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Christine M. Bulger

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IN THE BEST INTEREST OF THE CHILD? RACE AND CLASS DISCRIMINATION IN PRENATAL DRUG USE PROSECUTIONS

CHRISTINE M. BULGER*

PRIVATE CHOICES, PUBLIC CONSEQUENCES: REPRODUCTIVE TECHNOLOGY AND THE NEW ETHICS OF CONCEPTION, PREGNANCY, AND FAMILY. By LYNDA BECK FENWICK. New York: Dutton. 1998. Pp. 390.

Conflicts of opinion abound in regard to the moral and ethical questions posed by today's rapid advances in reproductive technology.¹ These issues include deciding whether or not to have fetuses tested for genetic abnormalities, considering freezing embryos for possible future use, and determining the relative rights of both gamete donors and the offspring that their donations have produced.² All of these issues generate thought-provoking discussions of ethics, morality, and personal choice.³ Among these reproductive dilemmas is the current trend of governmental attempts to criminalize drug use during pregnancy to protect the life of the fetus.⁴ This movement is resulting in the avoidance of prenatal care by pregnant drug users, the separation of mothers and children, and race discrimination.⁵

* Staff Writer, BOSTON COLLEGE THIRD WORLD LAW JOURNAL.

¹ See generally LYNDA BECK FENWICK, PRIVATE CHOICES, PUBLIC CONSEQUENCES: REPRODUCTIVE TECHNOLOGY AND THE NEW ETHICS OF CONCEPTION, PREGNANCY, AND FAMILY (1998).

² See generally *id.*

³ See generally *id.*

⁴ See generally *Whitner v. State*, 492 S.E.2d 777 (S.C. 1997) (conviction under child abuse and endangerment statute upheld); *State v. Gray*, 584 N.E.2d 710 (Ohio 1992) (conviction under child endangerment statute overturned); *People v. Hardy*, 469 N.W.2d 50 (Mich. App. Ct. 1991) (conviction under delivery of cocaine statute overturned).

⁵ See, e.g., Board of Trustees, American Medical Association, *Legal Interventions During Pregnancy: Court-Ordered Medical Treatments and Legal Penalties for Potentially Harmful Behavior by Pregnant Women*, 264 JAMA 2663, 2667 (1990) [hereinafter AMA] (stating that health and social welfare experts feel that criminal sanctions will prevent women from seeking prenatal care and that prison health experts warn that prisons are "shockingly deficient" in attending to the health care needs of pregnant women); Ira J. Chasnoff, et al., *The Prevalence of Illicit-Drug or Alcohol Use During Pregnancy and Discrepancies in Mandatory Reporting in Pinellas County, Florida*, 322 NEW ENG. J. MED. 1202, 1206 (1990) (stating that the preconception that substance abuse,

Despite similar rates of substance abuse among Black and white women found in a 1990 Florida study, Black women's drug abuse was reported to health authorities at approximately ten times the rate for white women.⁶ This disproportion may be the result of the fact that public hospitals, where the patient population is largely made up of poor minority women, are "more likely than private hospitals to report women whose tests show drug use."⁷ Such a situation occurred in South Carolina, where the defendants for a Charleston prosecutorial campaign against pregnant drug users⁸ were supplied by the Medical University of South Carolina (MUSC), a state hospital serving an indigent, minority population.⁹

Kimberly Hardy, a poor Black woman with only limited public health coverage, was the first pregnant drug user prosecuted for delivery of cocaine to her baby through the umbilical cord in Michigan in 1989.¹⁰ Although the Michigan Court of Appeals eventually overturned her conviction in 1991,¹¹ Hardy's description of her experience illustrates the racial discrimination involved in these prosecutions:

It came as a shock . . . and then I was pretty angry. Addiction is a medical problem. You wouldn't put a heart patient in jail for having a heart attack. And you wouldn't prosecute an epileptic for having a seizure It's been a nightmare! . . . My baby was taken away from his mother for the first ten months of his life; there was no bonding with his mother. If this was to protect my baby, [taking him away] was more damaging. . . . And what about my other children? . . . And one more thing, after all the publicity in my case, the prosecutor later prosecuted a thirty-six year old white woman lawyer to

especially during pregnancy, is a problem that affects minority groups and lower socioeconomic groups could bias physicians in identifying substance exposure in newborns, thus resulting in higher rates of testing and reporting of infants born to Black or poor women); Dorothy E. Roberts, *Unshackling Black Motherhood*, 95 MICH L. REV. 938, 939 (1997) (finding that prosecutions for prenatal drug use reflect a growing hostility toward poor Black mothers in particular).

⁶ See Chasnoff, *supra* note 5, at 1204.

⁷ See Gina Kolata, *Bias Seen Against Pregnant Addicts*, N.Y. TIMES, July 20, 1990, at A13.

⁸ See discussion *infra* Part II.A.

⁹ See Roberts, *supra* note 5, at 941.

¹⁰ See Dwight L. Greene, *Abusive Prosecutors: Gender, Race & Class Discretion and the Prosecution of Drug-Addicted Mothers*, 39 BUFF. L. REV. 737, 737, 741 (1991).

¹¹ See *People v. Hardy*, 469 N.W.2d 50, 53 (Mich. Ct. App. 1991) (finding that use of cocaine by pregnant woman, which may result in postpartum transfer of cocaine through umbilical cord to her infant, is not the type of conduct that legislature intended to be prosecuted under delivery of cocaine statute).

show he wasn't prejudiced; but the judge dismissed her case quick.¹²

In her book *Private Choices, Public Consequences: Reproductive Technology and the New Ethics of Conception, Pregnancy, and Family*, Lynda Beck Fenwick examines the current legal, moral, and social issues generated by today's reproductive technology.¹³ Fenwick exposes the bitter conflict between individual choice and governmental regulation of reproductive options.¹⁴ Alternating between real-life reproductive experiences and discussion of the various issues that these stories present, Fenwick explores such topics as surrogacy, infertility treatments, genetic engineering and testing, use of fetal tissue in research, and governmental controls over women's reproductive choices.¹⁵

When Fenwick, a former trial attorney and adjunct law professor at Baylor University School of Law, began writing *Private Choices, Public Consequences*, she was in favor of passing laws "to protect the babies from the selfish decisions of too many adults."¹⁶ However, by the end of her project, Fenwick had come to realize that parents could be just as vulnerable as the babies, and her feelings changed about the need for greater governmental regulation.¹⁷ She now believes that the greater number of reproductive choices that need to be made today demand a higher level of individual moral accountability than in previous generations.¹⁸ In regards to criminal prosecutions of pregnant drug users, Fenwick argues that any governmental restraint or control must be exercised for treatment and fetal safety, not for punishment.¹⁹ Otherwise, many pregnant addicts may choose to avoid prenatal care.²⁰

Part I of this Book Review will begin by describing Fenwick's discussion of criminal prosecution of pregnant drug users and its impact on Black women, how these prosecutions have been based on child abuse and drug delivery statutes, and the 1998 enactment of legislation that specifically targets pregnant drug users. Part II will examine some suggestions as to why minority women are being prose-

¹² Greene, *supra* note 10, at 737. Greene and his assistants interviewed Hardy on two occasions, December 3, 1990 and February 8, 1991, for the purposes of the article. *See id.* at 737 n.1.

¹³ *See generally* FENWICK, *supra* note 1.

¹⁴ *See generally id.*

¹⁵ *See generally id.*

¹⁶ *See id.* at 1.

¹⁷ *See id.* at 4, 7.

¹⁸ *See* FENWICK, *supra* note 1, at 7.

¹⁹ *See id.* at 142.

²⁰ *See id.*

cuted in such disproportionate numbers. Part III exposes the fact that racial discrimination has not played a significant role in defending against these prosecutions and proposes strategies for bringing this issue to the forefront in these cases. While the stated intent of prenatal drug use prosecutions is to protect unborn children, the disproportionate prosecution of Black women suggests racial and class biases against poor, minority women.²¹ Such discrimination will continue unless a concerted effort is made to expose this problem and create empathy for these women.

