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ARTICLE

PUNISHING DRUG ADDICTS WHO HAVE BABIES: WOMEN OF COLOR, EQUALITY, AND THE RIGHT OF PRIVACY

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Women increasingly face criminal charges for giving birth to infants who test positive for drugs. Most of the women prosecuted are poor, Black, and addicted to crack cocaine. In this Article, Professor Roberts seeks to add the perspective of poor Black women to the current debate over protecting fetal rights at the expense of women's rights. Based on the presumption that Black women experience several forms of oppression simultaneously, the author argues that the punishment of drug addicts who choose to carry their pregnancies to term violates their constitutional rights to equal protection and privacy regarding their reproductive choices. She begins by placing these prosecutions in the context of the historical devaluation of Black women as mothers. After presenting her view of the prosecutions as punishing drug-addicted women for having babies, the author argues that this punishment violates the equal protection clause because it stems from and perpetuates Black subordination. Finally, Professor Roberts argues that the prosecutions violate women's constitutional rights to autonomy and freedom from invidious government standards for childbearing. In presenting her view that the prosecutions violate women's privacy rights, the author critiques the liberal, "negative" conception of privacy rooted in freedom from government constraints. She concludes by advocating a progressive concept of privacy that places an affirmative obligation on the government to guarantee individual rights and recognizes the connection between the right of privacy and racial equality.

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Prologue

A former slave named Lizzie Williams recounted the beating of pregnant slave women on a Mississippi cotton plantation: "[I']s seen nigger women dat was fixin' to be confined do somethin' de white folks didn't like. Dey [the white folks] would dig a hole in de ground just big 'nuff fo' her stomach, make her lie face down an whip her on de back to keep from hurtin' de child."¹

In July 1989, Jennifer Clarise Johnson, a twenty-three-year-old crack addict, became the first woman in the United States to be criminally convicted for exposing her baby to drugs while pregnant.² Florida law enforcement officials charged Johnson with two counts of delivering a controlled substance to a minor after her two children tested positive for cocaine at birth. Because the relevant Florida drug law did not apply to fetuses,³ the prosecution invented a novel interpretation of the statute. The prosecution obtained Johnson's conviction for passing a cocaine metabolite from her body to her newborn infants during the sixty-second period after birth and before the umbilical cord was cut.⁴

I. INTRODUCTION

A growing number of women across the country have been charged with criminal offenses after giving birth to babies who test positive

¹ Johnson, *Smothered Slave Infants: Were Slave Mothers at Fault?*, 47 J.S. HIST. 493, 513 (1981).

² See *State v. Johnson*, No. E89-890-CFA, slip op. at 1 (Fla. Cir. Ct. July 13, 1989), *aff'd*, No. 89-1765, 1991 Fla. App. LEXIS 3583 (Fla. Dist. Ct. App. Apr. 18, 1991); Moss, *Substance Abuse During Pregnancy*, 13 HARV. WOMEN'S L.J. 278, 280-84 (1990); Roberts, *Drug-Addicted Women Who Have Babies*, TRIAL, Apr. 1990, at 56, 56; Davidson, *Newborn Drug Exposure Conviction a 'Drastic' First*, L.A. Times, July 31, 1989, pt. 1, at 1, col. 1. The recent affirmation of the *Johnson* decision by a Florida appeals court marked the first time that a state appeals court has upheld such a conviction under laws designed to punish the distribution of drugs to children under 18. See N.Y. Times, Apr. 20, 1991, at 6, col. 4.

Since Johnson's conviction, several other women have been charged with crimes for giving birth to crack-exposed infants. See, e.g., *State v. Grubbs*, No. 4FA-S89-415 Criminal (Alaska Sup. Ct. Aug. 25, 1989) (sentencing a 23-year-old white woman to six months in jail and five years probation for criminally negligent homicide in the death of her two-week-old son); *State v. Black*, No. 89-5325 (Fla. Cir. Ct. Jan. 3, 1990) (sentencing a 32-year-old Black woman to 18 months in jail and 3 years probation for distribution of drugs to a minor); *State v. Welch*, No. 90-CR-006 (Ky. Cir. Ct. March 15, 1990) (sentencing a 33-year-old white woman to jail for child abuse). See generally Paltrow & Shende, *State by State Case Summary of Criminal Prosecutions Against Pregnant Women and Appendix of Public Health and Public Interest Groups Opposed to These Prosecutions*, Oct. 29, 1990 (unpublished memorandum to ACLU Affiliates and Interested Parties) (on file at the Harvard Law School Library) [hereinafter *State Case Summary*].

³ See FLA. STAT. ANN. § 893.13(1)(c) (West Supp. 1990).

⁴ See Trial Transcript at 20-24, 57-60, *State v. Johnson* [hereinafter *Trial Transcript*] (testimony of Drs. Randy Tompkins and Mitchell Perlstein).

for drugs.⁵ The majority of these women, like Jennifer Johnson, are poor and Black.⁶ Most are addicted to crack cocaine.⁷ The prosecution of drug-addicted mothers is part of an alarming trend towards greater state intervention into the lives of pregnant women under the rationale of protecting the fetus from harm.⁸ This intervention has included compelled medical treatment, greater restrictions on abortion, and increased supervision of pregnant women's conduct.

⁵ Since 1987, at least 50 so-called "fetal abuse" cases have been brought in 19 states and the District of Columbia. See Hoffman, *Pregnant, Addicted — And Guilty?*, N.Y. Times, Aug. 19, 1990, § 6 (Magazine), at 32, 35; see also Lewin, *Drug Use in Pregnancy: New Issue for the Courts*, N.Y. Times, Feb. 5, 1990, at A14, col. 1 (reporting that "[p]rosecutors nationwide are putting . . . drug laws to new use to deal with the rapidly growing number of [drug-exposed] babies"); McNamara, *Fetal Endangerment Cases on the Rise*, Boston Globe, Oct. 3, 1989, at 1, col. 2 (noting that 10 new "fetal endangerment" cases had been brought nationwide in the three months following the Supreme Court's decision in Webster v. Reproductive Health Servs., 109 S. Ct. 3040 (1989)).

Several courts have recently dismissed such "fetal abuse" cases. See, e.g., *People v. Hardy*, No. 128458, 1991 Mich. App. LEXIS 135 (Mich. Ct. App. Apr. 1, 1991); *Judge Drops Charges of Delivering Drugs to an Unborn Baby*, N.Y. Times, Feb. 5, 1991, at B6, col. 4.

⁶ According to a memorandum prepared by the ACLU Reproductive Freedom Project, of the 52 defendants, 35 are African-American, 14 are white, 2 are Latina, and 1 is Native American. See State Case Summary, *supra* note 2; Telephone interviews with Joseph Merkin, Attorney for Sharon Peters (Jan. 7, 1991), James Shields, North Carolina ACLU (Jan. 7, 1991), and Patrick Young, Attorney for Brenda Yurchak (Jan. 7, 1991); see also Kolata, *Bias Seen Against Pregnant Addicts*, N.Y. Times, July 20, 1990, at A13, col. 1 (indicating that of 60 women charged, 80% were minorities). The disproportionate prosecution of poor Black women can be seen most clearly in the states that have initiated the most cases. In Florida, where two women have been convicted for distributing drugs to a minor, 10 out of 11 criminal cases were brought against Black women. See State Case Summary, *supra* note 2, at 3-5. Similarly, of 18 women in South Carolina charged since August 1989 with either criminal neglect of a child or distribution of drugs to a minor, 17 have been Black. See *id.* at 12.

⁷ See Hoffman, *supra* note 5, at 35 (noting that "with the exception of a few cases, prosecutors have not gone after pregnant alcoholics").

⁸ In addition to prosecuting women after the birth of a baby for prenatal crimes, the range of state intrusions on pregnant women's autonomy includes jailing pregnant women, see *infra* notes 54-56 and accompanying text; placing the child in protective custody, see N.J. REV. STAT. § 30:4C-11 (West 1981); allowing tort suits by children against their mothers for negligent conduct during pregnancy, see *Grodin v. Grodin*, 102 Mich. App. 396, 301 N.W.2d 869 (1980); ordering forced medical treatment performed on pregnant women, see *In re A.C.*, 573 A.2d 1235 (D.C. 1990); depriving mothers of child custody based on acts during pregnancy, see *infra* notes 48-53 and accompanying text; upholding employer policies excluding fertile women from the workplace, see *UAW v. Johnson Controls, Inc.*, 886 F.2d 871 (7th Cir. 1989), *rev'd*, 111 S. Ct. 1196 (1991); and placing greater restrictions on access to abortion, see Webster v. Reproductive Health Servs., 109 S. Ct. 3040 (1989). For general theoretical treatments of the issues involved in state intervention during pregnancy, see Gallagher, *Prenatal Invasions & Interventions: What's Wrong with Fetal Rights*, 10 HARV. WOMEN'S L.J. 9 (1987); Goldberg, *Medical Choices During Pregnancy: Whose Decision Is It Anyway?*, 41 RUTGERS L. REV. 591 (1989); McNulty, *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, 279-90 (1988); and Note, *The Creation of Fetal Rights: Conflicts with Women's Constitutional Rights to Liberty, Privacy, and Equal Protection*, 95 YALE L.J. 599 (1986).

Such government intrusion is particularly harsh for poor women of color.⁹ They are the least likely to obtain adequate prenatal care, the most vulnerable to government monitoring, and the least able to conform to the white, middle-class standard of motherhood. They are therefore the primary targets of government control.

The prosecution of drug-addicted mothers implicates two fundamental tensions. First, punishing a woman for using drugs during pregnancy pits the state's interest in protecting the future health of a child against the mother's interest in autonomy over her reproductive life — interests that until recently had not been thought to be in conflict. Second, such prosecutions represent one of two possible responses to the problem of drug-exposed babies. The government may choose either to help women have healthy pregnancies or to punish women for their prenatal conduct.¹⁰ Although it might seem that the state could pursue both of these avenues at once, the two responses are ultimately irreconcilable. Far from deterring injurious drug use, prosecution of drug-addicted mothers in fact deters pregnant women from using available health and counseling services because it causes women to fear that, if they seek help, they could be reported to government authorities and charged with a crime.¹¹ Moreover, prosecution blinds the public to the possibility of nonpunitive solutions and to the inadequacy of the nonpunitive solutions that are currently available.¹²

The debate between those who favor protecting the rights of the fetus and those who favor protecting the rights of the mother has been extensively waged in the literature.¹³ This Article does not repeat

⁹ I use the term "women of color" to refer to non-white women in America, including Black, Latina, Asian, and Native American women. Recognizing the diversity of historical and cultural backgrounds among women of color, this Article focuses particularly on the experience of Black women in America. When women of color are united in a common experience of oppression and poverty, however, I draw more general conclusions about constraints on their reproductive autonomy.

¹⁰ In 1990, lawmakers in 34 states debated bills concerning prenatal substance abuse. See *Key Battle in War on Drugs: Saving Pregnant Women, Endangered Babies*, State Health Notes, June 1990, at 1, col. 1 (published by the George Washington University Intergovernmental Health Policy Project). In California alone, about 20 different bills relating to the problem of drug use during pregnancy were pending before the legislature as of June 1989. See Marcotte, *Crime and Pregnancy*, A.B.A. J., Aug. 1989, at 14, 14.

¹¹ See *infra* notes 156–157 and accompanying text.

¹² See *infra* notes 87–89 and accompanying text.

¹³ For arguments supporting the mother's right to autonomy, see sources cited in note 8. For arguments advocating protection of the fetus, see King, *The Juridical Status of the Fetus: A Proposal for Legal Protection of the Unborn*, 77 MICH. L. REV. 1647, 1682–84 (1979); Parness & Pritchard, *To Be or Not to Be: Protecting the Unborn's Potentiality of Life*, 51 U. CIN. L. REV. 257, 267–86 (1982); Robertson, *Procreative Liberty and the Control of Conception, Pregnancy, and Childbirth*, 69 VA. L. REV. 405, 437–43 (1983); Walker & Puzder, *State Protection*

the theoretical arguments for and against state intervention. Rather, this Article suggests that both sides of the debate have largely overlooked a critical aspect of government prosecution of drug-addicted mothers. Can we determine the legality of the prosecutions simply by weighing the state's abstract interest in the fetus against the mother's abstract interest in autonomy? Can we determine whether the prosecutions are fair simply by deciding the duties a pregnant woman owes to her fetus and then assessing whether the defendant has met them? Can we determine the constitutionality of the government's actions without considering the race of the women being singled out for prosecution?

Before deciding whether the state's interest in preventing harm to the fetus justifies criminal sanctions against the mother, we must first understand the mother's competing perspective and the reasons for the state's choice of a punitive response. This Article seeks to illuminate the current debate by examining the experiences of the class of women who are primarily affected — poor Black women.

Providing the perspective of poor Black women offers two advantages. First, examining legal issues from the viewpoint of those whom they affect most¹⁴ helps to uncover the real reasons for state action and to explain the real harms that it causes. It exposes the way in which the prosecutions deny poor Black women a facet of their humanity by punishing their reproductive choices. The government's choice of a punitive response perpetuates the historical devaluation of Black women as mothers. Viewing the legal issues from the exper-

of the Unborn After Roe v. Wade: A Legislative Proposal, 13 STETSON L. REV. 237, 253-63 (1984).

¹⁴ A growing body of scholarship challenges dominant-group scholars' claims to neutrality or universality. This new scholarship is founded on the reality of oppression. See Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320, 2323-26 (1989) (describing "outsider jurisprudence"); West, *Progressive and Conservative Constitutionalism*, 88 MICH. L. REV. 641, 678-82, 684-86 (1990) (describing "idealistic" and "anti-subordination progressives"). Feminist legal theory is perhaps the most established example of this alternative jurisprudence. See, e.g., MacKinnon, *Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence*, 8 SIGNS 635 (1983); Scales, *The Emergence of Feminist Jurisprudence: An Essay*, 95 YALE L.J. 1373 (1986); West, *Jurisprudence and Gender*, 55 U. CHI. L. REV. 1 (1988).

