

Who Is the Guilty Party? Rights, Motherhood, and the Problem of Prenatal Drug Exposure

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Laura Gomez, *Misconceiving Mothers: Legislators, Prosecutors, and the Politics of Prenatal Drug Exposure*. Philadelphia: Temple University Press, 1997. Pp. x+256. \$59.95 cloth; \$19.95 paper.

Dorothy Roberts, *Killing the Black Body: Race, Reproduction, and the Meaning of Liberty*. New York: Pantheon Books, 1997. Pp. x+384. \$26.00 cloth; \$14.00 paper.

In 1987, California prosecutors used the state's child support statute to charge Pamela Rae Stewart with criminal neglect for using drugs while she was pregnant. With this prosecution Stewart became the first woman in the United States charged with the crime of exposing her fetus to drugs (Gomez 1997; Roberts 1997). In 1989, Florida prosecutors adapted state drug trafficking laws to convict Jennifer Johnson for delivering cocaine to a minor through the umbilical cord (Daniels 1993). And in 1992, South Carolina prosecutors used child abuse protection laws to convict Caroline Whitner with endangering the life of her unborn child by smoking crack cocaine during her pregnancy (Roberts 1997). While these three cases captured national headlines, in the past decade prosecutors have charged more than 200 women with crimes for prenatal drug exposure (Chavkin et al. 1998). Their justification: making prenatal drug exposure a crime would ultimately protect the health and well-being of infants. But should prenatal drug exposure be treated as a criminal offense? Does prosecution really protect the health and welfare of newborns? Should prosecutorial efforts to criminalize prenatal drug exposure be supported by legislative changes? Should the

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American public support the efforts of legislators and prosecutors to do just that?¹

Feminist lawyers, scholars, and activists have answered these questions with resounding no's. Expressing great concern about the popular support for punishment and the legislative and prosecutorial trend toward criminalizing prenatal drug exposure, they argue that criminalization is both an unconstitutional and ineffective response to a very pressing social problem. Criminalization of prenatal drug exposure, opponents suggest, violates women's rights to liberty, privacy, and equality, and fails to meet the standards set by the criminal justice system. These violations are based, in part, on the fact that punitive approaches fail to reduce both the incidence and the harmful effects of drug use during pregnancy (see, e.g., Johnsen 1986; 1992; Gallagher 1987; *Harvard Law Rev.* 1990; McGinnis 1990). Criminalization and prosecution may, in fact, do more harm than good by frightening women away from prenatal care and placing them in jail during their pregnancies. What is needed instead, opponents argue, are alternative interventions such as drug treatment programs and increased access to prenatal care. These interventions, they suggest, are not only more effective at reducing the incidence and effects of prenatal drug exposure but also more respectful of women's rights and cognizant of the healthcare needs of women and children.

Despite these powerful arguments, punitive legislation and prosecutions continue. Feminists have concluded, therefore, that such policies are actually attempts to regulate the lives of pregnant women and subordinate women's rights and needs to those of the fetus. Undergirded by idealized notions of motherhood, what Marlee Kline (1995) calls the "ideology of motherhood,"² punitive responses to prenatal drug exposure are said to feed on the desire to place the blame for social problems on particular individuals. Prosecutors and legislators use the ideology of motherhood, which presumes that "good" mothers always act in self-sacrificing and caring ways toward their children, in order to distinguish "good mothers" from "bad mothers" and "innocent victims" from "guilty parties." Through this process, prosecutors not only identify particular women as criminals, but ultimately reinforce "gender hierarchy" and hinder attempts to implement alternative policies and practices (see *Harvard Law Rev.* 1990; Dan-

¹ According to Gomez (1997:26), a 1989 poll revealed that 82% of Americans supported jailing pregnant drug users. Paltrow (1991:1003, n15) cites a 1991 poll reporting that a majority supports the criminal punishment of women whose prenatal drug use can be proven to harm their newborns.

² According to Marlee Kline (1995:119), the "dominant ideology of motherhood" can be understood as "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."

iels 1993). Truly successful opposition to criminalization will require, opponents argue, both the refutation of legal and public health justifications and the contestation of ideals and images that underlie them.

A little more than a decade since the first prosecution of prenatal drug exposure, it seems a good time to reassess the arguments and strategies that feminists have used to oppose punitive approaches to the problem of prenatal drug exposure. Have feminists' legal, public health, and cultural arguments and strategies of opposition been successful? Have they affected the way that the American public, legislators, prosecutors, and judges understand and respond to the issue? Do defeated policy proposals and failed prosecutions signal successful contestation? Might there be other more persuasive or more appropriate arguments with which to challenge criminalization? These are just some of the questions that Laura Gomez and Dorothy Roberts take up in their recent books on the subject. Pushing the examination and understanding of criminalization beyond the confines of the courtroom and the Constitution, both authors address the question of what makes for an appropriate and successful feminist response to the problem of prenatal drug exposure. Reaching differing conclusions on the appropriate basis for and success of feminist opposition, Gomez and Roberts offer insight into the justification and limits of both the support for and the opposition to the criminalization of prenatal drug exposure.

In *Misconceiving Mothers: Legislators, Prosecutors, and the Politics of Prenatal Drug Exposure*, Laura Gomez (1997) analyzes California's legislative and prosecutorial response to the issue between 1983 and 1996. Through a series of interviews and empirical research methods, Gomez exposes the misconceptions that underlie justifications for criminalization through the "life cycle" of this particular social problem. Although not surprised that the politics of prenatal drug exposure are fraught with misinformation and exaggeration, she is surprised to find that despite the media's portrayal of prenatal drug exposure as a grave social problem, the depiction of pregnant women as threats to their children, and numerous proposals for criminalizing prenatal drug exposure, most policies and prosecutions in California have actually failed. Gomez credits a coalition of feminists and public health experts for helping policy makers and prosecutors see their mistakes. She suggests that by linking criminalization to the larger issue of women's reproductive rights and portraying support for punitive measures as "antifeminist," this coalition successfully contested and displaced the images of both the innocent, helpless "crack baby" and the guilty, dangerous mother that