I. OVERVIEW OF PRENATAL DRUG USE AS A BASIS FOR CRIMINAL PROSECUTIONS

A. *Fenwick's Study of Criminal Prosecutions for Prenatal Conduct*

Fenwick begins her discussion of criminal prosecutions of prenatal drug use by presenting the experience of Sara Collins, a thirty-six-year-old white attorney who was addicted to cocaine during her pregnancy.²² Collins believed that she was singled out for prosecution because she was "atypical": she was neither unemployed nor Black, as were most of the defendants in previous cases.²³ Collins revealed her addiction to her doctor during the fourth month of her pregnancy, but since addiction is not a crime, she could not have been prosecuted at that point.²⁴ However, Collins did not stop using, and she was eventually charged with delivering a controlled substance to her newborn through the umbilical cord between the time of birth and the cutting of the cord.²⁵ Charges against her were dismissed after the Michigan Court of Appeals decided *People v. Hardy*, which held that such a prosecution was not a reasonable construction of the delivery of drugs to minors statute.²⁶

²¹ See AMA, *supra* note 5, at 2665; Chasnoff, *supra* note 5, at 1206; Roberts, *supra* note 5, at 938-39.

²² See FENWICK, *supra* note 1, at 114-15. "Sara Collins" is a pseudonym. See *id.* at 114 n.1. But, it seems clear that she is the "white woman lawyer" to whom Kimberly Hardy referred. See Greene, *supra* note 10, at 737. Professor Roberts indicates that the actual name of the white attorney is Lynn Bremer. See Roberts, *supra* note 5, at 958 n.103.

²³ See FENWICK, *supra* note 1, at 114.

²⁴ See *id.* at 115 (citing *Robinson v. California*, 370 U.S. 660, 667 (1962), which held that a California law making it a criminal offense for a drug addict to be within the state was unconstitutional because it imposed criminal prosecution for a medical problem, drug addiction, without any accompanying criminal activity, such as possession or use of drugs).

²⁵ See *id.*

²⁶ See *id.* at 116-17; see also MICH. COMP. LAWS § 333.7401 (2) (a) (iv) (1995) (Mich. Stat. Ann.

Next, Fenwick addresses the role of criminal prosecutions after conception.²⁷ She states that the general public is increasingly asking whether a woman who decides to carry a fetus to term should be legally responsible for actions that she knows, or should know, will measurably damage the baby.²⁸

Fenwick notes that most prosecutors have relied upon various criminal laws, such as laws prohibiting child abuse or delivery of drugs to minors, unrelated to prenatal substance abuse in these cases.²⁹ She also notes that most of the prosecutions have been for the use of illegal drugs, especially cocaine.³⁰ Fenwick questions why the general public is not equally disturbed by other harmful prenatal behaviors, such as smoking, drinking alcohol and coffee, maintaining a poor diet, failing to seek early prenatal care, and working in unsafe environments.³¹ She then acknowledges the government's resistance to regulating legal behaviors, especially since it is difficult to assess the extent of damage to a fetus caused by abusive prenatal conduct and virtually impossible to trace the cause and effect of each behavior.³²

Fenwick cites South Carolina's aggressive prosecution of pregnant drug users as an example of the argument that addicted women are incapable of regulating their own behavior and that judicial or state intervention is necessary to protect the fetus.³³ Charles Condon, a solicitor³⁴ involved in these prosecutions in Charleston, South Carolina, stated his belief that the medical caregivers and social workers in that city were so ineffective in reaching pregnant drug abusers that the only way to resolve this problem was to make individuals accountable for their own actions.³⁵

Fenwick disagrees with this sentiment. Rather, she feels that any governmental restraint or control must be done for purposes of treat-

§ 14.15(7401)(2)(a)(iv) (Callaghan 1995)); *People v. Hardy*, 469 N.W.2d 50, 53 (Mich. Ct. App. 1991) (holding that postpartum transfer of cocaine metabolites through umbilical cord to infant is not type of conduct legislature intended to be prosecuted under statute proscribing delivery of cocaine).

²⁷ See FENWICK, *supra* note 1, at 129.

²⁸ See *id.*

²⁹ See *id.* at 130.

³⁰ See *id.* at 131.

³¹ See *id.* at 131-32.

³² See FENWICK, *supra* note 1, at 133-34.

³³ See *id.* at 135.

³⁴ A solicitor is the chief law officer of the city. BLACK'S LAW DICTIONARY 1393 (6th ed. 1990).

³⁵ See Henry Eichel, S.C. *Lawsuit Spotlights Debate on How to Treat Pregnant Cocaine Users*, CHARLOTTE OBSERVER, Jan. 31, 1994, at 1A.

ment and fetal safety, not for punishment.³⁶ While education is the best strategy for reducing harmful conduct during pregnancy, society must be more willing to help these women in order for education to have any chance of success.³⁷ To underscore her position, Fenwick points out that current attempts to mandate healthy behavior during pregnancy too often include women who did not choose to become pregnant in the first place, in part or wholly due to their own addictions.³⁸ These women are often unable to conform to the behaviors demanded from them and likely will not be capable of mothering adequately after the babies are born.³⁹ Fenwick also points out that almost all medical associations and public health organizations, such as the American Medical Association and the March of Dimes, condemn these criminal prosecutions.⁴⁰

With respect to the prevalence of racial and class bias in prenatal conduct prosecutions, Fenwick finds that these charges are "not without merit."⁴¹ She then cites statistics from various studies⁴² and expert opinions⁴³ supporting the existence of racial and class bias and discrimination.⁴⁴ But Fenwick does not delve very deeply into this topic, likely because it is too complicated for the scope of her book.⁴⁵ The

³⁶ See FENWICK, *supra* note 1, at 142.

³⁷ See *id.* at 139.

³⁸ See *id.* at 141.

³⁹ See *id.*

⁴⁰ See *id.* at 142.

⁴¹ See FENWICK, *supra* note 1, at 135-36.

⁴² See *id.* at 136. The Pinellas County, Fla. study is cited. See generally Chasnoff, *supra* note 5. The 1992-1993 National Pregnancy and Health Survey found that more than half of the women surveyed who were using drugs were white, although the percentage of abusers was higher among Blacks, and also that white women were far more likely to drink or smoke during their pregnancies. See FENWICK, *supra* note 1, at 136. A National Institutes of Health study examining responses from 42,862 households to a federal government survey taken in 1992 found that welfare recipients are no more likely to abuse drugs and alcohol than the general population. See *id.* at 136 n.31.

⁴³ Research of the Georgia Addiction, Pregnancy and Parenting Project (GAPP) that began in 1980 supports the role intervention can play in helping pregnant drug and alcohol abusers and also warns against the dangers of coercive interventions that evidence a class bias. See *id.* at 134. Dr. Claire Coles of GAPP observed that the use of legal and illegal substances exists at all levels of society, but social condemnation of individual pregnant abusers tends to be directed at poor minority women. See *id.* at 135. Iris Smith, also of GAPP, agrees: "Identification of substance abuse among more affluent women is less likely because their doctors are reluctant to recognize it. If the woman is discovered as an abuser, and she is uncomfortable with the doctor's conversation, she'll go find another doctor. Low-income people generally don't have that kind of option. They have to go to the public health clinic; there's no place else they can go." *Id.* at 135.

⁴⁴ See FENWICK, *supra* note 1, at 134-37.

⁴⁵ See *id.*

remainder of this book review will attempt to complete Fenwick's analysis of racial and class discrimination in these prosecutions.