The scholarship of people of color is a more recent variety of alternative jurisprudence. See, e.g., D. BELL, *AND WE ARE NOT SAVED* (1987); Cook, *Beyond Critical Legal Studies: The Reconstructive Theology of Dr. Martin Luther King, Jr.*, 103 HARV. L. REV. 985 (1990); Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331 (1988). Among this latter group are scholars who, like me, are particularly concerned with the legal problems and concrete experiences of Black women. Their work has informed and inspired me. See, e.g., Austin, *Sapphire Bound!*, 1989 WIS. L. REV. 539; Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581 (1990); Scales-Trent, *Black Women and the Constitution: Finding Our Place, Asserting Our Rights*, 24 HARV. C.R.-C.L. L. REV. 9 (1989).

iential standpoint of the defendants enhances our understanding of the constitutional dimensions of the state's conduct.¹⁵

Second, examining the constraints on poor Black women's reproductive choices expands our understanding of reproductive freedom in particular and of the right of privacy in general. Much of the literature discussing reproductive freedom has adopted a white middle-class perspective, which focuses narrowly on abortion rights. The feminist critique of privacy doctrine has also neglected many of the concerns of poor women of color.¹⁶

My analysis presumes that Black women experience various forms of oppression simultaneously,¹⁷ as a complex interaction of race, gender, and class that is more than the sum of its parts.¹⁸ It is impossible to isolate any one of the components of this oppression or to separate the experiences that are attributable to one component from experiences attributable to the others. The prosecution of drug-addicted mothers cannot be explained as simply an issue of gender inequality. Poor Black women have been selected for punishment as a result of an inseparable combination of their gender, race, and economic status. Their devaluation as mothers, which underlies the prosecutions, has its roots in the unique experience of slavery and has been perpetuated by complex social forces.

Thus, for example, the focus of mainstream feminist legal thought on gender as the primary locus of oppression often forces women of color to fragment their experience in a way that does not reflect the reality of their lives.¹⁹ Angela Harris and others have presented a

¹⁵ For a description and critique of feminist standpoint epistemology, see Bartlett, *Feminist Legal Methods*, 103 HARV. L. REV. 829, 872-77 (1990). Bartlett criticizes feminist standpoint epistemology because it tends to standardize women's characteristics, it denies the significance of the viewpoints of non-victims, it does not explain differences of perception among women, and it engenders adversarial politics. See *id.* at 873-75. These criticisms have merit. Notwithstanding the problems inherent in adopting a general feminist standpoint epistemology, I believe there is value in the limited project of focusing on the perspective of Black women, especially because that perspective has traditionally been ignored.

¹⁶ See *infra* notes 197-214, 248-257 and accompanying text.

¹⁷ See Harris, *supra* note 14, at 604 ("Far more for black women than for white women, the experience of self is precisely that of being unable to disentangle the web of race and gender — of being enmeshed always in multiple, often contradictory, discourses of sexuality and color."); Kline, *Race, Racism, and Feminist Legal Theory*, 12 HARV. WOMEN'S L.J. 115, 121 (1989); Scales-Trent, *supra* note 14, at 9. The theme of the simultaneity of multiple forms of oppression is common in Black feminist writings. See, e.g., Combahee River Collective, *A Black Feminist Statement*, in THIS BRIDGE CALLED MY BACK: WRITINGS BY RADICAL WOMEN OF COLOR 210, 213 (C. Moraga & G. Anzaldúa eds. 1981); B. HOOKS, AIN'T I A WOMAN: BLACK WOMEN AND FEMINISM 12 (1981) ("[A]t the moment of my birth, two factors determined my destiny, my having been born black and my having been born female.").

¹⁸ See Scales-Trent, *supra* note 14, at 9 & n.2 (noting that "race and sex interact to magnify the effect of each independently").

¹⁹ Angela Harris notes the fragmentation produced by an arithmetic approach to multiple oppression: "The result of essentialism is to reduce the lives of people who experience multiple

racial critique of this gender essentialism in feminist legal theory.²⁰ By introducing the voices of Black women, these critics have begun to reconstruct a feminist jurisprudence based on the historical, economic, and social diversity of women's experiences.²¹ This new jurisprudence must be used to reconsider the more particular discourse of reproductive rights.

This Article advances an account of the constitutionality of prosecutions of drug-addicted mothers that explicitly considers the experiences of poor Black women. The constitutional arguments are based on theories of both racial equality and the right of privacy. I argue that punishing drug addicts who choose to carry their pregnancies to term unconstitutionally burdens the right to autonomy over reproductive decisions. Violation of poor Black women's reproductive rights helps to perpetuate a racist hierarchy in our society. The prosecutions thus impose a standard of motherhood that is offensive to principles of both equality and privacy. This Article provides insight into the particular and urgent struggle of women of color for reproductive freedom. Further, I intend my constitutional critique of the prose-

forms of oppression to addition problems: 'racism + sexism = straight black women's experience' Harris, *supra* note 14, at 588.

White feminist scholars do not completely ignore diversity among women. Catharine MacKinnon, for example, acknowledges the experiences of women of color and recognizes that feminist theory must take race into account. See, e.g., C. MACKINNON, *FEMINISM UNMODIFIED* 2 (1987) ("[G]ender . . . appears partly to comprise the meaning of, as well as bisect, race and class, even as race and class specificities make up, as well as cross-cut, gender.").

²⁰ Professor Harris defines gender essentialism as "the notion that a unitary, 'essential' women's experience can be isolated and described independently of race, class, sexual orientation, and other realities of experience." Harris, *supra* note 14, at 585. She observes that this tendency toward gender essentialism results in the silencing of the very same voices ignored by mainstream legal jurisprudence — including the voices of women of color. See *id.* To claim the existence of a monolithic, universal "woman's voice" is in fact to claim that the voice of white, heterosexual, socioeconomically privileged women can speak for all other women. See *id.* at 588; see also E. SPELMAN, *INESSENTIAL WOMAN: PROBLEMS OF EXCLUSION IN FEMINIST THOUGHT* 4 (1988) ("[T]he real problem has been how feminist theory has confused the condition of one group of women with the condition of all."); Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Racist Politics*, 1989 U. CHI. LEGAL F. 139, 152–60 (arguing that feminist theory has been built only upon the experiences of white women).

²¹ See A. LORDE, *Age, Race, Class, and Sex: Women Redefining Difference*, in *SISTER OUTSIDER* 114, 122 (1984) ("Now we must recognize differences among women who are our equals, neither inferior nor superior, and devise ways to see each others' difference to enrich our visions and our joint struggles."); Harris, *supra* note 14, at 585–86; Kline, *supra* note 17, at 150 ("[I]t is imperative that white feminist legal theorists problematize and complicate our analyses by taking into account the real and contradictory differences of interest and power between women that are generated by, and generate, racism."); see also Cain, *Feminist Jurisprudence: Grounding the Theories*, 4 BERKELEY WOMEN'S L.J. 191, 204–05 (1990) ("Good feminist thought ought to reflect the real differences in women's realities, in our lived experiences. These include differences of race, class, age, physical ability and sexual preference." (citation omitted)).

cutions to demonstrate the advantages of a discourse that combines elements of racial equality and privacy theories in advocating the reproductive rights of women of color.

Although women accused of prenatal crimes can present their defenses only in court, judges are not the only government officials charged with a duty to uphold the Constitution.²² Given the Supreme Court's current hostility to claims of substantive equality²³ and reproductive rights,²⁴ my arguments might be directed more fruitfully to legislatures than to the courts.²⁵ Robin West, among others, has

²² The fourteenth amendment, for example, explicitly gives Congress the power to enforce the equal protection clause. See U.S. CONST. amend. XIV, § 5.

²³ See, e.g., *Martin v. Wilks*, 490 U.S. 755, 762-63 (1989) (allowing white plaintiffs to challenge affirmative action consent decrees on grounds of reverse discrimination); *Wards Cove Packing Co. v. Antonio*, 490 U.S. 642, 650-52, 659-60 (1989) (limiting the basis for establishing a prima facie case of discrimination and shifting the burden of proving discrimination to employees in title VII "disparate impact" actions); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 505-06 (1989) (striking down set-aside program for minority contractors as reverse discrimination). But see *Metro Broadcasting, Inc. v. FCC*, 110 S. Ct. 2997, 3009 (1990) (upholding FCC policy designed to achieve more diverse programming by encouraging minority ownership of broadcast licenses).

²⁴ See, e.g., *Hodgson v. Minnesota*, 110 S. Ct. 2926, 2969-70 (1990) (upholding state statute requiring notification of two parents before a minor may obtain an abortion unless she secures a court order); *Webster v. Reproductive Health Servs.*, 109 S. Ct. 3040, 3052 (1989) (permitting state restrictions on abortion, including a ban on the use of public facilities for performing some abortions); *Harris v. McRae*, 448 U.S. 297, 326 (1980) (upholding version of Hyde Amendment that withheld federal Medicaid funds used to reimburse costs of abortion not necessary to save the mother's life); *Maier v. Roe*, 432 U.S. 464, 480 (1977) (permitting states to deny welfare payments for nontherapeutic abortions).

²⁵ Professor West argues that "for both strategic and theoretical reasons, the proper audience for the development of a progressive interpretation of the Constitution is Congress rather than the courts." West, *Progressive and Conservative Constitutionalism*, *supra* note 14, at 650 (emphasis in original). Alan Freeman has expressed a similar sentiment in more blunt terms: "If the federal courts are to become, as they were in the past, little more than reactionary apologists for the existing order, we should treat them with the contempt they deserve. One can only hope that other political institutions will be reinvigorated." Freeman, *Antidiscrimination Law: The View from 1989*, 64 TUL. L. REV. 1407, 1441 (1990). I do not advocate abandoning litigation as a strategy for challenging government abuses. Rather, I am suggesting the exploration of other forums for taking collective action to implement visions of a just society.

State courts and state constitutions may also provide a more progressive understanding of equal protection and privacy rights. See Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977); *Developments in the Law — The Interpretation of State Constitutional Rights*, 95 HARV. L. REV. 1324, 1442-43 (1982). State courts, for example, have interpreted the right of teenagers to obtain an abortion without parental consent more broadly under the state constitution's right of privacy than the Supreme Court has under the federal Constitution. Compare *American Academy of Pediatrics v. Van de Kamp*, 263 Cal. Rptr. 46, 55 (Cal. Ct. App. 1989) (affirming the issuance of a preliminary injunction of law that prohibited minors from obtaining abortions without parental consent or court order as violating state constitutional right of privacy) and *In re T.W.*, 551 So. 2d 1186, 1194 (Fla. 1989) (holding that a Florida statute requiring minors to obtain parental consent or court order prior to obtaining abortion violated the right of privacy guaranteed by Florida's constitution) with *Hodgson v. Minnesota*, 110 S. Ct. 2926, 2969-70 (1990) (holding that a parental notification requirement with judicially granted exception does not violate the Constitution).

persuasively recharacterized the progressive interpretation of the constitutional guarantees of liberty and equality — such as the redistributive directive embodied in the fourteenth amendment²⁶ — as “political ideals to guide legislation, rather than as legal restraints on legislation.”²⁷

Legislatures may be more receptive than courts to the claim that punitive policies contribute to the subordinate status of Black women. They can serve as a forum for presenting both a vision of a community free from racist standards of motherhood and as a means of collectively implementing that vision. This Article translates the dehumanization that Black women experience so that lawmakers may understand and reverse — or at least must confront — the injustice of the prosecutions.²⁸

Part II of this Article presents background information about the recent prosecutions of drug-addicted mothers and explains why most of the defendants are poor and Black. Part III sets out the context in which the prosecutions must be understood: the historical devaluation of Black women as mothers. I discuss three aspects of this social phenomenon — the control of Black women’s reproductive lives during slavery, the abusive sterilization of Black women and other women of color during this century, and the disproportionate removal of Black children from their families. I also describe how a popular mythology denigrating Black motherhood has reinforced and legitimated this devaluation. Part IV characterizes the prosecutions as punishing drug-addicted women for having babies. This approach exposes the impact that the government’s punitive policy has on the devaluation of Black women as mothers. Part V argues that the prosecutions violate the equal protection clause because they are rooted in and perpetuate Black subordination. Part VI examines the legal scholarship opposing state intervention in the lives of pregnant women. I show that the typical arguments advanced against intervention are inadequate to explain or challenge the criminal charges brought against drug-addicted mothers.

Finally, Part VII argues that punishing women for having babies violates their constitutional right of privacy for two reasons: it violates the right of autonomy of women over their reproductive decisions, and it creates an invidious government standard for childbearing. I discuss two benefits of privacy doctrine for advocating the reproductive rights of women of color: its emphasis on the value of personhood,

²⁶ See West, *Progressive and Conservative Constitutionalism*, *supra* note 14, at 715.

²⁷ *Id.* at 717.

²⁸ Professor Ball argues that some minority scholars are engaged in translating, or making visible, their world so that they may influence and eventually transform the world of conventional academia. See Ball, *The Legal Academy and Minority Scholars*, 103 HARV. L. REV. 1855, 1857–60 (1990).

and its protection against the abuse of government power. I argue, however, that the liberal interpretation of privacy is inadequate to eliminate the subordination of Black women. I therefore suggest that a progressive understanding of privacy must acknowledge government's affirmative obligation to guarantee the rights of personhood and must recognize the connection between the right of privacy and racial equality.

II. BACKGROUND: THE STATE'S PUNITIVE RESPONSE TO DRUG-ADDICTED MOTHERS

A. *The Crack Epidemic and the State's Response*

Crack cocaine appeared in America in the early 1980s, and its abuse has grown to epidemic proportions.²⁹ Crack is especially popular among inner-city women.³⁰ Indeed, evidence shows that, in several urban areas in the United States, more women than men now smoke crack.³¹ Most crack-addicted women are of childbearing age, and many are pregnant.³² This phenomenon has contributed to an explosion in the number of newborns affected by maternal drug use. Some experts estimate that as many as 375,000 drug-exposed infants are born every year.³³ In many urban hospitals, the number of these newborns has quadrupled in the last five years.³⁴ A widely cited 1988 study conducted by the National Association for Perinatal Addiction Research and Education (NAPARE) found that eleven percent of

²⁹ See *Crack: A Disaster of Historic Dimension, Still Growing*, N.Y. Times, May 28, 1989, § 4, at 14, col. 1 (editorial).

³⁰ Approximately half of the nation's crack addicts are women. See Alters, *Women and Crack: Equal Addiction, Unequal Care*, Boston Globe, Nov. 1, 1989, at 1, col. 1. Some have theorized that women are attracted to crack because it can be smoked rather than injected. See Teltsch, *In Detroit, a Drug Recovery Center that Welcomes the Pregnant Addict*, N.Y. Times, Mar. 20, 1990, at A14, col. 1. The highest concentrations of crack addicts are found in inner-city neighborhoods. See Malcolm, *Crack, Bane of Inner City, Is Now Gripping Suburbs*, N.Y. Times, Oct. 1, 1989, § 1, at 1, col. 1.