fueled punitive legislative and prosecutorial responses (Gomez 1997:123).³

Dorothy Roberts, in her 1997 work, *Killing the Black Body: Race, Reproduction and the Meaning of Liberty*, offers a different perspective on the politics of prenatal drug exposure. Arguing that criminalization, and the ideology and misconceptions that fuel it, continue to pose a considerable threat to women's reproductive freedom, Robert's study challenges some of Gomez's conclusions. According to Roberts, when criminalization is examined at the national level and placed in the context of a long history of regulations directed at pregnant women, and when race is taken as a prominent category of analysis, we see that traditional feminist arguments about women's right's to liberty and privacy have been only partially successful at best.⁴ Such arguments, Roberts suggests, have been unable to prevent "renegade" prosecutors from "impos[ing] their personal notions of criminal justice in a discriminatory fashion" (167). Such arguments were unsuccessful in preventing South Carolina from deciding, in Caroline Whitney's case, that a viable fetus could be considered a child for the purpose of determining child abuse in cases of prenatal drug exposure. These moments of failure and the already existing racial disparity in criminal cases, Roberts contends, put poor Black pregnant women at particular risk of being labeled as bad, dangerous mothers. Traditional feminist-rights arguments can do little to prevent this tendency. For Roberts, only an alternative conception of women's reproductive liberty that demands race as well as gender equality and justice, can truly displace the stereotypes, ideologies, and mistaken beliefs that fuel punitive responses to the problem of prenatal drug exposure. Feminists must work therefore with a revised notion of reproductive liberty, one that acknowledges the racial politics of regulation and makes racial and social equality central to an understanding of reproductive liberty. Only an affirmative and race conscious notion of reproductive freedom can prevent the implementation of puni-

³ Interestingly, Gomez does not introduce her book as contributing to the feminist research on criminalization of prenatal drug exposure. Nor does she make her position on the issue explicit. However, she presents information that clearly challenges the legal and public health bases of punitive policies and concludes that feminist opposition was crucial to the failure of policy and prosecution. Her work can be read, therefore, as contributing to feminist attempts to understand and respond to both the problem of prenatal drug exposure and the trend toward criminalization.

⁴ Roberts is not primarily focused on the criminalization of prenatal drug exposure. She discusses criminalization as one of several regulatory social policies, which include birth control and welfare reforms as well as new reproductive technologies, as she argues that black women's mothering has been regulated and denied for several hundreds of years. Roberts argues that poor black women have long been denied their right to bear children, a right that is overlooked by traditional approaches to reproductive freedom. The traditional emphasis on women's privacy rights, a negative liberty, fails, she suggests, to truly appreciate and address the racial politics that motivate social policies that regulate pregnant black women.

tive laws and enable racial equality and justice (Roberts 1997:311).

By taking readers into the offices and minds of legislators and prosecutors, as Gomez does, and by probing the racialized history and implications of criminalization, as Roberts does, both authors illuminate aspects of an issue that has confounded feminists for more than a decade. By examining what enables and what prevents a punitive response, and by assessing the strengths and weakness of feminist arguments opposing criminalization, Gomez and Roberts help broaden and deepen our understanding of the issue. In so doing, they take feminist scholarship on this policy dilemma to the next level and challenge feminists and other opponents of criminalization to reassess and perhaps alter their strategies of contestation. These books, however, offer more than advice on how to challenge punitive response to prenatal drug exposure. Their research and analyses make visible the power, pervasiveness, and danger of maternal ideology. Ideas about who is and what makes a good mother, their research suggests, enable punitive policy responses, and often obscure larger social issues, such as racism and economic inequality. It is their own reliance on aspects of maternal ideology that also, in the end, marks the limits of both authors' work.

Constructing the “Bad Mother”

Like much of the feminist literature challenging the criminalization of prenatal drug exposure, both Gomez and Roberts begin their analyses with a discussion of the media's role in the “discovery” or “creation” of the problem of prenatal drug exposure. As both authors explain, media coverage of prenatal drug exposure unfortunately reduced the problem of drug use during pregnancy to the problem of crack cocaine use during pregnancy. The media, in its “claims-making role” did more than simply bring the general “crack crisis” and, more specifically, the “crack baby” problem to the attention of the American public” (Gomez 1997:13). By deciding to focus extensively on crack usage and prenatal drug exposure, and through their choices about what and who is newsworthy, the media “ultimately present[ed] an interpretation of the nature and origins” of the problem (Gomez 1997: 14). The media's extensive coverage and dramatic stories left the American public, legislators, and prosecutors with certain images and ideas about who was responsible for prenatal drug exposure. These images, Gomez and Roberts argue, ultimately represented pregnant drug users as bad mothers, as nonmothers, and thereby perpetuated race and class stereotypes about good mothers.⁵

⁵ One of the first articles on the “crack crisis” appeared in the *New York Times* in 1986. Within the year following this first article, “six of the nation's largest and most

According to both authors, media's portrayal of the drug crisis as a crack cocaine crisis was laden with racial stereotypes. While reporters "glamorized" powder cocaine users, portraying them as wealthy, powerful, and in control of their drug use, crack cocaine users were dehumanized. Often depicted as poor Black individuals, crack users were also said to be completely under the spell of their addiction.⁶ This instantly addicting drug, according to media reports, fundamentally changed the character of its users. Increasing an individual's sex drive and engendering violent behavior, crack cocaine left its users in a world not of glamour, but of despair, a world in which they were "bereft of redeeming human qualities" (Gomez 1997:15; see also Roberts 1997:155).

