

2006

THE CONSTRUCTION OF PREGNANT DRUG-USING WOMEN AS CRIMINAL PERPETRATORS

Nancy D. Campbell
Rensselaer Polytechnic Institute

Follow this and additional works at: <https://ir.lawnet.fordham.edu/ulj>

 Part of the [Law and Gender Commons](#)

Recommended Citation

Nancy D. Campbell, *THE CONSTRUCTION OF PREGNANT DRUG-USING WOMEN AS CRIMINAL PERPETRATORS*, 33 Fordham Urb. L.J. 463 (2006).
Available at: <https://ir.lawnet.fordham.edu/ulj/vol33/iss2/6>

This Article is brought to you for free and open access by FLASH: The Fordham Law Archive of Scholarship and History. It has been accepted for inclusion in Fordham Urban Law Journal by an authorized editor of FLASH: The Fordham Law Archive of Scholarship and History. For more information, please contact tmelnick@law.fordham.edu.

THE CONSTRUCTION OF PREGNANT DRUG-USING WOMEN AS CRIMINAL PERPETRATORS

Cover Page Footnote

Assistant Professor, Department of Science and Technology Studies, Rensselaer Polytechnic Institute

THE CONSTRUCTION OF PREGNANT DRUG- USING WOMEN AS CRIMINAL PERPETRATORS

Nancy D. Campbell*

“[W]hat the law tells us to *do* is not as important as what the law tells us to *be*.”¹

Despite clear lack of intent to harm those whom they carry, drug-using pregnant women have been constructed as de facto criminal perpetrators. When women become noticeably unable or unwilling to carry out their assigned social roles and responsibilities as parents, they have often been demonized as “bad mothers,” and criminalized.² Women of color who live with poverty have been disproportionately affected by criminalization,³ which reinforces the view that they are “undeserving” of the right to procreate.⁴ Casting pregnant drug users as intentionally harming the fetuses they carry, feticide convictions rest upon the attribution of reckless indifference, “a conscious failure to exercise due care or ordinary care or a conscious indifference to the rights and safety of others or a reckless disregard thereof.”⁵ Drug use, I argue, falls short of being prima facie evidence of intent to harm, particularly in social circumstances where drug-using economies are endemic. Drug use is highly likely in the social and

*Assistant Professor, Department of Science and Technology Studies, Rensselaer Polytechnic Institute.

1. CYNTHIA R. DANIELS, *AT WOMEN’S EXPENSE: STATE POWER AND THE POLITICS OF FETAL RIGHTS* 100 (1993).

2. *See, e.g.*, Julia E. Hanigsberg & Sara Ruddick, *Introduction, in MOTHER TROUBLES: RETHINKING CONTEMPORARY MATERNAL DILEMMAS* ix-x (Julia E. Hanigsberg & Sara Ruddick eds., 1999) (discussing the notion of “bad mothers”); Molly Ladd-Taylor & Laurie Umansky, *Introduction, in “BAD” MOTHERS: THE POLITICS OF BLAME IN TWENTIETH-CENTURY AMERICA 2* (Molly Ladd-Taylor & Laurie Umansky eds., 1998) (“[T]hroughout the twentieth century, the label of ‘bad’ mother has been applied to far more women than those whose actions would warrant the name.”).

3. *See* Rachel Roth, *The Perils of Pregnancy: Ferguson v. City of Charleston*, 10 *FEMINIST LEGAL STUD.* 150, 152 (2002) (stating that women have been charged with drug crimes based on a single positive urine test after giving birth to their babies, while “the Charleston police department has never arrested a male patient and charged him with possessing drugs on the basis of a positive urine test”).

4. Dorothy E. Roberts, *Punishing Drug Addicts Who Have Babies: Women of Color, Equality, and the Right of Privacy*, 104 *HARV. L. REV.* 1419, 1444 (1991).

5. *State v. McKnight*, 576 S.E.2d 168, 173 (S.C. 2003).

economic circumstances of the vast majority of defendants in these cases, which follow the contours of the localized political geography of illicit drug use in the United States.⁶ It is difficult if not impossible to maintain that drug-taking is a conscious act intended to harm a fetus. The cases I examine in this article signal the limits of tolerance and the increasingly conditional nature of public welfare provision by raising the specter of a generation of urban mothers—and grandmothers—unable to care for their kids. These cases also reflect the policy-making role into which hospitals and the courts have stepped in the face of a legislative void.

Congressional hearings on maternal crack-cocaine use during the late 1980s and early 1990s elucidate the motives behind state and federal attempts to penalize illicit drug use by pregnant women.⁷ Women's rights advocates opposed the principle of criminalization behind these hearings, arguing instead for increased health care access through drug treatment tailored to the specific circumstances of pregnant women.⁸ The hearings defined the problem as a decline in maternal instinct⁹ that had rendered urban drug-using women "unable to manage their childcare responsibilities."¹⁰ Urban women's maternal incapacity placed a novel strain upon social services because "mothers and grandmothers could no longer care for the escalating numbers of drug exposed infants."¹¹ If the burning question of social policy was—"who should absorb the costs of

6. For a compelling argument concerning the concentration of risk and vulnerability in core urban areas of the United States, see KEVIN FITZPATRICK & MARK LAGORY, UNHEALTHY PLACES: THE ECOLOGY OF RISK IN THE URBAN LANDSCAPE 168-76 (2000).

7. See, e.g., *Falling Through the Crack: The Impact of Drug-Exposed Children on the Child Welfare System: Hearing on S. 101-846 Before the Subcomm. on Children, Family, Drugs & Alcoholism of the S. Comm. on Labor & Human Resources*, 101st Cong. (1990) (discussing the resources devoted to children born to mothers who used drugs during pregnancy); *Impact of Crack Cocaine on the Child Welfare System: Hearing Before the Subcomm. on Human Resources of the H. Comm. on Ways & Means*, 101st Cong. (1990); *Born Hooked: Confronting the Impact of Perinatal Substance Abuse: Hearing Before the H. Select Comm. on Children, Youth, & Families*, 101st Cong. (1989).

8. Advocacy was quite effective in California, where the prosecution of Pamela Rae Stewart galvanized a coalition that successfully resisted criminalization. See LAURA E. GÓMEZ, MISCONCEIVING MOTHERS: LEGISLATORS, PROSECUTORS, AND THE POLITICS OF PRENATAL DRUG EXPOSURE 41-62 (1997).

9. See Nancy D. Campbell, *Regulating "Maternal Instinct": Governing Mentalities of Late Twentieth Century U.S. Illicit Drug Policy*, 24 SIGNS 895, 895 (1999) [hereinafter Campbell, *Regulating "Maternal Instinct"*] ("Policy makers announced the erosion of 'maternal instinct' in the thick of the crack cocaine crisis in the late 1980s.").

10. *Impact of Drugs on Children and Families: Hearing on S. 101-397 Before the S. Comm. on Labor & Human Res. and the S. Comm. on the Judiciary*, 101st Cong. 25 (1989) (quoting the testimony of Reed Tuckson, D.C. Commissioner of Public Health).