³¹ See Kolata, *On Streets Ruled by Crack, Families Die*, N.Y. Times, Aug. 11, 1989, at A13, col. 3.

³² Many crack-addicted women become pregnant as a result of trading sex for crack or turning to prostitution to support their habit. See Alters, *supra* note 30, at 1, col. 1; Kolata, *supra* note 6, at A13, col. 1. Crack seems to encourage sexual activity, in contrast to the passivity induced by heroin addiction. See Alters, *supra* note 30, at 1, col. 1.

³³ See Besharov, *Crack Babies: The Worst Threat Is Mom Herself*, Wash. Post, Aug. 6, 1989, at B1, col. 1. Approximately 10,000 to 100,000 of these newborns are exposed to cocaine or crack-cocaine. See Nolan, *Protecting Fetuses from Prenatal Hazards: Whose Crimes? What Punishment?*, 9 CRIM. JUST. ETHICS 13, 14 (1990).

³⁴ The number of babies born to cocaine-addicted mothers in New York City, for example, has more than quadrupled since 1985. See *More Births to Cocaine Users*, N.Y. Times, Apr. 7, 1990, at B30, col. 2.

newborns in thirty-six hospitals surveyed were affected by their mothers' illegal-drug use during pregnancy.³⁵ In several hospitals, the proportion of drug-exposed infants was as high as fifteen and twenty-five percent.³⁶

Babies born to drug-addicted mothers may suffer a variety of medical, developmental, and behavioral problems, depending on the nature of their mother's substance abuse. Immediate effects of cocaine exposure can include premature birth,³⁷ low birth weight,³⁸ and withdrawal symptoms.³⁹ Cocaine-exposed children have also exhibited neurobehavioral problems such as mood dysfunction, organizational deficits, poor attention, and impaired human interaction, although it has not been determined whether these conditions are permanent.⁴⁰ Congenital disorders and deformities have also been associated with cocaine use during pregnancy.⁴¹ According to NAPARE, babies exposed to cocaine have a tenfold greater risk of suffering sudden infant death syndrome (SIDS).⁴²

Data on the extent and potential severity of the adverse effects of maternal cocaine use are controversial.⁴³ The interpretation of studies of cocaine-exposed infants is often clouded by the presence of other

³⁵ See Davidson, *Drug Babies Push Issue of Fetal Rights*, L.A. Times, Apr. 25, 1989, pt. 1, at 3, col. 3.

³⁶ See *id.*

³⁷ See Chasnoff, Griffith, MacGregor, Dirkes & Burns, *Temporal Patterns of Cocaine Use in Pregnancy: Perinatal Outcome*, 261 J. A.M.A. 1741, 1742 (1989); MacGregor, Keith, Chasnoff, Rosner, Chisum, Shaw & Minogue, *Cocaine Use During Pregnancy: Adverse Perinatal Outcome*, 157 AM. J. OBSTETRICS & GYN. 686, 687 (1987); Neerhof, MacGregor, Retzky & Sullivan, *Cocaine Abuse During Pregnancy: Peripartum Prevalence and Perinatal Outcome*, 161 AM. J. OBSTETRICS & GYN. 633, 635 (1989).

³⁸ See Petitti & Coleman, *Cocaine and the Risk of Low Birth Weight*, 80 AM. J. PUB. HEALTH 25, 25 (1990); Kerr, *Crack Addiction: The Tragic Toll on Women and Their Children*, N.Y. Times, Feb. 9, 1987, at B2, col. 1.

³⁹ See Chasnoff, *Newborn Infants with Drug Withdrawal Symptoms*, 9 PEDIATRICS REV. 273 (1988).

⁴⁰ See Chasnoff, *Cocaine, Pregnancy and the Neonate*, 15 WOMEN & HEALTH 23, 32-33 (1989); Chasnoff, Burns, Schnoll & Burns, *Cocaine Use in Pregnancy*, 313 NEW ENG. J. MED. 666, 669 (1985); Howard, *Cocaine and Its Effects on the Newborn*, 31 DEV. MED. & CHILD NEUROLOGY 255, 256 (1989).

⁴¹ See Chasnoff, Griffith, MacGregor, Dirkes & Burns, *supra* note 37, at 1743-44; Revkin, *Crack in the Cradle*, DISCOVER, Sept. 1989, at 62, 63; *Defects Reported in Babies of Cocaine Users*, N.Y. Times, Aug. 13, 1989, § 1, at 17, col. 1. *But see* Chasnoff, *Perinatal Effects of Cocaine*, CONTEMP. OB/GYN, May 1987, at 163, 176 ("Cocaine cannot be linked to an increased incidence of congenital malformations.").

⁴² See Marcotte, *supra* note 10, at 14; *see also* Chasnoff, Burns & Burns, *Cocaine Use in Pregnancy: Perinatal Morbidity and Mortality*, 9 NEUROTOXICOLOGY & TERATOLOGY 291, 292 (1987) (finding 15% incidence of SIDS in cocaine-exposed infants).

⁴³ See Koren, Graham, Shear & Einarson, *Bias Against the Null Hypothesis: The Reproductive Hazards of Cocaine*, LANCET, Dec. 16, 1989, at 1440, 1440; Blakeslee, *Child-Rearing Is Stormy when Drugs Cloud Birth*, N.Y. Times, May 19, 1990, § 1, at 1, col. 3.

fetal risk factors, such as the mother's use of additional drugs, cigarettes, and alcohol and her socioeconomic status.⁴⁴ For example, the health prospects of an infant are significantly threatened because pregnant addicts often receive little or no prenatal care and may be malnourished.⁴⁵ Moreover, because the medical community has given more attention to studies showing adverse effects of cocaine exposure than to those that deny these effects, the public has a distorted perception of the risks of maternal cocaine use.⁴⁶ Researchers have not yet authoritatively determined the percentage of infants exposed to cocaine who actually experience adverse consequences.⁴⁷

The response of state prosecutors, legislators, and judges to the problem of drug-exposed babies has been punitive. They have punished women who use drugs during pregnancy by depriving these mothers of custody of their children, by jailing them during their pregnancy, and by prosecuting them after their babies are born.

The most common penalty for a mother's prenatal drug use is the permanent or temporary removal of her baby.⁴⁸ Hospitals in a number of states now screen newborns for evidence of drugs in their urine and report positive results to child welfare authorities.⁴⁹ Some child protection agencies institute neglect proceedings to obtain custody of babies with positive toxicologies based solely on these tests.⁵⁰ More

⁴⁴ See Koren, Graham, Shear & Einarson, *supra* note 43, at 1441.

⁴⁵ See Poland, Ager & Olson, *Barriers to Receiving Adequate Prenatal Care*, 157 AM. J. OBSTETRICS & GYN. 297, 300 (1987); Ryan, Ehrlich & Finnegan, *Cocaine Abuse in Pregnancy: Effects on the Fetus and Newborn*, 9 NEUROTOXICOLOGY & TERATOLOGY 295, 298 (1987). A Northwestern University study of pregnant cocaine addicts found that comprehensive prenatal care may improve the outcome of pregnancies complicated by cocaine abuse. See MacGregor, Keith, Bachicha & Chasnoff, *Cocaine Abuse During Pregnancy: Correlation Between Prenatal Care and Perinatal Outcome*, 74 OBSTETRICS & GYN. 882, 885 (1989).

⁴⁶ See Koren, Graham, Shear & Einarson, *supra* note 43, at 1440-41.

⁴⁷ See Nolan, *supra* note 33, at 14.

⁴⁸ See Sherman, *Keeping Babies Free of Drugs*, NAT'L L.J., Oct. 16, 1989, at 1, col. 4; Gorman, *Involuntary Drug Testing of New Mothers Gives Birth to Legal Debate*, L.A. Times, Apr. 14, 1988, pt. 2, at 1, col. 1.

⁴⁹ Several states have enacted statutes that require the reporting of positive newborn toxicologies to state authorities. See MASS. GEN. L. ch. 119, § 51A (Supp. 1990); MINN. STAT. ANN. § 626.556(2)(c) (West Supp. 1991); OKLA. STAT. ANN. tit. 21, § 846 (West Supp. 1991); UTAH CODE ANN. § 62A-4-504 (1989). Many hospitals also interpret state child abuse reporting laws to require them to report positive results. For a discussion of the constitutional and ethical issues raised by the drug screening of postpartum women and newborns, see Moss, *Legal Issues: Drug Testing of Postpartum Women and Newborns as the Basis for Civil and Criminal Proceedings*, 23 CLEARINGHOUSE REV. 1406, 1409-13 (1990); Moss, *supra* note 2, at 292-96.

⁵⁰ See Moss, *supra* note 2, at 289-90; Sherman, *supra* note 48, at 28, col. 4; Besharov, *supra* note 33, at B4, col. 2.

Several states have facilitated this process by expanding the statutory definition of neglected children to include infants who test positive for controlled substances at birth. See FLA. STAT. ANN. § 415.503(9)(A)(2) (West Supp. 1991); Ill. Juvenile Ct. Act, ILL. ANN. STAT. ch. 37, para. 802-3, § 2-3(1)(c) (Smith-Hurd Supp. 1990); IND. CODE ANN. § 31-6-4-3.1(1)(b) (West Supp.

and more government authorities are also removing drug-exposed newborns from their mothers immediately after birth pending an investigation of parental fitness.⁵¹ In these investigations, positive neonatal toxicologies often raise a strong presumption of parental unfitness,⁵² which circumvents the inquiry into the mother's ability to care for her child that is customarily necessary to deprive a parent of custody.⁵³

A second form of punishment is the "protective" incarceration of pregnant drug addicts charged with unrelated crimes. In 1988, a Washington, D.C. judge sentenced a thirty-year-old woman named Brenda Vaughn, who pleaded guilty to forging \$700 worth of checks, to jail for the duration of her pregnancy.⁵⁴ The judge stated at sentencing that he wanted to ensure that the baby would be born in jail to protect it from its mother's drug abuse.⁵⁵ Although the *Vaughn* case has received the most attention, anecdotal evidence suggests that defendants' drug use during pregnancy often affects judges' sentencing decisions.⁵⁶

Finally, women have been prosecuted after the birth of their children for having exposed the fetuses to drugs or alcohol.⁵⁷ Creative

1990); MASS. GEN. L. ch. 119, § 51A (Supp. 1990); NEV. REV. STAT. ANN. § 432B.330(1)(b) (Michie 1991); OKLA. STAT. ANN. tit. 10, § 1101(4)(c) (West Supp. 1991).

⁵¹ See Note, *The Problem of the Drug-Exposed Newborn: A Return to Principled Intervention*, 42 STAN. L. REV. 745, 749, 752 & n.25 (1990).

⁵² See, e.g., *In re Stefanel Tyesha C.*, 157 A.D.2d 322, 325-26, 556 N.Y.S.2d 280, 282-83 (N.Y. App. Div. 1990), *appeal dismissed*, 76 N.Y.2d 1006 (1990) (holding that allegations of a positive infant toxicology, along with the mother's admitted drug use during pregnancy and failure to enroll in a drug rehabilitation program, constituted a cause of action for neglect); *In re Baby X*, 97 Mich. App. 111, 116, 293 N.W.2d 736, 739 (1980) (holding that a drug-exposed newborn "may properly be considered a neglected child within the jurisdiction of the probate court"). For a critical analysis of the presumption of parental unfitness, see Note, *supra* note 51, at 755-58.

⁵³ See *Santosky v. Kramer*, 455 U.S. 745, 768 (1982) (holding that proof of neglect by clear and convincing evidence is constitutionally required before state may terminate parental rights). For a general description and critique of state neglect statutes, see Wald, *State Intervention on Behalf of "Neglected" Children: Standards for Removal of Children from Their Homes, Monitoring the Status of Children in Foster Care, and Termination of Parental Rights*, 28 STAN. L. REV. 623, 628-35, 643-48, 665-72 (1976).

⁵⁴ See *United States v. Vaughn*, Crim. No. F 2172-88 B (D.C. Super. Ct. Aug. 23, 1988); Moss, *Pregnant? Go Directly to Jail*, A.B.A. J., Nov. 1, 1988, at 20; Cohen, *When a Fetus Has More Rights than the Mother*, Wash. Post, July 28, 1988, at A21, col. 1; see also *Cox v. Court*, 42 Ohio App. 3d 171, 173, 537 N.E.2d 721, 723 (1988) (reversing juvenile court order placing a pregnant woman in a "secure drug facility" to protect the fetus from the woman's cocaine use).

⁵⁵ At Vaughn's sentencing, Judge Peter Wolf stated: "I'm going to keep her locked up until the baby is born because she's tested positive for cocaine when she came before me. . . . She's apparently an addictive personality, and I'll be darned if I'm going to have a baby born that way." Moss, *supra* note 54, at 20.

⁵⁶ See Davidson, *supra* note 35, at 19, col. 1.

⁵⁷ See *supra* notes 2 & 5.

statutory interpretations that once seemed little more than the outlandish concoctions of conservative scholars⁵⁸ are now used to punish women. Mothers of children affected by prenatal substance abuse have been charged with crimes such as distributing drugs to a minor, child abuse and neglect, manslaughter, and assault with a deadly weapon.

This Article considers the constitutional implications of criminal prosecution of drug-addicted mothers because, as Part IV explains, this penalty most directly punishes poor Black women for having babies. When the government prosecutes, its intervention is not designed to protect babies from the irresponsible actions of their mothers (as is arguably the case when the state takes custody of a pregnant addict or her child). Rather, the government criminalizes the mother as a consequence of her decision to bear a child.

B. The Disproportionate Impact on Poor Black Women

Poor Black women bear the brunt of prosecutors' punitive approach.⁵⁹ These women are the primary targets of prosecutors, not because they are more likely to be guilty of fetal abuse, but because they are Black and poor. Poor women, who are disproportionately Black,⁶⁰ are in closer contact with government agencies, and their drug use is therefore more likely to be detected. Black women are also more likely to be reported to government authorities, in part because of the racist attitudes of health care professionals.⁶¹ Finally, their failure to meet society's image of the ideal mother makes their prosecution more acceptable.

To charge drug-addicted mothers with crimes, the state must be able to identify those who use drugs during pregnancy. Because poor women are generally under greater government supervision — through their associations with public hospitals, welfare agencies, and probation officers — their drug use is more likely to be detected and reported.⁶² Hospital screening practices result in disproportionate re-

⁵⁸ See, e.g., Parness, *The Duty to Prevent Handicaps: Laws Promoting the Prevention of Handicaps to Newborns*, 5 W. NEW ENG. L. REV. 431, 442–52 (1983); Parness & Pritchard, *supra* note 13, at 270 (advocating that states “promote the unborn’s potentiality for life by outlawing fetus endangerment, abandonment, neglect and nonsupport”) (citations omitted).