But if crack left its "typical" users socially damaged and violent, it had an even more troubling effect on female users.⁷ According to the media coverage, which focused extensively on the prevalence and harmful effects of crack cocaine on women and children, crack use by women "increase[d] the female libido" and led young women to sell themselves to support their drug habit (Gomez 1997:15). Consumed and controlled by addiction, these women, the media reported, often turned to prostitution in order to feed their habits. So overwhelming was the addiction that it trumped all other concerns. Indeed, in pregnant women, crack addiction was said to damage women's "maternal instincts," destroying their concern for their fetuses. Numerous media accounts reported that the "natural impulse to mother" was being destroyed by "the chemical properties of crack." These stories, both authors suggest, left the American public with an image of pregnant drug users as bad mothers, as a mother who is the "exact opposite of a mother: she was promiscuous, uncaring, and self-indulgent" (Roberts 1997:156).

These bad mothers, these women without maternal qualities, were made the sole parties responsible for "innocent crack babies," those babies who laid "trembling and shrieking in an overcrowded hospital," emotionally and developmentally impaired. "Crack babies," the "innocent victims" of their mothers' unnatural and dangerous behaviors, thus became the symbol of the legislative and prosecutorial fight to punish pregnant drug users, a symbol "indelibly etched in the American psyche" (Roberts 1997:159). But how could these images and ideas be challenged? Would it help to expose the exaggeration and misinformation

prestigious news magazines and newspapers had run more than one thousand stories about crack cocaine" (Gomez 1997:14).

⁶ Gomez (15) reports that "[n]early half of all images that accompanied television news stories about the drug scourge featured Black people."

⁷ According to both Gomez and Roberts, the media "singled out female crack users—especially those who were Black and Latina—as presenting special concerns" (Gomez, 1997: see Roberts 1997:156).

contained in these reports? Would it be effective to reveal that “scientific studies” reported flawed and incorrect findings regarding the prevalence and effects of prenatal drug exposure. What would it mean to make visible the extent to which media stories “obscure the complexities of addicted women’s lives?” (Gomez 1997:17; see also Roberts 1997:157-58).⁸

Refiguring the Bad Mother

As part of their effort to oppose the criminalization of prenatal drug exposure, both Gomez and Roberts engage in what Marie Ashe (1992; 1993) calls “refiguring the bad mother” or “subjectifying the bad mother.” This process involves challenging stereotypical depictions that present unified and idealized notions of good mothers and bad mothers. It requires giving voice to women usually identified as bad mothers, and making audible and intelligible the complicated life experiences of these women. This refiguration involves defending women against criminal charges of criminal behavior by presenting them as “overcharged” and as subjects deserving of assistance, rather than as objects deserving of punishment.⁹ For Gomez and Roberts, refiguration and subjectification entails investigating the context in which addiction occurs and explaining scientific evidence regarding the prevalence and impact of prenatal drug exposure. These strategies allow them to represent drug-using pregnant women as victims of circumstances and good mothers in the making.

Both Gomez and Roberts center their refiguration around an examination of the scientific and medical evidence used to support criminalization. Both reveal flaws in the initial medical research regarding the prevalence and effects of prenatal drug exposure, and expose gaps between the media’s portrayal and the

⁸ Neither Gomez nor Roberts suggest that the media completely fabricated these stories. Indeed, both recognize that the media often built their stories around medical and scientific research. As Gomez suggests, the medical community played an important role in the “creation” or “discovery” of the crisis as well. Early research suggested that there were “high prevalence rates and severe outcomes” associated with crack cocaine use (Gomez 1997:25). Another study suggested that 11% of infants were exposed to alcohol or drugs prenatally resulting in the birth of 375,000 substance exposed babies per year. The media, however, “conflated the number of babies born exposed to alcohol or illicit drugs with the number of babies born addicted to crack” (Gomez 1997:22). The media also took highly controversial and speculative scientific studies and reported causal links between exposure and addiction, and exposure and impairment.

⁹ According to Ashe (1993), the subjectification of bad mothers can occur in both a defense lawyer’s narrative and a work of literature. This process involves constructing a narrative that explains or excuses the “bad” behaviors in which mothers may engage. Unlike the law, which often obscures the context of these women’s lives, erasing the realities of race and class inequalities that influence and constrain their behaviors and decisions in literature, lawyers and writers who subjectify bad mothers resist the tendency to essentialize the identity and behaviors of women accused of bad mothering (Ashe 1993: 2547–9). See Ashe (1992) for a discussion of subjectification in literature.

reality of pregnant addicts' lives. Their findings illustrate the extent to which media reports were really "horror stories [that] often diverge[d] from documented patterns of behavior" of pregnant women (Gomez 1997:17). Gomez and Roberts explain that not only is crack addiction less prevalent and more racially diverse than the media's portrait reveals. Furthermore, media reports fail to acknowledge the many other causes of fetal harm, which include alcohol, tobacco, poverty, poor health, domestic violence, and poor nutrition. Crack cocaine usage may not be the only substance, nor even the primary substance that harms a fetus. As Roberts suggests in *Killing the Black Body*, drug addiction often occurs in such a complex context that it is exceedingly difficult to determine what precisely impairs a fetus: "Researchers cannot tell us which of this array of hazards actually caused the terrible outcomes they originally attributed to crack" (1997:158). Furthermore, research has yet to determine conclusively that drug exposure will always harm a fetus. And as Gomez explains, the impact of drug exposure must be studied in further detail because

[c]ontrary to information in the popular media, not all substance-exposed children suffer the same poor prognosis. In fact, generalizations about the fate of drug-exposed children must await additional research into the outcome of the broader population of drug-exposed children, examining the roles of maternal and environmental factors. (1997:25)

In addition to misreporting the effects of prenatal drug exposure on fetal development, the media, according to both authors, erroneously depicts the impact of crack on women, particularly as it affects their "maternal instincts." According to Gomez and Roberts, pregnant drug users are not selfish and irresponsible, as the media would have us believe. Rather, studies show that pregnancy influences the behavior of drug-using women in positive ways. For example, studies report that addicts not only desire to end their addiction but seek out ways to prevent or at least reduce the harmful effects of prenatal drug use (Gomez 1997:17). They enter drug treatment programs and obtain prenatal care because they "want to kick their habits and provide the best they can for their babies" and because they "dread" the possibility that criminal charges will lead to their "losing their children" (Roberts 1997:193).