11. See NANCY D. CAMPBELL, USING WOMEN: GENDER, DRUG POLICY, AND SOCIAL JUSTICE 185 (2000) [hereinafter CAMPBELL, USING WOMEN].

social reproduction?”¹²—the answer was that drug-using mothers clearly could not.¹³ These Congressional hearings highlighted the fear that drug-using women would shift their burdens to the state.¹⁴

Long used as a potent metaphor for social decline, the figure of the addicted woman encodes compulsion without control, the failures of self-governance, and the overwhelming power of illegitimate desires and insatiable needs. Yet, our view of individual parental responsibility stems from the notion that only those who can govern themselves are “fit” to govern others. Despite their marginalization, addicted women have been held individually accountable by zealous prosecutors for pregnancy “outcomes” over which they have little control.¹⁵ Pregnancy outcomes have come under scrutiny as states have found compelling interests in fetal life and death. Fetal rights proponents owe their momentum to the anti-abortion movement, which strategically salted “the unborn” in numerous policy arenas ranging from child health insurance to separate penalties for the violent assault of a fetus.¹⁶ While prosecutions of pregnant drug-using women may seem separate from the abortion debate, they have galvanized both the pro-prosecution anti-abortionists and the anti-prosecution feminists, civil libertarians, and clinicians who counter them.¹⁷ A flurry of legislative activity in the 1990s yielded widespread recognition that drug treatment for pregnant women was largely unavailable.¹⁸ Advocates led

12. As a nation we are in a remarkably deep state of denial about who does absorb these costs and the toll it takes on those that do. Women’s unpaid labor remains the “hidden cost” of social reproduction, and it is contextualized within the continued undervaluation of women’s paid and unpaid labor, coupled with the construction of motherhood as itself a form of social service. Poor women are forced into the low-wage labor market, despite the oft-noted lack of adequate and affordable child care, health insurance, and other supports necessary to sustain their labor-force participation. For documentation on the extent to which women continue to absorb more than their share of these costs, see NANCY FOLBRE, *WHO PAYS FOR THE KIDS? GENDER AND THE STRUCTURES OF CONSTRAINT* (1994).

13. For an article that makes this point clearly in reference to the prosecutorial trends under discussion, see Shalini Bhargava, *Challenging Punishment and Privatization: A Response to the Conviction of Regina McKnight*, 39 HARV. C.R.-C.L. L. REV. 513 (2004).

14. See CAMPBELL, *USING WOMEN*, *supra* note 11, at 185 (“[W]omen are no longer fit or willing to absorb the tasks and costs of social reproduction.”).

15. On the prosecutorial role, see GÓMEZ, *supra* note 8, at 63-91.

16. See Unborn Victims of Violence Act of 2004, Pub. L. No. 108-212, 118 Stat. 568 (2004) (providing for the protection of unborn children).

17. Lynn M. Paltrow, *The War on Drugs and the War on Abortion: Some Initial Thoughts on the Connections, Intersections and the Effects*, 28 S.U. L. REV. 201 (2001) [hereinafter Paltrow, *The War on Drugs and the War on Abortion*].

18. On the variety of legislative activities in one state (California), see GÓMEZ, *supra* note 8, at 28-29 (“Between 1986 and 1996, California lawmakers introduced 57 bills concerning prenatal drug exposure. . . . Before 1986, not a single legislative proposal had even mentioned drug use during pregnancy.”).

policy makers to understand the well documented inability of the drug treatment system to treat pregnant women. By 1992, the crack epidemic had faded,¹⁹ and legislative and prosecutorial energy declined in most locales. State supreme courts rejected the use of existing child abuse and neglect statutes—or creative charges such as the delivery of controlled substances to babies through the umbilical cord²⁰—and did not take kindly to the fact that laws intended to curb drug trafficking were being twisted to another purpose. When the Supreme Court of Florida overturned Jennifer Johnson’s drug trafficking conviction in 1992,²¹ it joined similar decisions, acquittals, or dismissals in other states.²² Even in South Carolina, where prosecutorial energy did not decline, the legislature did not explicitly criminalize illicit drug use during pregnancy, despite open encouragement from the South Carolina Supreme Court in the *Whitner* decision.²³ Thus, courts tended to treat substance abuse during pregnancy as a public health matter rather than one requiring criminal penalties.

South Carolina, however, has persisted in an ongoing effort to reverse the direction of this trajectory by placing behavioral conditions upon pregnant women, requiring cross-reporting between criminal justice and health care settings, and using health care settings to gain access to

19. CRAIG REINARMAN & HARRY G. LEVINE, *CRACK IN AMERICA: DEMON DRUGS AND SOCIAL JUSTICE* 42-43 (1997).

20. *See, e.g.*, *Johnson v. State*, 578 So. 2d 419, 420 (Fla. Dist. Ct. App. 1991) (holding that an adult mother violated the statutory prohibition against the delivery of controlled substances to minors by taking “cocaine into her pregnant body and caus[ing] the passage of that cocaine to each of her children through the umbilical cord after birth of the child”).

21. *Johnson v. State*, 602 So. 2d 1288 (Fla. 1992); *see also* Gómez, *supra* note 8, at 79. The Florida District Court of Appeals has found that Johnson violated a statutory prohibition against the delivery of controlled substance to minors by passing cocaine to her fetus through the umbilical cord, *Johnson*, 578 So. 2d at 420, but the Florida Supreme Court overturned this decision, finding that:

[w]hile unhealthy behavior cannot be condoned, to bring criminal charges against a pregnant woman for activities which may be harmful to her fetus is inappropriate. Such prosecution is counterproductive to the public interest as it may discourage a woman from seeking prenatal care or dissuade her from providing accurate information to health care providers out of fear of self-incrimination.

Johnson, 602 So. 2d at 1296.

22. For example, the Pamela Rae Stewart case attracted national attention. *See Fetus Abuse?; Against Doctor’s Orders*, TIME MAG., Oct. 13, 1986, at 81; Andrea Sachs, *Here Comes the Pregnancy Police; Mothers of Drug-Exposed Infants Face Legal Punishment*, TIME MAG., May 22, 1989, at 104. Cases elsewhere include *State v. Luster*, 419 S.E.2d 32 (Ga. Ct. App. 1992); *People v. Hardy*, 469 N.W.2d 50 (Mich. Ct. App. 1991). For an exhaustive list of cases, see Lynn M. Paltrow, *Pregnant Drug Users, Fetal Persons, and the Threat to Roe v. Wade*, 62 ALB. L. REV. 999, 1004 n.17 (1999).

23. *Whitner v. State*, 492 S.E.2d 777, 778-84 (S.C. 1997). For a further discussion of *Whitner*, see *infra* notes 50-59 and accompanying text.

evidence for criminal prosecutions.²⁴ Drug-tested as the result of a stealth protocol set up in 1989 at the Medical University of South Carolina (MUSC) in Charleston, South Carolina, Crystal Ferguson and her co-defendants neither knew about nor consented to the tests.²⁵ Over its five-year life, the MUSC program directly impacted thirty women who were arrested and charged with possession or distribution of cocaine, or child neglect.²⁶ Advocates vigorously attacked the motivations of program staff, the underlying perceptions of “crack babies” and the “crack-cocaine crisis” that contributed to their motivations, and the lack of drug treatment capacity for women in the region. They raised constitutional questions concerning MUSC’s “human subjects research.”²⁷ They also circulated stories that suggested racial targeting had occurred, despite a 1991 study showing that only 0.79% of South Carolina women tested positive for cocaine when they gave birth.²⁸ While pregnancy has been used to abrogate rights and increase social control,²⁹ the experience of Crystal

24. See Heather Flynn Bell, Comment, *In Utero Endangerment and Public Health: Prosecution vs. Treatment*, 36 TULSA L. J. 649, 671-72 (2001).

