLING BLACK MOTHERHOOD

Dorothy E. Roberts\*

When stories about the prosecutions of women for using drugs during pregnancy first appeared in newspapers in 1989, I immediately suspected that most of the defendants were Black women. Charging someone with a crime for giving birth to a baby seemed to fit into the legacy of devaluing Black mothers.<sup>1</sup> I was so sure of this intuition that I embarked on my first major law review article based on the premise that the prosecutions perpetuated Black women's subordination.<sup>2</sup> My hunch turned out to be right: a memorandum prepared by the ACLU Reproductive Freedom Project documented cases brought against pregnant women as of October 1990 and revealed that thirty-two of fifty-two defendants were Black.<sup>3</sup> By the middle of 1992, the number of prosecutions had increased to more than 160 in 24 states.<sup>4</sup> About 75% were brought against women of color.<sup>5</sup>

In *Punishing Drug Addicts Who Have Babies: Women of Color, Equality and the Right of Privacy*,<sup>6</sup> I argued that the prosecutions

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1. The prosecutions are based in part on a woman's pregnancy and not on her drug use alone. The legal rationale underlying the criminal charges depends on harm to the fetus rather than the illegality of drug use. Prosecutors charge these defendants with crimes such as child abuse and distribution of drugs to a minor that only *pregnant* drug users could commit. Moreover, pregnant women receive harsher sentences than drug using men or women who are not pregnant. Because a pregnant addict can avoid prosecution by having an abortion, it is her decision to carry her pregnancy to term that is penalized.

2. See Dorothy E. Roberts, *Punishing Drug Addicts Who Have Babies: Women of Color, Equality, and the Right of Privacy*, 104 HARV. L. REV. 1419 (1991).

3. See Lynn Paltrow & Suzanne Shende, State by State Case Summary of Criminal Prosecutions Against Pregnant Women and Appendix of Public Health and Public Interest Groups Opposed to These Prosecutions (Oct. 29, 1990) (unpublished memorandum to ACLU Affiliates and Interested Parties) (on file with author). I confirmed the race of some of the defendants by telephone calls to their attorneys. See Telephone Interview with Joseph Merkin, Attorney for Sharon Peters (Jan. 7, 1991); Telephone Interview with James Shields, North Carolina ACLU (Jan. 7, 1991); Telephone Interview with Patrick Young, Attorney for Brenda Yurchak (Jan. 7, 1991); see also Gina Kolata, *Bias Seen Against Pregnant Addicts*, N.Y. TIMES, July 20, 1990, at A13.

4. See Lynn M. Paltrow, *Defending the Rights of Pregnant Addicts*, CHAMPION, Aug. 1993, at 18, 19.

5. See *id.* at 21.

6. Roberts, *supra* note 2.

could be understood and challenged only by looking at them from the standpoint of Black women. Although the prosecutions were part of an alarming trend toward greater state intervention into the lives of pregnant women in general, they also reflected a growing hostility toward poor Black mothers in particular. The debate on fetal rights, which had been waged extensively in law review articles and other scholarship, focused on balancing the state's interest in protecting the fetus from harm against the mother's interest in autonomy. My objective in that article was not to repeat these theoretical arguments, but to inject into the debate a perspective that had largely been overlooked. It seemed to me impossible to grasp the constitutional injury that the prosecutions inflicted without taking into consideration the perspective of the women most affected. Nor could we assess the state's justification for the prosecutions without uncovering their racial motivation.

Taking race into account transformed the constitutional violation at issue. I argued that the problem with charging these women with fetal abuse was not that it constituted unwarranted governmental intervention into pregnant women's lifestyles — surely a losing argument considering the lifestyles of these defendants.<sup>7</sup> Instead I reframed the issue: the prosecutions punished poor Black women for having babies.<sup>8</sup> Critical to my argument was an examination of the historical devaluation of Black motherhood.<sup>9</sup> Given this conceptualization of the issue and the historical backdrop, the real constitutional harm became clear: charging poor Black women with prenatal crimes violated their rights both to equal protection of the laws and to privacy by imposing an invidious governmental standard for childbearing.<sup>10</sup> Adding the perspective of poor Black women yielded another advantage. It confirmed the importance of expanding the meaning of reproductive liberty beyond opposing state restrictions on abortion to include broader social justice concerns.

Most women charged with prenatal crimes are pressured into accepting plea bargains to avoid jail time.<sup>11</sup> When defendants have appealed their convictions, however, they have been almost uni-

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7. *See id.* at 1459.

8. *See id.* at 1445-50.

9. *See id.* at 1436-44.

10. *See id.* at 1471-76.

11. *See* CENTER FOR REPRODUCTIVE LAW & POLICY, PUNISHING WOMEN FOR THEIR BEHAVIOR DURING PREGNANCY: A PUBLIC HEALTH DISASTER 2 (1993).

formly victorious. With only one recent exception,<sup>12</sup> every appellate court to consider the issue, including the highest courts in several states, has invalidated criminal charges for drug use during pregnancy. Yet none of these courts has based its decision on the grounds that I argued were critical. Most decisions centered on the interpretation of the criminal statute in the indictment. These courts have held that the state's laws concerning child abuse, homicide, or drug distribution were not meant to cover a fetus or to punish prenatal drug exposure. The Supreme Court of Florida, for example, overturned Jennifer Johnson's conviction in 1992 on the ground that the state legislature did not intend "to use the word 'delivery' in the context of criminally prosecuting mothers for delivery of a controlled substance to a minor by way of the umbilical cord."<sup>13</sup> Other courts rejected the prosecutions on constitutional grounds, finding that the state had violated the mothers' right to due process or to privacy.<sup>14</sup> The defendants' race, however, has not played a role in the courts' analyses.<sup>15</sup>

Thus, attorneys have successfully challenged the prosecutions of prenatal crimes in appellate courts without relying on arguments about the race of the defendants. But failing to contest society's devaluation of poor Black mothers still has negative consequences. Renegade prosecutors in a few states continue to press charges against poor Black women for exposing their babies to crack.<sup>16</sup> Many crack-addicted mothers have lost custody of their babies following a single positive drug test.<sup>17</sup> The continuing popular support for the notion of punishing crack-addicted mothers leaves open the

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12. See *Whitner v. South Carolina*, No. 24468, 1996 WL 393164 (S.C. July 15, 1996).

13. *Johnson v. State*, 602 So. 2d 1288, 1290 (Fla. 1992).

14. See, e.g., *People v. Morabito*, 580 N.Y.S.2d 843, 844-47 (Geneva City Ct. 1992); *Commonwealth v. Pellegrini*, No. 87970 (Mass. Super. Ct. Oct. 15, 1990).

15. See, e.g., *Johnson*, 602 So. 2d, at 1288 (reversing a conviction for the delivery of drugs to a minor on the ground that the criminal statute did not encompass drug use during pregnancy); *State v. Gray*, 584 N.E.2d 710 (Ohio 1992) (holding that a mother could not be convicted of child endangerment based on prenatal substance abuse); *State v. Osmus*, 276 P.2d 469 (Wyo. 1954) (refusing to apply a criminal neglect statute to a woman's prenatal conduct).

16. See, e.g., David Crosby, "Crack" Baby's Mom Faces Trial on Endangering Life of Fetus, COM. APPEAL (Memphis), July 18, 1995, at A1, available in 1995 WL 9356413; Telephone Interview with David Crosby (Nov. 22, 1996).

17. See Michelle Oberman, *Sex, Drugs, Pregnancy, and the Law: Rethinking the Problems of Pregnant Women Who Use Drugs*, 43 HASTINGS L.J. 505, 520-21 (1992) (observing that states such as Illinois revoke maternal custody "immediately upon receipt of a report of a positive toxicology screen in a newborn"); Rorie Sherman, *Keeping Babies Free of Drugs*, NATL. L.J., Oct. 16, 1989, at 1, 28 ("In some jurisdictions, women whose newborns' urine tests positive for drugs immediately lose custody for months until they can prove to a court that they are fit mothers."); Joe Sexton, *Officials Seek Wider Powers To Seize Children in Drug Homes*, N.Y. TIMES, Mar. 12, 1996, at B1.

possibility of a resurgence of prosecutions and the passage of punitive legislation. In this essay, I want to explore the strategies that lawyers have used on behalf of crack-addicted mothers to evaluate the importance of raising issues of race. Some lawyers and feminist scholars have tried to avoid the degrading mythology about Black mothers by focusing attention on issues other than racial discrimination and by emphasizing the violation of white, middle-class women's rights. I argue, however, that we should develop strategies to contest the negative images that undergird policies that penalize Black women's childbearing.