Unfortunately, as both authors suggest, it is not enough to deconstruct and refute the portrayals of prenatal drug exposure that prevail in media depictions and scientific research. Despite evidence that news reporting was sensationalizing, exaggerating, and inaccurately depicting the prevalence and effects of drug use, and "despite the imprecision of prevalence studies," these stories and studies continued. Ultimately, the repetition and pervasiveness of media horror stories influenced public opinion,

playing “a crucial role in convincing the public and policy makers that something needed to be done about ‘crack babies’” (Gomez 1997:22). So deeply entrenched were beliefs about the impact of drug use on women and babies, that it would take much more than challenging media and medical depictions of pregnant drug users in order to quell the impulse to criminalize. It would take more than a challenge to the media to persuade legislators and prosecutors to seek alternative responses to the problem of prenatal drug exposure.

For Gomez and Roberts, an understanding of legislative and prosecutorial motivation is crucial to successful opposition to criminalization. Yet the authors find motivations in different locations. While Gomez seeks an understanding of motivation through attention to the failure of criminalization, Roberts focuses on the question of its continuing popularity and its disproportionate impact on the lives of poor Black women. For Gomez, an understanding of how a policy position can be transformed, contested, or troubled requires an appreciation of the impact of media and scientific misinformation on the minds of prosecutors and legislators. For Roberts, however, it also requires an understanding of the racial politics and historical roots that make support for criminalization possible in the first place. But despite the difference in their focus, both authors make clear that maternal ideology plays a prominent and troubling role in the politics of legislative and prosecutorial responses.

Behind the Office Doors: Gomez and the Study of Policy Makers and Prosecutors

In her study of the movement of prenatal drug exposure from media coverage to the legislative and prosecutorial responses, Gomez identifies a paradoxical pattern. Initially California legislators and prosecutors were highly influenced by “sensationalist news media coverage” and alarming scientific statistics. This led legislators to introduce 57 bills responding to prenatal drug exposure (many of which were punitive). Prosecutors, in the meantime, responded with expressions of concern and a desire to use the criminal justice system to address the problem. This initial interest and support for criminalization did not lead, however, to the establishment of punitive laws or to the expansion of the criminal justice system. Instead, Gomez finds a trail of rejected punitive proposals and discarded criminal prosecutions. What, she asks, accounts for this shift in legislative and prosecutorial support for criminalization? What accounts for the handful of prosecutions that do occur? In answering these questions, Gomez offers insight into what might work or fail in other cases, ultimately suggesting that a pervasive maternal ideology

must be recognized and challenged if criminalization is to be opposed successfully.

Not surprisingly, Gomez finds that legislators who support criminalization have been profoundly influenced by the media. Legislative proposals “paralleled coverage of the topic by California’s two largest newspapers” during the late 1980s and early 1990s (Gomez 1997:29). Media coverage not only left legislators feeling pressured to respond, but also provided the background information and justification for a number of key policy proposals. Like the media, legislators took a sensationalist tone, describing prenatal drug exposure as a form of child abuse while ignoring the fact that there was little clear and uncontested evidence that exposure led directly to harm. Gomez states that legislators “uncritically adopted inconclusive reports about [the] prevalence and severity” of prenatal drug exposure as part of what she calls “symbolic politics” (28). Legislators, she suggests, knew from the beginning that many of their policies were based on suspect evidence and were likely to be defeated. Their policy proposals were, Gomez concludes, more about posturing and sending messages about values than truly addressing a pressing social problem.

But legislative defeat cannot be completely attributed to symbolic politics. In fact, Gomez argues, credit for the rejection of criminalization must be given to the coalition of feminists, physicians, and social service and drug treatment professionals that went to great lengths to reeducate policy makers and prosecutors. The coalition, galvanized by the 1987 prosecution of Pamela Rae Stewart, not only educated themselves about the prevalence and effects of prenatal drug exposure, but disseminated this information widely to “treatment providers, lobbyists, and legislators” (46). This “consciousness-raising” involved linking criminalization directly to the reproductive rights concerns of all women, presenting it as a “slippery slope” from support for criminalization to the dismantling of women’s right to choose. And it involved gathering the support of public health practitioners who condemned prosecution as ineffective public health policy. With the assistance of professional lobbyists and the backing of powerful physicians’ organizations, feminists were able not only “to prevent criminalization of pregnant women’s drug use [but also] to increase health care, drug treatment, and other services for pregnant substance abusers and their children” (50).¹⁰

Gomez finds that prosecutors, like legislators, were influenced by the media and challenged to rethink the issue by the

¹⁰ Gomez (1997) illustrates this point by telling us that by the end of 1990 the legislature had rejected a manslaughter bill and adopted, in its place, an anticriminalization policy. This policy provided \$3 million for treatment services (56–57). Unfortunately, by 1996 two new punitive bills had been introduced and had yet to be soundly defeated at the time of Gomez’s writing (1997:60–1).

opposition coalition. Prosecutorial rhetoric reveals that the media engendered a feeling of responsibility among prosecutors who saw the criminal justice system as an appropriate tool with which to fashion a response to the problem of prenatal drug exposure. Feeling a “responsibility to the fetus” (70) and recognizing themselves as being in the position to do something, prosecutors saw their role as enabling, indeed demanding, behavior change. “We are the ones that have the threat, the power to make people act,” one prosecutor told Gomez (1997:80). Like legislators who repeated exaggerated stories about the incidence of prenatal drug exposure, prosecutorial responses were often grounded in misinformation regarding the effects of exposure. Indeed, several prosecutors shared a mistaken belief that prenatal exposure to crack would indelibly alter the character of children. One prosecutor explained his desire to punish prenatal drug exposure saying that “the initial kinds of research data [suggested that] . . . we were going to have to spend hundreds of thousands of dollars to work with these crack babies” (71). These babies, he argued, would not only burden the medical community and the public, generating tremendous medical bills, but as children and young people they would be a drain on the criminal justice system. Scientific evidence suggested, prosecutors argued, that crack babies would grow up to be “kids without any sense of social norms” who would eventually become “a new class of criminal” (72).