B. Prosecutorial and Legislative Attempts to Criminalize Prenatal Illegal Drug Use

In order to criminalize prenatal substance abuse, prosecutors have attempted to use criminal laws prohibiting child abuse, neglect and endangerment, delivery of drugs to minors, assault with a deadly weapon, and manslaughter. However, most convictions have been overturned on grounds of incorrect interpretations of the statutes at issue.⁴⁶ In prosecutions based on child abuse and endangerment statutes, courts have overturned convictions for several reasons, including:⁴⁷ 1) a fetus is not a "child" within the meaning of the statute;⁴⁸ 2) application of the statute in a fetal abuse context is inconsistent, which can lead to improper notice;⁴⁹ and 3) legislatures never intended for child abuse statutes to protect a fetus.⁵⁰ When women have been convicted under delivery of controlled substance statutes through a theory of delivery through the umbilical cord after birth, appellate courts have uniformly overruled these cases. The courts have ruled both that the statutes do

⁴⁶ See, e.g., *Reyes v. Superior Court*, 75 Cal. App. 3d 214, 217-18 (1977) (holding that statute relating to felony-child endangering did not refer to an unborn "child" or fetus and did not proscribe endangering of fetus by mother who used heroin during her pregnancy); *Johnson v. State*, 602 So.2d 1288, 1294 (Fla. 1992) (holding that legislature never intended for general drug delivery statute to authorize prosecutions in which drugs passed from mother to child through umbilical cord after birth); *People v. Hardy*, 469 N.W.2d 50, 53 (Mich. Ct. App. 1991) (holding that pregnant woman's use of cocaine, which might result in postpartum transfer of cocaine metabolites through umbilical cord to her infant, is not the type of conduct legislature intended to be prosecuted under delivery of cocaine statute); *State v. Gray*, 584 N.E.2d 710, 710-11 (Ohio 1992) (holding that parent may not be prosecuted for child endangerment for substance abuse occurring prior to birth because child did not become "child" within contemplation of statute until born). *But see* *Whitner v. State*, 492 S.E.2d 777, 780 (S.C. 1997) (holding that viable fetus is "child" within meaning of child abuse and endangerment statute, and therefore mother could be charged under statute for taking cocaine during third trimester of pregnancy, causing baby to be born with cocaine in its system).

⁴⁷ See Michelle D. Mills, *Fetal Abuse Prosecutions: The Triumph of Reaction over Reason*, 47 DEPAUL L. REV. 989, 994-95 (1998).

⁴⁸ See *State v. Gethers*, 585 So.2d 1140, 1142 (Fla. Dist. Ct. App. 1991) (finding it against state's public policy to consider fetus a child for purposes of aggravated child abuse statute).

⁴⁹ See *Commonwealth v. Welch*, 864 S.W.2d 280, 283 (Ky. 1993) (holding that if criminal abuse statute were to include injury to fetuses, it would be impermissibly vague and that statute would lack fair notice).

⁵⁰ See *Sheriff v. Encoe*, 885 P.2d 596, 599 (Nev. 1994) (holding that child endangerment statute does not apply to transmission of controlled substances through umbilical cord after delivery and that legislature's examination of this issue and its subsequent silence indicates that prenatal drug use should not be criminally prosecuted).

not provide sufficient notice that prenatal drug use would be considered a violation within the meaning of the statute and that legislatures did not intend for such behavior to be covered by these statutes.⁵¹

To avoid these legislative intent problems, South Dakota and Wisconsin enacted legislation in 1998 that specifically targets pregnant drug users.⁵² In addition, South Dakota law was also amended in 1998 to include in its definition of an abused or neglected child one who was subjected prenatally to abusive use of alcohol or any illegal controlled substance.⁵³ The statute also authorizes emergency involuntary commitment of an intoxicated woman who is pregnant and abusing alcohol and drugs to an approved treatment facility.⁵⁴ Wisconsin's law provides that an adult pregnant woman may be taken into state custody if there is substantial risk that the physical health of the unborn child will be seriously affected or endangered due to the woman's "habitual lack of self-control in the use of alcohol beverages, controlled substances or controlled substance analogs, exhibited to a severe degree"⁵⁵ While these laws do not provide for criminal sanctions, they do define an "unborn child" as a person with legal rights from the time of fertilization to the time of birth.⁵⁶

Similarly, in South Carolina it is unlawful for a parent to "place the child at unreasonable risk of harm affecting the child's life, physical or mental health, or safety."⁵⁷ Conviction under this felony statute is punishable by a fine, a potential ten-year prison sentence, or both.⁵⁸ In *Whitner v. State*,⁵⁹ the Supreme Court of South Carolina held that the definition of a "child"—"a person under the age of eighteen"⁶⁰—

⁵¹ See Mills, *supra* note 47, at 995 (citing Johnson, 602 So.2d at 1290 (finding that legislative history does not show intent to use term "delivery" in context of criminally prosecuting mothers of delivery of controlled substance to minor by way of umbilical cord); Hardy, 469 N.W.2d at 52 (finding that "penal statute must be sufficiently definite and explicit to inform those who are subject to it what conduct will render them liable to its penalties"))).

⁵² S.D. CODIFIED LAWS § 34-20A-63 (Michie 1998); WIS. STAT. § 48.193 (1998).

⁵³ S.D. CODIFIED LAWS § 26-8A-2(9).

⁵⁴ *Id.* § 34-20A-63(3).

⁵⁵ WIS. STAT. § 48.193(1)(c)-(d). The woman may be held in the home of an adult relative or friend, a licensed community-based residential facility, a hospital, or an approved public treatment facility for emergency treatment. See WIS. STAT. § 48.207(1m).

⁵⁶ See Bob Herbert, *Fetal Protection Conceals Real Agenda*, MILWAUKEE J. SENTINEL, June 16, 1998, available in 1998 WL 6333375. This is evidence of a fetal protection movement with an underlying goal of having the fetus defined as a person in as many venues as possible, which can eventually undermine a woman's right to have an abortion. See *id.*

⁵⁷ S.C. CODE ANN. § 20-7-50(A)(1) (West 1998).

⁵⁸ See *id.* § 20-7-50(B).

⁵⁹ 492 S.E.2d 777, 777 (S.C. 1997).

⁶⁰ S.C. CODE ANN. § 20-7-30(1).

includes a fetus in the context of the child endangerment statute.⁶¹ This is contrary to the opinion of all other state appellate courts that have addressed this issue.⁶² By conferring legal rights to a viable fetus, the court found that Cornelia Whitner had violated the statute by using cocaine while pregnant.⁶³

Both Whitner and Malissa Ann Crawley, who was charged with the same offense as Whitner, pleaded guilty in 1992 in South Carolina.⁶⁴ Each gave birth to a healthy child,⁶⁵ but the Supreme Court of South Carolina's decision has removed both women from their families and put them into prison.⁶⁶ At the time of the South Carolina Supreme Court decision, Crawley had overcome her drug habit, obtained employment, and was successfully raising three children.⁶⁷ Lynn Paltrow of the New York-based Center for Constitutional Rights, which filed the appeal on behalf of the women, believes both were being targeted selectively as African-American women to be the first to go to jail on a theory of fetal rights that hurts both children and women.⁶⁸

On May 26, 1998, the United States Supreme Court denied certiorari on Whitner's appeal,⁶⁹ essentially allowing the prosecutions to continue and opening the door for other states to follow suit with similar statutes or interpretations of existing statutes.⁷⁰ This may result in a slippery slope of prosecuting pregnant women for other legal

⁶¹ See *Whitner v. State*, 492 S.E.2d 777, 780 (S.C. 1997).

⁶² See, e.g., *Reyes v. Superior Court*, 75 Cal. App. 3d 214, 217-18 (1977) (holding that statute relating to felony-child endangering did not refer to an unborn "child" or fetus and did not proscribe endangering of fetus by mother who used heroin during her pregnancy); *People v. Hardy*, 469 N.W.2d 50, 53 (Mich. App. Ct. 1991) (holding that pregnant woman's use of cocaine, which might result in postpartum transfer of cocaine metabolites through umbilical cord to her infant, is not the type of conduct legislature intended to be prosecuted under delivery of cocaine statute).

⁶³ See *Whitner*, 492 S.E.2d at 782-83.

⁶⁴ See *Politics & Policy Fetal Abuse: Supreme Court Lets South Carolina Law Stand*, AMERICAN HEALTH LINE, (American Political Network, Inc.), May 27, 1998, available in WESTLAW, APN-HE Database [hereinafter, *Supreme Court Lets Law Stand*].