⁵⁹ See *supra* note 6.

⁶⁰ Black women are five times more likely to live in poverty, five times more likely to be on welfare, and three times more likely to be unemployed than are white women. See UNITED STATES COMM’N ON CIVIL RIGHTS, *THE ECONOMIC STATUS OF BLACK WOMEN* 1 (1990).

⁶¹ See *infra* notes 70–78 and accompanying text.

⁶² See McNulty, *supra* note 8, at 319; see also Fallor & Ziefert, *Causes of Child Abuse and Neglect*, in *SOCIAL WORK WITH ABUSED AND NEGLECTED CHILDREN* 32, 46–47 (K. Fallor ed. 1981) (providing a similar explanation of why poor parents are more likely to be reported for child neglect).

porting of poor Black women.⁶³ The government's main source of information about prenatal drug use is hospitals' reporting of positive infant toxicologies to child welfare authorities. Hospitals serving poor minority communities implement this testing almost exclusively.⁶⁴ Private physicians who serve more affluent women perform less of this screening both because they have a financial stake both in retaining their patients' business and securing referrals from them and because they are socially more like their patients.⁶⁵

Hospitals administer drug tests in a manner that further discriminates against poor Black women. One common criterion triggering an infant toxicology screen is the mother's failure to obtain prenatal care,⁶⁶ a factor that correlates strongly with race and income.⁶⁷ Worse still, many hospitals have no formal screening procedures, relying solely on the suspicions of health care professionals.⁶⁸ This discretion allows doctors and hospital staff to perform tests based on their stereotyped assumptions about drug addicts.⁶⁹

Health care professionals are much more likely to report Black women's drug use to government authorities than they are similar drug use by their wealthy white patients.⁷⁰ A study recently reported in *The New England Journal of Medicine* demonstrated this racial bias in the reporting of maternal drug use.⁷¹ Researchers studied the results of toxicologic tests of pregnant women who received prenatal care in public health clinics and in private obstetrical offices in Pinellas County, Florida.⁷² Little difference existed in the prevalence of substance abuse by pregnant women along either racial or economic

⁶³ See Note, *supra* note 51, at 753, 782 n.157; Kolata, *supra* note 31, at A13, col. 3.

⁶⁴ See Note, *supra* note 51, at 753.

⁶⁵ See Chasnoff, Landress & Barrett, *The Prevalence of Illicit-Drug or Alcohol Use During Pregnancy and Discrepancies in Mandatory Reporting in Pinellas County, Florida*, 322 NEW ENG. J. MED. 1202, 1205 (table 3) (1990); Angel, *Addicted Babies: Legal System's Response Unclear*, L.A. Daily J., Feb. 29, 1988, at 1, col. 6.

⁶⁶ See Note, *supra* note 51, at 753, 798-99.

⁶⁷ See Moss, *supra* note 49, at 1412; *infra* notes 143-146 and accompanying text.

⁶⁸ See Note, *supra* note 51, at 753.

⁶⁹ See Chasnoff, Landress & Barrett, *supra* note 65, at 1206; Note, *supra* note 51, at 754 & n.36; see also Faller & Ziefert, *supra* note 62, at 47 (noting that professionals are more likely to report child abuse by poor parents because of their disbelief in abuse by their own socioeconomic class).

⁷⁰ See Note, *supra* note 51, at 754 & n.36; Chasnoff, Landress & Barrett, *supra* note 65, at 1205.

⁷¹ See Chasnoff, Landress, & Barrett, *supra* note 65, at 1205 (table 3).

⁷² See *id.* at 1203. The researchers tested urine samples from 715 pregnant women who enrolled for prenatal care in the county during a one-month period. Three hundred eighty women at five public health clinics and 335 women at 12 private obstetrical offices were screened for alcohol, opiates, cocaine and its metabolites, and cannabinoids between January 1 and June 30, 1989.

lines,⁷³ nor was there any significant difference between public clinics and private offices.⁷⁴ Despite similar rates of substance abuse, however, Black women were *ten times* more likely than whites to be reported to public health authorities⁷⁵ for substance abuse during pregnancy.⁷⁶ Although several possible explanations can account for this disparate reporting,⁷⁷ both public health facilities and private doctors are more inclined to turn in pregnant Black women who use drugs than pregnant white women who use drugs.⁷⁸

It is also significant that, out of the universe of maternal conduct that can injure a fetus,⁷⁹ prosecutors have focused on crack use. The selection of crack addiction for punishment can be justified neither by the number of addicts nor the extent of the harm to the fetus. Excessive alcohol consumption during pregnancy, for example, can cause severe fetal injury,⁸⁰ and marijuana use may also adversely affect the

⁷³ See *id.* at 1204. The rate of positive results on toxicologic testing for white women (15.4%) was slightly higher than that for Black women (14.1%). See *id.* at 1204 (table 2).

⁷⁴ "The frequency of a positive result was 16.3% for women seen at the public clinics and 13.1% for women seen at the private offices." *Id.* at 1203 (table 1).

⁷⁵ In March 1987, the Florida Department of Health and Rehabilitative Services adopted a policy requiring hospitals to report to local health departments evidence of drug and alcohol use during pregnancy. See *id.* at 1202-03.

⁷⁶ See *id.* at 1204.

⁷⁷ The authors of the Pinellas County study suggest several reasons for the discrepancy in reporting. Physicians may have been prompted to test Black women and their infants more frequently because the infants displayed more severe symptoms or because Black women intoxicated from smoking crack are more readily identified than white women intoxicated from smoking marijuana. See *id.* at 1205. Additionally, the disproportionate reporting of Black women may result from socioeconomic factors and the mistaken preconception that substance abuse during pregnancy is predominantly an inner-city, minority group problem. See *id.* at 1206. The second explanation does not negate the racist nature of the rate of reporting and subsequent prosecution of women who use drugs during pregnancy, however. Even if physicians do not consciously decide to report Black women rather than white women, their testing and reporting practices unjustifiably discriminate against Black women and thus demonstrate their unconscious racism. See Lawrence, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 316, 328-44 (1987).

⁷⁸ The striking degree of difference between the reporting rate of drug use by Black women and that of white women and the similarity in their rates of substance abuse strongly suggests that racial prejudice and stereotyping must be a factor.

⁷⁹ Numerous maternal activities are potentially harmful to the developing fetus, including drinking alcohol, taking prescription and nonprescription drugs, smoking cigarettes, failing to eat properly, and residing at high altitudes for prolonged periods. See, e.g., INSTITUTE OF MED., PREVENTING LOW BIRTHWEIGHT 65-72 (1985); Berkowitz, Holford & Berkowitz, *Effects of Cigarette Smoking, Alcohol, Coffee and Tea Consumption on Preterm Delivery*, 7 EARLY HUM. DEV. 239 (1982); Note, *Parental Liability for Prenatal Injury*, 14 COLUM. J.L. & SOC. PROBS. 47, 73-75 (1978). Conduct by people other than the pregnant woman can also threaten the health of the fetus. A pregnant woman's exposure to secondary cigarette smoke, sexually transmitted and other infectious diseases, environmental hazards such as radiation and lead, and physical abuse can harm the fetus. See CHILDREN'S DEFENSE FUND, *THE HEALTH OF AMERICA'S CHILDREN* 35-37 (1989); Note, *supra* note 8, at 606-07.

⁸⁰ Infants born to mothers who drink heavily during pregnancy may suffer from fetal alcohol

unborn.⁸¹ The incidence of both these types of substance abuse is high as well.⁸² In addition, prosecutors do not always base their claims on actual harm to the child, but on the mere delivery of crack by the mother.⁸³ Although different forms of substance abuse prevail among pregnant women of various socioeconomic levels and racial and ethnic backgrounds,⁸⁴ inner-city Black communities have the highest concentrations of crack addicts.⁸⁵ Therefore, selecting crack abuse as the primary fetal harm to be punished has a discriminatory impact that cannot be medically justified.

Focusing on Black crack addicts rather than on other perpetrators of fetal harms serves two broader social purposes.⁸⁶ First, prosecution of these pregnant women serves to degrade women whom society

syndrome, characterized by physical malformations, small head and body size, poor mental capabilities, and abnormal behavior patterns, including mental retardation. See Clarren & Smith, *The Fetal Alcohol Syndrome*, 298 NEW ENG. J. MED. 1063 (1978); Ouellette, Rosett, Rosman & Weiner, *Adverse Effects on Offspring of Maternal Alcohol Abuse During Pregnancy*, 297 NEW ENG. J. MED. 528 (1977). Some experts believe that prenatal alcohol exposure is the most common known cause of mental retardation in this country. See Rosenthal, *When a Pregnant Woman Drinks*, N.Y. Times, Feb. 4, 1990, § 6 (Magazine), at 30.

⁸¹ Marijuana use during pregnancy has been associated with impaired fetal development and reduced gestational length. See, e.g., Fried, Watkinson & Willan, *Marijuana Use During Pregnancy and Decreased Length of Gestation*, 150 AM. J. OBSTETRICS & GYN. 23 (1984); Zuckerman, Frank, Hingson, Amaro, Levenson, Kayne, Parker, Vinci, Aboagye, Fried, Cabral, Timperi & Bauchner, *Effects of Maternal Marijuana and Cocaine Use on Fetal Growth*, 320 NEW ENG. J. MED. 762 (1989) [hereinafter *Effects of Maternal Marijuana*].

⁸² Approximately 6000 to 8000 newborns each year suffer from fetal alcohol syndrome. See Nolan, *supra* note 33, at 15. An additional 35,000 infants experience less severe effects of maternal drinking. See *Doctors Criticized on Fetal Problem*, N.Y. Times, Dec. 11, 1990, at B10, col. 6. A study of 2200 women who gave birth at the University of Washington Hospital in Seattle from March 1989 to March 1990 and who used drugs during or immediately before pregnancy revealed that 20% smoked marijuana, 16% used cocaine, and 9% used either heroin, methadone, or amphetamines. See Blakeslee, *Parents Fight for a Future for Infants Born to Drugs*, N.Y. Times, May 19, 1990, at A1, col. 3; see also *Effects of Maternal Marijuana*, *supra* note 81, at 762 (noting that in 1985, 31% of American women in their late teens and early twenties reported using marijuana within the past year).

⁸³ See State Case Summary, *supra* note 2; *infra* note 260.

⁸⁴ See Chasnoff, Landress & Barrett, *supra* note 65, at 1204; Malcolm, *supra* note 30, at 1, col. 1. A 1989 study of 2278 highly educated women found that 30% consumed more than one drink per week while pregnant. See Rosenthal, *supra* note 80, at 49. Furthermore, despite the media's depiction of crack addiction as an exclusively inner-city problem, crack use among middle-class and affluent people is on the rise. See Elmer-DeWitt, *A Plague Without Boundaries: Crack, Once a Problem of the Poor, Invades the Middle Class*, TIME, Nov. 6, 1989, at 97; Malcolm, *supra* note 30, at 1, col. 1.

⁸⁵ See Malcolm, *supra* note 30, at 1, col. 1. The Pinellas County study, for example, found that Black women tested positive more frequently for cocaine use during pregnancy (7.5% versus 1.8% for white women), whereas white women tested positive more frequently for the use of marijuana (14.4% versus 6.0% for Black women). See Chasnoff, Landress & Barrett, *supra* note 65, at 1204 (table 2).

⁸⁶ See Roberts, *The Bias in Drug Arrests of Pregnant Women*, N.Y. Times, Aug. 11, 1990, at 25, col. 2.

views as undeserving to be mothers and to discourage them from having children. If prosecutors had instead chosen to prosecute affluent women addicted to alcohol or prescription medication, the policy of criminalizing prenatal conduct very likely would have suffered a hasty demise. Society is much more willing to condone the punishment of poor women of color who fail to meet the middle-class ideal of motherhood.

In addition to legitimizing fetal rights enforcement, the prosecution of crack-addicted mothers diverts public attention from social ills such as poverty, racism, and a misguided national health policy and implies instead that shamefully high Black infant death rates⁸⁷ are caused by the bad acts of individual mothers. Poor Black mothers thus become the scapegoats for the causes of the Black community's ill health. Punishing them assuages any guilt the nation might feel at the plight of an underclass with infant mortality at rates higher than those in some less developed countries.⁸⁸ Making criminals of Black mothers apparently helps to relieve the nation of the burden of creating a health care system that ensures healthy babies for all its citizens.⁸⁹

For a variety of reasons, then, an informed appraisal of the competing interests involved in the prosecutions must take account of the race of the women affected. Part III examines a significant aspect of Black women's experience that underlies the punishment of crack-addicted mothers.

III. THE DEVALUATION OF BLACK MOTHERHOOD

The systematic, institutionalized denial of reproductive freedom has uniquely marked Black women's history in America. An important part of this denial has been the devaluation of Black women as mothers. A popular mythology that degrades Black women and portrays them as less deserving of motherhood reinforces this subordi-

⁸⁷ In 1987, the mortality rate for Black infants was 17.9 deaths per 1000, compared to a rate of 8.6 deaths per 1000 for white infants. See U.S. DEP'T OF COMMERCE, BUREAU OF CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES 77 (table 110) (1990).

⁸⁸ In 1986, the Black infant mortality rate (18 deaths per 1000 live births) was higher than the infant mortality rate in Bulgaria, Costa Rica, Cuba, and Singapore. See CHILDREN'S DEFENSE FUND, *supra* note 79, at 14 (table 1.8) (1989). A Black infant born in the inner city has an even greater chance of dying before reaching his first birthday. See *id.* at 23 (table 1.10).

⁸⁹ Descriptions of the degeneracy and disintegration of the Black family have played a similar role in explaining poverty, crime, and unemployment in the Black community. The self-destructiveness of Blacks is often blamed for their predicament rather than racism. See Gresham, *The Politics of Family in America*, NATION, July 24/31, 1989, at 116, 117-19 (discussing how the Moynihan Report on the Black family and the CBS Special Report, *The Vanishing Black Family — Crisis in Black America*, made the Black family the scapegoat for the condition of Black America).

nation. This mythology is one aspect of a complex set of images that deny Black humanity in order to rationalize the oppression of Blacks.⁹⁰

In this Part, I will discuss three manifestations of the devaluation of Black motherhood: the original exploitation of Black women during slavery, the more contemporary, disproportionate removal of Black children from their mothers' custody, and sterilization abuse. Throughout this Part, I will also show how several popular images denigrating Black mothers — the licentious Jezebel, the careless, incompetent mother, the domineering matriarch, and the lazy welfare mother — have reinforced and legitimated their devaluation.