### I. THE SOUTH CAROLINA EXPERIMENT

Despite the fact that most prosecutors renounce a punitive approach toward prenatal drug use, South Carolina continues to promote a prosecutorial campaign against pregnant crack addicts. The state bears the dubious distinction of having prosecuted the largest number of women for maternal drug use.<sup>18</sup> Many of these cases arose from the collaboration of Charleston law enforcement officials and the Medical University of South Carolina (MUSC), a state hospital serving an indigent, minority population. In August 1989, Nurse Shirley Brown approached the local solicitor, Charles Condon, about the increase in crack use that she perceived among her pregnant patients.<sup>19</sup> Solicitor Condon immediately held a series of meetings, inviting additional members of the MUSC staff, the police department, child protective services and the Charleston County Substance Abuse Commission, to develop a strategy for addressing the problem. The MUSC clinicians may have intended to help their patients, but larger law enforcement objectives soon overwhelmed the input of the staff. The approach turned toward pressuring pregnant patients who used drugs to get treatment by threatening them with criminal charges. As Condon expressed it: "We all agreed on one principle: We needed a program that used not only a carrot, but a real and very firm stick."<sup>20</sup> Condon also pressed the position that neither the physician-patient privilege nor

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18. See LYNN M. PALTROW, *CRIMINAL PROSECUTIONS AGAINST PREGNANT WOMEN: NATIONAL UPDATE AND OVERVIEW* at i, 24 (1992).

19. See Barry Siegel, *In the Name of the Children: Get Treatment or Go to Jail, One South Carolina Hospital Tells Drug-Abusing Pregnant Women*, L.A. TIMES, Aug. 7, 1994, Magazine, at 14.

20. Charles Molony Condon, *Clinton's Cocaine Babies: Why Won't the Administration Let Us Save Our Children?*, POLY. REV., Spring 1995, at 12.

the Fourth Amendment prevented hospital staff members from reporting positive drug tests to the police.<sup>21</sup>

Within two months MUSC instituted the "Interagency Policy on Cocaine Abuse in Pregnancy" ("Interagency Policy"), a series of internal memos that provided for nonconsensual drug testing of pregnant patients, reporting results to the police, and the use of arrest for drug and child abuse charges as punishment or intimidation.<sup>22</sup> Although the program claimed "to ensure the appropriate management of patients abusing illegal drugs during pregnancy,"<sup>23</sup> its origin suggests that it was designed to supply Condon with defendants for his new prosecutorial crusade. The arrests had already begun by the time the hospital's board of directors officially approved the new policy. Hospital bioethicists later criticized the hasty process orchestrated by Condon for neglecting the careful internal deliberation one would expect of a program affecting patient care.<sup>24</sup> Condon personally broadcast the new policy in televised public service announcements that advised pregnant women, "not only will you live with guilt, you could be arrested."<sup>25</sup>

During the first several months, women were immediately arrested if they tested positive for crack at the time they gave birth. Then the Interagency Policy set up what Condon called an "amnesty" program: patients who tested positive for drugs were offered a chance to get treatment; if they refused or failed, they would be arrested. Patients who tested positive were handed two letters, usually by Nurse Shirley Brown: one notified them of their appointment with the substance abuse clinic; the other, from the solicitor, warned that "[i]f you fail to complete substance abuse counselling, fail to cooperate with the Department of Social Services in the placement of your child and services to protect that child, or if you

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21. See Plaintiffs' Memorandum in Support of Their Partial Cross-Motion for Summary Judgment and in Opposition to Defendants' Motion for Summary Judgment at 16, *Ferguson v. City of Charleston*, No. 2:93-2624-2 (D.S.C. Oct. 1995) [hereinafter Plaintiffs' Memorandum]; Philip H. Jos et al., *The Charleston Policy on Cocaine Use During Pregnancy: A Cautionary Tale*, 23 J.L. MED. & ETHICS 120, 121-22 (1995). On January 8, 1997, the jury in *Ferguson* rejected the plaintiffs' claims that the state had violated their Fourth Amendment and Fourteenth Amendment rights. The judge in the case has yet to rule on three related claims alleging violations of Title VI, the right to procreate, and the right to privacy. See *South Carolina Jury Rejects Claims That Hospital Policy Violated Rights of Pregnant Women*, REPRODUCTIVE FREEDOM NEWS (Center for Reproductive Law & Policy, New York, N.Y.), Jan. 17, 1997, at 4.

22. See Plaintiffs' Memorandum, *supra* note 21, at 10-11.

23. Medical University of South Carolina, Policy II-7 Management of Drug Abuse During Pregnancy (Oct. 1989), *quoted in* Jos et al., *supra* note 21, at 120.

24. See Jos et al., *supra* note 21, at 122.

25. Siegel, *supra* note 19, at 16.

fail to maintain clean urine specimens during your substance abuse rehabilitation, you *will* be arrested by the police and prosecuted by the Office of the Solicitor."<sup>26</sup>

The policy offered no second chances. Women who tested positive for drugs a second time or who delivered a baby who tested positive were arrested and imprisoned.<sup>27</sup> Depending on the stage of pregnancy, the mother was charged with drug possession, child neglect, or distribution of drugs to a minor. Uncooperative women were arrested based on a single positive test.

The Interagency Policy resulted in the arrests of forty-two patients, all but one of whom were Black.<sup>28</sup> Disregarding the sanctity of the maternity ward, the arrests more closely resembled the conduct of the state in some totalitarian regime. Police arrested some patients within days or even hours of giving birth and hauled them to jail in handcuffs and leg shackles.<sup>29</sup> The handcuffs were attached to a three-inch wide leather belt that was wrapped around their stomachs. Some women were still bleeding from the delivery. One new mother complained, and was told to sit on a towel when she arrived at the jail.<sup>30</sup> Another reported that she was grabbed in a chokehold and shoved into detention.<sup>31</sup>

At least one woman who was pregnant at the time of her arrest sat in a jail cell waiting to give birth.<sup>32</sup> Lori Griffin was transported weekly from the jail to the hospital in handcuffs and leg irons for prenatal care. Three weeks after her arrest, she went into labor and was taken, still in handcuffs and shackles, to MUSC. Once at the hospital, Ms. Griffin was kept handcuffed to her bed *during the entire delivery*.<sup>33</sup>

I opened *Punishing Drug Addicts Who Have Babies* with the recollection of an ex-slave about the method slave masters used to

26. Plaintiffs' Memorandum, *supra* note 21, at 18-19 n.25.

27. See Jos et al., *supra* note 21, at 121.

28. See Plaintiffs' Memorandum, *supra* note 21, at 32. Nurse Brown noted on the chart of the sole white woman arrested that her boyfriend was Black. See Plaintiffs' Memorandum, *supra* note 21, at 33.

29. See Plaintiffs' Memorandum, *supra* note 21, at 26; CENTER FOR REPRODUCTIVE LAW & POLICY, PUNISHING WOMEN FOR THEIR BEHAVIOR DURING PREGNANCY: AN APPROACH THAT UNDERMINES WOMEN'S HEALTH AND CHILDREN'S INTERESTS 4 (1996); Philip J. Hiltz, *Hospital Is Accused of Illegal Drug Testing*, N.Y. TIMES, Jan. 21, 1994, at A12.

30. See Lynn M. Paltrow, *When Becoming Pregnant Is a Crime*, CRIM. JUST. ETHICS, Winter/Spring 1990, at 41, 41.

31. See Siegel, *supra* note 19, at 16.

32. See Plaintiffs' Memorandum, *supra* note 21, at 27; Siegel, *supra* note 19, at 16.

33. See Plaintiffs' Memorandum, *supra* note 21, at 27.

discipline their pregnant slaves while protecting the fetus from harm:

A former slave named Lizzie Williams recounted the beating of pregnant slave women on a Mississippi cotton plantation: "[I']s seen nigger women dat was fixin' to be confined do somethin' de white folks didn't like. Dey [the white folks] would dig a hole in de ground just big 'nuff fo' her stomach, make her lie face down an whip her on de back to keep from hurtin' de child."<sup>34</sup>

Thinking about an expectant Black mother chained to a belt around her swollen belly to protect her unborn child, I cannot help but recall this scene from Black women's bondage. The sight of a pregnant Black woman bound in shackles is a modern-day reincarnation of the horrors of slavemasters' degrading treatment of their female chattel.

## II. THE *WHITNER* SETBACK

In a dramatic reversal of the trend to overturn charges for prenatal drug use, the Supreme Court of South Carolina recently affirmed the legality of prosecuting pregnant crack addicts.<sup>35</sup> The case involved twenty-eight-year-old Cornelia Whitner, who was arrested for "endangering the life of her unborn child" by smoking crack while pregnant. On the day of her hearing, Whitner met briefly in the hallway with her court-appointed attorney, Cheryl Aaron, for the first time. Aaron advised Whitner to plead guilty to the child neglect charges, promising to get her into a drug treatment program so that she could be reunited with her children. At the April 20, 1992, hearing before Judge Frank Eppes, Whitner pleaded for help for her drug problem.<sup>36</sup> Aaron explained that her client was in a counseling program and had stayed off drugs since giving birth to her son, who was in good health. She requested that Whitner be placed in a residential treatment facility. Turning a deaf ear, Judge Eppes simply responded, "I think I'll just let her go to jail."<sup>37</sup> He then sentenced Whitner to a startling eight-year prison term.<sup>38</sup>

Whitner had been incarcerated for nineteen months before a lawyer from the local ACLU contacted her about challenging her conviction. Whitner's lawyers filed a petition for postconviction re-

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34. Roberts, *supra* note 2, at 1420.