Yet, like the legislators, prosecutorial attitudes shifted when confronted with feminist and public health arguments. As one prosecutor told Gomez, “Various coalitions and women’s groups saw the mere suggestion of criminal prosecution of a pregnant woman as an attack not on criminals, but on women! And, obviously, that’s very effective politically. That kind of calls a halt to any progress” (44). Prosecutors’ support for women’s rights, their respect for the law on the books, and their sense of responsibility to address the issue left many profoundly ambivalent (Gomez 1997:84–85). Prosecutors, explains Gomez, were “deeply torn by the issue of whether and how the criminal system should deal with prenatal drug exposure,” thus leading to and explaining the wide range of prosecutorial responses to prenatal drug exposure (85). While some prosecutors took very punitive measures, charging women with crimes and offering no alternative to jail,¹¹ others implemented strategies that offered women the option of drug treatment rather than jail time, and others took no prosecutorial action at all (78–81). Those prosecutors who fa-

¹¹ According to Gomez, those counties in which prosecutions did occur shared certain characteristics. She identifies these counties as “edge counties” because of their relationship, both physical and psychological, to Los Angeles. She suggests these counties were experiencing an identity crisis because of economic and demographic changes. Prosecutors saw their role as “establishing and maintaining social norms” (95–98).

vored treatment often identified public health and social services workers as having had an impact on their thinking.

Gomez contends that there were two powerful arguments that checked legislative and prosecutorial attempts to criminalize prenatal drug exposure—reproductive rights arguments and public health arguments. Both of these explicitly countered the association of pregnant drug users with stereotypical representations of and assumptions about bad mothers. That is, both arguments attempted to represent the voices and experiences of pregnant drug users to undermine the charges of criminal intent and selfish behavior. These arguments, Gomez argues, not only put drug treatment forth as a more efficacious alternative to the problem, but also, and perhaps more importantly, contested and even displaced the bad mother/innocent victim dichotomy used to justify criminalization. Gomez's findings, however, suggest something more complicated than simply the successful contestation of crack baby and guilty bad mother images (1997:121). Her interview data suggest, although Gomez herself does not develop this point, that maternal ideology made its way into oppositional arguments as well as the justificatory ones. In fact, Gomez's findings reveal that women's needs and rights were less often defended and quite often obscured by arguments opposing criminalization.

Kathy Kneer, a lobbyist who worked closely with the coalition opposing criminalization, explained her role as "figur[ing] out how to leverage the system to come out with something that we like at the end" (Gomez 1997:46). Though Kneer's goal was clearly to oppose punitive policies and gain approval for policies designed to improve the availability of drug treatment and other social services for pregnant women, what is interesting is the justification for these ends. According to Kneer, in order to convince legislators to reject criminalization, she had to make it clear that criminalization was not in the best interest of the infants. Explaining that she implored legislators to act in a manner that would best protect infants, Kneer says nothing about convincing them to take women's rights seriously. And while the latter may have been central to her attack on criminalization, as Gomez suggests it was, her statements do not support this reading. Rather, these statements suggest that fetal health remained the primary concern of all parties involved.

This attention to infant needs and the absence of the language of women's rights or even women's needs is quite evident in Gomez's review of physicians' arguments as well. Physicians, one interviewee told Gomez, "dealt the fatal blow" to a 1989 bill that would have made it possible to convict women of manslaughter for giving birth to drug-addicted infants (53). Gomez's discussion of physicians' arguments reveals that doctors were far less concerned with women's rights, or even women's care, than

with infant care and physician autonomy. Though some legislators reported being influenced by an equality argument put forth by doctors (an argument that raised the question of whether legislators should choose to single out prenatal drug exposure as a crime, while ignoring the dangers associated with prenatal exposure to alcohol or tobacco), the tenor of physicians' arguments focused more on infant care. According to Gomez's findings, doctors opposed criminalization because (1) it would drive women away from prenatal care and drug treatment; (2) they did not want to act as police and thereby threaten the patient-doctor relationship of trust; and (3) they did not want their power in the area of reproduction challenged (49–50). The elision of women's needs becomes clear in one interviewee's comment: "What physicians have to say about the women they treat is powerful testimony; a physician testifying on what to do to save these fetuses has special credibility . . ." (Gomez 1997:59).

This is not to suggest that reproductive rights and women's health were unimportant justifications for opposing the bills.¹² The coalition opposing criminalization did influence legislators to recognize that criminalization "would do more harm than good by driving women away from prenatal care and voluntary drug rehabilitation" (Gomez 1997:56). And they were key players in the introduction of a policy that provided pregnant substance abusers "with coordinated health, education, and social services totaling \$75 million in state expenditures" (57).¹³ And while Gomez may be correct that the coalition was successful in persuading lawmakers "that supporting criminalization was akin to having an antifeminist agenda," my reading of her findings suggests that the more effective strategy focused on helping the fetus. Although this focus did engender policies that, in the end, respected women's rights and provided for women's health in better ways, it did little to challenge the reduction of pregnant women to the status of fetal environment. Though no longer a vector of danger, or of drug addiction, the pregnant woman was still reduced to the status of conduit or environment, the key to an infant's proper nutrition and healthy development.

Illuminating the opposition's reliance on fetal health concerns at the expense of women's rights and needs leads me to wonder if opponents' strategies of resistance really recognized the pregnant woman as a citizen and an individual in her own right. In opposing punitive policy and supporting more "woman-friendly" policies by privileging the needs of infants, have they truly displaced maternal ideology or have they simply reinforced, though slightly revised, a woman's duty to care? (Condit 1995).

¹² When Gomez writes that "the coalition launched a frontal assault," the reader is left to assume that part of this assault included reproductive rights arguments. Unfortunately, little evidence is provided to support this assumption (53).

¹³ Unfortunately, the expenditure was eventually cut to \$3 million.