A. The Slavery Experience

The essence of Black women's experience during slavery was the brutal denial of autonomy over reproduction. Female slaves were commercially valuable to their masters not only for their labor, but also for their capacity to produce more slaves.⁹¹ Henry Louis Gates, Jr., writing about the autobiography of a slave named Harriet A. Jacobs, observes that it "charts in vivid detail precisely how the shape of her life and the choices she makes are defined by her reduction to a sexual object, an object to be raped, bred or abused."⁹² Black women's childbearing during slavery was thus largely a product of oppression rather than an expression of self-definition and personhood.

⁹⁰ See, e.g., *id.* at 120 (describing the dominant society's resistance to the concept of Black people as "vulnerable human beings"). For a discussion of the hegemonic function of racist ideology, see Crenshaw, *supra* note 14, at 1370-81 (1988). See generally G. FREDRICKSON, *THE BLACK IMAGE IN THE WHITE MIND* 256-82 (1971) (discussing the propagation of theories of Black inferiority and degeneracy at the turn of the century); J. WILLIAMSON, *THE CRUCIBLE OF RACE: BLACK-WHITE RELATIONS IN THE AMERICAN SOUTH SINCE EMANCIPATION* 111-51 (1984) (discussing the prevalence of theories near the turn of the century that Blacks, freed from slavery, were returning to their "natural state of bestiality").

⁹¹ See A. DAVIS, *WOMEN, RACE, AND CLASS* 7 (1981); J. JONES, *LABOR OF LOVE, LABOR OF SORROW: BLACK WOMEN, WORK AND THE FAMILY FROM SLAVERY TO THE PRESENT* 12 (1985). Legislation giving the children of Black women and white men the status of slaves left female slaves vulnerable to sexual violation as a means of financial gain. See P. GIDDINGS, *WHEN AND WHERE I ENTER: THE IMPACT OF BLACK WOMEN ON RACE AND SEX IN AMERICA* 37 (1984). For a discussion of such laws in Virginia and Georgia, see A. HIGGINBOTHAM, *IN THE MATTER OF COLOR* 42-45, 252 (1978).

White masters controlled their slaves' reproductive capacity by rewarding pregnancy with relief from work in the field and additions of clothing and food, punishing slave women who did not give birth, manipulating slave marital choices, forcing them to breed, and raping them. See J. JONES, *supra*, at 34-35; WE ARE YOUR SISTERS: *BLACK WOMEN IN THE NINETEENTH CENTURY* 24-26 (D. Sterling ed. 1984); Clinton, *Caught in the Web of the Big House: Women and Slavery*, in *THE WEB OF SOUTHERN SOCIAL RELATIONS* 19, 23-28 (W. Raser, R. Saunders & J. Wakelyn eds. 1985).

⁹² Gates, *To be Raped, Bred or Abused*, N.Y. TIMES BOOK REV., Nov. 22, 1987, at 12 (reviewing H. JACOBS, *INCIDENTS IN THE LIFE OF A SLAVE GIRL* (J. Yellin ed. 1987)).

The method of whipping pregnant slaves that was used throughout the South vividly illustrates the slaveowners' dual interest in Black women as both workers and childbearers. Slaveowners forced women to lie face down in a depression in the ground while they were whipped.⁹³ This procedure allowed the masters to protect the fetus while abusing the mother. It serves as a powerful metaphor for the evils of a fetal protection policy that denies the humanity of the mother. It is also a forceful symbol of the convergent oppressions inflicted on slave women: they were subjugated at once both as Blacks and as females.

From slavery on, Black women have fallen outside the scope of the American ideal of womanhood.⁹⁴ Slave owners forced slave women to perform strenuous labor that contradicted the Victorian female roles prevalent in the dominant white society. Angela Davis has observed: "judged by the evolving nineteenth-century ideology of femininity, which emphasized women's roles as nurturing mothers and gentle companions and housekeepers for their husbands, Black women were practically anomalies."⁹⁵ Black women's historical deviation from traditional female roles has engendered a mythology that denies their womanhood.

One of the most prevalent images of slave women was the character of Jezebel, a woman governed by her sexual desires.⁹⁶ As early as 1736, the *South Carolina Gazette* described "African Ladies" as women "of 'strong robust constitution' who were 'not easily jaded out' but able to serve their lovers 'by Night as well as Day.'"⁹⁷ This ideological construct of the licentious Jezebel legitimated white men's sexual abuse of Black women.⁹⁸ The stereotype of Black women as sexually promiscuous helped to perpetuate their devaluation as mothers.

The myth of the "bad" Black woman was deliberately and systematically perpetuated after slavery ended.⁹⁹ For example, historian

⁹³ See J. JONES, *supra* note 91, at 20; Johnson, *supra* note 1, at 513.

⁹⁴ See A. DAVIS, *supra* note 91, at 5; D. WHITE, AR'N'T I A WOMAN? FEMALE SLAVES IN THE PLANTATION SOUTH 16, 27-29 (1985). For a description of gender conventions in the plantation South, see E. FOX-GENOVESE, WITHIN THE PLANTATION HOUSEHOLD 192-241 (1988).

Kimberlé Crenshaw describes how racist ideology reflects an "oppositional dynamic, premised upon maintaining Blacks as an excluded and subordinated 'other.'" Crenshaw, *supra* note 14, at 1381. Under this pattern of oppositional categories, whites are associated with positive characteristics (industrious, intelligent, responsible); Blacks are associated with the opposite, aberrational qualities (lazy, ignorant, shiftless). See *id.* at 1370-71 & n.151.

⁹⁵ A. DAVIS, *supra* note 91, at 7.

⁹⁶ See D. WHITE, *supra* note 94, at 28-29.

⁹⁷ *Id.* at 30.

⁹⁸ See E. FOX-GENOVESE, *supra* note 94, at 292; D. WHITE, *supra* note 94, at 61.

⁹⁹ See BLACK WOMEN IN WHITE AMERICA 163-71 (G. Lerner ed. 1973); P. GIDDINGS, *supra* note 91, at 85-89; B. HOOKS, *supra* note 17, at 55-60.

Philip A. Bruce's book, *The Plantation Negro as a Freeman*, published in 1889, strengthened popular views of both Black male and Black female degeneracy.¹⁰⁰ Bruce traced the alleged propensity of the Black man to rape white women to the "wantonness of the women of his own race" and "the sexual laxness of plantation women as a class."¹⁰¹ This image of the sexually loose, impure Black woman that originated in slavery persists in modern American culture.¹⁰²

Black women during slavery were also systematically denied the rights of motherhood. Slave mothers had no legal claim to their children.¹⁰³ Slave masters owned not only Black women, but also their children. They alienated slave women from their children by selling them to other slaveowners and by controlling childrearing.¹⁰⁴ In 1851, Sojourner Truth reminded the audience at a women's rights convention that society denied Black women even the limited dignity of Victorian womanhood accorded white women of the time, including the right of mothering:

Dat man ober dar say dat women needs to be helped into carriages, and lifted ober ditches, and to have de best place every whar. Nobody eber help me into carriages, or ober mud puddles, or gives me any best place . . . and ar'n't I a woman? Look at me! Look at my arm! . . . I have plowed, and planted, and gathered into barns, and no man could head me — and ar'n't I a woman? I could work as much and eat as much as a man (when I could get it), and bear de lash as well — and ar'n't I a woman? I have borne thirteen chilern and seen em mos' all sold off into slavery, and when I cried out with a mother's grief, none but Jesus heard — and ar'n't I a woman?¹⁰⁵

Black women struggled in many ways to resist the efforts of slave masters to control their reproductive lives. They used contraceptives and abortives, escaped from plantations, feigned illness, endured severe punishment, and fought back rather than submit to slave masters' sexual domination.¹⁰⁶ Free Black women with the means to do so

¹⁰⁰ See Gresham, *supra* note 89, at 117.

¹⁰¹ P. BRUCE, *THE PLANTATION NEGRO AS A FREEMAN* 84-85 (1889).

¹⁰² See B. HOOKS, *supra* note 17, at 65-68; Omolade, *Black Women, Black Men and Tawana Brawley: The Shared Condition*, 12 HARV. WOMEN'S L.J. 12, 16 (1989).

¹⁰³ See Allen, *Surrogacy, Slavery, and the Ownership of Life*, 13 HARV. J.L. & PUB. POL'Y 139, 140 n.9 (1990). Professor Allen tells the story of Polly, a woman wrongfully held in slavery, who successfully sued a white man in 1842 for the return of her daughter Lucy. Polly used slave law to prove unlawful possession. She argued that, because she was not in fact a slave at the time of Lucy's birth, she was the rightful owner of her daughter. See *id.* at 142-44.

¹⁰⁴ See *id.* at 140 n.9; Burnham, *Children of the Slave Community in the United States*, 19 FREEDOMWAYS 75, 75-77 (1979).

¹⁰⁵ O. GILBERT, *NARRATIVE OF SOJOURNER TRUTH* 133 (1878).

¹⁰⁶ See P. GIDDINGS, *supra* note 91, at 46; WE ARE YOUR SISTERS, *supra* note 91, at 25-26, 58-61; D. WHITE, *supra* note 94, at 76-90.

purchased freedom for their daughters and sisters.¹⁰⁷ Black women, along with Black men, succeeded remarkably often in maintaining the integrity of their family life despite slavery's disrupting effects.¹⁰⁸

B. The Disproportionate Removal of Black Children

The disproportionate number of Black mothers who lose custody of their children through the child welfare system is a contemporary manifestation of the devaluation of Black motherhood.¹⁰⁹ This disparate impact of state intervention results in part from Black families' higher rate of reliance on government welfare.¹¹⁰ Because welfare families are subject to supervision by social workers, instances of perceived neglect are more likely to be reported to governmental

¹⁰⁷ See BLACK WOMEN IN WHITE AMERICA, *supra* note 99, at 40-42. This practice is poignantly described in the words of a former slave named Anna Julia Cooper in a speech given in 1893 to the Congress of Representative Women:

Yet all through the darkest period of the colored women's oppression in this country her yet unwritten history is full of heroic struggle, a struggle against fearful and overwhelming odds, that often ended in horrible death, to maintain and protect that which woman holds dearer than life. The painful, patient, and silent toil of mothers to gain a fee simple title to the bodies of their daughters, the despairing fight, as of an entrapped tigress, to keep hallowed their own persons, would furnish material for epics.

BLACK WOMEN IN NINETEENTH-CENTURY AMERICAN LIFE 329 (B. Loewenberg & R. Bogin eds. 1976).

¹⁰⁸ See generally H. GUTMAN, THE BLACK FAMILY IN SLAVERY AND FREEDOM, 1790-1925 (1976) (describing the life of the Black family during slavery); Jones, "My Mother Was Much of a Woman": Black Women, Work, and the Family Under Slavery, 8 FEMINIST STUD. 235, 252-61 (1982) (describing the sexual division of labor initiated by slaves within their own communities).

¹⁰⁹ See Gray & Nybell, *Issues in African-American Family Preservation*, 69 CHILD WELFARE 513, 513 (1990) (noting that about half of the children in foster care are Black); Hogan & Sin, *Minority Children and the Child Welfare System: An Historical Perspective*, 33 SOC. WORK 493 (1988). Once Black children enter foster care, they remain there longer and receive less desirable placements than white children; they are also less likely than white children to be returned home or adopted. See B. MANDELL, WHERE ARE THE CHILDREN? A CLASS ANALYSIS OF FOSTER CARE AND ADOPTION 36 (1973); Gray & Nybell, *supra*, at 513-14; Stehno, *Differential Treatment of Minority Children in Service Systems*, 27 SOC. WORK 39, 39-41 (1982). These realities have led some Blacks to deem foster care a system of legalized slavery. See B. MANDELL, *supra*, at 60. Malcolm X described the state's disruption of his own family in these terms:

Soon the state people were making plans to take over all of my mothers' children. . . .

A Judge . . . in Lansing had authority over me and all of my brothers and sisters. We were "state children," court wards; he had the full say-so over us. A white man in charge of a black man's children! Nothing but legal, modern slavery — however kindly intentioned. . . .

I truly believe that if ever a state social agency destroyed a family, it destroyed ours.

M. LITTLE, THE AUTOBIOGRAPHY OF MALCOLM X 20-21 (1965).

¹¹⁰ See Wald, *supra* note 53, at 629 n.22.

authorities than neglect on the part of more affluent parents.¹¹¹ Black children are also removed from their homes in part because of the child welfare system's cultural bias and application of the nuclear family pattern to Black families.¹¹² Black childrearing patterns that diverge from the norm of the nuclear family have been misinterpreted by government bureaucrats as child neglect.¹¹³ For example, child welfare workers have often failed to respect the longstanding cultural tradition in the Black community of shared parenting responsibility among blood-related and non-blood kin.¹¹⁴ The state has thus been more willing to intrude upon the autonomy of poor Black families, and in particular of Black mothers, while protecting the integrity of white, middle-class homes.¹¹⁵

This devaluation of Black motherhood has been reinforced by stereotypes that blame Black mothers for the problems of the Black family. This scapegoating of Black mothers dates back to slavery, when mothers were blamed for the devastating effects on their children of poverty and abuse of Black women. When a one-month-old slave girl named Harriet died in the Abbeville District of South Carolina on December 9, 1849, the census marshal reported the cause of death as "[s]mothered by carelessness of [her] mother."¹¹⁶ This report was typical of the United States census mortality schedules for the southern states in its attribution of a Black infant death to accidental suffocation by the mother.¹¹⁷ Census marshal Charles M. Pelot explained: "I wish it to be distinctly understood that nearly all the accidents occur in the negro population, which goes clearly to prove their great carelessness & total inability to take care of themselves."¹¹⁸ It now appears that the true cause of these suffocation deaths was Sudden Infant Death Syndrome.¹¹⁹ Black children died at a dramat-

¹¹¹ See Faller & Ziefert, *supra* note 62, at 47; Wald, *supra* note 53, at 629 n.21. For a discussion of the connection between the child welfare system and poverty, see Jenkins, *Child Welfare as a Class System*, in CHILDREN AND DECENT PEOPLE 3-4 (A. Schorr ed. 1974).