35. See *Whitner v. South Carolina*, No. 24468, 1996 WL 393164 (S.C. July 15, 1996).

36. See Transcript of Record at 5, *South Carolina v. Whitner*, No. 92-GS-39-670 (S.C. Ct. Gen. Sess. Apr. 20, 1992) [hereinafter *Whitner Transcript*].

37. *Whitner Transcript*, *supra* note 36, at 5.

38. See *Whitner Transcript*, *supra* note 36, at 5.

lief that claimed that the trial court lacked jurisdiction to accept a guilty plea for a nonexistent offence. They argued that the relevant criminal statute punished the unlawful neglect of a *child*, not a fetus. On November 22, 1993, Judge Larry Patterson invalidated the conviction and released Whitner from prison.<sup>39</sup>

On July 15, 1996, the South Carolina Supreme Court, in a three to two decision, reinstated Whitner's conviction, holding that a viable fetus is covered by the child abuse statute.<sup>40</sup> The court based its conclusion on prior case law that recognized a viable fetus as a person. South Carolina courts allowed civil actions for the wrongful death of a fetus and had upheld a manslaughter conviction for the killing of a fetus.<sup>41</sup> According to the court, these precedents supported its interpretation of the child abuse statute: "[I]t would be absurd to recognize the viable fetus as a person for purposes of homicide and wrongful death statutes but not for purposes of statutes proscribing child abuse."<sup>42</sup> Moreover, punishing fetal abuse would further the statute's aim of preventing harm to children. The court reasoned that "[t]he consequences of abuse or neglect after birth often pale in comparison to those resulting from abuse suffered by the viable fetus before birth."<sup>43</sup>

The *Whitner* holding opens the door for a new wave of prosecutions in South Carolina, as well as in other states that wish to follow its lead. Condon, who had been elected Attorney General in a landslide victory, declared: "This is a landmark, precedent-setting decision. . . . This decision is a triumph for all those who want to protect the children of South Carolina."<sup>44</sup> As the state's chief law enforcement officer, Condon may have visions of replicating his Charleston experiment in other hospitals across South Carolina.

### III. SHACKLING BLACK MOTHERHOOD

Not only did South Carolina law enforcement agents brutally degrade Black mothers and pregnant women at the Charleston hospital with little public outcry, but the state's highest court essentially sanctioned the indignity. How could judges ignore this

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39. See *Whitner v. State*, No. 93-CP-39-347 (S.C. Ct. Comm. Pleas Nov. 22, 1993) (vacating the sentence), *revd.*, No. 24468, 1996 WL 393164 (S.C. Jul. 15, 1996).

40. See *Whitner v. South Carolina*, No. 24468, 1996 WL 393164 (S.C. July 15, 1996).

41. See *Whitner*, 1996 WL 393164, at \*2.

42. *Whitner*, 1996 WL 393164, at \*3.

43. *Whitner*, 1996 WL 393164, at \*3.

44. John Heilprin, *Drug Users Face Fetal Abuse Charge*, POST & COURIER (Charleston), July 16, 1996, at A1, available in LEXIS, News Library, Papers File.

blatant devaluation of Black motherhood? State officials repeatedly disclaim any racial motivation in the prosecutions, and courts routinely accept their disclaimer. Everyone continues to pretend that race has nothing to do with the punishment of these mothers.

The blatant racial impact of the prosecutions can be overlooked only because it results from an institutionalized system that selects Black women for prosecution and from a deeply embedded mythology about Black mothers. These two factors make the disproportionate prosecution of Black mothers seem fair and natural, and not the result of any invidious motivation. These factors also make it more difficult to challenge the prosecutions on the basis of race. As the Black poet Nikki Giovanni recently observed: "In some ways, the struggle is more difficult now. I'd rather take what we did — if we were killed or beaten, you knew you were fighting the system."<sup>45</sup> Giovanni explained that the battle for racial justice is more complicated today than in the 1960s, because "racism is more sophisticated and insidious than segregated drinking fountains."<sup>46</sup>

Prosecutors like Condon do not announce that they plan to single out poor Black women for prosecution. Rather, they rely on a process already in place that is practically guaranteed to bring these women to their attention. The methods the state uses to identify women who use drugs during pregnancy result in disproportionate reporting of poor Black women.<sup>47</sup> The government's main source of information about prenatal drug use comes from hospital reports of positive infant toxicologies to child welfare authorities. This testing is implemented with greater frequency in hospitals serving poor minority communities. Private physicians who serve more affluent women are more likely to refrain from screening their patients, both because they have a financial stake in retaining their patients' business and securing referrals from them, and because they are socially more similar to their patients.<sup>48</sup>

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45. Felicia R. Lee, *Defying Evil, and Mortality*, N.Y. TIMES, Aug. 1, 1996, at C9.

46. *Id.*

47. See Molly McNulty, Note, *Pregnancy Police: The Health Policy and Legal Implications of Punishing Pregnant Women for Harm to Their Fetuses*, 16 N.Y.U. REV. L. & SOC. CHANGE 277, 318 (1988); Bonnie I. Robin-Vergeer, Note, *The Problem of the Drug-Exposed Newborn: A Return to Principled Intervention*, 42 STAN. L. REV. 745, 753, 782 n.157 (1990); Gina Kolata, *Bias Seen Against Pregnant Addicts*, N.Y. TIMES, July 20, 1990, at A13.

48. See Ira J. Chasnoff et al., *The Prevalence of Illicit-Drug or Alcohol Use During Pregnancy and Discrepancies in Mandatory Reporting in Pinellas County, Florida*, 322 NEW ENG. J. MED. 1202, 1205 (1990); Carol Angel, *Addicted Babies: Legal System's Response Unclear*, L.A. DAILY J., Feb. 29, 1988, at 1 (noting that reports from doctors serving upper income patients are rare).

Hospitals administer drug tests in a manner that further discriminates against poor Black women. One common criterion triggering an infant toxicology screen is the mother's failure to obtain prenatal care, a factor that correlates strongly with race and income.<sup>49</sup> Worse still, many hospitals have no formal screening procedures, and rely solely on the suspicions of health care professionals. This discretion allows doctors and hospital staff to perform tests based on their stereotyped assumptions about the identity of drug addicts.<sup>50</sup> Women who smoke crack report being abused and degraded by hospital staff during the delivery.<sup>51</sup> Their experiences suggest that staff often harbor a deep contempt for these women born at least partly of racial prejudice. A twenty-four-year-old woman from Brooklyn, "K," recounted a similar experience:

Bad . . . they treat you bad. . . . That was like I had my daughter, when the nurse came, and I was having the stomach pain and my stomach was killing me. I kept callin and callin and callin. She just said you smokin that crack, you smoke that crack, you suffer.<sup>52</sup>

Accordingly to court papers, Nurse Brown, the chief enforcer of the Charleston Interagency Policy, frequently expressed racist views about her Black patients to drug counselors and social workers, including her belief that most Black women should have their tubes tied and that birth control should be put in the drinking water in Black communities.<sup>53</sup> It is not surprising that such nurses would turn their Black patients over to the police.

A study published in the prestigious *New England Journal of Medicine* discussed possible racial biases of health care professionals who interact with pregnant women.<sup>54</sup> Researchers studied the results of toxicologic tests of pregnant women who received prenatal care in public health clinics and in private obstetrical offices in Pinellas County, Florida. The study found that little difference existed in the prevalence of substance abuse by pregnant women along either racial or economic lines, and that there was little significant difference between patients at public clinics and private of-

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49. See Robin-Vergeer, *supra* note 47, at 798-99.

50. See Chasnoff et al., *supra* note 48, at 1206; Linda C. Mayes et al., *The Problem of Prenatal Cocaine Exposure*, 267 JAMA 406 (1992); Robin-Vergeer, *supra* note 47, at 754 & n.36.

51. See Lisa Maher, *Punishment and Welfare: Crack Cocaine and the Regulation of Mothering*, in *THE CRIMINALIZATION OF A WOMAN'S BODY* 157, 180 (Clarice Feinman ed., 1992); Siegel, *supra* note 19, at 16.