Condit (1995:43–44) argues that policies that presume that the female body is dangerous to the fetus, such as criminalization, render the pregnant woman invisible. In order to contest regulatory policies that assume the pregnant women as “mere containers for little people,” she (43) suggests we need to look at pregnancy differently, we need to “see” women “as citizens and persons with equal rights.”

My point is that the feminists Gomez studied often reproduced the very dynamic that Condit and others find so troubling. Oppositional rhetoric often reduces pregnant women to maternal environment by contesting regulation on the grounds of fetal interests and health. Although such an argument may presume that maternal and fetal interests are in harmony, rather than in opposition, and contest the representation of women as threats to the fetus, this argument makes it difficult, if not impossible, to privilege maternal interests at all. So concerned to counter the representation of pregnant women as selfish and uncaring, feminists, like those whom Gomez celebrates, may risk reinforcing the very ideals of good mothering that they find troubling in the first place.

Looking Back to Move Ahead: Roberts on Race and Reproductive Freedom

Unlike Gomez, Roberts remains quite skeptical about the power of reproductive rights language to challenge criminalization. The Whitner decision and a history of racially motivated regulatory social policy leave Roberts concerned about basing opposition on traditional understandings of reproductive rights that obscure underlying racial politics. According to Roberts, the 1996 South Carolina Supreme Court decision to uphold Caroline Whitner’s conviction, a decision that found that a viable fetus could be considered a child protected under the state’s child abuse law, opens the door for “a new wave of prosecutions,” not only in South Carolina but also across the nation (Roberts 1997:170).¹⁴ This future possibility leads Roberts to caution against a premature declaration of victory.

But Roberts is not simply concerned that all pregnant women’s lives will be more severely regulated in the aftermath of the Whitner discussion. She is particularly concerned that poor Black women will be disproportionately targeted for prosecution. Placing criminalization in the context of previous reproduction regulations, Roberts argues that “South Carolina will not go after thousands of pregnant women on child neglect charges. . . . Instead, it will escalate its crusade against . . . poor Black women

¹⁴ Lynn Paltrow (1999) argues that this decision and the determination that a viable fetus is a child is the first step on a “slippery slope” toward the repudiation of abortion rights in this country.

who smoke crack" (171-72). The state, she believes, will target these particular women because it has long regulated their reproduction and punished them for having babies.¹⁵ To think or act as if all women will be targeted equally and to pose a legal challenge based on traditional notions of reproductive rights is to obscure the racial motivations and implications, which undergird criminalization efforts.¹⁶ An effective challenge will require, Roberts suggests, that race politics be made visible and understandable and that criminalization be fought using a revised notion of reproductive freedom.

In order to make her case for this revision and in order to make visible the racial dimensions of criminalization, Roberts not only exposes the racial implications of criminalization but its racist history as well. She explains that criminalization is just one of several social policies, like welfare reforms and early 20th-century birth control regulations, that have regulated the lives of pregnant women in general and poor Black women in particular.¹⁷ In Charleston alone "all but one of four dozen women arrested for prenatal crimes in Charleston were Black" (3). At the national level 70% of the 1990 criminal cases involving prenatal drug exposure also involved Black defendants (172). And despite a slightly higher rate of drug use rate among white women, Black women are ten times more likely to be reported to authorities.¹⁸ These statistics can be explained in part by the racial bias of medical professionals. Roberts quotes one nurse as saying that her solution to the problem of prenatal drug exposure would be to recommend that "most Black women . . . have their tubes tied . . ." (175).

But it is not just skin color or racial prejudice that put Black women at risk of regulation. It is also poverty. The poverty of Black women drug users brings them "in closer contact with gov-

¹⁵ According to Roberts (1997), criminalization of prenatal drug exposure is not about the protection of the fetus, nor even about punishing pregnant women for using drugs. Rather, criminal prosecution punishes a woman for having a baby: her crime "hinges on her decision to have a baby" and can be avoided if she has an abortion. "[I]ncarceration becomes the penalty for the defendant's decision to remain fertile" (152).

¹⁶ Gomez discusses the racial dimensions of the issue, but only very briefly noting where she finds the perpetuation of racial stereotypes or when she believes her own race influenced interviewees' responses. Roberts, on the other hand, delves into the racial dimensions more explicitly, pushing readers beyond identifying the racial stereotypes to thinking about where they come from and how they affect not just black women, but race relations and justice in our society as a whole.

¹⁷ Roberts is not only interested in revealing the racial bias that underlies toxicology test reporting and criminalization. Indeed, her project is to expose the racial dimensions of and similarities between a variety of regulatory policies including slavery regulations, birth control rhetorics, Norplant usage, welfare reform, and new reproductive technologies.

¹⁸ At a South Carolina hospital, one study found that drug use among pregnant patients is fairly evenly distributed among white and black women, but "nearly all of the women the hospital reported to the solicitor were Black" (Roberts 1997:172).

ernment agencies [where] their drug use is more likely to be detected" (172). Affluent drug-using women, on the other hand, are less likely to be reported because private physicians "tend to refrain from testing their patients for drug use, and certainly would not report them to the police" (173).

This contemporary race and class disparity should not surprise us. As Roberts explains, prosecution and criminalization are part of a larger and long term social tendency to devalue Black women's mothering. This tendency draws upon and reinforces dominant ideals of motherhood, which include ideas about who is and who is not fit to be a mother, about whose children are a social benefit and whose are not. These ideals are then used as the basis and justification for various regulatory social policies.