⁶⁵ See *All Things Considered* (National Public Radio radio broadcast, May 26, 1998) audio available in NPR Online (visited Mar. 2, 1999) <<http://www.npr.org/programs/atc/archives/1998/980526.atc.html>>.

⁶⁶ See *Supreme Court Lets Law Stand*, *supra* note 64.

⁶⁷ See Bob Herbert, Editorial, *Little Sense in "Lock 'Em Up" Attitude*, SUN-SENTINEL (Fl. Lauderdale, Fla.), June 16, 1998, at 31A, available in 1998 WL 12817690.

⁶⁸ See *All Things Considered*, *supra* note 65.

⁶⁹ See *Whitner v. South Carolina*, 118 S.Ct. 1857, 1857 (1998).

⁷⁰ See *Can Child-Abuse Laws Protect the Unborn? Case in S.C. Could Serve As a Model*, OMAHA

behaviors that can harm a fetus, including smoking, drinking alcohol or even exercising too much.⁷¹

None of these statutes is racially discriminatory on its face.⁷² Nevertheless, the Supreme Court subjects race-neutral statutes to strict scrutiny if they are discriminatory in both impact and purpose.⁷³ As this book review will demonstrate, these fetal abuse laws may very well be discriminatory in both their impact and their enforcement since they are directed primarily at pregnant users of cocaine, who are more likely to be poor minority women than middle-class white women.⁷⁴ However, no courts have overturned prenatal drug abuse convictions on the grounds of race discrimination, and attorneys challenging the convictions have not relied on the race of the defendants in their arguments.⁷⁵ Therefore, special efforts are required to uncover the discriminatory impact of these prosecutions.⁷⁶

II. THE DISPROPORTIONATE PROSECUTION OF BLACK WOMEN FOR PRENATAL DRUG ABUSE

A. *The South Carolina "Interagency Policy on Cocaine Abuse in Pregnancy"*

The most egregious example of the discriminatory enforcement of these prosecutions occurred in Charleston, South Carolina from 1989–1994.⁷⁷ Forty-one of the forty-two prenatal drug users arrested

WORLD-HERALD, June 11, 1998, available in 1998 WL 5509149 [hereinafter *Can Child-Abuse Laws Protect the Unborn?*].

⁷¹ See *id.*

⁷² See, e.g., S.C. CODE ANN. § 20–7–50(A)(1) (West 1998); S.D. CODIFIED LAWS § 34–20A-63 (Michie 1998); WIS. STAT. § 48.193 (1998).

⁷³ See *Washington v. Davis*, 426 U.S. 229, 242 (1976) (holding that discriminatory impact alone will not trigger strict scrutiny); *Mills*, *supra* note 47, at 1030 (citing LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW, § 16–20, at 1502 (2nd ed. 1988)).

⁷⁴ See *Mills*, *supra* note 47, at 1030–31; see also *Yick Wo v. Hopkins*, 118 U.S. 356, 373–74 (1886) (holding that application and administration of facially neutral law in a clearly discriminatory manner is a violation of equal protection). *But see McCleskey v. Kemp*, 481 U.S. 279, 297–98 (1987) (finding that exceptionally clear proof is required before inferring that an abuse of discretion in the criminal justice process has occurred and also that proof that the state legislature enacted or maintained a statute because of an anticipated racially discriminatory effect is required to find a violation of equal protection).

⁷⁵ See *Roberts*, *supra* note 5, at 940.

⁷⁶ See *id.* at 941.

⁷⁷ See *id.* at 941–44.

were Black.⁷⁸ Even more disturbing, the South Carolina Supreme Court has upheld the convictions under child endangerment statutes.⁷⁹

An overview of South Carolina's "Interagency Policy on Cocaine Abuse in Pregnancy," illustrates the attitudes of the officials involved in these prosecutions and the reasons why mainly Black women were prosecuted.⁸⁰ A collaboration between Charleston law enforcement officials and the MUSC, a state hospital serving an indigent, minority population, supplied the defendants in many of the prosecutions.⁸¹

In August 1989, Nurse Shirley Brown of MUSC approached the local solicitor, Charles Condon, about the increase in crack cocaine use that she perceived among her pregnant patients; she felt she had a legal responsibility to inform law enforcement authorities about the harm that was being inflicted upon unborn children.⁸² During the previous year, Nurse Brown and other MUSC staff members had identified and treated over 100 pregnant drug users.⁸³ Condon viewed this situation as nothing less than harboring criminals, arguing that the hospital was obliged to report the cases if they involved viable fetuses.⁸⁴

This prompted Condon to meet with members of MUSC staff, the police department, child protective services, and the Charleston County Substance Abuse Commission to develop a strategy to address the problem.⁸⁵ Broader law enforcement objectives quickly overwhelmed the good intentions of MUSC staff, and the threat of criminal charges was used to coerce pregnant patients into drug treatment programs.⁸⁶ Condon also asserted that the physician-patient privilege did not prevent hospital staff members from reporting positive drug tests to police.⁸⁷

Within two months, MUSC instituted the "Interagency Policy on Cocaine Abuse in Pregnancy," a series of internal memos that provided

⁷⁸ See *id.* at 943 (citing Plaintiffs' Memorandum in Support of Their Partial Cross-Motion for Summary Judgment and in Opposition to Defendants' Motion for Summary Judgment at 32-33, *Ferguson v. City of Charleston*, No. 2:93-2624-2 (D.S.C. Oct. 1995) [hereinafter Plaintiffs' Memorandum]).

⁷⁹ See, e.g., *Whitner v. State*, 492 S.E.2d 777, 786 (S.C. 1997).

⁸⁰ See Roberts, *supra* note 5, at 941-44.

⁸¹ See *id.* at 941-42.

⁸² See Barry Siegel, *In the Name of the Children: Get Treatment or Go to Jail, One South Carolina Hospital Tells Drug-Abusing Pregnant Women*, L.A. TIMES, Aug. 7, 1994, Magazine, at 14.

⁸³ See *id.*

⁸⁴ See *id.*

⁸⁵ See Roberts, *supra* note 5, at 941.

⁸⁶ See *id.*

⁸⁷ See Siegel, *supra* note 82.

for nonconsensual drug testing of pregnant patients, the reporting of results to police, and the use of arrest for drug and child abuse charges as punishment or intimidation.⁸⁸ Although the program claimed "to ensure appropriate management of patients abusing illegal drugs during pregnancy,"⁸⁹ its origin suggests that the program was designed to supply Condon with defendants for his new prosecutorial crusade.⁹⁰ Hospital bioethicists later criticized the pressure that Condon exerted in instituting the policy so quickly because it precluded the painstaking deliberation that should have gone into a new patient care program.⁹¹

Arrests had begun already by the time the hospital had officially approved the policy.⁹² During the first several months of the policy, women were arrested immediately if they tested positive for crack at the time they gave birth.⁹³

The policy also set up a so-called "amnesty program" whereby patients who tested positive for drugs were offered a chance to get treatment.⁹⁴ Patients who tested positive were handed two letters—one notified them of their appointment with the substance abuse clinic; the other, from Condon, warned that

[i]f you fail to complete substance abuse counselling [sic], fail to cooperate with the Department of Social Services in the placement of your child and services to protect that child, or if you fail to maintain clean urine specimens during your substance abuse rehabilitation, you will be arrested by the police and prosecuted by the Office of the Solicitor.⁹⁵

Women who failed to meet these requirements would not receive a second chance.⁹⁶ If patients refused or failed to enter into a treatment program, they would be arrested.⁹⁷

⁸⁸ See Roberts, *supra* note 5, at 942 (citing Plaintiffs' Memorandum, *supra* note 78, at 10–11).

⁸⁹ MUSC, *Policy II-7 Management of Drug Abuse During Pregnancy* (Oct. 1989), quoted in Philip H. Jos et al., *The Charleston Policy on Cocaine Use During Pregnancy: A Cautionary Tale*, 23 J.L. MED. & ETHICS 120, 120 & n.1 (1995).

⁹⁰ See Roberts, *supra* note 5, at 942.

⁹¹ See *id.* (citing Jos et al., *supra* note 89, at 122).