52. Maher, *supra* note 51, at 180 (alteration in original).

53. See Plaintiffs' Memorandum, *supra* note 21, at 33-34.

54. See Chasnoff et al., *supra* note 48.

fices.<sup>55</sup> Despite similar rates of substance abuse, however, Black women were *ten times* more likely than whites to be reported to government authorities.<sup>56</sup> Both public health facilities and private doctors were more inclined to turn in Black women than white women for using drugs while pregnant.<sup>57</sup>

Just as important as this structural bias against Black women is the ideological bias against them. Prosecutors and judges are predisposed to punish Black crack addicts because of a popular image promoted by the media during the late 1980s and early 1990s. News of an astounding increase in maternal drug use broke in 1988 when the National Association for Perinatal Addiction Research and Education (NAPARE) published the results of a study of babies in hospitals across the country. NAPARE found that at least eleven percent of women admitted in labor in hospitals across the country would test positive for illegal drugs.<sup>58</sup> In several hospitals, the proportion of drug-exposed infants was as high as twenty-five percent.<sup>59</sup> Extrapolating these statistics to the population at large, some observers estimated that as many as 375,000 drug-exposed infants are born every year.<sup>60</sup> This figure covered all drug exposure nationwide and did not break down the numbers based on the extent of drug use or its effects on the newborn.

The media parlayed the NAPARE report into a horrific tale of irreparable damage to hundreds of thousands of babies. A review of newspaper accounts of the drug exposure data reveals a stunning instance of journalistic excess. Although NAPARE's figures referred to numbers of infants *exposed* to, not *harmed* by, maternal drug use, the *Los Angeles Times* wrote that about 375,000 babies were "tainted by potentially fatal narcotics in the womb each year."<sup>61</sup> The NAPARE figure did not indicate the extent of maternal drug use or its effects on the fetus. In fact, the nature of harm, if

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55. *See id.* at 1204.

56. *See id.*

57. *See id.*

58. *See* Jean Davidson, *Drug Babies Push Issue of Fetal Rights*, L.A. TIMES, Apr. 25, 1989, at 1.

59. *See id.*

60. *See* Kathleen Nolan, *Protecting Fetuses from Prenatal Hazards: Whose Crimes? What Punishment?*, CRIM. JUST. ETHICS, Winter/Spring 1990, at 13, 14 ("Over 350,000 infants are exposed prenatally to some form of illicit drug each year."); Douglas J. Besharov, *Crack Babies: The Worst Threat Is Mom Herself*, WASH. POST, Aug. 6, 1989, at B1 (recognizing the "most widely cited estimate" that "up to 375,000 fetally exposed [crack] babies" are born each year, but observing that this estimate is "much too high").

61. Jean Davidson, *Newborn Drug Exposure Conviction a 'Drastic' First*, L.A. TIMES, July 31, 1989, at 1.

any, caused by prenatal drug use depends on a number of factors, including the type and amount of drugs ingested, the pregnant woman's overall health, and the baby's environment after birth.<sup>62</sup> Some articles attributed all 375,000 cases to cocaine,<sup>63</sup> although experts estimate that 50,000 to 100,000 newborns are exposed specifically to cocaine each year.<sup>64</sup> In one editorial the figure ballooned to 550,000 babies who have "their fragile brains bombarded with the drug."<sup>65</sup> The *Los Angeles Times* implied in a front-page story that crack was the *only* drug used by pregnant women, writing, "Crack was even responsible for the creation of an entirely new, and now leading, category of child abuse: exposure of babies to drugs during pregnancy."<sup>66</sup> Of course, babies had been exposed prenatally to dangerous amounts of alcohol, prescription pills, and illicit drugs long before crack appeared in the 1980s.

The pregnant crack addict was portrayed as an irresponsible and selfish woman who put her love for crack above her love for her children.<sup>67</sup> In news stories she was often represented by a prostitute, who sometimes traded sex for crack, violating every conceivable quality of a good mother.<sup>68</sup> The chemical properties of crack were said to destroy the natural impulse to mother. "The most remarkable and hideous aspect of crack cocaine use seems to be the undermining of the maternal instinct," a nurse was quoted as observing about her patients.<sup>69</sup> The pregnant crack addict, then, was

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62. See Barry Zuckerman, *Effects on Parents and Children*, in *WHEN DRUG ADDICTS HAVE CHILDREN: REORIENTING CHILD WELFARE'S RESPONSE* 49, 49-50 (Douglas J. Besharov ed., 1994).

63. See, e.g., *Cocaine Babies' Mom Convicted in Drug Trial*, *MIAMI HERALD*, July 14, 1989, at 1A, available in *DIALOG*.

64. See *OFFICE OF EVALUATION & INSPECTIONS, DEPT. OF HEALTH AND HUMAN SERVICES, CRACK BABIES* (1990); Lou Carlozo, *Moms' Arrests Rekindle Issue of Drug Babies*, *CHI. TRIB.*, Jan. 27, 1995, *Metro Lake Sec.*, at 1.

65. *Ignoring Wails of Babies*, *ROCKY MOUNTAIN NEWS* (Denver), July 1, 1995, at 58A, available in 1995 WL 3200263.

66. Rich Connell, *The Hidden Devastation of Crack*, *L.A. TIMES*, Dec. 18, 1994, at A1 (beginning a series entitled "The Real Cost of Crack").

67. See CYNTHIA R. DANIELS, *AT WOMEN'S EXPENSE: STATE POWER AND THE POLITICS OF FETAL RIGHTS* 116-17 (1993); Melissa Fletcher Stoeltje, *Backing Away from the Edge*, *HOUS. CHRON.*, Jan. 21, 1996, *Lifestyle Sec.*, at 1, available in 1996 WL 5577982.

68. See, e.g., Charles Anzalone, *Small Miracles: Michelle Spikes Lost Herself When She Lost Her Mother. Now She Is Finding Herself In Her Child*, *BUFF. NEWS*, May 14, 1995, *Magazine*, at M6, available in 1995 WL 5475335; Davidson, *supra* note 58; Wendy Kurland, *Crack Stronger than Mother's Love*, *TENNESSEAN*, Oct. 29, 1995, at 1A, available in 1995 WL 11683478; Clare Ulik, *An Addict from the First Breath: Mothers' Drug Use Dooms Infants to Excruciating Odds*, *ARIZ. REPUBLIC/PHOENIX GAZETTE*, May 18, 1994, *Northwest Community Sec.*, at 1, available in 1994 WL 6362475.

69. Cathy Trost, *Born to Lose: Babies of Crack Users Crowd Hospitals, Break Everybody's Heart*, *WALL ST. J.*, July 18, 1989, at A1.

the exact opposite of a mother: she was promiscuous, uncaring, and self-indulgent.

By focusing on maternal *crack* use, which is more prevalent in inner-city neighborhoods and stereotypically associated with Blacks,<sup>70</sup> the media left the impression that the pregnant addict is typically a Black woman.<sup>71</sup> Even more than a “metaphor for women’s alienation from instinctual motherhood,”<sup>72</sup> the pregnant crack addict was the latest embodiment of the bad *Black* mother.

The monstrous crack-smoking mother was added to the iconography of depraved Black maternity, alongside the matriarch and the welfare queen. For centuries, a popular mythology has degraded Black women and portrayed them as less deserving of motherhood. Slave owners forced slave women to perform strenuous labor that contradicted the Victorian female roles prevalent in the dominant white society.<sup>73</sup> One of the most prevalent images of slave women was the character of Jezebel, a woman governed by her sexual desires, which legitimated white men’s sexual abuse of Black women.<sup>74</sup> The stereotype of Black women as sexually promiscuous helped to perpetuate their devaluation as mothers.

This devaluation of Black motherhood has been reinforced by stereotypes that blame Black mothers for the problems of the Black family, such as the myth of the Black matriarch — the domineering female head of the Black family. White sociologists have held Black matriarchs responsible for the disintegration of the Black family and the consequent failure of Black people to achieve success in America.<sup>75</sup> Daniel Patrick Moynihan popularized this theory in his 1965 report, *The Negro Family: The Case for National Action*, which claimed, “At the heart of the deterioration of the

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70. See JAMES A. INCIARDI ET AL., WOMEN AND CRACK-COCAINE 1-13 (1993); Elijah Gosier, *Crack Deals Cross Boundaries of Race*, ST. PETERSBURG TIMES, July 30, 1989, at 1B, available in 1990 WL 5387265; Syl Jones, *On Race, Local Media Deserves Euthanasia*, STAR-TRIB. (Minneapolis-St. Paul), June 21, 1990, at 23A, available in 1989 WL 6793740; Andrew H. Malcolm, *Crack, Bane of Inner City, Is Now Gripping Suburbs*, N.Y. TIMES, Oct. 1, 1989, § 1, at 1.

71. See, e.g., Kathleen Schuckel, *Aims of Home for Pregnant Addicts Include Reducing Infant Mortality*, INDIANAPOLIS STAR, Nov. 30, 1995, at C9, available in 1995 WL 3095246 (associating drug use during pregnancy with high Black infant mortality rate).

72. DANIELS, *supra* note 67, at 116.

73. See ANGELA Y. DAVIS, WOMEN, RACE AND CLASS 5 (1983); DEBORAH GRAY WHITE, AR’N’T I A WOMAN? FEMALE SLAVES IN THE PLANTATION SOUTH 16, 27-29 (1985).