If we begin interpreting statutes regarding child endangerment to include all viable fetuses, as was the case in *Whitner v. State*, it could lead to prosecution of parents for acts that are legal but might endanger the child’s well-being, including smoking or the consumption of alcohol. . . . ‘[N]o woman can provide the perfect womb, [and] prosecution for prenatal drug use could possibly open the door for any variety of activities during their pregnancy’

Id. at 671-73.

25. See *Ferguson v. Charleston*, 532 U.S. 67, 70 (2001); see also Gómez, *supra* note 8, at 79-80.

26. *Ferguson*, 532 U.S. at 103.

27. Mary Faith Marshall et al., *Perinatal Substance Abuse and Human Subjects Research: Are Privacy Protections Adequate?*, 9 MENTAL RETARDATION & DEVELOPMENTAL DISABILITIES RES. REVS. 54, 54 (2003).

In 1993, while [MUSC’s] policy was in effect, the former Office of Protection from Research Risks, the federal office with oversight authority for compliance with regulations governing federally funded human subjects research determined that investigators at the Medical University of South Carolina had performed research on the plaintiffs without their informed consent. The Medical University’s multiple project assurance was put on hold until corrective actions were taken.

Id.

28. Kimani Paul-Emile, *The Charleston Policy: Substance or Abuse?*, 4 MICH. J. RACE & L. 325, 353 (1999) (citing a study by the South Carolina State Council on maternal, infant, and child health).

29. See DANIELS, *supra* note 1, at 6 (“[T]his process of ‘going public’ has both empowered women and drawn them into more subtle and complex mechanisms of social control.”); DOROTHY ROBERTS, *KILLING THE BLACK BODY: RACE, REPRODUCTION, AND THE MEANING OF LIBERTY* (1997) [hereinafter ROBERTS, *KILLING THE BLACK BODY*]; LAURA R. WOLIVER, *THE POLITICAL GEOGRAPHIES OF PREGNANCY* 141 (2002) (“[P]unishing drug addicts who choose to carry their pregnancies to term burdens the constitutional right to

Ferguson and her co-defendants resulted from a set of social exclusions and dehumanizing assumptions that transcend the circumstances of this case. Yet the United States Supreme Court responded with a ruling in *Ferguson v. Charleston* that was but a narrow victory for reproductive rights advocates.³⁰ As Birgitte Nahas noted, the Court never reached the questions of the constitutionality of South Carolina's characterization of the viable fetus as a person,³¹ or of mandatory child abuse reporting laws.³² The Court ruled that testing pregnant women for drugs without their knowledge or consent constituted unlawful searches and seizures in violation of the Fourth Amendment.³³ This ruling left South Carolina free to explore just how far it could go toward criminalizing women's behavior during pregnancy by scrutinizing pregnancy outcome.

Pregnancy outcome, of course, is determined by many conditions that transcend individual circumstances and affect wider populations, including poverty and lack of access to nutrition and health care. Yet, it is difficult to argue that policies granting fetal rights and rendering women's rights conditional will negatively affect women as a class, because these policies target individual drug-using women. Although there is very little social gain in prosecuting female drug users, that may be beside the point. Feminist political scientists Cynthia Daniels and Rachel Roth suggest that such policies are a form of "symbolic vengeance" that send a symbolic message that some pregnant women threaten the social order.³⁴ The putative balance between fetal rights and women's rights constructed by fetal rights advocates obscures the real conflict between women and the state.³⁵ It makes it seem as if fetal rights are not contingent, conditional, or

autonomy over reproductive decisions, helping to perpetuate a racist hierarchy in our society.").

30. 532 U.S. 67 (2001).

31. See Brigitte M. Nahas, Comment, *Drug Tests, Arrests, and Fetuses: A Comment on the U.S. Supreme Court's Narrow Opinion in Ferguson v. City of Charleston*, 8 CARDOZO WOMEN'S L.J. 105, 141 (2001) (explaining how the majority "ducked" these issues). The South Carolina State Supreme Court held that a viable fetus is a person in *State v. Home*, 319 S.E.2d 703, 704 (S.C. 1984), and upheld a criminal neglect conviction in *Whitner v. State*, 492 S.E.2d 777, 786 (S.C. 1997).

32. See Nahas, *supra* note 31, at 141.

33. *Ferguson v. Charleston*, 532 U.S. 67, 86 (2001); see also Marshall et al., *supra* note 27, at 54.

34. See DANIELS, *supra* note 1, at 117 ("The prosecution and incarceration of drug-addicted pregnant women operates symbolically as retribution for the women's transgressions."); RACHEL ROTH, MAKING WOMEN PAY: THE HIDDEN COSTS OF FETAL RIGHTS 15 (2000) ("Criminal trials in the United States often serve as a kind of public theater or modern-day morality play, and so it is right to point out this symbolic function.").

35. On "fetal rights" generally, see DANIELS, *supra* note 1; Martha A. Field, *Controlling the Woman to Protect the Fetus*, 17 L. MED. & HEALTH CARE 114 (Summer 1989); Janet

contested, but rather are well established. For this reason, Roth argues for recasting the conflict as one between pregnant women and the state: a “maternal-state conflict.”³⁶

In *Whitner v. State*³⁷ and *State v. McKnight*,³⁸ South Carolina courts upheld individual women’s convictions. These cases illustrate how maternal-state conflicts play out in a “fetal rights” state. Cornelia Whitner was convicted of criminal child neglect for ingesting cocaine during her third trimester; her healthy, now-teenage son tested positive for cocaine metabolites at birth.³⁹ Regina McKnight, who sporadically used cocaine during her pregnancy and sought treatment for her drug use, delivered a stillborn child eight-and-a-half months into her pregnancy.⁴⁰ She “became the first woman in America to be convicted of homicide by child abuse based on her behavior during pregnancy,” and was sentenced to twenty years in prison.⁴¹

Fetal rights law is reaching a state of maturity in a friendly political climate. We see evidence of its “success” in the Unborn Victims of Violence Act of 2004⁴² and the recent extension of child health insurance to unborn children.⁴³ Fetal rights proponents have pushed to the extreme,

Gallagher, *Prenatal Invasions & Interventions: What’s Wrong with Fetal Rights*, 10 HARV. WOMEN’S L.J. 9 (1987); Dawn E. Johnsen, *The Creation of Fetal Rights: Conflicts With Women’s Constitutional Rights to Liberty, Privacy, and Equal Protection*, 95 YALE L.J. 599 (1986).

36. See ROTH, *supra* note 34, at 90 (“The expression ‘maternal-fetal conflict’ commonly used to describe these situations is a misnomer, but these cases certainly are about conflict—between women and medical authority and between women and state authority.”).

37. 492 S.E.2d 777, 786 (S.C. 1997) (holding that a state may impose additional penalties for pregnant women who engage in illegal conduct).

38. 576 S.E.2d 168, 179 (S.C. 2003) (affirming lower court conviction of a woman who gave birth to a stillborn baby because of drug abuse).

39. *Whitner*, 492 S.E.2d at 778-79. Whitner served an eight-year sentence.

40. *McKnight*, 576 S.E.2d at 170-71; see also Lynn Paltrow, *What Happened to Regina McKnight?*, HARM REDUCTION COMM. (Harm Reduction Coalition, New York, N.Y.), Spring 2004 [hereinafter Paltrow, *What Happened to Regina McKnight?*], available at <http://www.harmreduction.org/pubs/news/spring04/paltrow.html>.

41. Paltrow, *What Happened to Regina McKnight?*, *supra* note 40, at 2 (noting also that the final eight years of McKnight’s sentence were suspended); see also *McKnight v. South Carolina*, 540 U.S. 819 (2003) (denying McKnight’s appeal).