For Roberts, this trend can be seen by reviewing the social policies that have regulated the reproductive lives of Black women since the days of slavery. Since that time, to be Black and poor has meant being associated with being unfit and undeserving of procreative rights. Unregulated Black reproduction, has often been identified as a social danger, as the source of children's and social corruption: "Poor Black mothers are blamed for perpetuating social problems by transmitting defective genes, irreparable crack damage, and a deviant lifestyle to their children" (Roberts 1997:3–8). In response, policy makers have turned to such policies as birth control, welfare regulations, and criminalization as part of an effort to "monitor and restrain" the "corrupting tendency of Black motherhood" (8).¹⁹ These policies, Roberts explains, ultimately rest upon and reinforce "the twin assumptions that the problem of Black poverty can be cured by lowering Black birthrates and that Black women's bodies are an appropriate site for this social experiment" (149). Criminalization must be seen, Roberts contends, as part of this "continuing legacy of the degradation of Black motherhood" (154).²⁰

Roberts continues by arguing that when poor Black women are punished for having babies, these punishments do little to alleviate the problems associated with prenatal drug use and are, therefore, unacceptable denials of women's constitutional rights. These rights include, or should include, not only women's rights to privacy and liberty but also (and perhaps more importantly for

¹⁹ Roberts finds this to be a particular problem in the early birth control movement, particularly as it joins forces with eugenicists. For example, she criticizes Margaret Sanger's political language and tactics for birth control: "It appears that Sanger was motivated by a genuine concern to improve the health of the poor mothers she served rather than a desire to eliminate their stock. . . . Sanger nevertheless promoted . . . the most perverse tenets of eugenic thinking" (Roberts 1997:81).

²⁰ This sentiment is echoed, though underanalyzed, in Gomez's interviews with prosecutors, particularly in comments like "social problems are caused by reproduction of the socially disadvantaged and that . . . childbearing should therefore be deterred" (Gomez 1997:81).

Roberts) women's rights to dignity, personhood, and autonomy. The right to bear children, she suggests, is a right that is "vital to our human dignity" and is as worthy of protection as the right to choose not to be a mother (1997:55). Traditional reproductive rights, with their focus on the right to be left alone and the right to choose abortion, unfortunately, cannot adequately recognize, address, or demand the right of motherhood. While traditional liberal notions of reproductive freedom, which are individualistic and abstracting, may "protect all citizens' choices from the most direct and egregious abuses of government power, . . . [they do] nothing to dismantle social arrangements that make it impossible for some people to make a choice in the first place" (294).

As the right to bear children falls outside the traditional understanding of reproductive rights it ultimately engenders a disturbing paradox. According to Roberts, even though reproductive liberty has been granted the status of a "fundamental right," "Black women's reproductive choices seem to fall outside this sphere of protection that is supposed to apply to all citizens" (294). If feminists are to challenge regulatory social policies like criminalization through recourse to rights discourse they must, Roberts demands, revise their understanding of reproductive freedom so as to include Black women and address the racial politics underlying regulatory social policies.

The revaluation of poor Black women's mothering and the recognition of their right to bear children requires a new notion of reproductive freedom. Though Roberts recognizes that there may be a role for liberal conceptions of liberty (it "stresses the value of self-definition, and it protects against the totalitarian abuse of government power"), she seeks an understanding of liberty that address equality as well as freedom (304–5). Such a notion would recognize that "the right to bear children goes to the heart of what it means to be human. The value we place on individuals determines whether we see them as entitled to perpetuate themselves in their children" (305). And it would demand affirmative action on the part of the government. In this revised understanding of reproductive freedom, government would be required "to protect the individual's personhood from degradation and to facilitate the processes of choice and self-determination," (309) and it would call on the government to assist individuals to attain "a meaningfully flourishing, independent, enriched individual life" (310). Roberts' revised notion of reproductive rights would provide the legal tools to contest criminalization, rendering prosecution a clear violation of women's right to personhood and requiring government to act affirmatively by providing social services for drug-addicted pregnant women.

Though Roberts challenges feminists to reevaluate the underlying assumptions and implications of traditional understandings of reproductive liberty, she does not deny that law and rights

discourse have a vital role to play in challenging regulatory social policies. Rights language, she suggests, can be used to demand an affirmative duty on the part of the state, which, in turn, could bring about gender and race equality and freedom. This position, and the important historical and critical work upon which it is based, however, suggests several questions that call for further research.

Careful to make visible race and class mythologies that both justify regulation and limit feminist opposition, Roberts' investigation seems to demand even more critical examination of these ideas and beliefs. That is, in order to avoid the kind of troubling absences and oversights Roberts finds in traditional conceptions of reproductive rights, it will be necessary to examine in further detail the multiple myths and motivations behind regulation. It will be necessary to do more than equating race with Blackness or conflating the experiences of poor Black women with Black women in general. These tendencies elide questions of difference.

While Roberts does explain how Black women and white women are treated differently, she does not address how economics precisely affect this situation. Are poor Black women treated differently than middle-class or wealthy Black women? If so, might class mythologies drive social policy to the same extent that race mythologies do? Are poor white women in as vulnerable a position as poor Black women? A study of these dimensions might shed light on some of the other fears and beliefs to which our society clings when justifying policies like criminalization. Disaggregating race from class momentarily and examining the way in which various regulations are directed against other minority women, such as Native Americans and Latinas, might offer us more insight into the multiplicity of myths and ideas that demand contestation and revision.

Having made a brilliant start at illustrating the workings of a raced and classed maternal ideology in both punitive policy making and traditional conceptions of reproductive rights, Roberts unfortunately puts aside her critical eye when it comes to her own notion of reproductive liberty. That is, she does not investigate which, if any, ideals and myths about motherhood inhabit her oppositional arguments. Just as Gomez's findings reveal that opponents could reduce pregnant women to maternal environments as easily as supporters of criminalization, Roberts' argument seems to reinforce the very expectations of good or natural mothering that she struggles to challenge. While Roberts clearly seeks to add poor Black women to the category "good mother," to refigure drug-using pregnant women as victims or good mothers in the making, she bases this work on a belief that "the right to bear children goes to the heart of what it means to be human" (Roberts 1997:305). And while it might make for a pow-

erful legal argument to ground motherhood in a notion of human nature, Roberts' linkage of human dignity with childbearing might ultimately reinforce the association of womanhood with notions of naturalized maternal instincts. It seems as if her argument leaves little room for women's ambivalence about motherhood or pregnancy. Thus her revision of reproductive rights might actually undermine attempts to see women (pregnant or not) as somehow separable from the identity of mother, and to see them as individuals with needs, rights, and feelings that may be in conflict.