74. See WHITE, *supra* note 73, at 28-29, 61.

75. See PAULA GIDDINGS, WHEN AND WHERE I ENTER: THE IMPACT OF BLACK WOMEN ON RACE AND SEX IN AMERICA 325-35 (1984); BELL HOOKS, AIN’T I A WOMAN: BLACK WOMEN AND FEMINISM 70-83 (1981); ROBERT STAPLES, THE BLACK WOMAN IN AMERICA: SEX, MARRIAGE, AND THE FAMILY 10-34 (1973).

fabric of Negro society is the deterioration of the Negro family."<sup>76</sup> Moynihan blamed domineering Black mothers for the demise of their families, arguing that "the Negro community has been forced into a matriarchal structure which, because it is so out of line with the rest of the American society, seriously retards the progress of the group as a whole."<sup>77</sup>

The myth of the Black Jezebel has been supplemented by the contemporary image of the lazy welfare mother who breeds children at the expense of taxpayers in order to increase the amount of her welfare check.<sup>78</sup> This view of Black motherhood provides the rationale for society's restrictions on Black female fertility. It is this image of the undeserving Black mother that also ultimately underlies the government's choice to punish crack-addicted women.

The frightening portrait of diabolical pregnant crack addicts and irreparably damaged crack babies was based on data that have drawn criticism within the scientific community.<sup>79</sup> The data on the extent and severity of crack's impact on babies are highly controversial. At the inception of the crisis numerous medical journals reported that babies born to crack-addicted mothers suffered a variety of medical, developmental, and behavioral problems.<sup>80</sup> More recent analyses, however, have isolated the methodological flaws of these earlier studies.<sup>81</sup>

The initial results were made unreliable by the lack of controls and the selection of poor, inner-city subjects at high risk for unhealthy pregnancies. Maternal crack use often contributes to underweight and premature births. This fact alone is reason for

76. OFFICE OF POLICY PLANNING & RESEARCH, U.S. DEPT. OF LABOR, *THE NEGRO FAMILY: THE CASE FOR NATIONAL ACTION* 5 (1965).

77. *Id.* at 29.

78. See Wahneema Lubiano, *Black Ladies, Welfare Queens, and State Minstrels: Ideological War by Narrative Means*, in *RACE-ING JUSTICE, EN-GENDERING POWER: ESSAYS ON ANITA HILL, CLARENCE THOMAS, AND THE CONSTRUCTION OF SOCIAL REALITY* 323, 332 (Toni Morrison ed., 1992); Lucy A. Williams, *Race, Rat Bites and Unfit Mothers: How Media Discourse Informs Welfare Legislation Debate*, 22 *FORDHAM URB. L.J.* 1159 (1995).

79. See Linda C. Mayes et al., Commentary, *The Problem of Prenatal Cocaine Exposure: A Rush to Judgment*, 267 *JAMA* 406 (1992); Barry Zuckerman & Deborah A. Frank, Commentary, "Crack Kids": *Not Broken*, 89 *PEDIATRICS* 337 (1992); Robert Mathias, "Crack Babies" *Not a Lost Generation, Researchers Say*, *NIDA NOTES* (Nat'l. Inst. on Drug Abuse, Rockville, Md.), Jan.-Feb. 1992, at 16.

80. See Ira J. Chasnoff et al., *Temporal Patterns of Cocaine Use in Pregnancy: Perinatal Outcome*, 261 *JAMA* 1741 (1989); Mark G. Neerhof et al., *Cocaine Abuse During Pregnancy: Peripartum Prevalence and Perinatal Outcome*, 161 *AM. J. OBSTETRICS & GYNECOLOGY* 633 (1989); Diana B. Petitti & Charlotte Coleman, *Cocaine and the Risk of Low Birth Weight*, 80 *AM. J. PUB. HEALTH* 25 (1990).

81. See Mayes et al., *supra* note 79; Zuckerman & Frank, *supra* note 79; Mathias, *supra* note 79.

concern. But many of the problems seen in crack-exposed babies are just as likely to have been caused by other risk factors associated with their mothers' crack use, such as malnutrition, cigarettes, alcohol, physical abuse, and inadequate health care. Researchers cannot determine authoritatively which of this array of hazards actually caused the terrible outcomes they originally attributed to crack, or the percentage of infants exposed to crack in the womb who actually experience these consequences.<sup>82</sup> In addition, the claim that prenatal crack use causes irreparable neurological damage leading to behavioral problems has not been fully substantiated.<sup>83</sup> An article by a team of research physicians concluded that "available evidence from the newborn period is far too slim and fragmented to allow any clear predictions about the effects of intrauterine exposure to cocaine on the course and outcome of child growth and development."<sup>84</sup>

The medical community's one-sided attention to studies showing detrimental results from cocaine exposure added to the public's misperception of the risks of maternal crack use.<sup>85</sup> For a long time, journals tended to accept for publication only studies that supported the dominant view of fetal harm. Research that reported no adverse effects was published with less frequency, even though it was often more reliable.<sup>86</sup>

The point is not that crack use during pregnancy is safe, but that the media exaggerated the extent and nature of the harm it causes. News reports erroneously suggested, moreover, that the problem of maternal drug use was confined to the Black community. A public health crisis that cuts across racial and economic lines was transformed into an example of *Black* mother's depravity that warranted harsh punishment. Why hasn't the media focused as much attention on the harmful consequences of alcohol abuse or cigarette smoking during pregnancy,<sup>87</sup> or the widespread devastation that

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82. See Marvin Dicker & Eldin A. Leighton, *Trends in the US Prevalence of Drug-Using Parturient Women and Drug Affected Newborns, 1979 through 1990*, 84 AM. J. PUB. HEALTH 1433 (1994); Mayes et al., *supra* note 79.

83. See Mayes et al., *supra* note 79; Zuckerman & Frank, *supra* note 79.

84. Mayes et al., *supra* note 79.

85. See Gideon Koren et al., *Bias Against the Null Hypothesis: The Reproductive Hazards of Cocaine*, LANCET, Dec. 16, 1989, at 1440.

86. See *id.*

87. See DANIELS, *supra* note 67, at 128; Barry Zuckerman, *Marijuana and Cigarette Smoking during Pregnancy: Neonatal Effects*, in DRUGS, ALCOHOL, PREGNANCY AND PARENTING 73 (Ira J. Chasnoff ed., 1988); Elisabeth Rosenthal, *When a Pregnant Woman Drinks*, N.Y. TIMES, Feb. 4, 1990, § 6 (Magazine), at 30.

Black infants suffer as a result of poverty?<sup>88</sup> In *Punishing Drug Addicts Who Have Babies*, I suggested an answer:

[T]he prosecution of crack-addicted mothers diverts public attention from social ills such as poverty, racism, and a misguided national health policy and implies instead that shamefully high Black infant death rates are caused by the bad acts of individual mothers. Poor Black mothers thus become the scapegoats for the causes of the Black community's ill health. Punishing them assuages any guilt the nation might feel at the plight of an underclass with infant mortality at rates higher than those in some less developed countries. Making criminals of Black mothers apparently helps to relieve the nation of the burden of creating a health care system that ensures healthy babies for all its citizens.<sup>89</sup>

Additional medical studies demonstrate the perversity of a punitive approach. Some researchers have found that the harmful effects of prenatal crack exposure may be temporary and treatable.<sup>90</sup> A Northwestern University study of pregnant cocaine addicts, for example, found that "comprehensive prenatal care may improve [the] outcome in pregnancies complicated by cocaine abuse."<sup>91</sup>

Research has also discovered dramatic differences in the effects of maternal alcohol abuse depending on the mother's socioeconomic status. Heavy drinking during pregnancy can cause fetal alcohol syndrome, characterized by serious physical malformations and mental deficiencies.<sup>92</sup> Although all women in a study drank at the same rate, the children born to low-income women had a 70.9% rate of fetal alcohol syndrome, compared to a 4.5% rate for those of upper-income women.<sup>93</sup> The main reason for this disparity was the

88. See SARA ROSENBAUM ET AL., CHILDREN'S DEFENSE FUND: THE HEALTH OF AMERICA'S CHILDREN 4 & tbl. 1.1 (1988); Lorna McBarnette, *Women and Poverty: The Effects on Reproductive Status*, in TOO LITTLE, TOO LATE: DEALING WITH THE HEALTH NEEDS OF WOMEN IN POVERTY 55 (Cesar A. Perales & Lauren S. Young eds., 1988).

89. See Roberts, *supra* note 2, at 1436.

90. See BONNIE BAIRD WILFORD & JACQUELINE MORGAN, GEORGE WASHINGTON UNIVERSITY, FAMILIES AT RISK: ANALYSIS OF STATE INITIATIVES TO AID DRUG-EXPOSED INFANTS AND THEIR FAMILIES 11 (1993); Ira J. Chasnoff et al., *Cocaine/Polydrug Use in Pregnancy: Two-Year Follow-up*, 89 PEDIATRICS 337 (1992); Mathias, *supra* note 79, at 14.