42. Unborn Victims of Violence Act of 2004, Pub. L. No. 108-212, 118 Stat. 568 (2004).

43. Congress created the State Children’s Health Insurance Program (SCHIP) in 1997 to address the growing number of children without healthcare. See Centers for Medicare and Medicaid Services, Welcome to the State Children’s Health Insurance Program, <http://www.cms.hhs.gov/schip/about-SCHIP.asp> (last viewed Dec. 2, 2005). SCHIP provides coverage to “targeted low-income children.” *Id.* An unborn child now can qualify as a targeted low-income child by the State (and therefore be eligible for SCHIP) if other applicable State eligibility requirements are met. See 42 C.F.R. § 457.10 (2005). An

as shown by their use of fetal rights phrases such as “the ‘right’ of a mother to kill her children”⁴⁴ or “addicted to abortion.”⁴⁵ Although most states count a pregnant mother as a single citizen, fetal rights proponents have sought to create “two litigants” (the pregnant mother and her unborn child).⁴⁶ As one proponent argued in reference to McKnight,

if a woman possesses a constitutional right to kill her baby at any time during a pregnancy (and the United States Supreme Court has ruled that she does), then why should it matter that Ms. McKnight exercised her right by smoking crack as opposed to paying an abortionist to dismember and vacuum out her baby? Indeed, Ms. McKnight did not set out to kill her unborn child—it was simply an unintended result of her smoking crack. Why should she be sent to prison for doing negligently something which, if done intentionally, qualifies as a constitutional right?⁴⁷

Intention mattered to this author: “in an abortion, unlike in a crack-smoking death, the mother does set ‘out to ‘intentionally harm her child.’”⁴⁸

Feticide laws sit uneasily with decriminalized abortion now that pregnant women themselves are charged and convicted under them. State legislatures originally passed feticide laws to address third party harms to fetuses separate from third party harms to pregnant women.⁴⁹ *Whitner v. State*, however, widened the scope of South Carolina’s child neglect statute to include viable fetuses and served as precedent for *State v. McKnight*.⁵⁰ The *Whitner* Court held that viable fetuses have been considered “persons holding certain legal rights and privileges” within the state of South Carolina since the early 1960s.⁵¹ The court continued, “[o]nce the concept

alternative would have been to extend universal coverage to pregnant women.

44. Mark Trapp, *Addicted to Abortion* (June 18, 2001), <http://www.enterstageright.com/archive/articles/0601abortion.htm> (“[T]he South Carolina Advocates for Pregnant Women is nothing more than another pro-abortion group, willing to excuse any behavior, no matter how reprehensible, in order to preserve the ‘right’ of a mother to kill her children.”).

45. See, e.g., Will Johnston, *A Proposal for a New Strategy Towards Abortion*, VITAL SIGNS (Canadian Physicians for Life, Ontario, Can.), Fall 2002, at 1, available at <http://www.physiciansforlife.ca/Fall%20'02.html> (“[I]t is time to see that our society as a whole has become addicted to abortion.”).

46. Patrik Jonsson, *South Carolina Tests the Bounds of a Fetus’s Rights*, CHRISTIAN SCI. MONITOR, June 28, 2001, at 1 (describing the history of fetal laws in America, and South Carolina’s fetal laws in particular).

47. Trapp, *supra* note 44.

48. *Id.*

49. Lynn Okamoto, *House Passes Feticide Bill*, DES MOINES REGISTER, Apr. 7, 2004, at 1 (describing Iowa’s proposed legislation to provide for two victims, and noting that thirty-one states have their own fetal homicide laws).

50. *Whitner v. State*, 492 S.E.2d 777, 778 (S.C. 1997).

51. *Id.* at 779.

of the unborn, viable child as a person is accepted, we have no difficulty in holding that a cause of action for tortious injury to such a child arises immediately upon the infliction of the injury.”⁵² The *Whitner* court cited earlier cases in which third parties committed feticide, such as *State v. Horne*, where a husband stabbed his wife to death and a full-term fetus died in her womb from suffocation.⁵³ The ostensible reason for creating “two litigants” was to address the lack of redress in wrongful death fetal homicide cases.

The *Whitner* Court granted fetuses the status of persons, tendentiously explaining, “[w]e do not believe that the plain and ordinary meaning of the word ‘person’ has changed in any way that would now deny viable fetuses status as persons.”⁵⁴ Dissenting Justice Moore chastised his colleagues for their “course of judicial activism rejected by every other court to address the issue.”⁵⁵ Justice Moore argued against the majority’s strained assertion that a viable fetus is a child.⁵⁶ He noted that greater inequities result from the majority’s argument for “equal treatment of viable fetuses and children.”⁵⁷ In particular, pregnant women would be immune from prosecution if they quit using cocaine pre-viability, and pregnant women who have illegal abortions only get two-year sentences for killing a viable fetus.⁵⁸ He noted that if *Whitner*, whose son was healthy, had instead legally aborted, she would have been better off in terms of sentencing.⁵⁹

The amicus brief in *McKnight* was filed by organizations committed to a harm-reduction drug policy.⁶⁰ Careful not to endorse non-medical use of drugs during pregnancy by either parent, these organizations sought to use scientific consensus on the effects of prenatal ingestion of cocaine to *McKnight*’s advantage.⁶¹ Arguing that the prosecution was “devoid of

52. *Id.* at 780 (emphasis omitted) (quoting *Fowler v. Woodward*, 138 S.E.2d 42, 44 (S.C. 1964)).

53. *See State v. Horne*, 319 S.E.2d 703, 704 (S.C. 1984).

54. *Whitner*, 492 S.E.2d at 780.

55. *Id.* at 787 (Moore, J., dissenting).

56. *Id.* at 787-88 (Moore, J., dissenting).

57. *Id.* at 788 (Moore, J., dissenting).

58. *Id.*

59. *Id.*

60. *See generally* Brief as Amici Curiae in Support of Appellant, Regina McKnight Submitted By South Carolina Medical Ass’n et al., *McKnight v. S.C.*, 540 U.S. 819 (2003) (No. 02-1741), 2003 WL 22428153 [hereinafter Brief in Support of McKnight]. The amicus brief was submitted by the South Carolina Medical Association; South Carolina Association of Alcoholism and Drug Abuse Counselors; American Nurses Association; National Association of Social Workers; Association of Maternal and Child Health Programs; and Institute For Health and Recovery.

61. *Id.* at 2-3.

scientific underpinning,” they mobilized science to show that the evidence could not plausibly suggest, much less prove, causation of stillbirth.⁶² While medical evidence does not “indicate that cocaine is entirely benign for mother and fetus,” the risks “fall far short of the misconception of extreme harm typified by the ‘crack baby’ myth.”⁶³ The brief writers then cited evidence on the prevalence of stillbirth, its various causes, and the lack of certainty concerning causation (a full ten percent of stillbirths go unexplained).⁶⁴ Indeed, they noted that poverty, homelessness, malnutrition, and the stress associated with them could exacerbate known causes of stillbirths.⁶⁵ They referred to the prosecution’s insistence that cocaine ingestion caused McKnight’s stillbirth as an “inferential leap.”⁶⁶ The State’s testifying pathologists inferred causality from the simple coexistence of cocaine metabolites and stillbirth.⁶⁷ The amici argued that “[s]uch an inference does not withstand scientific scrutiny.”⁶⁸ They contended that the pathologists failed to consider far more common reasons for fetal demise, many of which may have impacted McKnight.⁶⁹ The amici documented confusion among treatment providers and their clients as to how mandatory reporting laws were supposed to work, indicating that there are ongoing debates over whether mandatory reporting laws deter women from seeking prenatal and obstetrical care.⁷⁰ Finally, the amici contended that the court would “vitate the longstanding recognition by the courts and the medical community that addiction is a disease, not a crime” if it upheld McKnight’s conviction.⁷¹

The unstable legal status of addiction—that is, our decision to respond to it as both crime and disease, but more a crime for some and a disease for others—contributes to the uncertainty of what rights and whose rights should be upheld in cases where fetal rights clash with maternal rights. Although the *McKnight* amici identified the “longstanding recognition . . . that addiction is a disease, and not a crime” it did not acknowledge that

62. *Id.* at 2.