Seeking an Alternative: Drug Treatment and Maternal Ideology:

While both books do a wonderful job of exposing the nuances and complexities of the debates around the issue of criminalization, and making it clear that opposition requires a comprehensive, multilayered, and coalitional response, both authors accept drug treatment as the appropriate alternative to criminalization. What neither do, perhaps because it is beyond the scope of their projects, is investigate the costs and benefits of treatment as it is currently conceived.²¹ In a 1995 article, Iris Marion Young engages in an Foucauldian critique of drug treatment programs, highlighting the extent to which maternal ideology structures and constrains these programs. According to Young, a truly successful challenge to criminalization and a complete response to the problem of prenatal drug exposure requires contestation of the stereotypical and essentialized notions of good and bad mothers at a variety of levels. While she would agree with Gomez and Roberts that we need to challenge maternal ideology as it is embedded in media representations, scientific research agendas and findings, and legislative and prosecutorial justifications, we must also recognize maternal ideals as they inhabit the very site Gomez and Roberts put forth as the solution to the problem—drug treatment programs.

Drug treatment programs, Young argues, are premised on certain norms of individualism and maternalism that undermine attempts to offer a feminist response to prenatal drug exposure. That is, drug treatment programs must be read, in a Foucauldian sense, as sites where technologies of normalization operate, where problematic norms of good and bad mothering and proper citizenship “often operate to adjust women to dominant gender, race, and class structures and depoliticizes and individualizes their situations” (Young 1995:110). Young is quite certain

²¹ Roberts is concerned that pregnant women have little access to drug treatment programs, either because these programs do not exist in great numbers or because they refuse to take pregnant women, but she does not challenge the content or goals of programs as Young does.

that punitive solutions to prenatal drug exposure reflect a “particular rage” directed against mothers: “The mother is supposed to be the one who sacrifices herself, who will do anything for her child, who will preserve and nurture it. That’s what mothering means. . . . The mother who harms her child is not merely a criminal, she is a monster” (111). And like Gomez and Roberts, Young reminds readers that punishment does little to reduce the effects of prenatal drug exposure and thus “seems only to have the function of marking [the drug -using mother] as deviant, publicly affirming her exclusion from the class of clear upstanding citizen” (p. 114). What sets Young apart, however, is her critical reflection on drug treatment practices themselves. According to Young, ideas of good mothering and individual responsibility that motivate punishment reappear in a slightly different, but no less troubling, form in the treatment environment.

Although treatment programs do not consciously set out to reproduce structures of domination and experiences of subordination for the women they treat, they do not necessarily challenge the unequal relations of power, and may unconsciously reproduce “paternalistic power and discipline” (Young 1995: 118). That is, according to Young, treatment programs may reinforce norms that are problematic as they transform the client’s sense of self, “adjust[ing] her to dominant social norms of being a ‘good’ woman and a ‘good’ worker in ways designed to adjust her to prevailing structures of domination and exploitation” (119). Young worries that treatment programs encourage women to mother, to work, and to understand their situations in very particular and troubling ways. For example, certain cultural styles and norms may be privileged over others: “A woman may ‘earn’ the right to live with her children by demonstrating a proper self-sacrificing attitude, orienting her concern away from her own needs and pleasures, and adopting a work ethic where pleasure can and should be delayed, pursued in small amounts, and always kept under control” (119). She may be encouraged “to construct her self, or her family, as the source of her pain and her problems.” Such encouragement “diverts her from locating her life in the context of wider social institutions and problems and also discourages her from forming dialogic bonds with others in relations of solidarity and resistance” (121).

Young’s alternative to the normalizing drug treatment programs is a program of empowerment built on practices of consciousness-raising and an ethic of care. Such programs would enable the “development of a sense of collective influence over the social conditions of one’s life” (122). Empowerment for Young means “a process in which individual and relatively powerless persons dialogue with each other and thereby come to understand the social sources of their powerlessness and see the possibility of acting collectively to change their social environment”

(123). This approach, she suggests, may not avoid all the problems of normalization and disciplinary power, but it offers a better chance for just outcomes than traditional approaches to drug treatment.

Conclusion

I bring Young into this essay not to suggest that her notion of empowerment rooted in an ethic of care offers the only, or even the most compelling analysis of, or response to, the problem of prenatal drug exposure. Rather, Young offers an example of the kind of critical self-reflection that is a crucial component of any attempt, legal, political, or otherwise, to challenge punitive responses to problems such as prenatal drug exposure.

While it is crucial for opponents to expose the gender, race, and class mythologies and ideologies that motivate punitive and regulatory responses to social problems related to reproduction, a similar critical eye should be turned to oppositional strategies themselves. While Roberts clearly takes a race lens to feminist strategies of opposition, exposing the racial dimensions of the issue obscured by a traditional reproductive rights response, Foucault (1978:1980) reminds us that norms and normalizing practices exist in a multiplicity of strategies and practices of resistance as well as regulation. And while Young uses Foucault to investigate norms of mothering as they function in treatment programs, I suggest that we continue to attend to these norms as they inhabit our own attempts to contest regulation. In our rush to refute the representation of drug-addicted pregnant women as bad mothers, in our portrayal of them as victims or as struggling to be good mothers, do we adequately contest the essentialized notions of good and bad mother that are at play in these policy debates? Do we shift, but not destroy, the line demarcating good mothers from villains? Do we in some way reduce pregnant women and mothers to vessels and conduits of (good or bad) care? Just as we do the important work of challenging the maternal ideals that fuel punitive responses to prenatal drug exposure, so too must we keep sight of our own investment in and perpetuation of these ideals. Gender and race equality, particularly in the area of reproduction, will require our coming to grips not only with women's right to bear or not bear children, but also with the individual and social ambivalence that surrounds childbearing and childrearing.

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