91. See Scott N. MacGregor et al., *Cocaine Abuse During Pregnancy: Correlation Between Prenatal Care and Perinatal Outcome*, 74 OBSTETRICS & GYNECOLOGY 882, 885 (1989) (finding that comprehensive prenatal care can improve the outcome, but also finding that perinatal morbidity associated with cocaine abuse "cannot be eliminated solely by improved prenatal care"). Black women face financial, institutional, and cultural barriers to receiving adequate prenatal care. See Marilyn L. Poland et al., *Barriers to Receiving Adequate Prenatal Care*, 157 AM. J. OBSTETRICS & GYNECOLOGY 297, 297, 301-02 (1987); Ruth E. Zambrana, *A Research Agenda on Issues Affecting Poor and Minority Women: A Model for Understanding Their Health Needs*, 12 WOMEN & HEALTH, Nos. 3/4, at 137 (1988); Philip J. Hilts, *Life Expectancy for Blacks in U.S. Shows Sharp Drop*, N.Y. TIMES, Nov. 29, 1990, at A1.

92. See Rosenthal, *supra* note 87.

93. See Nesrin Bingol et al., *The Influence of Socioeconomic Factors on the Occurrence of Fetal Alcohol Syndrome*, 6 ADVANCES IN ALCOHOL & SUBSTANCE ABUSE 105 (1987).

nutrition of the pregnant women. While the wealthier women ate a regular, balanced diet, the poorer women had sporadic, unhealthy meals. Admittedly, crack is not good for anyone, and we need effective policies to stem crack use by pregnant women. Yet these studies about fetal alcohol syndrome and prenatal crack exposure suggest that crack's harmful consequences for babies may be minimized, or even prevented, by ensuring proper health care and nutrition for drug-dependant mothers. The best approach for improving the health of crack-exposed infants, then, is to improve the health of their mothers by ensuring their access to health care and drug treatment services. Yet prosecuting crack-addicted mothers does just the opposite: it drives these women away from these services out of fear of being reported to law enforcement authorities.<sup>94</sup> This result reinforces the conclusion that punitive policies are based on resentment toward Black mothers, rather than on a real concern for the health of their children.

The medical profession's new information regarding the risks of prenatal crack exposure has had little impact on the public's perception of the "epidemic." The image of the crack baby — trembling in a tiny hospital bed, permanently brain damaged, and on his way to becoming a parasitic criminal — seems indelibly etched in the American psyche. It will be hard to convince most Americans that the caricature of the crack baby rests on hotly contested data.

#### IV. STRATEGIES FOR UNSHACKLING BLACK MOTHERHOOD

Given the mountain of structural and ideological hurdles that pregnant crack addicts must surmount, their attorneys have a difficult task in presenting them as sympathetic parties. One strategy in opposing a punitive approach to prenatal drug use is to divert attention away from these women and the devaluing racial images that degrade them.

##### A. *Diverting Attention from Race*

Attorneys and scholars have suggested three alternative issues to replace attention to the racial images that make their clients so unpopular — concern for the health of the babies exposed to prenatal drug use, the potential expansion of state interference in pregnant women's conduct, and claims of middle-class white women who have been prosecuted for using drugs during pregnancy.

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94. See Roberts, *supra* note 2, at 1448-50; *infra* notes 95-99 and accompanying text.

### 1. *Concern for Babies' Health*

One of the greatest assets on the defendants' side is the opinion of major medical and public health organizations about the health risks created by the prosecution of substance-abusing mothers. Most leading medical and public health organizations in the country have come out in opposition to the prosecutions for this very reason.<sup>95</sup> In 1990, the American Medical Association issued a detailed report on legal interventions during pregnancy, stating its concern that "physicians' knowledge of substance abuse . . . could result in a jail sentence rather than proper medical treatment."<sup>96</sup> It concluded that "criminal penalties may exacerbate the harm done to fetal health by deterring pregnant substance abusers from obtaining help or care from either the health or public welfare professions, the very people who are best able to prevent future abuse."<sup>97</sup> According to the American Academy of Pediatrics, "[p]unitive measures taken toward pregnant women, such as criminal prosecution and incarceration, have no proven benefits for infant health."<sup>98</sup> The American College of Obstetricians and Gynecologists, the March of Dimes, the National Council on Alcoholism and Drug Dependence, and other groups have also issued policy statements denouncing the criminalization of maternal drug use.<sup>99</sup>

Attorneys have taken advantage of this support by assembling an impressive array of medical experts at trial and amicus briefs on appeal. In the *Whitner* appeal, for example, major medical, public health, and women's organizations, including the American Medical Association and its South Carolina affiliate, the American Public Health Association, the National Council on Alcoholism and Drug Dependence, and NOW Legal Defense and Education Fund, joined in amicus briefs opposing prosecution of women for prenatal drug use.

Lynn Paltrow, Director of Special Litigation at the Center for Reproductive Law and Policy ("the Center") and the leading advo-

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95. See CENTER FOR REPRODUCTIVE LAW & POLICY, *supra* note 29, at 11-12; DANIELS, *supra* note 67, at 102; Dawn Johnsen, *Shared Interests: Promoting Healthy Births Without Sacrificing Women's Liberty*, 43 HASTINGS L.J. 569, 572 & n.12 (1992).

96. Board of Trustees, American Medical Association, *Legal Interventions During Pregnancy: Court-Ordered Medical Treatments and Legal Penalties for Potentially Harmful Behavior by Pregnant Women*, 264 JAMA 2663, 2667 (1990).

97. *Id.* at 2669.

98. Committee on Substance Abuse, American Academy of Pediatrics, *Drug-Exposed Infants*, 86 PEDIATRICS 639, 641 (1990).

99. See CENTER FOR REPRODUCTIVE LAW & POLICY, *supra* note 29, at 11-12; Plaintiffs' Memorandum, *supra* note 21, at 14 n.18.

cate for women charged with prenatal crimes, has described the focus on the prosecutions' medical hazards as a way of diverting attention from her unpopular clients. A lengthy article in *The Los Angeles Times Magazine* discussed Paltrow's rationale:

[Paltrow] knows that, as impressive as the intellectual arguments might be in favor of women's reproductive rights, they pale for many in the face of a sickly newborn twitching from a cocaine rush. She knows she'd lose support, even among those committed to women's rights, if people felt forced to choose between pregnant substance abusers and their babies.

The medical community's policy statements provide Paltrow with a way to avoid this perilous choice. "Even if you care only about the baby, even if you don't give a damn about the mother, you should still oppose Charleston's policy," Paltrow finds herself able to argue.<sup>100</sup>

According to this view, a strategy that seeks to avoid the disparaging images of poor Black mothers is more likely to prevail than one that attempts to discredit them.

## 2. *The Parade of Horribles*

A second avoidance tactic is to steer attention to more sympathetic middle-class white women. A common criticism of the prosecution of drug-addicted mothers is that the imposition of maternal duties will lead to punishment for less egregious conduct. Commentators have predicted government penalties for cigarette smoking, consumption of alcohol, strenuous physical activity, and failure to follow a doctor's orders.<sup>101</sup>

If harm to a viable fetus constitutes child abuse, as the *Whitner* court held, then an endless panoply of activities could make pregnant women guilty of a crime. After the *Whitner* decision, Lynn Paltrow pointed out that:

There are not enough jail cells in South Carolina to hold the pregnant women who have a drug problem, drink a glass of wine with dinner, smoke cigarettes . . . or decide to go to work despite their doctor's advice that they should stay in bed. Thousands of women are now child neglecters.<sup>102</sup>

I concur in the objective of demonstrating that the prosecution of pregnant crack addicts should be the concern of all women. It may be a more effective tactic to convince affluent women that such

100. Siegel, *supra* note 19, at 17.

101. See, e.g., Kary Moss, *Substance Abuse During Pregnancy*, 13 HARV. WOMEN'S L.J. 278, 288-89 (1990); Dawn E. Johnson, Note, *The Creation of Fetal Rights: Conflicts with Women's Constitutional Rights to Liberty, Privacy, and Equal Protection*, 95 YALE L.J. 599, 606-07 (1986).

102. Lisa Greene, *Court Rules Drug Use is Fetal Abuse*, THE STATE, July 16, 1996, at A1.

government policies also jeopardize their lifestyles. Although valid, this argument tends to ignore the reality of poor Black women who are currently abused by punitive policies. The reference to a parade of horrors to criticize the fetal rights doctrine often belittles the significance of current government action. It seems to imply that the prosecution of Black crack addicts is not enough to generate concern and that we must postulate the prosecution of white middle-class women in order for the challenge to be meaningful.