63. *Id.* at 3.

64. *Id.* at 4.

65. *Id.*

66. *Id.*

67. *Id.* at 5.

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.* at 2-3; *see also* *Robinson v. California*, 370 U.S. 660, 667 n.8 (1962) (noting that in 1925, the U.S. Supreme Court recognized that “persons addicted to narcotics ‘are diseased and proper subjects for (medical) treatment’”) (quoting *Lindner v. United States*, 268 U.S. 5, 18 (1925)).

some “diseases” retain the moral character of a voluntaristic act.⁷² Historians have identified the pervasive construction of alcoholism and drug addiction as inexorably powerful “diseases of the will.”⁷³ The characterization of drug use as intentional or voluntary is commonly expressed by those who believe that criminalization is a useful response to drug use by pregnant and parenting women.

Feminist legal scholars see the matter differently, for they have embraced policies that “recognize[] that women who bear children share the government’s objective of promoting healthy births.”⁷⁴ Women’s rights advocate Dawn Johnsen refers to this as the “facilitative model,” because it facilitates women’s choices.⁷⁵ Johnsen describes an alternate approach, called the “adversarial model,” which is characterized by attempts to “impose special restrictions and duties on women solely because they are or may become pregnant.”⁷⁶ Johnsen disapproves of the adversarial model, arguing that, “[s]ubjecting women to special restrictions because of their childbearing capability interferes with rights the Constitution recognizes as so fundamental to individual liberty that they may be restricted by the government only under the most compelling circumstances. Adversarial policies must therefore satisfy the demanding strict scrutiny standard of judicial review.”⁷⁷ Without the protection of the strict scrutiny standard, Johnsen argued there would be “no logical stopping point to the kinds of personal decisions by women that could be second-guessed by zealous prosecutors, estranged husbands and former lovers, or judges scrutinizing an isolated decision with the benefit of hindsight.”⁷⁸

There are several dangers of using pregnancy outcomes in the adversarial context. Such outcomes create an inherent conflict between promoting healthy births and protecting women’s fundamental liberties.⁷⁹ Additionally, they over-scrutinize women’s behavior while obscuring the

72. Brief in Support of McKnight, *supra* note 60, at 2-3.

73. See generally MARIANA VALVERDE, *DISEASES OF THE WILL: ALCOHOL AND THE DILEMMAS OF FREEDOM* (1998).

74. See Dawn E. Johnsen, *Shared Interests: Promoting Healthy Births Without Sacrificing Women’s Liberty*, 43 *HASTINGS L.J.* 569, 571 (1992).

75. *Id.*

76. *Id.* The adversarial model views “the woman and the fetus she carries as distinct legal entities having adverse interests, and assume[s] that the government’s role is to protect the fetus from the woman.” *Id.*

77. *Id.* at 581. Johnsen finds that “[u]sing adversarial approached to the problem of drug use during pregnancy when alternative facilitative approaches exist” is both “bad policy” and “a basis for finding such policies unconstitutional.” *Id.* at 606.

78. *Id.* at 586.

79. *Id.* at 613.

behavior of men.⁸⁰ Finally, the use of pregnancy outcomes is counterproductive; it deters the very behaviors that contribute to healthy births.⁸¹

CONTEXTUALIZING THE CLASH BETWEEN CONDITIONAL RIGHTS AND UNCONDITIONAL RESPONSIBILITIES

Fueled by the crack-cocaine crisis of the late 1980s, the War on Drugs became a “war on women.”⁸² It sharply increased the number of women under the control of the criminal justice system, especially due to random drug testing of parolees.⁸³ Feminist sociologists and historians who study women as criminal perpetrators argue that women’s offenses must be contextualized⁸⁴ within the circumstances of trauma that derive from living in contexts of “structural violence.”⁸⁵ They return us to a few simple questions: Whose rights are at stake? What privacy and other protections are accorded to the vulnerable? How will benefits, burdens, or the basic autonomy required to discharge one’s obligations and responsibilities be distributed? What are the terms and conditions of the social contract(s) by which we abide, and do these terms and conditions differ for the poor, for those who are entangled in structural constraints? What happens to those whose circumstances prevent them from exercising their rights or discharging their duties? As I have argued elsewhere, “[w]omen’s rights as persons are made conditional—rights are purchased by [some] women’s good behavior as mothers and forfeited in the case of bad behavior [by other women].”⁸⁶

This conditionality is based on a false antithesis between the rights of women as persons and the obligations of women as mothers which was created by the fetal rights campaign. I refer to this as the “irreconcilable differences model,” contending that such a framework presents practical, legal, and political problems of an irresolvable nature. Although fetal rights proponents restage this false antithesis, it is not limited to the fetal rights debate. Since suffrage, according to historian Linda Gordon, “[t]he

80. *See id.* at 607-08 (noting cases in which “men and women are similarly situated, yet government action singles out only women for penalties and restrictions”).

81. *Id.* at 589.

82. MEDA CHESNEY-LIND, *THE FEMALE OFFENDER: GIRLS, WOMEN, AND CRIME* 99 (1997).

83. *Id.* at 147.

84. *Id.* at 142-43.

85. *See generally* PAUL FARMER, *PATHOLOGIES OF POWER: HEALTH, HUMAN RIGHTS, AND THE NEW WAR ON THE POOR* (2003). Farmer uses the term “structural violence” as “a broad rubric that includes a host of offensives against human dignity.” *Id.* at 8.

86. CAMPBELL, *USING WOMEN*, *supra* note 11, at 188.

problem [has been] that the mother-child separation occurred not in a feminist discourse that would have validated women's needs and the work of parenting, but in a discourse that treated children, quite unrealistically, alone, as a group with a unique claim on the state."⁸⁷ That specious split has now been extended through the attempted institutionalization of an even less realistic discourse that treats fetuses as a group with a uniquely compelling claim upon the state apart from the women whose bodies sustain them.

Fetal rights proponents defend fetuses in ways that render women's rights conditional.⁸⁸ Their approach ensures that women continue to shoulder the burdens of biosocial reproduction:

the burden on the woman is to stop using illegal drugs once she has exercised her constitutional decision not to have an abortion. . . . Once the mother has made the choice to have a child, she must accept the consequence of that choice. One of the consequences of having children is that it creates certain duties and obligations to that child. If a woman does not fulfill those obligations, then the state must step in to prevent harm to the child.⁸⁹

Attempts to gain criminal liability for fetal endangerment are in part about social reproduction. This point was illustrated in a 1990 *Criminal Justice Ethics* symposium in which Phillip Johnson lamented the "ACLU philosophy" in the face of the "crack mother prosecutions" that reveal a nation "desperately" trying to slow the "alarming disappearance of personal and family norms."⁹⁰ According to Johnson, "[t]he great-grandparents of today's crack mothers and absent fathers had a religious morality that enabled them in most cases to provide an admirable family life during the Great Depression, when poverty and discrimination were everywhere and no one imagined that child care was the federal government's business."⁹¹ Johnson's historical analysis suggests that fetal rights proponents have a moral agenda to counter the "license for self-indulgence" that has taken hold as individuals "have come to think of themselves as rights-bearing and pleasure-seeking individuals."⁹² That a "license for self-indulgence"

87. LINDA GORDON, *PITIED BUT NOT ENTITLED: SINGLE MOTHERS AND THE HISTORY OF WELFARE 1890-1935*, at 100 (1994).

88. Sam S. Balisy, *Maternal Substance Abuse: The Need to Provide Legal Protection for the Fetus*, 60 S. CAL. L. REV. 1209, 1220-21 (1987).