⁹² See *id.*

⁹³ See *id.*

⁹⁴ See *id.*

⁹⁵ See Roberts, *supra* note 5, at 942–43 (citing Plaintiffs' Memorandum, *supra* note 78, at 18–19 n.25).

⁹⁶ See *id.* at 943.

⁹⁷ See *id.* at 942.

Depending on the mother's stage of pregnancy, authorities would charge her with drug possession, child neglect, or distribution of drugs to a minor.⁹⁸ If authorities felt that a woman was "uncooperative," law enforcement would arrest her upon one positive drug test.⁹⁹ These tactics led to the arrest of forty-two patients, all but one of whom were Black.¹⁰⁰

The arrests resembled the conduct of a state in some totalitarian regime, with police apprehending some patients within days, or even hours, of giving birth, hauling them to jail in handcuffs and leg shackles.¹⁰¹ Police attached handcuffs to three-inch wide leather belts that were wrapped around the women's stomachs.¹⁰² Some women were still bleeding from the delivery; when one complained, she was told to sit on a towel at the jail.¹⁰³ Another reported that she was grabbed in a chokehold and forcefully escorted into treatment.¹⁰⁴ One woman who was pregnant at the time of her arrest sat in a jail cell waiting to give birth.¹⁰⁵ Another pregnant woman was transported weekly from the jail to the hospital in handcuffs and leg irons for prenatal care; she was still in handcuffs and leg irons when authorities took her to the hospital in labor.¹⁰⁶ She was kept handcuffed to her bed during the entire delivery.¹⁰⁷

The decision to institute this policy in a state hospital serving a poor minority population could be reason enough to believe that race bias played a significant role in these prosecutions.¹⁰⁸ An even stronger suggestion of racist motivation is the fact that all but one of the women

⁹⁸ See *id.*

⁹⁹ See *id.*

¹⁰⁰ See Roberts, *supra* note 5, at 943 (citing Plaintiffs' Memorandum, *supra* note 78, at 32-33). In addition, Nurse Brown noted on the chart of the sole white woman arrested that her boyfriend was Black. See *id.* at 943 n.28.

¹⁰¹ See *id.* at 943 (citing Plaintiffs' Memorandum, *supra* note 78, at 26; Philip J. Hiltz, *Hospital Sought Out Prenatal Drug Abuse*, N.Y. TIMES, Jan. 21, 1994, at A12).

¹⁰² See *id.*

¹⁰³ See Lynn M. Paltrow, *When Becoming Pregnant Is a Crime*, CRIM. JUST. ETHICS, Winter/Spring 1990, at 41, 41.

¹⁰⁴ See Siegel, *supra* note 82.

¹⁰⁵ See *id.*

¹⁰⁶ See Roberts, *supra* note 5, at 943 (citing Plaintiffs' Memorandum, *supra* note 78, at 27).

¹⁰⁷ See *id.* (citing Plaintiffs' Memorandum, *supra* note 78, at 27).

¹⁰⁸ See Roberts, *supra* note 5, at 946; Molly McNulty, Note, *Pregnancy Police: The Health Policy and Legal Implications of Punishing Pregnant Women for Harm to Their Fetuses*, 16 N.Y.U. REV. L. & SOC. CHANGE 277, 318 (1987-1988); Bonnie I. Robin-Vergeer, Note, *The Problem of the Drug-Exposed Newborn: A Return to Principled Intervention*, 42 STAN. L. REV. 745, 753, 782 n.157 (1990); Kolata, *supra* note 7.

arrested was Black.¹⁰⁹ The degrading, inhumane manner in which the arrested women were treated also indicates racial animus.¹¹⁰ The next section will demonstrate how the South Carolina policy exemplifies the racially disproportionate impact in other states' prosecutions of prenatal drug use.

B. *The Unspoken Racial Discrimination of Prenatal Drug Use Prosecutions and Its Effects on Black Women*

While the above account of the South Carolina Interagency Policy evidences racially disproportionate enforcement on the part of hospital employees, law enforcement, and prosecutors, state officials repeatedly deny any racial motivation in the prosecutions, and courts routinely accept their disclaimers.¹¹¹ Professor Dorothy E. Roberts¹¹² believes that prosecutors and judges have overlooked this blatant racial impact because they "see poor Black women as suitable subjects for these reproductive penalties because society does not view these women as suitable mothers in the first place."¹¹³ She attributes this to a deeply embedded mythology about Black mothers in our culture.¹¹⁴ Accordingly, the disproportionate prosecution of Black mothers seems fair and natural, not the result of any invidious motivation, which makes it more difficult to challenge the prosecutions on the basis of race.¹¹⁵ Other commentators agree that there is an unconscious racial bias and argue that patterns of racist opinions and attitudes are shared and reinforced by groups, a phenomenon referred to as the "circle of ignorance."¹¹⁶

¹⁰⁹ See Roberts, *supra* note 5, at 943.

¹¹⁰ See *id.* at 943-44.

¹¹¹ See *id.* at 945-46.

¹¹² Professor Roberts, of the Rutgers University School of Law, is a noted scholar in the study of race and reproductive freedom. Her law review articles on the subject include *Punishing Drug Addicts Who Have Babies: Women of Color, Equality, and the Right of Privacy*, 104 HARV. L. REV. 1419 (1991); *The Genetic Tie*, 62 U. CHI. L. REV. 209 (1995); *Irrationality and Sacrifice in the Welfare Reform Consensus*, 81 VA. L. REV. 2607 (1995); *Welfare and the Problem of Black Citizenship*, 105 YALE L.J. 1563 (1996); and *Race and the New Reproduction*, 47 HASTINGS L.J. 935 (1996).

¹¹³ DOROTHY ROBERTS, *KILLING THE BLACK BODY: RACE, REPRODUCTION, AND THE MEANING OF LIBERTY* 152 (1997) [hereinafter *KILLING THE BLACK BODY*].

¹¹⁴ See Roberts, *supra* note 5, at 946. For centuries, a popular mythology has degraded Black women and portrayed them as less deserving of motherhood by stereotyping them as sexually promiscuous and as solely responsible for the problems of the Black family. See *id.* at 950.

¹¹⁵ See *id.* at 946.

¹¹⁶ See Greene, *supra* note 10, at 799; see also Charles R. Lawrence III, *The Id, The Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN L. REV. 317, 322 (1987) (stating

The South Carolina example illustrates this unconscious racial bias. The state used methods to identify pregnant drug users that resulted in disproportionate reporting of poor Black women.¹¹⁷ Positive infant toxicology reports sent to child welfare authorities were the main source of prenatal drug use information.¹¹⁸ Since this testing is used more often in hospitals serving poor minority communities, it follows that Black women will be disproportionately reported.¹¹⁹ In private hospitals more likely to have an affluent white patient population, doctors are less likely to screen pregnant women in this way.¹²⁰ These doctors may fear losing current and potential patients; they also feel more socially similar to their patients and therefore are less likely to report them.¹²¹

The actual manner in which hospitals administer drug testing also disproportionately affects poor Black mothers.¹²² Hospitals commonly decide to perform an infant toxicology screening when the mother has not received prenatal care, which is often the case for poor Black women.¹²³ Many hospitals do not even have standard criteria upon which a decision to test should be made, so that hospital staff rely solely on suspicion and are allowed to perform tests based on their stereotyped assumptions about the identity of drug addicts.¹²⁴

Nurse Brown of the MUSC hospital serves as an extreme example of the healthcare worker who holds stereotypical views of minority women.¹²⁵ She frequently expressed racial stereotypes about her Black patients to drug counselors and social workers, including her beliefs that most Black women should have their tubes tied and that birth

that unconscious racial motivation influenced by our cultural experience contributes to racial discrimination). *But see* ROBERTS, *KILLING THE BLACK BODY*, *supra* note 113, at 185, where Harvard law professor Randall Kennedy and Charleston, SC police chief Reuben Greenberg, both Black, state that they believe that the prosecution of pregnant drug users protects Black citizens and benefits Black children.