In fact, it is very unlikely that South Carolina will pursue thousands of pregnant women on child neglect charges. It is hard to imagine police raiding private hospitals and hauling away middle-class women for fetal abuse. Instead, the state will escalate its crusade against the women it has prosecuted in the past — poor Black women who smoke crack.

### 3. *Relying on White Women's Claims*

Feminist strategists have also suggested that challenging the charges brought against white drug users will benefit Black defendants. In her insightful book, *At Women's Expense: State Power and the Politics of Fetal Rights*, Cynthia Daniels stresses the strategic advantages of connecting the charges brought against Black and white middle-class drug users:

While the threat of prosecution is not shared equally by women of different races and classes, it is critically important to see that the threat is still shared by all women: no woman is exempt from the threat to self-sovereignty posed by the idea of fetal rights. The successful prosecution of a poor black woman for fetal drug abuse has set legal, political, and social precedents that have been used to prosecute white women of privilege. When a prosecutor in Michigan was confronted with allegations that he was targeting only poor black women addicted to crack, he brought similar charges against Kim Hardy, a white woman lawyer who was addicted to cocaine.

This strategy can have unintended results, however. The cultural, economic, and political power that women of privilege use to resist attempts to prosecute them — or to force them to have surgery, or to keep them out of good-paying jobs — can result in critical precedents for the defense of poor women's rights as well. Kim Hardy, for instance, defended herself successfully in court; the precedent set by her case can now be used to defend women of lesser economic means. . . . The disproportionate privilege of some women, rather than hope-

lessly dividing rich from poor or white women from women of color, can be used to defend the rights of all women.<sup>103</sup>

This view, while recognizing the special injury to women of color, also proposes a strategy of challenging governmental intrusion in women's reproductive decisions by demonstrating how they thwart the liberties of middle-class women. Again, the rationale is that calling attention to the harm to privileged women is more likely to generate change than decrying the harm to poor minority women. It is based on the hope that the benefit of establishing a strong theory of reproductive liberty for middle-class white women will trickle down to their poor, less privileged sisters.

But this strategy also has limited potential for liberating Black women. The restraints on Black women's reproductive freedom have *trickled up* to white women. Protections afforded white middle-class women, on the other hand, are often withheld from Black women. Medical and social experiments are tested on the bodies of Black women first before they are imposed on white women. Norplant, for example, was developed to curtail the fertility of poor Third-World women,<sup>104</sup> and then was marketed to white women in this country. As Daniels recognizes, the prosecution of Black women for smoking crack during pregnancy has set a precedent for regulating the conduct of pregnant women in the middle-class. Welfare "family caps" gained popularity as a means of reducing the numbers of Black children on public assistance, but they will throw thousands of white children into poverty. At the same time, the ideology that devalues Black mothers and perpetuates a racial division among women continues to thwart the universal application of

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103. DANIELS, *supra* note 67, at 134-35. Daniels mistakenly identifies Kim Hardy as the white Michigan attorney prosecuted for exposing her fetus to cocaine. In fact, Kimberly Hardy was a *Black* woman prosecuted by Muskegon County prosecutor Tony Tague for smoking crack during pregnancy. The white defendant was named Lynn Bremer. See PALTROW, *supra* note 18, at 18-19. Kim Hardy was angered by the racial disparity she saw in the court's disposition of the two cases:

It came as a shock . . . and then I was pretty angry. Addiction is a medical problem. You wouldn't put a heart patient in jail for having a heart attack. And you wouldn't prosecute an epileptic for having a seizure. . . . It's been a nightmare! . . . My baby was taken away from his mother for the first ten months of his life. . . . And one more thing, after all the publicity in my case, the prosecutor later prosecuted a thirty-six year old white woman lawyer to show he wasn't prejudiced; but the judge dismissed her case quick.

Dwight L. Greene, *Abusive Prosecutors: Gender, Race & Class Discretion and the Prosecution of Drug-Addicted Mothers*, 39 BUFF. L. REV. 737, 737 (1991) (quoting Kim Hardy). The trial judge denied Hardy's motion to quash the charge based on delivery of drugs to a minor. The Michigan Court of Appeals, however, reversed that decision and quashed the drug delivery charge. See *Michigan v. Hardy*, 469 N.W.2d 50 (Mich. Ct. App. 1991).

104. See BETSY HARTMANN, *REPRODUCTIVE RIGHTS AND WRONGS: THE GLOBAL POLITICS OF POPULATION CONTROL* 119 (South End Press 1995) (1987); JANICE G. RAYMOND, *WOMEN AS WOMBS: REPRODUCTIVE TECHNOLOGIES AND THE BATTLE OVER WOMEN'S FREEDOM* 15-19 (1993).

gains achieved by white, professional women. Theories of reproductive freedom must start with the lives of the women at the bottom, not at the top.

### B. *Focusing on Race*

After winning a number of state court victories, Lynn Paltrow decided to take the offensive. In October 1993, the Center filed in federal district court a class action lawsuit against the City of Charleston and MUSC on behalf of two Black women who had been jailed under the Interagency Policy.<sup>105</sup> The plaintiffs demanded three million dollars for violations of a number of constitutional guarantees, including the right to privacy in medical information, the right to refuse medical treatment, the right to procreate, and the right to equal protection of the laws.

The plaintiffs' papers identify no less than five discrete aspects of the policy that have a racially discriminatory impact:

(1) the choice to apply the Policy only at MUSC where the patient population is disproportionately African American by comparison with the community at large; (2) the choice to apply the policy within MUSC, only to patients of the obstetrics clinic where the patient population is even more disproportionately African American, even by comparison with MUSC as a whole; (3) the choice not to test babies or their mothers treated at MUSC but born at other hospitals in Charleston, where a greater proportion of the patient population was white; (4) the choice to use non-medically indicated criteria for testing, including failure to obtain prenatal care, which arose disproportionately in the African-American community; and (5) the choice to arrest only for the use of cocaine, a drug that defendants concede is used disproportionately by African American women.<sup>106</sup>

The response to the lawsuit demonstrates the strength of derogatory images about Black mothers. Despite the overwhelming evidence that the policy was intended to punish Black women alone, South Carolina officials dismissed the race discrimination claim. Condon tried to explain away the program's blatant racial targeting as the innocent result of demographics. He conceded that "[i]t is true that most of the women treated were black. The hospital serves a primarily indigent population, and most of the patient population is black."<sup>107</sup> Condon did not believe he had to explain why he had singled out MUSC as the lone site for the punitive program.

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105. See *Ferguson v. City of Charleston*, No. 2:93-2624-2 (D.S.C. filed Oct. 5, 1993).

106. Plaintiffs' Reply Memorandum in Support of Their Cross-Motion for Partial Summary Judgment at 17-18, *Ferguson v. City of Charleston*, No. 2:93-2624-2 (D.S.C. Nov. 10, 1995) (citations omitted).

107. Condon, *supra* note 20, at 14.

Surely hospitals with a white clientele also had pregnant patients who abused drugs. But the image of the pregnant crack addict justified in many people's minds this disparate treatment. Federal Judge C. Weston Houck refused to halt the program pending trial, explaining that "the public is concerned about children who, through no fault of their own . . . are born addicted."<sup>108</sup>

An editorial in Denver's *Rocky Mountain News* applauded Houck's decision and made light of the allegations of racial discrimination. "[T]he hospital serves mostly black clients, so naturally most participants were black. And the center talked as though black junkies were being harmed rather than weaned from a hellish habit. A federal judge dismissed the suit for the hogwash it was."<sup>109</sup> The CBS Evening News presented a similar view on a 1994 Eye on America segment on the South Carolina policy.<sup>110</sup> Co-anchor Connie Chung set the stage by framing the policy as an answer to the "national tragedy" of cocaine use during pregnancy: "Every day in America thousands of pregnant women take cocaine, endangering the health of their children. Now one state is trying to stop women from doing that by threatening to throw them in jail."<sup>111</sup> Correspondent Jacqueline Adams reported that "nurse Shirley Brown says race has nothing to do with it. She believes cocaine is so powerful, mothers need the threat of jail before they'll change their ways."<sup>112</sup>

Paltrow was also afraid that the discriminatory intent requirement would make it hard to establish an equal protection claim.<sup>113</sup> She nevertheless believed that alleging racial bias would bolster the other claims: "[E]ven if the race discrimination claim is not successful, bringing the racially discriminatory pattern to the court's attention in the main or an *amicus* brief may sensitize the court and create additional pressure to dismiss the charges on the other grounds presented."<sup>114</sup> I believe that there are additional reasons to focus on the defendants' race rather than avoid it.

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108. *Controversial Drug Treatment Program Won't Be Suspended*, HERALD ROCK HILL (South Carolina), Feb. 17, 1994, at 11B, available in 1994 WL 7030385.

109. *Ignoring Wails of Babies*, ROCKY MOUNTAIN NEWS (Denver), July 1, 1995, at 58A, available in 1995 WL 3200263.