89. Nova D. Janssen, *Fetal Rights and the Prosecution of Women for Using Drugs During Pregnancy*, 48 DRAKE L. REV. 741, 762 (2000).

90. Phillip E. Johnson, *The ACLU Philosophy and the Right to Abuse the Unborn*, 9 CRIM. JUST. ETHICS 48, 51 (1990).

91. *Id.*

92. *Id.* at 49.

should be withheld from the poor will not come as a surprise to those familiar with both the multiple indignities to which the poor are subjected and the recent trend toward conditioning public aid on good behavior.⁹³

Drug-using women are vulnerable due to social-structural circumstances beyond their control. Additionally, a symbolic vengeance has been exacted through the enforcement of laws and policies targeted at poor, pregnant, drug-using women, most of whom are African-American. Although punitive efforts have been highly localized—most of the cases have come from South Carolina⁹⁴—the issues at their core transcend the local circumstances of specific cases. They are not merely about biological reproduction, but about women's over-responsibility for the difficult labors of social reproduction and lack of public support for the exercise of reproductive rights and decisions. How many women in McKnight's or Whitner's situation—burdened by a lifetime of abuse and bound by the structures of constraint specific to their race, class, and gender⁹⁵—can be said to make clear, constitutional decisions to have children? Not only have courts and legislatures everywhere declined to support poor women's autonomy in reproductive decision-making,⁹⁶ they also have burdened the path of even highly enfranchised women exercising reproductive choice.⁹⁷ The drug and pregnancy debate only makes sense when located in the geography of social inequality.

The displacement of rights from women to the fetus was the anti-abortion movement's response to the framing of abortion as women's right to choose.⁹⁸ First-generation feminist characterizations of women's reproductive autonomy set up women's rights to conflict with those of the fetuses they were carrying. The earliest "fetal rights" cases, assembled by Janet Gallagher after a pattern emerged in 1982, involved compelled Cesarean sections.⁹⁹ In particular, advocates for pregnant women were

93. See SANFORD F. SCHRAM, *AFTER WELFARE: THE CULTURE OF POSTINDUSTRIAL SOCIAL POLICY* 168-69 (2000).

94. See Dana Page, Note, *The Homicide by Child Abuse Conviction of Regina McKnight*, 46 *HOW. L.J.* 363, 370 (2003).

95. See *id.* at 365-69 (describing the abusive conditions of McKnight's life).

96. ROBERTS, *KILLING THE BLACK BODY*, *supra* note 29, at 25.

97. See SUSAN M. BEHUNIAK, *A CARING JURISPRUDENCE: LISTENING TO PATIENTS AT THE SUPREME COURT* 62-63 (1999) (examining a series of abortion cases and concluding that the courts disregarded the patients' knowledge and instead focused almost exclusively on medical knowledge).

98. See CELESTE MICHELLE CONDIT, *DECODING ABORTION RHETORIC: COMMUNICATING SOCIAL CHANGE* (1990).

99. See, e.g., Janet Gallagher, *Prenatal Invasions and Interventions: What's Wrong with Fetal Rights*, 10 *HARV. WOMEN'S L.J.* 9, 11 (1987) ("The most dramatic and highly publicized claims of 'fetal rights' have been made in the context of coerced Caesarean

galvanized by the plight of Angela Carder.¹⁰⁰ Georgetown Hospital, acting under court authorization, forced Mrs. Carder, a young, terminally ill woman, to undergo a C-section against her wishes, as well as those of her husband, her parents, and her physicians.¹⁰¹ Both Mrs. Carder and the fetus died as a result of that C-section.¹⁰² This case made apparent the limitations of the rhetoric of “choice,” clearing the way for advocacy on behalf of pregnant women to become somewhat separate from mainstream advocacy for reproductive rights. This differentiation occurred even as fetal rights proponents sought to construct laws favorable to their anti-abortion position.¹⁰³ Thus the limitations of the rhetoric of choice were not simply symbolic—they opened the door to criminalization not only of abortion but of stillbirth or the presence of drug metabolites by making it appear that all behaviors during pregnancy are intentional and that fairly arcane and unproven matters of clinical practice are “common knowledge.”¹⁰⁴

Trying to shift away from the individualist rhetoric of the pro-choice movement, a small network of feminist reproductive rights advocates that initially worked out of the ACLU Reproductive Freedom Project argued that pregnant women and fetuses share an interest in healthy births.¹⁰⁵ They ran up against the mainstream of women’s policy research and reproductive rights advocacy organizations, which had become sophisticated users and defenders of the “dominant language of liberal individualism”¹⁰⁶ to prevent their marginalization and dissolution during the 1980s; “[m]ost of the organizations that did survive the 1980s maintained their credibility while keeping feminist claims—for women’s economic rights, overcoming violence and sexual assault against women,

sections.”).

100. See, e.g., DANIELS, *supra* note 1, at 42; Terry E. Thornton & Lynn Paltrow, *The Rights of Pregnant Patients: Carder Case Brings Bold Policy Initiatives*, 8 HEALTHSPAN 10 (1991), available at <http://advocatesforpregnantwomen.org/articles/angela.htm>.

101. DANIELS, *supra* note 1, at 31-32.

102. *Id.* at 32. The Carder family sued the hospital for violating Angela Carder’s civil rights. *Id.* The U.S. Court of Appeals upheld Mrs. Carder’s rights and argued that the lower court “erred in subordinating [Angela Carder’s] right to bodily integrity in favor of the state’s interest in potential life.” *In re A.C.*, 573 A.2d 1235, 1238 (D.C. Cir. 1990).

103. See CAMPBELL, USING WOMEN, *supra* note 14, at 182 (describing how “choice” is a “flexible term that triggers an emphasis on moral accountability”).

104. For a discussion of the epistemological underpinnings of “common knowledge,” see generally MARIANA VALVERDE, LAW’S DREAM OF A COMMON KNOWLEDGE (2003).