¹¹⁷ See Roberts, *supra* note 5, at 946; McNulty, *supra* note 108, at 318; Robin-Vergeer, *supra* note 108, at 782 n.157; Kolata, *supra* note 7.

¹¹⁸ See Roberts, *supra* note 5, at 946.

¹¹⁹ See *id.*

¹²⁰ See *id.* (citing Chasnoff, *supra* note 5, at 1205; Carol Angel, *Addicted Babies: Legal System's Response Unclear*, L.A. DAILY J., Feb. 29, 1988, at 1 (noting that reports from doctors serving upper income patients are rare)).

¹²¹ See Chasnoff, *supra* note 5, at 1205.

¹²² See Roberts, *supra* note 5, at 947.

¹²³ See *id.*; Robin-Vergeer, *supra* note 108, at 798-99.

¹²⁴ See Chasnoff, *supra* note 5, at 1206; Linda C. Mayes et al., *The Problem of Prenatal Cocaine Exposure*, 267 JAMA 406, 406-07 (1992); Robin-Vergeer, *supra* note 108, at 754 & n.36.

¹²⁵ See Roberts, *supra* note 5, at 947.

control should be put in the drinking water in Black communities.¹²⁶ It is hardly surprising that such nurses would report their Black patients to the police.¹²⁷

An ideological bias against Black women also exists.¹²⁸ Some contend that “[p]rosecutors and judges are predisposed to punish Black crack addicts because of a popular image promoted by the media during the late 1980s and early 1990s.”¹²⁹ By focusing on maternal crack use, which is more prevalent in inner-city neighborhoods and is stereotypically associated with Blacks,¹³⁰ the media created the impression that the pregnant addict is typically a Black woman.¹³¹ Professor Roberts argues that the image of the pregnant crack addict has been added to the iconography of the “bad Black mother,” which already includes the “matriarch,” the domineering female head of the family responsible for the disintegration of the Black family, and the “welfare queen” who breeds children at the expense of taxpayers in order to increase the amount of her welfare check.¹³² Because the media erroneously suggested that the problem of maternal drug use was confined to the Black community, a public health crisis that affects people of all races and economic levels was transformed into an example of the Black mother’s depravity that warranted harsh punishment.¹³³

Recent medical studies also demonstrate that criminal prosecution may be unwarranted because the harmful effects of prenatal crack exposure may be temporary and treatable.¹³⁴ Studies suggest that the harmful effects of crack use on babies may be minimized by ensuring proper health care and nutrition for drug-dependant mothers.¹³⁵ How-

¹²⁶ See *id.* (citing Plaintiffs’ Memorandum, *supra* note 78, at 33–34).

¹²⁷ See *id.*

¹²⁸ See *id.* at 948.

¹²⁹ *Id.*

¹³⁰ See Roberts, *supra* note 5, at 950; Elijah Gosier, *Crack Deals Cross Boundaries of Race*, ST. PETERSBURG TIMES, July 30, 1989, at 1B; Syl Jones, *On Race, Local Media Deserves Euthanasia*, STAR-TRIB. (Minneapolis-St. Paul), June 21, 1990, at 23A; Andrew H. Malcolm, *Crack, Bane of Inner City, Is Now Gripping Suburbs*, N.Y. TIMES, Oct. 1, 1989, at 1.

¹³¹ See Roberts, *supra* note 5, at 950 (citing Kathleen Schuckel, *Aims of Home for Pregnant Addicts Include Reducing Infant Mortality*, INDIANAPOLIS STAR, Nov. 30, 1995, at C9 (associating drug use during pregnancy with high Black infant mortality rate)).

¹³² See Roberts, *supra* note 5, at 950–51.

¹³³ See *id.* at 952.

¹³⁴ See *id.* at 953; Ira J. Chasnoff et al., *Cocaine/Polydrug Use in Pregnancy: Two-Year Follow-Up*, 89 PEDIATRICS 284 (1992); Robert Mathias, *Developmental Effects of Prenatal Drug Exposure May Be Overcome by Postnatal Environment*, NIDA NOTES (Nat. Inst. On Drug Abuse, Rockville, Md.), Jan.-Feb. 1992, at 14).

¹³⁵ See Roberts, *supra* note 5, at 953–54 (citing Scott N. MacGregor et al., *Cocaine Abuse During Pregnancy: Correlation Between Prenatal Care and Perinatal Outcome*, 74 OBSTETRICS &

ever, the criminal prosecution of crack-addicted mothers accomplishes the opposite: Pregnant drug users will avoid prenatal care for fear of being reported to governmental authorities, and, if convicted and incarcerated, the woman will be faced with the likelihood of inadequate healthcare inside the prison system.¹³⁶

This result supports the theory “that punitive policies are based on resentment toward Black mothers, rather than on a real concern for the health of their children.”¹³⁷ Furthermore, this prosecutorial interest may possibly appeal to white “majoritarian sentiments to punish crack/cocaine mothers for burdening society with their special-needs children[.]”¹³⁸ Despite the fact that the laws, and the officials who enforce them, state no explicit racial bias, these policies have the effect of discriminating against poor Black mothers.

III. THE ABSENCE OF RACIAL DISCRIMINATION ARGUMENTS IN PRENATAL DRUG USE PROSECUTIONS

A. *Diverting Attention from Race to Create Sympathy*

While prenatal drug use convictions have been overturned on appeal, racial discrimination has never been a factor in the decisions.¹³⁹ Because Black pregnant drug users are subjected to so many structural and ideological barriers, it is difficult for their attorneys to portray them as sympathetic parties.¹⁴⁰ Therefore one of the strategies used in defending these cases is to divert attention away from these women and the stereotypes that degrade them.¹⁴¹

Defense attorneys and scholars have suggested three alternative arguments on which to focus to de-emphasize the racial images of Black defendants that make these defendants so unpopular.¹⁴² First, defense attorneys argue that concern for the health of the babies exposed to prenatal drug use should be of the utmost importance.¹⁴³

GYNECOLOGY 882, 885 (1989) (finding that comprehensive prenatal care can improve the outcome, but also finding that perinatal morbidity associated with cocaine abuse “cannot be eliminated solely by improved prenatal care”).

¹³⁶ See Roberts, *supra* note 5, at 954; AMA, *supra* note 5, at 2667.

¹³⁷ See Roberts, *supra* note 5, at 954.

¹³⁸ See Greene, *supra* note 10, at 745.

¹³⁹ See Roberts, *supra* note 5, at 940.

¹⁴⁰ See *id.* at 954.

¹⁴¹ See *id.*

¹⁴² See *id.*

¹⁴³ See *id.* at 954–55.

Proper medical treatment, not a jail sentence, should result when prenatal drug use is discovered.¹⁴⁴ Second, legal experts warn against the potential expansion of state interference in pregnant women's conduct.¹⁴⁵ Arguments based on these first two issues have been successful because medical and social experts have warned that the threat of criminal punishment may cause pregnant drug users to avoid prenatal treatment altogether.¹⁴⁶ Also, legal authorities stress that such convictions could lead to prosecutions of all sorts of illegal and legal behaviors that may be unhealthy for a fetus, such as smoking, drinking alcohol, and not maintaining proper nutrition.¹⁴⁷

The third strategy used by defense attorneys is relying on the precedents of white women's successful appeals of prenatal drug use convictions.¹⁴⁸ The rationale here is that calling attention to the harm to privileged white women is more likely to generate sympathy and change for poor minority women than emphasizing the harm to poor minority women themselves.¹⁴⁹ The desired result is a trickle-down effect of middle-class white women's reproductive liberty to less affluent minority women.¹⁵⁰

However, restraints on Black women's reproductive freedom have also trickled up to white women.¹⁵¹ An example is the Welfare "family caps" that not only gained popularity as a means of reducing the numbers of Black children on public assistance, but also denies benefits to white children.¹⁵² Accordingly, it may be more universally effective to start with the lives of the women at the bottom, indigent minority women, when arguing theories of reproductive freedom.¹⁵³

Fenwick's presentation of criminal prosecutions for prenatal conduct and arguments against them follows the pattern of emphasizing more sympathetic white defendants.¹⁵⁴ She devotes an introductory chapter to the story of Sara Collins, the white attorney who was prosecuted for using cocaine during her pregnancy.¹⁵⁵ Fenwick emphasizes

¹⁴⁴ See AMA, *supra* note 5, at 2667.