110. See *Profile: Eye on America; Controversial Program in South Carolina Cracks Down on Pregnant Women Doing Cocaine* (CBS Evening News television broadcast, Mar. 10, 1994), available in WL 3302176.

111. *Id.*

112. *Id.* at \*2.

113. See Paltrow, *supra* note 4, at 21.

114. *Id.*

## 1. *Telling the Whole Story*

The diversionary strategy might be worth the neglect of Black women's particular injuries if it presented the only feasible route to victory. Yet this tactic has other disadvantages that weaken its power to challenge policies that devalue Black childbearing. By diverting attention from race, this strategy fails to connect numerous policies that degrade Black women's procreation. In addition to the prosecutions, for example, lawmakers across the country have been considering schemes to distribute Norplant to poor women, as well as measures that penalize welfare mothers for having additional children.<sup>115</sup> Viewed separately, these developments appear to be isolated policies that can be justified by some neutral government objective. When all are connected by the race of the women most affected, a clear and horrible pattern emerges.

Lynn Paltrow recently stated, "for the first time in American history . . . what a pregnant woman does to her own body becomes a matter for the juries and the court."<sup>116</sup> Paltrow is correct that the criminal regulation of pregnancy that occurs today is in some ways unprecedented.<sup>117</sup> Yet it continues the legacy of the degradation of Black motherhood. A pregnant slave woman's body was subject to legal fiat centuries ago because the fetus she was carrying already belonged to her master. Over the course of this century, government policies have regulated Black women's reproductive decisionmaking based on the theory that Black childbearing causes social problems.<sup>118</sup> Although the prosecution of women for prenatal crimes is relatively recent, it should be considered in conjunction with the sterilization of Black welfare mothers during the 1970s and the promotion of Norplant as a solution to Black poverty.

## 2. *Telling Details about Black Women's Lives*

I recently heard on a radio program portions of the audio-taped diary of a Mexican teenager who had migrated across the Rio

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115. See Dorothy E. Roberts, *The Only Good Poor Woman: Unconstitutional Conditions and Welfare*, 72 *DENV. U. L. REV.* 931, 933-34 (1995); Madeline Henley, Comment, *The Creation and Perpetuation of the Mother/Body Myth: Judicial and Legislative Enlistment of Norplant*, 41 *BUFF. L. REV.* 703, 747-58 (1993).

116. *Rivera Live* (CNBC television broadcast, July 16, 1996), available in 1996 WL 7051755, at \*3 (interviewing Lynn Paltrow).

117. See Janet Gallagher, *Collective Bad Faith: "Protecting" the Fetus, in REPRODUCTION, ETHICS, AND THE LAW* 343, 346-52 (Joan C. Callahan ed., 1995) (discussing developments during the 1980s that led to prosecutions for prenatal crimes).

118. See Roberts, *supra* note 2, at 1442-44; Dorothy E. Roberts, *Crime, Race, and Reproduction*, 67 *TUL. L. REV.* 1945, 1961-77 (1993).

Grande River into Texas.<sup>119</sup> One day as he was looking at the river he saw the body of a dead man who looked Mexican floating downstream. The youth, breathing heavily and noticeably shaken by the scene, commented into his tape recorder that he was thinking about the man's family back in Mexico. This dead man, he thought, was probably the father of a poor family that was counting on him for their sustenance. It appeared that he had tried to forge the river in search of work so that he could send money back to them. How would they learn about his awful fate? How would his family survive without him? As the teenager told the story, the man in the river was transformed from the popular image of a "wetback" trying to sneak illegally into the United States into a hero who valiantly had risked his life for the sake of his family. The program impressed upon me how telling a story from a different perspective changes the entire meaning of a set of events.

Although the image of the monstrous crack-addicted mother is difficult to eradicate, it will be hard to abolish the policies that regulate Black women's fertility without exposing the image's fallacies. Describing the details of these women's lives may help. Crystal Ferguson, for example, was arrested for failing to comply with Nurse Brown's order to enter a two-week residential drug-rehabilitation program. Her arrest might appear to be justified without knowing the circumstances that led to her refusal. Ferguson requested an outpatient referral because she had no one to care for her two sons at home and the two-week program provided no childcare. Ferguson explained in an interview that she made every effort to enroll in the program, but was thwarted by circumstances beyond her control:

I saw the situation my kids were in. There was no one to take care of them. Someone had stolen our food stamps and my unemployment check while I was at the hospital. There was no way I was going to leave my children for two weeks, knowing the environment they were in.<sup>120</sup>

### 3. *Highlighting the Abuse of Black Women's Bodies*

The Center also attacked the South Carolina policy by filing a complaint with the National Institutes of Health alleging that the Interagency Policy constituted research on human subjects, which MUSC had been conducting without federally mandated review

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119. See *All Things Considered: Teenage Diaries — Juan's Story* (Natl. Pub. Radio, Aug. 5, 1996), available in 1996 WL 12726136.

120. Siegel, *supra* note 19 (quoting Crystal Ferguson).

and approval.<sup>121</sup> It argued that the hospital had embarked on an experiment designed to test the hypothesis that threats of incarceration would stop pregnant women from taking drugs and improve fetal health. Yet MUSC had never taken the required precautions to ensure that patients were adequately protected; indeed, it had surreptitiously collected confidential information about them and given it to the police. The strategy proved effective: the NIH agreed that MUSC had violated the requirements for human experimentation. In October 1994, five years after the policy's inception, MUSC dropped the program as part of a settlement agreement with the Department of Health and Human Services, which had commenced its own investigation of possible civil rights violations. Under threat of losing millions of dollars in federal funding, the hospital halted its joint venture with the solicitor's office and the police.

One advantage of the complaint was that it made the Black mothers claimants rather than defendants. Instead of defending against charges of criminality, they affirmatively demanded an end to the hospital's abusive practices. Instead of fending off a host of negative images, claimants can accuse the government of complicity in a legacy of medical experimentation on the bodies of Black women without their consent.<sup>122</sup>

In past centuries, doctors experimented on slave women before practicing new surgical procedures on white women. Marion Sims, for example, developed gynecological surgery in the nineteenth century by performing countless operations, without anesthesia, on female slaves purchased expressly for his experiments.<sup>123</sup> In the 1970s, doctors coerced hundreds of thousands of Black women into agreeing to sterilization by conditioning medical services on consent to the operation.<sup>124</sup> More recently, a survey published in 1984 found that 13,000 Black women in Maryland were screened for sickle-cell anemia without their consent or the benefit of adequate counseling.<sup>125</sup> Doctors have also been more willing to override

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121. See Philip J. Hilts, *Hospital Put on Probation Over Tests on Poor Women*, N.Y. TIMES, Oct. 5, 1994, at B9.

122. I elaborate this point in Dorothy E. Roberts, *Reconstructing the Patient: Starting with Women of Color*, in FEMINISM AND BIOETHICS: BEYOND REPRODUCTION 116 (Susan M. Wolf ed., 1996).

123. See G.J. BARKER-BENFIELD, THE HORRORS OF THE HALF-KNOWN LIFE: MALE ATTITUDES TOWARD WOMEN AND SEXUALITY IN NINETEENTH-CENTURY AMERICA 101 (1976).

124. See Roberts, *supra* note 2, at 1442-43.

125. See Mark R. Farfel & Neil A. Holtzman, *Education, Consent, and Counseling in Sickle Cell Screening Programs: Report of a Survey*, 74 AM. J. PUB. HEALTH 373, 373 (1984).

Black patients' autonomy by performing forced medical treatment to benefit the fetus.<sup>126</sup> A national survey published in 1987 in the *New England Journal of Medicine* discovered twenty-one cases in which court orders for cesarean sections were sought, and petitions were granted in eighteen of these cases.<sup>127</sup> Eighty-one percent of the women involved were women of color; all were treated in a teaching-hospital clinic or were receiving public assistance.

Given the durability of disparaging images of Black mothers, particularly those who smoke crack, it is understandable that lawyers would search for ways to avoid these images altogether. One strategy, then, is to try to make judges forget that the prosecutions of prenatal crimes are targeted primarily at crack-addicted mothers. But I believe that leaving these images unchallenged will only help to perpetuate Black mothers' degradation. A better approach is to uproot and contest the mythology that propels policies that penalize Black women's childbearing. The medical risks of punitive policies and their potential threat to all women only enhance an argument that these policies perpetuate Black women's subordination.

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126. See Nancy Ehrenreich, *The Colonization of the Womb*, 43 DUKE L.J. 492, 500-01, 520-22 (1993); Lisa C. Ikemoto, *Furthering the Inquiry: Race, Class, and Culture in the Forced Medical Treatment of Pregnant Women*, 59 TENN. L. REV. 487, 510 (1992).

127. See Veronika E.B. Kolder et al., *Court-Ordered Obstetrical Interventions*, 316 NEW ENG. J. MED. 1192 (1987).