¹¹² Cf. *Santosky v. Kramer*, 455 U.S. 745, 763 (1982) (noting that termination proceedings "are often vulnerable to judgments based on cultural or class bias"); Gray & Nybell, *supra* note 109, at 515-17; Stack, *Cultural Perspectives on Child Welfare*, 12 N.Y.U. REV. L. & SOC. CHANGE 539, 541 (1983-84). See generally A. BILLINGSLEY & J. GIOVANNONI, CHILDREN OF THE STORM (1972) (tracing the history of Black children in the American child welfare system).

¹¹³ See Gray & Nybell, *supra* note 109, at 515-17; Stack, *supra* note 112, at 541. For descriptions of childrearing patterns in the Black community that are considered deviant, such as extended kin networks, see R. HILL, INFORMAL ADOPTION AMONG BLACK FAMILIES (1977); and C. STACK, ALL OUR KIN: STRATEGIES FOR SURVIVAL IN A BLACK COMMUNITY 62-107 (1974).

¹¹⁴ See Stack, *supra* note 112, at 539-43.

¹¹⁵ See *id.* at 547.

¹¹⁶ Johnson, *supra* note 1, at 493 (quoting S. Carolina Mortality Schedules, 1850, Abbeville District).

¹¹⁷ See *id.* at 493-96.

¹¹⁸ *Id.* at 495 (quoting S. Carolina Mortality Schedules, 1850, Abbeville District).

¹¹⁹ See *id.* at 496-508; Savitt, *Smothering and Overlaying of Virginia Slave Children: A Suggested Explanation*, 49 BULL. HIST. MED. 400, 400 (1975).

ically higher rate because of the hard physical work, poor nutrition, and abuse that their slave mothers endured during pregnancy.¹²⁰

The scapegoating of Black mothers has manifested itself more recently in the myth of the Black matriarch, the domineering female head of the Black family. White sociologists have held Black matriarchs responsible for the disintegration of the Black family and the consequent failure of Black people to achieve success in America.¹²¹ Daniel Patrick Moynihan popularized this theory in his 1965 report, *The Negro Family: The Case for National Action*.¹²² According to Moynihan:

At the heart of the deterioration of the fabric of the Negro society is the deterioration of the Negro family. It is the fundamental cause of the weakness of the Negro community . . . In essence, the Negro community has been forced into a matriarchal structure which, because it is so out of line with the rest of the American society, seriously retards the progress of the group as a whole.¹²³

Thus, Moynihan attributed the cause of Black people's inability to overcome the effects of racism largely to the dominance of Black mothers.

C. The Sterilization of Women of Color

Coerced sterilization is one of the most extreme forms of control over a woman's reproductive life. By permanently denying her the right to bear children, sterilization enforces society's determination that a woman does not deserve to be a mother. Unlike white women, poor women of color have been subjected to sterilization abuse¹²⁴ for decades.¹²⁵ The disproportionate sterilization of Black women is yet

¹²⁰ See Johnson, *supra* note 1, at 508-20.

¹²¹ See P. GIDDINGS, *supra* note 91, at 325-35; B. HOOKS, *supra* note 17, at 70-83; R. STAPLES, *THE BLACK WOMAN IN AMERICA* 10-34 (1976); Bennett & Gresham, *supra* note 89, at 117-18.

¹²² OFFICE OF PLANNING & POLICY RESEARCH, U.S. DEP'T OF LABOR, *THE NEGRO FAMILY: THE CASE FOR NATIONAL ACTION* (1965).

¹²³ *Id.* at 5.

¹²⁴ "Sterilization abuse occurs whenever the sterilization procedure is performed under conditions that . . . pressure an individual into agreeing to be sterilized, or obscure the risks, consequences, and alternatives associated with sterilization." Petchesky, *Reproduction, Ethics, and Public Policy: The Federal Sterilization Regulations*, 9 HASTINGS CENTER REP. 29, 32 (1979); see also Note, *Sterilization Abuse: Current State of the Law and Remedies for Abuse*, 10 GOLDEN GATE U.L. REV. 1147, 1152-53 (1980) (listing many common situations of sterilization abuse).

¹²⁵ See A. DAVIS, *supra* note 91, at 215-21; Nsiah-Jefferson, *Reproductive Laws, Women of Color, and Low-Income Women*, in *REPRODUCTIVE LAWS FOR THE 1990S*, at 46-47 (S. Cohen & N. Taub eds. 1988). One study found that 43% of women sterilized in 1973 under a federally funded program were Black, although only 33% of the patients were Black. See Note, *supra* note 124, at 1153 n.30. Spanish-speaking women are twice as likely to be sterilized as those

another manifestation of the dominant society's devaluation of Black women as mothers.

Sterilization abuse has taken the form both of blatant coercion and trickery and of subtle influences on women's decisions to be sterilized.¹²⁶ In the 1970s, some doctors conditioned delivering babies and performing abortions on Black women's consent to sterilization.¹²⁷ In a 1974 case brought by poor teenage Black women in Alabama, a federal district court found that an estimated 100,000 to 150,000 poor women were sterilized annually under federally-funded programs.¹²⁸ Some of these women were coerced into agreeing to sterilization under the threat that their welfare benefits would be withdrawn unless they submitted to the operation.¹²⁹ Despite federal and state regulations intended to prevent involuntary sterilization, physicians and other health care providers continue to urge women of color to consent to sterilization because they view these women's family sizes as excessive and believe these women are incapable of effectively using other methods of birth control.¹³⁰

Current government funding policy perpetuates the encouragement of sterilization of poor, and thus of mainly Black, women. The federal government pays for sterilization services under the Medicaid program,¹³¹ while it often does not make available information about

who speak English. See Levin & Taub, *Reproductive Rights*, in *WOMEN AND THE LAW* § 10A.07[3][b], at 10A-28 (C. Lefcourt ed. 1989). The racial disparity in sterilization cuts across economic and educational lines, although the frequency of sterilization is generally higher among the poor and uneducated. Another study found that 9.7% of college-educated Black women had been sterilized, compared to 5.6% of college-educated white women. Among women without a high school diploma, 31.6% of Black women and 14.5% of white women had been sterilized. See *id.*

¹²⁶ See Clarke, *Subtle Forms of Sterilization Abuse: A Reproductive Rights Analysis*, in *TEST-TUBE WOMEN* 120, 120-32 (R. Arditti, R. Klein & S. Minden eds. 1984); Nsiah-Jefferson, *supra* note 125, at 44-45; Petchesky, *supra* note 124, at 32.

¹²⁷ See Nsiah-Jefferson, *supra* note 125, at 46-47.

¹²⁸ See *Relf v. Weinberger*, 372 F. Supp. 1196, 1199 (D.D.C. 1974), *on remand sub nom.* *Relf v. Mathews*, 403 F. Supp. 1235 (D.D.C. 1975), *vacated sub nom.* *Relf v. Weinberger*, 565 F.2d 722 (D.C. Cir. 1977).

¹²⁹ See *id.*

¹³⁰ See Nsiah-Jefferson, *supra* note 125, at 47-48; see also Note, *supra* note 124, at 1159-60 (noting the lack of any sanctions for noncompliance with federal sterilization regulations). In contrast to the encouragement of minority sterilization, our society views childbearing by white women as desirable. Ruth Colker tells the story of a classmate of hers in law school who decided to be sterilized. The university physician refused to allow her to undergo the procedure unless she agreed to attend several sessions with a psychiatrist, presumably to dissuade her from her decision. See Colker, *Feminism, Theology, and Abortion: Toward Love, Compassion, and Wisdom*, 77 CALIF. L. REV. 1011, 1067 n.196 (1989). Colker recognizes that the "physician's actions reflect the dominant social message — that a healthy (white) woman should want to bear a child." *Id.*

¹³¹ Subchapters XIX and XX of the Social Security Act provide matching funds for sterilization reimbursement. See 42 U.S.C. §§ 1396a(10)(A), 1397a(a)(2) (1988).

and access to other contraceptive techniques and abortion.¹³² In effect, sterilization is the only publicly-funded birth control method readily available to poor women of color.

Popular images of the undeserving Black mother legitimate government policy as well as the practices of health care providers. The myth of the Black Jezebel has been supplemented by the contemporary image of the lazy welfare mother who breeds children at the expense of taxpayers in order to increase the amount of her welfare check.¹³³ This view of Black motherhood provides the rationale for society's restrictions on Black female fertility.¹³⁴ It is this image of the undeserving Black mother that also ultimately underlies the government's choice to punish crack-addicted women.

¹³² See Nsiah-Jefferson, *supra* note 125, at 45-46; Petchesky, *supra* note 124, at 39; Note, *supra* note 124, at 1154.

¹³³ See Harrington, *Introduction* to S. SHEEHAN, *A WELFARE MOTHER* at x-xi (1976); MILWAUKEE COUNTY WELFARE RIGHTS ORG., *WELFARE MOTHERS SPEAK OUT* 72-92 (1972). In a chapter entitled "Welfare Mythology," the Milwaukee County Welfare Rights Organization portrays a common image of welfare mothers:

You give those lazy, shiftless good-for-nothings an inch and they'll take a mile. You have to make it tougher on them. They're getting away with murder now. You have to catch all those cheaters and put them to work or put them in jail. Get them off the welfare rolls. I'm tired of those niggers coming to our state to get on welfare. I'm tired of paying their bills just so they can sit around home having babies, watching their color televisions, and driving Cadillacs.

Id. at 72. Writers in the 1980s claimed that welfare induces poor Black women to have babies. See, e.g., C. MURRAY, *LOSING GROUND* 154-66 (1984). Other researchers have refuted this claim. See, e.g., Darity & Myers, *Does Welfare Dependency Cause Female Headship? The Case of the Black Family*, 46 J. MARRIAGE & FAM. 765, 773 (1984) (concluding that "[t]he attractiveness of welfare and welfare dependency exhibit no effects on black female family heads").

¹³⁴ This thinking was reflected in a recent newspaper editorial suggesting that Black women on welfare should be given incentives to use Norplant, a new contraceptive. See *Poverty and Norplant: Can Contraception Reduce the Underclass?*, Phila. Inquirer, Dec. 12, 1990, at A18, col. 1. On January 2, 1991, a California judge ordered a Black woman on welfare who was convicted of child abuse to use Norplant for three years as a condition of probation. See Lev, *Judge Is Firm on Forced Contraception, but Welcomes an Appeal*, N.Y. Times, Jan. 11, 1991, at A17, col. 1; see also Lewin, *Implanted Birth Control Device Renews Debate over Forced Contraception*, N.Y. Times, Jan. 10, 1991, at A20 col. 1 (reviewing the debate on forced use of Norplant). The condemnation of single mothers can also be seen as penalizing poor Black women for departing from white middle-class norms of motherhood. Cf. *Chambers v. Omaha Girls Club*, 834 F.2d 697 (8th Cir. 1987) (affirming dismissal of title VII action brought by an unmarried Black staff member of a private girls' club who was fired because she became pregnant). Regina Austin suggests that "young, single, sexually active, fertile, and nurturing black women are being viewed ominously because they have the temerity to attempt to break out of the rigid economic, social, and political categories that a racist, sexist, and class-stratified society would impose upon them." Austin, *supra* note 14, at 555.

IV. PROSECUTING DRUG ADDICTS AS PUNISHMENT FOR HAVING BABIES

Informed by the historical and present devaluation of Black motherhood, we can better understand prosecutors' reasons for punishing drug-addicted mothers. This Article views such prosecutions as punishing these women, in essence, for having babies; judges such as the one who convicted Jennifer Johnson are pronouncing not so much "I care about your baby" as "You don't deserve to be a mother."

It is important to recognize at the outset that the prosecutions are based in part on a woman's pregnancy and not on her illegal drug use alone.¹³⁵ Prosecutors charge these defendants not with drug use, but with child abuse or drug distribution — crimes that relate to their pregnancy. Moreover, pregnant women receive harsher sentences than drug-addicted men or women who are not pregnant.¹³⁶

The unlawful nature of drug use must not be allowed to confuse the basis of the crimes at issue. The legal rationale underlying the prosecutions does not depend on the illegality of drug use. Harm to the fetus is the crux of the government's legal theory. Criminal charges have been brought against women for conduct that is legal but was alleged to have harmed the fetus.¹³⁷

When a drug-addicted woman becomes pregnant, she has only one realistic avenue to escape criminal charges: abortion.¹³⁸ Thus, she is penalized for choosing to have the baby rather than having an abortion. In this way, the state's punitive action may coerce women to have abortions rather than risk being charged with a crime. Thus, it is the *choice of carrying a pregnancy to term* that is being penalized.¹³⁹

¹³⁵ At Jennifer Johnson's sentencing, the prosecutor made clear the nature of the charges against her: "About the end of December 1988, our office undertook a policy to begin to deal with mothers like Jennifer Johnson . . . as in the status of a child abuse case, Your Honor. . . . *We have never viewed this as a drug case.*" Motion for Rehearing and Sentencing at 12, *State v. Johnson*, No. E89-890-CFA (Fla. Cir. Ct. Aug. 25, 1989) (emphasis added).

¹³⁶ The drug user's pregnancy not only greatly increases the likelihood that she will be prosecuted, but also greatly enhances the penalty she faces upon conviction. In most states, drug use is a misdemeanor, while distribution of drugs is a felony. See Hoffman, *supra* note 5, at 44.

¹³⁷ Pamela Rae Stewart, for example, was charged with criminal neglect in part because she failed to follow her doctor's orders to stay off her feet and refrain from sexual intercourse while she was pregnant. See *People v. Stewart*, No. M508197, slip op. at 4 (Cal. Mun. Ct. Feb. 26, 1987); Bonavoglia, *The Ordeal of Pamela Rae Stewart*, Ms., Jul./Aug. 1987, at 92, 92.

¹³⁸ Seeking drug treatment is not a viable alternative. First, it is likely that the pregnant addict will be unable to find a drug treatment program that will accept her. See *infra* notes 151-155 and accompanying text. Second, even if she successfully completes drug counseling by the end of her pregnancy, she may still be prosecuted for her drug use that occurred during pregnancy before she was able to overcome her addiction.

¹³⁹ I recognize that both becoming pregnant and continuing a pregnancy to term are not

There is also good reason to question the government's justification for the prosecutions — the concern for the welfare of potential children. I have already discussed the selectivity of the prosecutions with respect to poor Black women.¹⁴⁰ This focus on the conduct of one group of women weakens the state's rationale for the prosecutions.