¹⁴⁵ See Roberts, *supra* note 5, at 954.

¹⁴⁶ See AMA, *supra* note 5, at 2667.

¹⁴⁷ See *Whitner v. State*, 492 S.E.2d 777, 788 (S.C. 1997) (Moore, J., dissenting); Lynn Paltrow, *Rivera Live* (CNBC television broadcast, July 16, 1996) (transcript available in 1996 WL 7051755).

¹⁴⁸ See Roberts, *supra* note 5, at 954.

¹⁴⁹ See *id.* at 958.

¹⁵⁰ See *id.*

¹⁵¹ See *id.*

¹⁵² See *id.*

¹⁵³ See Roberts, *supra* note 5, at 958-59.

¹⁵⁴ See FENWICK, *supra* note 1, at 114-43.

¹⁵⁵ See *id.* at 114-18.

the "enormous personal toll" the prosecution had on Collins: She lost her job with a firm during the prosecution of the case, and she has since been unable to find a new position with a firm.¹⁵⁶ While Collins "avoided an attempt by the state bar to take away her license to practice law," she has only been able to continue as a solo practitioner.¹⁵⁷

Fenwick's technique illustrates how harm to a privileged white woman through such prosecutions is used to create sympathy for pregnant drug users.¹⁵⁸ The one example of a Black pregnant drug user presented by Fenwick, Cecilia Lyles, is buried at the end of the chapter discussing these prosecutions.¹⁵⁹ Also, Lyles does not fit the "bad crack-addict mother" stereotype.¹⁶⁰ In fact, Lyles was voted as the most likely to succeed in high school before she got caught up in the "nightlife"- "drug arena" scene, during which time she got pregnant.¹⁶¹ It took several years for Lyles to admit her addiction; she explains her denial by the fact that she was able to keep a decent job throughout the period of her drug use.¹⁶² Presently, Lyles has regained custody of her son and works as a counselor for addiction recovery and AIDS prevention programs.¹⁶³

Intentionally or not, Fenwick chose to highlight an atypical Black substance abuser, not one of the more commonly targeted-for-prosecution poor, unemployed Black women,¹⁶⁴ to create sympathy. Lyles was successful in high school and she was able to keep her job during her addiction.¹⁶⁵ She was never criminally prosecuted; she has been able to overcome her addiction, and she works in her community to help other women who are now in the same position in which she used to be.¹⁶⁶ While Lyles is an excellent illustration of what can happen when a minority woman is given the chance to get proper treatment within an adequate period of time, she is not the target of prosecutorial campaigns set up in poor minority communities.¹⁶⁷

¹⁵⁶ See *id.* at 117.

¹⁵⁷ See *id.*

¹⁵⁸ See FENWICK, *supra* note 1, at 114-43; Roberts, *supra* note 5, at 958.

¹⁵⁹ See FENWICK, *supra* note 1, at 137-39.

¹⁶⁰ See *id.*; Roberts, *supra* note 5, at 950.

¹⁶¹ See FENWICK, *supra* note 1, at 137.

¹⁶² See *id.*

¹⁶³ See *id.*

¹⁶⁴ See Chasnoff, *supra* note 5, at 1204; Roberts, *supra* note 5, at 939.

¹⁶⁵ See FENWICK, *supra* note 1, at 137.

¹⁶⁶ See *id.*

¹⁶⁷ See Roberts, *supra* note 5, at 938-39.

Decisions by defense attorneys to stay away from the issue of race is echoed in *Private Choices, Public Consequences*.¹⁶⁸ Fenwick focuses on her mainstream American audience and chooses women who will readily evoke sympathy in this audience for pregnant drug users.¹⁶⁹ In such an atmosphere, recognition of race and class bias in these cases will not occur unless the focus is purposely shifted to expose this problem.¹⁷⁰

B. *Shifting the Focus to Race to Uncover Racial Bias*

Focusing on the lives of poor Black drug users is essential to revealing the embedded racial motivation in the prosecutions of these women.¹⁷¹ By diverting attention from race in defending these cases, the opportunity to uncover numerous policies that infringe upon Black women's procreative freedom is lost.¹⁷² Other examples of these policies include the distribution of Norplant contraception to poor women¹⁷³ and measures that penalize welfare mothers for having additional children.¹⁷⁴ When all of these procreative situations are connected by the race of the women most affected, a clear and horrible pattern of discrimination emerges, continuing the legacy of the degradation of Black motherhood.¹⁷⁵

Another strategy for fighting these cases is to expose the inaccuracy of the "bad crack-addict mother" by providing the details of poor Black women's lives.¹⁷⁶ An example is Crystal Ferguson, who was arrested for failing to comply with MUSC's Nurse Brown's order to enter a two-week residential drug-rehabilitation program.¹⁷⁷ Because Ferguson had no one to care for her children for two weeks, and the residential program had no childcare, she requested an outpatient referral.¹⁷⁸ Furthermore, her food stamps and unemployment check

¹⁶⁸ See FENWICK, *supra* note 1, at 114-18.

¹⁶⁹ See *id.*; Roberts, *supra* note 5, at 957-59.

¹⁷⁰ See Roberts, *supra* note 5, at 960-64.

¹⁷¹ See *id.* at 961.

¹⁷² See *id.*

¹⁷³ See *id.* Several state legislatures have considered bills authorizing courts to impose Norplant as punishment for drug related offenses as well as measures to offer cash bonuses to fertile women on public assistance who consent to implantation with Norplant. See Madeline Henley, Comment, *The Creation and Perpetuation of the Mother/Body Myth: Judicial and Legislative Enlistment of Norplant*, 41 BUFF. L. REV. 703, 747-49 (1993).

¹⁷⁴ See Roberts, *supra* note 5, 961.

¹⁷⁵ See *id.*

¹⁷⁶ See *id.* at 962.

¹⁷⁷ See *id.*

¹⁷⁸ See *id.*

were stolen while she was in the hospital.¹⁷⁹ Ferguson was clearly faced with a no-win situation: She would be perceived as a bad mother not only if she did not go into the program, but also if she did enter treatment and left her children alone in an unsafe neighborhood.

Another method for bringing race into these prosecutions is to emphasize the abuse of Black women's bodies.¹⁸⁰ The Center for Reproductive Law and Policy (the Center) filed a complaint with the National Institutes of Health (NIH) alleging that the South Carolina Interagency policy constituted research on human subjects, which MUSC had been conducting without federally mandated review and approval.¹⁸¹ The Center argued that the hospital had embarked on an experiment designed to test a hypothesis that the threat of prison time would stop pregnant women from taking drugs and improve fetal health.¹⁸² MUSC never took the required precautions to ensure that patients were adequately protected, and MUSC even handed over confidential patient information to the police without patient consent.¹⁸³ NIH agreed that MUSC had violated the requirements for human experimentation, and the policy ended in October, 1994, as a condition of settlement with the Department of Health and Human Services, which had commenced its own investigation of possible civil rights violations.¹⁸⁴

The Center's complaint allowed Black mothers to be claimants rather than defendants, enabling them to affirmatively demand an end to the hospital's inappropriate practices.¹⁸⁵ This permitted Black women to hold the government accountable for taking part in a legacy of medical experimentation dating back to times of slavery, when doctors experimented on slave women before practicing new medical procedures on white women.¹⁸⁶ Other illustrations of nonconsensual medical procedures forced on Black women include the coercion by doctors in the 1970s to get hundreds of thousands of Black women to agree to sterilization by conditioning medical services on consent to

¹⁷⁹ See Roberts, *supra* note 5, at 962.

¹⁸⁰ See *id.* at 962-63.

¹⁸¹ See *id.*; Philip J. Hiltz, *Hospital Put on Probation over Tests on Poor Women*, N.Y. TIMES, Oct. 5, 1994, at B9.