105. See generally Johnsen, *supra* note 74.

106. Roberta Spalter-Roth & Ronnee Schreiber, *Outsider Issues and Insider Tactics: Strategic Tensions in the Women’s Policy Network During the 1980s*, in FEMINIST ORGANIZATIONS: HARVEST OF THE NEW WOMEN’S MOVEMENT 105, 115-17 (Myra Marx Ferree & Patricia Yancey Martin eds., 1995).

abortion rights, civil rights, and political empowerment—on the policy agenda, albeit not always in their purest form.”¹⁰⁷ Such liberal individualist rights talk bolstered the credibility of women who could conform to prevailing notions of gender-neutral equality, self-discipline, and good conduct at the expense of those who could not. Choice was a discursive political trap that led the liberal reproductive rights movement to be painted as “anti-fetal rights.”¹⁰⁸

Rights talk makes it seem as if women deliberately take illegal drugs in order to harm fetuses, which plays into the hands of fetal rights proponents. Claims of intentionality should rest on proof that a woman knows the extent to which cocaine harms her fetus. In *McKnight*, however, the court only found proof of extreme indifference because McKnight, like Whitner, supposedly possessed common knowledge about the effects of cocaine:

although the precise effects of maternal crack use during pregnancy are somewhat unclear, it is well documented and within the realm of public knowledge that such use can cause serious harm to the viable unborn child. Given this common knowledge, Whitner was on notice that her conduct in utilizing cocaine during pregnancy constituted child endangerment.¹⁰⁹

The court concluded that “the fact that McKnight took cocaine knowing she was pregnant was sufficient evidence to submit to the jury on whether she acted with extreme indifference to her child’s life.”¹¹⁰ Given the gravity of the charge, the court should have based its conclusion that McKnight acted with extreme indifference on something other than the following assertion that Judge Toal made twelve years prior in another case: “The drug ‘cocaine’ has torn at the very fabric of our nation. Families have been ripped apart, minds have been ruined, and lives have been lost. It is common knowledge that the drug is highly addictive and potentially fatal.”¹¹¹ This quotation, along with some circumstantial evidence from a Department of Social Services (DSS) investigator who testified that McKnight knew she was pregnant and used cocaine, served as the only evidence of McKnight’s criminal intent.¹¹²

The science of in utero cocaine exposure has not been unequivocal.

107. *Id.* at 125.

108. See RICKIE SOLINGER, BEGGARS AND CHOOSERS: HOW THE POLITICS OF CHOICE SHAPES ADOPTION, ABORTION, AND WELFARE IN THE UNITED STATES 220-24 (2001) (providing a thorough critique of the idiom of “choice”).

109. *State v. McKnight*, 576 S.E.2d 168, 173 (S.C. 2003).

110. *Id.*

111. *Id.* (quoting *State v. Major*, 391 S.E.2d 235, 237 (S.C. 1990)).

112. *Id.*

Researchers and medical organizations including the American Medical Association have expressed concerns that their “rush to judgment” in the early days of the crack-cocaine scare was harmful to children.¹¹³ Investigators have since documented few differences between children from similar social and economic circumstances who are exposed to cocaine in utero versus those who are not.¹¹⁴ The amicus briefs in *McKnight* offered far more scientific evidence that cocaine use did not negatively affect pregnancy than the prosecution offered to support its contrary assertions.¹¹⁵ Current studies show that in utero cocaine exposure is about as harmful as tobacco exposure—and less harmful than heavy alcohol exposure.¹¹⁶ But these studies did not accord with the governing mentalities of the court, which disregarded them. In fact, *Whitner* and *McKnight* did not suffer the two most problematic complications of in vitro cocaine exposure—ruptured membranes and placental abruption. What then was going on in South Carolina?

POLICY ENTREPRENEURS AND JUDICIAL ACTIVISTS

Prosecutors dictate whether and how a drugs-and-pregnancy case will be brought. Legal sociologist Laura Gómez has found that local prosecutors, who typically used “crack baby” terminology, embraced two extreme, polarized strategies: one very punitive, revealing an obvious intent to punish, and the other a strategy of inaction.¹¹⁷ *Johnson v. State* demonstrates an extremely punitive strategy that ultimately failed when Johnson’s conviction was overturned by the Florida Supreme Court.¹¹⁸ A paucity of cases fell into the middle range of Gómez’s continuum—“moderately punitive” diversion that coerced women into treatment and

113. L.C. Maynes et al., *The Problem of Prenatal Cocaine Exposure: A Rush to Judgment*, 267 JAMA 406, 406 (1992).

114. Deborah A., Frank et al., *Growth, Development, and Behavior in Early Childhood Following Prenatal Cocaine Exposure: A Systematic Review*, 285 JAMA 1613, 1621-24 (2001) (“[A]mong children up to 6 years of age, there is no convincing evidence that prenatal cocaine exposure is associated with any developmental toxicity different in severity of age, scope, or kind from the sequelae of many other risk factors [including tobacco, marijuana, alcohol, or the quality of the child’s environment].”).

115. See Brief in Support of *McKnight*, *supra* note 60, at 3-24; see also *supra* notes 60-71 and accompanying text (describing the scientific evidence in the *McKnight* brief).

116. See Brief in Support of *McKnight*, *supra* note 60, at 15-16.

117. GÓMEZ, *supra* note 8, at 74, 78.

118. 602 So. 2d 1288, 1296 (Fla. 1992) (holding that the prosecution of pregnant women who engage in activities that are harmful to the fetus is inappropriate and against public interest); see also GÓMEZ, *supra* note 8, at 79. For more information on the *Johnson* case, see *supra* notes 20-21 and accompanying text.

softer, less punitive diversion.¹¹⁹ In *Ferguson v. City of Charleston*¹²⁰ there was a potent synergy between the elements of extremely punitive prosecutorial behavior, legal coercions, and moral fervor.¹²¹ Charles Condon, the publicly outspoken anti-abortion prosecutor in that case, helped set up the “rights talk” version of the debate: “[y]ou have the right to an abortion. You have the right to have a baby. You don’t have the right to have a baby deformed by cocaine.”¹²² As the State Supreme Court wrote in *Whitner* and quoted in *McKnight*:

It strains belief for Whitner to argue that using crack cocaine during pregnancy is encompassed within the constitutionally recognized right of privacy. Use of crack cocaine is illegal, period. No one here argues that laws criminalizing the use of crack cocaine are themselves unconstitutional. If the State wishes to impose additional criminal penalties on pregnant women who engage in this already illegal conduct because of the effect the conduct has on the viable fetus, it may do so. We do not see how the fact of pregnancy elevates the use of crack cocaine to the lofty status of a fundamental right.¹²³

The argument that reproductive rights advocates promote the use of crack cocaine by pregnant women or construct it as a fundamental right is belied by McKnight’s amicus briefs.¹²⁴ But the tendentious claim serves the symbolic value of tarring reproductive rights advocates with the brush of condoning drug use and rendering their cause absurd or malicious. This disdainful tone pervaded the *McKnight* Court’s dismissal of the defense’s fears that reproductive rights were being rolled back, or that women would be deterred from seeking medical help. The court remarked in a footnote that, “[a]s did *Whitner*, *McKnight* forebodes a parade of horrors and points to commentators who object to the prosecution of pregnant women as being contrary to public policy and deterring women from seeking appropriate medical care and/or creating incentives for women to seek abortions to avoid prosecution.”¹²⁵ The court dismissed the legitimate concerns that therapeutic relationships would be jeopardized and fundamental trust between women and medical professionals would be

119. See GÓMEZ, *supra* note 8, at 78-79; see also CAMPBELL, USING WOMEN, *supra* note 11, at 189.

120. 532 U.S. 67 (2001).

121. See generally *id.*

122. GÓMEZ, *supra* note 8, at 79. Condon later became the South Carolina Attorney General. *Id.*

123. *State v. McKnight*, 576 S.E.2d 168, 176-77 (S.C. 2003) (quoting *Whitner v. State*, 492 S.E.2d 777, 786 (S.C. 1997)).

124. See generally Brief in Support of McKnight, *supra* note 60.

125. *McKnight*, 576 S.E.2d at 175 n.5.

eroded.¹²⁶ The strategy of fetal rights law and policy entrepreneurs has been to paint feminist advocates as paranoid projectors of a “parade of horrors” out of misguided concerns for public health and social justice.