The history of overwhelming state neglect of Black children casts further doubt on its professed concern for the welfare of the fetus. When a society has always closed its eyes to the inadequacy of prenatal care available to poor Black women, its current expression of interest in the health of unborn Black children must be viewed with suspicion. The most telling evidence of the state's disregard of Black children is the high rate of infant death in the Black community. In 1987, the mortality rate for Black infants in the United States was 17.9 deaths per thousand births — more than twice that for white infants (8.6).¹⁴¹ In New York City, while infant mortality rates in upper- and middle-income areas were generally less than nine per thousand in 1986, the rates exceeded nineteen in the poor Black communities of the South Bronx and Bedford-Stuyvesant and reached 27.6 in Central Harlem.¹⁴²

The main reason for these high mortality rates is inadequate prenatal care.¹⁴³ Most poor Black women face financial and other bar-

necessarily real "choices" that women — particularly women of color and addicted women — make. Rape, battery, lack of available contraceptives, and prostitution induced by drug addiction may lead a woman to become pregnant without exercising meaningful choice. Similarly, coercion from the father or her family, lack of money to pay for an abortion, or other barriers to access to an abortion may force a woman to continue an unwanted pregnancy. *See infra* note 211.

Nevertheless, these constraints on a woman's choice do not justify the government's punishment of the reproductive course that she ultimately follows. While we work to create the conditions for meaningful reproductive choice, it is important to affirm women's right to be free from unwanted state intrusion in their reproductive decisions.

¹⁴⁰ *See supra* pp. 1432–36.

¹⁴¹ *See* U.S. DEP'T OF COMMERCE, BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES 77 (table 110) (1990). This means that in 1987, Black children were 2.08 times more likely than white children to die before reaching one year of age. This is the largest gap between Black and white infant mortality rates since 1940, when infant mortality data were first reported by race. *See* CHILDREN'S DEFENSE FUND, *supra* note 79, at 3.

¹⁴² *See* F. CARO, D. KALMUSS & I. LOPEZ, BARRIERS TO PRENATAL CARE 1 (1988). Another example of the institutionalized devaluation of Black life is race-of-the-victim sentencing disparities. *See* Kennedy, McCleskey v. Kemp: *Race, Capital Punishment, and the Supreme Court*, 101 HARV. L. REV. 1388, 1388–90 (1988).

¹⁴³ *See* Binsacca, Ellis, Martin & Petitti, *Factors Associated with Low Birthweight in an Inner-City Population: The Role of Financial Problems*, 77 AM. J. PUB. HEALTH 505, 505 (1987); Leveno, Cunningham, Roark, Nelson & Williams, *Prenatal Care and the Low Birth Weight Infant*, 66 OBSTETRICS & GYN. 599, 602 (1985). Babies born to women who receive no prenatal care are three times more likely to die within the first year than those born to women who receive adequate care. *See* Hughes, Johnson, Rosenbaum & Simons, *The Health of America's Mothers and Children: Trends in Access to Care*, 20 CLEARINGHOUSE REV. 472, 473 (1986).

riers to receiving proper care during pregnancy.¹⁴⁴ In 1986, only half of all pregnant Black women in America received adequate prenatal care.¹⁴⁵ It appears that in the 1980s Black women's access to prenatal care has actually declined.¹⁴⁶ The government has chosen to punish poor Black women rather than provide the means for them to have healthy children.

¹⁴⁴ One of the most significant obstacles to receiving prenatal care is the inability to pay for health care services. See CHILDREN'S DEFENSE FUND, *supra* note 79, at 43-48; McNulty, *supra* note 8, at 295-97. Most poor women depend on overextended public hospitals for prenatal care because of the scarcity of neighborhood physicians who accept Medicaid. See *id.* Institutional, cultural, and educational barriers also deter poor women of color from using the few available services. See generally F. CARO, D. KALMUSS & I. LOPEZ, *supra* note 142 (discussing institutional and cultural barriers to prenatal care among low-income women in New York City); Curry, *Nonfinancial Barriers to Prenatal Care*, 15 WOMEN & HEALTH 85-87 (1989) (discussing accessibility problems to needed health care sites); Zambrana, *A Research Agenda on Issues Affecting Poor and Minority Women: A Model for Understanding Their Health Needs*, 14 WOMEN & HEALTH 137, 148-50 (1988) (discussing cultural barriers to prenatal care). A Haitian woman's explanation of why she discontinued prenatal care illustrates these obstacles to the use of public health facilities:

My friend say go to doctor and get checked. . . . My friend be on the phone much time before they make appointment. They no have space for 30 days.

When I go to hospital, it confusing. . . . I go early, and see doctor late in the afternoon. . . . I wait on many long lines and take lots of tests. I no understand why so many test every time. No one explain nothing. No one talk my language. I be tired, feel sick from hospital. I go three times, but no more. Too much trouble for nothing.

F. CARO, D. KALMUSS & I. LOPEZ, *supra* note 142, at 75-76.

¹⁴⁵ See CHILDREN'S DEFENSE FUND, *supra* note 79, at 4 (table 1.1). The percentage of white women receiving adequate prenatal care was 72.6. See *id.*

¹⁴⁶ See Hughes, Johnson, Rosenbaum & Simons, *supra* note 143, at 473-74; McNulty, *supra* note 8, at 293-94.

The percentage of Black women receiving prenatal care in the first three months of pregnancy declined from a high of 62.7 in 1980 to 61.1 in 1988. See Hiltz, *Life Expectancy for Blacks in U.S. Shows Sharp Drop*, N.Y. Times, Nov. 29, 1990, at B17, col. 1. The percentage of babies born to Black women getting no prenatal care increased from 8.8 in 1980 to 11.0 in 1988. See *id.*

The number of Black infant deaths could be reduced significantly by a national commitment to ensuring that all pregnant women receive high-quality prenatal care. See generally Leu, *Legislative Research Bureau Report: A Proposal to Strengthen State Measures for the Reduction of Infant Mortality*, 23 HARV. J. LEGIS. 559 (1986) (proposing methods for delivering prenatal care services to poor women). A recently revealed confidential draft of a report by the White House Task Force on Infant Mortality recommends 18 specific measures costing a total of \$480 million per year to reduce infant mortality. "The steps include expansion of Medicaid to cover 120,000 additional pregnant women and children in low-income families, an increase in Federal spending on prenatal care and a requirement for states to provide a uniform set of Medicaid benefits to pregnant women." Pear, *Study Says U.S. Needs to Attack Infant Mortality*, N.Y. Times, Aug. 6, 1990, at B9, col. 3. Programs specifically designed to provide prenatal care to low-income, high-risk women have succeeded in substantially reducing the rates of low birth-weight and high infant mortality. See F. CARO, D. KALMUSS & I. LOPEZ, *supra* note 142, at 3-5. For discussions of recommendations of measures to increase the use of prenatal care by poor women, see *id.* at 85-99; and Poland, Ager & Olson, *supra* note 45, at 303.

The cruelty of this punitive response is heightened by the lack of available drug treatment services for pregnant drug addicts.¹⁴⁷ Protecting the welfare of drug addicts' children requires, among other things, adequate facilities for the mother's drug treatment. Yet a drug addict's pregnancy serves as an *obstacle* to obtaining this treatment. Treatment centers either refuse to treat pregnant women or are effectively closed to them because the centers are ill-equipped to meet the needs of pregnant addicts.¹⁴⁸ Most hospitals and programs that treat addiction exclude pregnant women because their babies are more likely to be born with health problems requiring expensive care.¹⁴⁹ Program directors also feel that treating pregnant addicts is worth neither the increased cost nor the risk of tort liability.¹⁵⁰

Moreover, there are several barriers to pregnant women who seek to use centers that will accept them. Drug treatment programs are generally based on male-oriented models that are not geared to the needs of women.¹⁵¹ The lack of accommodations for children is perhaps the most significant obstacle to treatment. Most outpatient clinics do not provide child care, and many residential treatment programs do not admit children.¹⁵² Furthermore, treatment programs have

¹⁴⁷ See Chavkin, *Drug Addiction and Pregnancy: Policy Crossroads*, 80 AM. J. PUB. HEALTH 483, 485 (1990); McNulty, *supra* note 8, at 301-02. A 1979 national survey by the National Institute on Drug Abuse found only 25 drug treatment programs that described themselves as specifically geared to female addicts. See Chavkin, *supra*, at 485. The lack of facilities for pregnant addicts in two cities illustrates the problem. A recent survey of 78 drug treatment programs in New York City revealed that 54% denied treatment to pregnant women, 67% refused to treat pregnant addicts on Medicaid, and 87% excluded pregnant women on Medicaid addicted specifically to crack. Less than half of those programs that did accept pregnant addicts provided prenatal care, and only two provided child care. See Chavkin, *Help, Don't Jail, Addicted Mothers*, N.Y. Times, July 18, 1989, at A21, col. 2. Similarly, drug-addicted mothers in San Diego must wait up to six months to obtain one of just 26 places in residential treatment programs that allow them to live with their children. See Schachter, *Help Is Hard to Find for Addict Mothers: Drug Use "Epidemic" Overwhelms Services*, L.A. Times, Dec. 12, 1986, pt. 2, at 1, col. 1; *Substance Abuse Treatment for Women: Crisis in Access*, Health Advoc., Spring 1989, at 9, col. 1. Furthermore, because Medicaid covers only 17 days of a typical 28-day program, poor women may not be able to afford full treatment even at centers that will accept them. See Hoffman, *supra* note 5, at 44.

¹⁴⁸ See Cusky, Berger & Densen-Gerber, *Issues in the Treatment of Female Addiction: A Review and Critique of the Literature*, 6 CONTEMP. DRUG PROBS. 307, 324-26 (1977); McNulty, *supra* note 8, at 301-02; Suffet, Hutson & Brotman, *Treatment of the Pregnant Addict: A Historical Overview*, in PREGNANT ADDICTS AND THEIR CHILDREN: A COMPREHENSIVE CARE APPROACH 13, 21 (R. Brotman, D. Hutson & F. Suffet eds. 1984); Alters, *supra* note 30, at 1, col. 1; Freitag, *Hospital Defends Limiting of Drug Program*, N.Y. Times, Dec. 12, 1989, at B9, col. 1.

¹⁴⁹ See McNulty, *supra* note 8, at 301; Teltsch, *supra* note 30, at A14, col. 1.

¹⁵⁰ See Chavkin, *Drug Addiction and Pregnancy: Policy Crossroads*, *supra* note 147, at 485; McNulty, *Combating Pregnancy Discrimination in Access to Substance Abuse Treatment for Low-Income Women*, 23 CLEARINGHOUSE REV. 21, 22 (1989).

¹⁵¹ See Cuskey, Berger & Densen-Gerber, *supra* note 148, at 312-14; Alters, *supra* note 30, at 1, col. 1.

¹⁵² See McNulty, *supra* note 150, at 22; *Substance Abuse Treatment for Women: Crisis in Access*, *supra* note 147, at 9.

traditionally failed to provide the comprehensive services that women need, including prenatal and gynecologic care, contraceptive counseling, appropriate job training, and counseling for sexual and physical abuse.¹⁵³ Predominantly male staffs and clients are often hostile to female clients and employ a confrontational style of therapy that makes many women uncomfortable.¹⁵⁴ Moreover, long waiting lists make treatment useless for women who need help during the limited duration of their pregnancies.¹⁵⁵

Finally, and perhaps most importantly, ample evidence reveals that prosecuting addicted mothers may not achieve the government's asserted goal of healthier pregnancies; indeed, such prosecutions will probably lead to the opposite result. Pregnant addicts who seek help from public hospitals and clinics are the ones most often reported to government authorities.¹⁵⁶ The threat of prosecution based on this reporting forces women to remain anonymous and thus has the perverse effect of deterring pregnant drug addicts from seeking treatment.¹⁵⁷ For this reason, the government's decision to punish drug-addicted mothers is irreconcilable with the goal of helping them.

¹⁵³ See Chavkin, *Drug Addiction and Pregnancy: Policy Crossroads*, *supra* note 147, at 485; Chavkin, Driver & Forman, *The Crisis in New York City's Perinatal Services*, 89 N.Y. ST. J. MED. 658, 661-62 (1989).

¹⁵⁴ See Chavkin, *Drug Addiction and Pregnancy: Policy Crossroads*, *supra* note 147, at 485; see also NATIONAL INSTITUTE ON DRUG ABUSE, *DRUG DEPENDENCY IN PREGNANCY* 46 (1978) (describing pervasive negative attitudes toward pregnant addicts).

¹⁵⁵ The experience of one Black pregnant drug addict, whom I will call Mary, exemplifies the barriers to care. Mary needed to find a residential drug treatment program that provided prenatal care and accommodations for her two children, ages three and eight. She tried to get into H.U.G.S. (Hope, Unity and Growth), the sole residential treatment program for women with children in Detroit, but there was no vacancy. Mary's only source of public prenatal care was Eleanor Hutzel Hospital, which has a clinic for high risk pregnancies. She was also able to receive drug counseling on an outpatient basis from the adjacent Eleanore Hutzel Recovery Center. But Mary encountered an eight-week waiting list at the hospital, and inadequate public transportation made it extremely difficult for her to get there. In the end, she received deficient care for both her addiction and her pregnancy. Telephone Interview with Adrienne Edmonson-Smith, Advocate with the Maternal-Child Health Advocacy Project, Wayne State University (July 25, 1990).

¹⁵⁶ See Berrien, *Pregnancy and Drug Use: The Dangerous and Unequal Use of Punitive Measures*, 2 YALE J.L. & FEMINISM 239, 247 (1990).

The government learned of Jennifer Johnson's crack addiction only because she confided her addiction to the obstetrician who delivered her baby at a public hospital. Her trust in her doctor prompted the hospital to test Johnson and her baby for drugs. See Brief of American Public Health Association and Other Concerned Organizations as Amici Curiae in Support of Appellant at 2, *Johnson v. State*, No. 89-1765 (Fla. Dist. Ct. App. Dec. 28, 1989). Moreover, the state's entire proof of Johnson's criminal intent was based on the theory that Johnson's attempts to get help for her addiction showed that she knew that her cocaine use harmed the fetus. The key evidence against her was that, a month before her daughter's birth, Johnson had summoned an ambulance after a crack binge because she was worried about its effect on her unborn child. See Trial Transcript, *supra* note 4, at 144.