¹⁸² See Roberts, *supra* note 5, at 963.

¹⁸³ See *id.*

¹⁸⁴ See *id.*

¹⁸⁵ See *id.*

¹⁸⁶ See G.J. BARKER-BENFIELD, *THE HORRORS OF THE HALF-KNOWN LIFE: MALE ATTITUDES TOWARD WOMEN AND SEXUALITY IN NINETEENTH-CENTURY AMERICA* 101 (1976) (describing the brutal use of Black women slaves in gynecological experimentation).

the operation,¹⁸⁷ the screening for sickle cell anemia of 13,000 Black women in Maryland in 1984 without their consent or subsequent adequate counseling,¹⁸⁸ and the willingness of doctors to override Black patients' autonomy by performing forced medical treatment to benefit the fetus.¹⁸⁹ A new focus on the history of race and class discrimination and the difficult choices that poor, minority women are confronted with on a daily basis will reveal the racial and class bias that underlies the criminal prosecution of pregnant drug users.¹⁹⁰ Perhaps this will in turn encourage courts and legislatures to more closely consider this issue.

C. *Constitutional Challenges Based on the Right to Reproductive Liberty*

Since it would likely be difficult to prevail on an equal protection claim,¹⁹¹ the constitutional violation can be reframed as an infringement upon reproductive liberty.¹⁹² Initially, it is important to recognize that these charges are premised on a woman's pregnancy and not on her illegal drug use alone, as the defendants are charged with offenses that only pregnant drug users can commit.¹⁹³ Therefore, it is the choice to carry a pregnancy to term that is penalized, because the woman could choose to have an abortion, which would probably result in the avoidance of criminal liability.¹⁹⁴

A view of the constitutional issue as the right to choose to be a mother reveals the relevance of race to the resolution of these opposing conditions.¹⁹⁵ Since race has historically determined the value society places on a woman's right to choose motherhood, the devaluation of Black motherhood gives this right a unique significance.¹⁹⁶

¹⁸⁷ See Dorothy E. Roberts, *Punishing Drug Addicts Who Have Babies: Women of Color, Equality, and the Right of Privacy*, 104 HARV. L. REV. 1419, 1442-43 (1991).

¹⁸⁸ See Mark R. Farfel & Neil A. Holtzman, *Education, Consent, and Counseling in Sickle Cell Screening Programs: Report of a Survey*, 74 AM. J. PUB. HEALTH 373, 373-74 (1984).

¹⁸⁹ See AMA, *supra* note 5, at 2665; Nancy Ehrenreich, *The Colonization of the Womb*, 43 DUKE L.J. 492, 500-01, 520-22 (1993); Lisa C. Ikemoto, *Furthering the Inquiry: Race, Class, and Culture in the Forced Medical Treatment of Pregnant Women*, 59 TENN. L. REV. 487, 510 (1992).

¹⁹⁰ See Roberts, *supra* note 5, at 961-64.

¹⁹¹ See *McCleskey v. Kemp*, 481 U.S. 279, 292 (1987) (holding that to prevail on equal protection claim, challenger must prove discriminatory purpose through evidence specific to his or her own case).

¹⁹² See ROBERTS, *KILLING THE BLACK BODY*, *supra* note 113, at 181-82.

¹⁹³ See *id.* at 180.

¹⁹⁴ See *id.* at 181.

¹⁹⁵ See *id.* at 182.

¹⁹⁶ See *id.*

Prosecutions of drug-addicted mothers infringe on the right to choose to bear a child, a fundamental right protected by the Supreme Court in *Eisenstadt v. Baird*.¹⁹⁷ Government intrusion as extreme as criminal prosecution infringes on this protected autonomy.¹⁹⁸ Not only do these prosecutions discourage the decision to bear a child, but they also impose a severe penalty for choosing to carry the child to term.¹⁹⁹

These prosecutions also infringe on reproductive freedom by "imposing an invidious government standard for procreation."²⁰⁰ The prosecution of crack-addicted mothers infringes on the mother's right to make decisions that determine her individual identity.²⁰¹ It also violates her right to equal respect as a human being by recognizing a lesser value of Black motherhood.²⁰² Punishing a woman for exercising her right to bear a child "deprives her of a basic part of her humanity."²⁰³ When this denial is based on race, as demonstrated through evidence of the devaluation of Black motherhood, a racial hierarchy that essentially disregards Black humanity is preserved.²⁰⁴ Therefore, by challenging these prosecutions as violations of the right of reproductive liberty, race discrimination will also be exposed.²⁰⁵

CONCLUSION

Prosecutions for prenatal drug use have usually been based on criminal laws prohibiting child endangerment and delivery of drugs to minors. State officials repeatedly deny that racial motivation plays a part in these prosecutions.²⁰⁶ Courts routinely accept their denials, since most convictions have been overturned on grounds of incorrect interpretations of statutes and never on race discrimination grounds.²⁰⁷

¹⁹⁷ See 405 U.S. 438, 453 (1972) (holding that the right of privacy includes the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child); ROBERTS, *KILLING THE BLACK BODY*, *supra* note 113, at 182.

¹⁹⁸ See ROBERTS, *KILLING THE BLACK BODY*, *supra* note 113, at 182.

¹⁹⁹ See *id.* at 182-83.

²⁰⁰ See *id.* at 183.

²⁰¹ See *id.*

²⁰² See *id.*

²⁰³ See ROBERTS, *KILLING THE BLACK BODY*, *supra* note 113, at 305.

²⁰⁴ See *id.*

²⁰⁵ See *id.* at 182.

²⁰⁶ See Roberts, *supra* note 5, at 946.

²⁰⁷ See *id.*; Reyes v. Superior Court, 75 Cal. App. 3d 214, 217-18 (1977) (holding that statute relating to felony-child endangering did not refer to an unborn "child" or fetus and did not proscribe endangering of fetus by mother who used heroin during her pregnancy); Johnson v.

In addition, the attorneys challenging the convictions have not made arguments based on the race of the defendants, despite the fact that these policies clearly have the effect of disproportionately impacting poor Black mothers.²⁰⁸

Race and class discrimination in these cases will continue to be ignored unless special efforts are made to expose this problem.²⁰⁹ By focusing on historical race and class discrimination and the present hardships and barriers that poor, minority women are challenged by, the racial and class bias that underlies the criminal prosecution of pregnant drug users can be uncovered, discussed, and hopefully remedied.²¹⁰ Framing the constitutional issue at stake as a violation of reproductive liberty also aids in confronting the problem of the devaluation of Black motherhood.²¹¹ The need for action in this situation is especially urgent following the United States Supreme Court's decision to deny certiorari on Cornelia Whitner's appeal. This denial essentially upholds South Carolina's criminal prosecution of pregnant drug users and allows other states to follow suit with the same devastating impact.²¹² Allowing these prosecutions to continue will only further degrade Black motherhood and result in throwing more children into an already overburdened child welfare system. Is this in the best interest of the child?

State, 602 So.2d 1288, 1294 (Fla. 1992) (holding that legislature never intended for general drug delivery statute to authorize prosecutions in which drugs passed from mother to child through umbilical cord after birth); *People v. Hardy*, 469 N.W.2d 50, 53 (Mich. Ct. App. 1991) (holding that pregnant woman's use of cocaine, which might result in postpartum transfer of cocaine metabolites through umbilical cord to her infant, is not the type of conduct legislature intended to be prosecuted under delivery of cocaine statute); *State v. Gray*, 584 N.E.2d 710, 711 (Ohio 1992) (holding that parent may not be prosecuted for child endangerment for substance abuse occurring prior to birth because child did not become "child" within contemplation of statute until born).

²⁰⁸ See Roberts, *supra* note 5, at 940.

²⁰⁹ See *id.* at 959-64.

²¹⁰ See generally *id.*

²¹¹ See ROBERTS, *KILLING THE BLACK BODY*, *supra* note 113, at 181-83, 305.

²¹² See *Whitner v. State*, 118 S.Ct. 1857 (1998); *Can Child-Abuse Laws Protect the Unborn?*, *supra* note 70.