When advocates struggled against punitive policies directed toward pregnant women who use drugs, their issue fell between the cracks of the feminist reproductive rights movement, the civil rights movement, the women’s health movement, and the drug policy reform movement.¹²⁷ Lynn Paltrow argues that “[t]hose who are concerned about fundamental issues of social justice may be losing ground, missing opportunities to build coalitions and strengthen arguments by failing to recognize the similarities among and relationships between the [drug policy and reproductive rights] issues.”¹²⁸ Fetal rights claims tend to undermine coalitions for health care, disability rights, environment, drug policy, prison reform efforts, even immigrant health care rights. Yet, fetal rights proponents use drug policy to justify limiting (some) women’s rights in ways that will ultimately retract (all) women’s rights. Neoconservatives use a wide and almost bewildering range of policy arenas ranging from welfare reform to crime control to gain an advantage in reproductive rights debates. Nowhere have they been quite so successful as within the illicit drug policy arena—and nowhere quite so successful as in South Carolina.¹²⁹ Drug policy has been especially useful to this neoconservative project because the scourge of drugs separates some (especially bad) women out from (mostly good) women without much dissent from either. To the extent that feminists buy into the idea of splitting off “good” women from “bad,” our coalitions will be undermined.

The policy design literature implicates the production of “target populations” within what Anne Larason Schneider and Helen Ingram call “degenerative politics.”¹³⁰ The term “degenerative politics” refers to issue contexts where divisions between “target populations” that are deserving and undeserving, worthy and unworthy, are deeply inscribed.¹³¹ Schneider and Ingram identify four different policy targets: (i) the already advantaged; (ii) groups of “contenders,” who are often negatively

126. See Brief in Support of McKnight, *supra* note 60, at 25.

127. I want to acknowledge the inspiration of Lynn Paltrow and her organization, National Advocates for Pregnant Women (NAPW), for building a national response network and working on all fronts to defend pregnant women charged with criminal acts.

128. Paltrow, *The War on Drugs and the War on Abortion*, *supra* note 17, at 201-02.

129. For a discussion of the policies South Carolina employed, see ELLEN ALDERMAN & CAROLINE KENNEDY, *THE RIGHT TO PRIVACY* 123 (1995).

130. ANNE LARASON SCHNEIDER & HELEN INGRAM, *POLICY DESIGN FOR DEMOCRACY* 102 (1997).

131. *Id.*

constructed as undeserving, greedy, or willing to deal behind closed doors because they have some power; (iii) dependents, constructed as deserving if needy and helpless; and (iv) deviants, who are negatively constructed as undeserving.¹³² According to Schneider and Ingram's calculus, policy-makers gain similar benefits by punishing deviant groups as they do by rewarding advantaged groups.¹³³ Due to the political appeal of symbolic vengeance in such arenas,¹³⁴ policies of incarceration, coercion, or unduly intensive surveillance may be oversubscribed or used inappropriately.¹³⁵ While pluralists assume that there will be self-corrective mechanisms, they are unlikely to prevail in such "degenerative" issue contexts.

Reproductive rights movements run into predictable trouble according to Schneider's and Ingram's typology.¹³⁶ Their "target populations" cross all groups—social policies must simultaneously represent highly advantaged groups, as well as less advantaged groups of contenders, dependents, and deviants. As such, they run into internal contradictions as well as external contention over the allocation of rights, resources, obligations, and burdens. The perennial accusation that the "white" reproductive rights movement is insufficiently attentive to low-income women and women of color has been belied by the second and third generation reproductive rights organizations that focus specifically on them. Advocates of drug-using women have built a social movement that does not support the distinction between "good" and "bad" actors. Instead, they have sought unconditional rights and a facilitative relationship between women and the state, as well as seeking to move the drugs-and-pregnancy debate outside the "degenerative" issue context of the adversarial model and the anti-abortion movement.

Women were largely invisible within the nation's drug policy until the late 1980s crack-cocaine epidemic brought the "decline of maternal instinct" to the national stage.¹³⁷ Prior to that, it was hard for women's health advocates to draw attention to the issue. During the crack-cocaine

132. *Id.*

133. *Id.* at 120-22.

134. *See id.* at 120 ("[G]overnments are especially likely to shift toward a politics of punishment as a means of displacing blame onto others and creating opportunities for political gain.").

135. *See id.* ("Some powerless groups offer easy scapegoats for societal problems Providing punishments to persons constructed as deviants yields little or no resistance as these groups have essentially no political power, and the actions are generally applauded by the broader public because they believe deviants deserve to be punished.").

136. *See supra* notes 131-132 and accompanying text for a description of Schneider's and Ingram's typology.

137. CAMPBELL, USING WOMEN, *supra* note 11, at 170; *see* Campbell, *Regulating "Maternal Instinct"*, *supra* note 9, at 895 ("Policymakers announced the erosion of 'maternal instincts' in the thick of the crack cocaine crisis of the late 1980's.").

scare, and well into the 1990s as the scare abated, many states debated policies to target using women.¹³⁸ While “no-pregnancy” conditions had been struck down as “impermissively overbroad,”¹³⁹ there have been drug-related cases in which lower courts have required women to choose sterilization or jail.¹⁴⁰ For the most part, however, legislatures and courts have determined that there are much *better* ways to protect the public and prevent injury to future children than criminal prosecution of pregnant women. On purely instrumental grounds, specific criminalization fails to achieve our goals of healthy births, drug-free pregnancies, adequate prenatal and postpartum care, or adequate support for already-born children. So what were these prosecutions about? If we allow prosecutions to become symbolic policy, the unfortunate individual outcome of a cycle in which we as a society seek retribution against women who transgress, we ignore that these are among the most vulnerable of women. We ignore that women are far from the majority of drug users and abusers, and that pregnant women are a very small subset of addicted persons.

What messages will pregnant women get regarding their constitutional protections? Will pregnant women be forced to forego the protections of informed consent, irregardless of their circumstances? Should we allow women’s rights to self-sovereignty, freedom from government intrusion, and right to bodily integrity to be questioned? If so, when, on what grounds, and at what cost? Daniels argues that even a single case where a pregnant woman is forced to undergo medical treatment that anyone else would not be forced to undergo chips away at all women’s rights to self-sovereignty: “[w]omen face a risk of social coercion never faced by men simply because of women’s ability to carry a fetus to term.”¹⁴¹ This gender differential derives from socially assigned roles in social reproduction, and the preoccupation with some women’s failure to meet theirs. If drug policy can be read as a form of cultural production, then we may ask what our treatment of drug-using women tells us about what women are supposed to be and do in our political culture.

138. ALDERMAN & KENNEDY, *supra* note 129, at 121-23 (explaining Florida’s attempt to prosecute a woman for ingesting crack during labor, Connecticut’s attempt to deprive a woman who used cocaine after her water broke of parental rights, and South Carolina’s testing of pregnant women for illegal drug use).

139. *Id.* at 125 (citing *People v. Zaring*, 10 Cal. Rptr. 2d 263, 269 (Ct. App. 1992)).

140. *See, e.g.,* Sheila C. Cummings, *Is Crack the Cure?*, 5 J.L. Soc’y 1, 5 (2003) (discussing the monetary incentives that “Project Prevention,” a private organization, offers to encourage addicted men and women to undergo sterilization); Jim Persels, *The Norplant Condition: Protecting the Unborn or Violating Fundamental Rights?*, 13 J. LEGAL MED. 237 (1992) (discussing the constitutionality of forced sterilization by states).

141. DANIELS, *supra* note 1, at 53.