¹⁵⁷ See American Medical Association, *Report of the Board of Trustees on Legal Interventions During Pregnancy: Court Ordered Medical Treatments and Legal Penalties for Potentially Harm-*

Pregnancy may be a time when women are most motivated to seek treatment for drug addiction and make positive lifestyle changes.¹⁵⁸ The government should capitalize on this opportunity by encouraging drug-addicted women to seek help and providing them with comprehensive treatment. Punishing pregnant women who use drugs only exacerbates the causes of addiction — poverty, lack of self-esteem, and hopelessness.¹⁵⁹ Perversely, this makes it more likely that poor Black women's children — the asserted beneficiaries of the prosecutions — will suffer from the same hardships.

V. PUNISHING BLACK MOTHERS AND THE PERPETUATION OF RACIAL HIERARCHY

The previous Part showed how recent prosecutions have penalized Black women for their reproductive choices based in part on society's devaluation of Black motherhood. This analysis implicates two constitutional protections: the equal protection clause of the fourteenth amendment and the right of privacy. These two constitutional challenges appeal to different but related values. They are related¹⁶⁰ in the sense that underlying the protection of the individual's autonomy is the principle that all individuals are entitled to equal dignity.¹⁶¹ A basic premise of equality doctrine is that certain fundamental aspects of the human personality, including decisional autonomy, must be respected in all persons.¹⁶² Theories of racial equality and privacy can be used as related means to achieve a common end of eliminating

ful Behavior by Pregnant Women, 264 J. A.M.A. 2663, 2669 (1990). The reaction of pregnant women in San Diego to the 1987 arrest of Pamela Rae Stewart for harming her unborn child illustrates the deterrent effect of prosecution. Health care professionals reported that their pregnant clients' fear of prosecution for drug use made some of them distrustful and caused others to decline prenatal care altogether. See Moss, *supra* note 49, at 1411-12.

¹⁵⁸ See Note, *supra* note 51, at 766 & n.84; Chavkin, *Help, Don't Jail, Addicted Mothers*, *supra* note 147 at A21, col. 2.

¹⁵⁹ See Escamilla-Mondanaro, *Women: Pregnancy, Children and Addiction*, 9 J. PSYCHEDELIC DRUGS 59, 59-60 (1977); see also Zuckerman, Amaro, Bauchner & Cabral, *Depressive Symptoms During Pregnancy: Relationship to Poor Health Behaviors*, 160 AM. J. OBSTETRICS & GYN. 1107, 1109 (1989) (stating that poor health behavior in pregnancy correlates with such characteristics as "being single, older, unemployed, and having a lower income").

¹⁶⁰ See A. ALLEN, *UNEASY ACCESS: PRIVACY FOR WOMEN IN A FREE SOCIETY* 57-81 (1988) (noting similarity between benefits of privacy and equality for women). But see Sunstein, *Sexual Orientation and the Constitution: A Note on the Relationship Between Due Process and Equal Protection*, 55 U. CHI. L. REV. 1161, 1170-79 (1988) (discussing differences between due process liberty and equal protection). Laurence Tribe and Michael Dorf criticize Professor Sunstein for failing to "take greater account of the inseparability of liberty and equality." Tribe & Dorf, *Levels of Generality in the Definition of Rights*, 57 U. CHI. L. REV. 1057, 1095 (1990).

¹⁶¹ See Karst, *The Supreme Court, 1976 Term — Foreword: Equal Citizenship Under the Fourteenth Amendment*, 91 HARV. L. REV. 1, 32 (1977).

¹⁶² See R. DWORKIN, *TAKING RIGHTS SERIOUSLY* 272-78 (1977).

the legacy of racial discrimination that has devalued Black motherhood. Both aim to create a society in which Black women's reproductive choices, including the decision to bear children, are given full respect and protection.

The equal protection clause¹⁶³ embodies the Constitution's ideal of racial equality. State action that violates this ideal by creating classifications based on race must be subjected to strict judicial scrutiny.¹⁶⁴ The equal protection clause, however, does not explicitly define the meaning of equality or delineate the nature of prohibited government conduct. As a result, equal protection analyses generally have divided into two visions of equality: one that is informed by an antidiscrimination principle, the other by an antisubordination principle.¹⁶⁵

The antidiscrimination approach identifies the primary threat to equality as the government's "failure to treat Black people as individuals without regard to race."¹⁶⁶ The goal of the antidiscrimination principle is to ensure that all members of society are treated in a color-blind or race-neutral fashion. Under this view of equality, the function of the equal protection clause is to outlaw specific acts committed by individual government officials that discriminate against individual Black complainants because of their race. Thus, this approach judges the legitimacy of government action from the perpetrator's perspective.¹⁶⁷ The analysis focuses on the process by which government decisions are made and seeks to purge racial classifications from that process.

The Supreme Court's current understanding of the equal protection clause is based on a narrow interpretation of the antidiscrimination principle.¹⁶⁸ The Court has confined discrimination prohibited by the

¹⁶³ The fourteenth amendment provides, in relevant part, that "[n]o State shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

¹⁶⁴ Racial classifications are held unconstitutional absent a compelling governmental justification. See *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 274 (1986) (plurality opinion); *Palmore v. Sidoti*, 466 U.S. 429, 432 (1984); *Korematsu v. United States*, 323 U.S. 214, 216 (1944). See generally L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 16-6, at 1451-54 (2d ed. 1988) (explaining the strict scrutiny standard).

¹⁶⁵ These competing views of equal protection law have been variously characterized by commentators. See, e.g., L. TRIBE, *supra* note 164, § 16-21, at 1514-21 (describing the "anti-discrimination" and "antisubjugation" principles); Brest, *The Supreme Court, 1975 Term — Foreword: In Defense of the Antidiscrimination Principle*, 90 HARV. L. REV. 1, 5 (1976) (advocating the antidiscrimination principle as a theory of racial justice); Colker, *Anti-Subordination Above All: Sex, Race, and Equal Protection*, 61 N.Y.U. L. REV. 1003, 1005-13 (1986) (comparing the "anti-differentiation" principle with the "anti-subordination" approach).

¹⁶⁶ Dimond, *The Anti-Caste Principle — Toward a Constitutional Standard for Review of Race Cases*, 30 WAYNE L. REV. 1, 1 (1983).

¹⁶⁷ See Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049, 1052-57 (1978).

¹⁶⁸ See Strauss, *Discriminatory Intent and the Taming of Brown*, 56 U. CHI. L. REV. 935,

Constitution to state conduct performed with a discriminatory intent.¹⁶⁹ State conduct that disproportionately affects Blacks violates the Constitution only if it is accompanied by a purposeful desire to produce this outcome.¹⁷⁰ Although recognized violations are not limited to explicit racial classifications, an invidious purpose cannot be inferred solely from the adverse consequences of racially neutral policies.¹⁷¹ A Black complainant, therefore, need not produce a law that expressly differentiates between whites and Blacks; but neither can she simply demonstrate that a color-blind law has a clearly disproportionate impact on Blacks. As one commentator has noted, "the Justices have demanded proof . . . that officials were 'out to get' a person or group on account of race."¹⁷²

Black women prosecuted for drug use during pregnancy nevertheless may be able to make out a *prima facie* case of discriminatory purpose.¹⁷³ The Court has recognized that a selection process characterized by broad government discretion that produces unexplained racial disparities may support the presumption of discriminatory purpose.¹⁷⁴ In *Castaneda v.*

953-54 (1989). For an analysis of the development of Supreme Court antidiscrimination doctrine, see Dimond, *supra* note 166, at 16-42; and Freeman, *supra* note 167, at 1057-1118.

¹⁶⁹ See, e.g., *Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 265 (1977); *Washington v. Davis*, 426 U.S. 229, 239-45 (1976).

Commentators have noted that the Court adopted the discriminatory intent rule not because this standard is inherently required by the equal protection clause, but because it feared the remedies a discriminatory impact rule would entail. See, e.g., Binion, *Intent and Equal Protection: A Reconsideration*, 1983 SUP. CT. REV. 397, 404-08; Kennedy, *supra* note 142, at 1414 (noting Justice Brennan's derision of the Court's "fear of too much justice"); Schwemm, *From Washington to Arlington Heights and Beyond: Discriminatory Purpose in Equal Protection Litigation*, 1977 U. ILL. L.F. 961, 1050.

¹⁷⁰ Freeman recognizes in the Court's discriminatory intent standard the twin notions of "fault" and "causation": proof of an equal protection violation requires identification of a blameworthy perpetrator whose actions can be linked to the victim's injury. See Freeman, *supra* note 167, at 1054-56; see also Sullivan, *The Supreme Court, 1985 Term — Comment: Sins of Discrimination: Last Term's Affirmative Action Cases*, 100 HARV. L. REV. 78, 80 (1986) (arguing that "the Court has approved affirmative action only as precise penance for the specific sins of racism a government, union, or employer has committed in the past").

¹⁷¹ See *Personnel Adm'r v. Feeney*, 442 U.S. 256, 279 (1979); Kennedy, *supra* note 142, at 1404.

¹⁷² Kennedy, *supra* note 142, at 1405.

¹⁷³ For a discussion of equal protection challenges to racially selective prosecutions, see *Developments in the Law — Race and the Criminal Process*, 101 HARV. L. REV. 1472, 1532-49 (1988) [hereinafter *Developments*].

¹⁷⁴ See Kennedy, *supra* note 142, at 1425-27. See generally Note, *To Infer or Not to Infer a Discriminatory Purpose: Rethinking Equal Protection Doctrine*, 61 N.Y.U. L. REV. 334, 351-62 (1986) (discussing the impact-inference standard as applied to jury selection and advocating its extension to death penalty cases and other contexts). The cases in which the Supreme Court has applied this reasoning involve challenges to the racial composition of juries. See, e.g., *Castaneda v. Partida*, 430 U.S. 482, 500-01 (1977); *Turner v. Fouche*, 396 U.S. 346, 360-61 (1970). The Court has not been willing to extend this reasoning to other claims of racial

Partida,¹⁷⁵ for example, the Court held that the defendant demonstrated a prima facie case of intentional discrimination in grand jury selection by showing a sufficiently large statistical disparity between the percentage of Mexican-Americans in the population (seventy-nine percent) and the percentage of those summoned (thirty-nine percent), combined with a selection procedure that relied on the discretion of jury commissioners.¹⁷⁶

Similarly, a Black mother arrested in Pinellas County, Florida could make out a prima facie case of unconstitutional racial discrimination by showing that a disproportionate number of those chosen for prosecution for exposing newborns to drugs are Black. In particular, she could point out the disparity between the percentage of defendants who are Black and the percentage of pregnant substance abusers who are Black.¹⁷⁷ The *New England Journal of Medicine* study of pregnant women in Pinellas County referred to earlier found that only about twenty-six percent of those who used drugs were Black.¹⁷⁸ Yet over *ninety percent* of Florida prosecutions for drug abuse during pregnancy have been brought against Black women.¹⁷⁹ The defendant could buttress her case with the study's finding that, despite similar rates of substance abuse, Black women were ten times more likely than white women to be reported to public health authorities for substance abuse during pregnancy.¹⁸⁰ In addition, the defendant could show that both health care professionals and prosecutors wield a great deal of discretion in selecting women to be subjected to the criminal justice system.¹⁸¹ The burden would then shift to the state "to dispel the inference of intentional discrimination" by justifying the racial discrepancy in its prosecutions.¹⁸²

The antistatutory approach to equality would not require Black defendants to prove that the prosecutions are motivated by racial bias. Rather than requiring victims to prove distinct instances of discriminating behavior in the administrative process,¹⁸³ the anti-

discrimination in the administration of criminal justice. See Cardinale & Feldman, *The Federal Courts and the Right to Nondiscriminatory Administration of the Criminal Law: A Critical View*, 29 SYRACUSE L. REV. 659, 662-64 (1978); Kennedy, *supra* note 142, at 1402 (observing that "no defendant in state or federal court has ever successfully challenged his punishment on grounds of racial discrimination in sentencing") (emphasis in original).

¹⁷⁵ 430 U.S. 482 (1977).

¹⁷⁶ See *id.* at 494-97.

¹⁷⁷ See *McCleskey v. Kemp*, 481 U.S. 279, 349-61 (1987) (Blackmun, J., dissenting) (applying the *Castaneda* test to a claim of discriminatory prosecution); *Developments*, *supra* note 173, at 1552-54 (advocating use of an impact-inference standard in the racial prosecution context).

¹⁷⁸ See Chasnoff, Landress & Barrett, *supra* note 65, at 1204 (table 2).

¹⁷⁹ See State Case Summary, *supra* note 2, at 3-5.

¹⁸⁰ See *supra* p. 1434.

¹⁸¹ See *supra* p. 1433.

¹⁸² *Castaneda v. Partida*, 430 U.S. 482, 497-98 (1977).

¹⁸³ See Binion, *supra* note 169, at 407-08.

subordination approach considers the concrete effects of government policy on the substantive condition of the disadvantaged.¹⁸⁴ This perspective recognizes that racial subjugation is not maintained solely through the racially antagonistic acts of individual officials.¹⁸⁵ It instead views social patterns and institutions that perpetuate the inferior status of Blacks as the primary threats to equality. The goal of antisubordination law is a society in which each member is guaranteed equal respect as a human being. Under this conception of equality, the function of the equal protection clause is to dismantle racial hierarchy by eliminating state action or inaction that effectively preserves Black subordination.¹⁸⁶

The prosecution of drug-addicted mothers demonstrates the inadequacy of antidiscrimination analysis and the superiority of the anti-subordination approach. Rather than conform Black women's experiences to the intent standard, we can use those experiences to reveal the narrowmindedness of the Court's view of equality. First, the antidiscrimination approach may not adequately protect Black women from prosecutions' infringement of equality, because it is difficult to identify individual guilty actors. Who are the government officials motivated by racial bias to punish Black women? The hospital staff who test and report mothers to child welfare agencies? The prosecutors who develop and implement policies to charge women who use drugs during pregnancy? Legislators who enact laws protecting the unborn?

It is unlikely that any of these individual actors intentionally singled out Black women for punishment based on a conscious devaluation of their motherhood. The disproportionate impact of the prosecutions on poor Black women does not result from such isolated, individualized decisions. Rather, it is a result of two centuries of systematic exclusion of Black women from tangible and intangible benefits enjoyed by white society. Their exclusion is reflected in Black women's reliance on public hospitals and public drug treatment centers, in their failure to obtain adequate prenatal care, in the more

¹⁸⁴ See Kennedy, *supra* note 142, at 1424-25.

¹⁸⁵ See L. TRIBE, *supra* note 164, § 16-21, at 1518, 1520-21.

¹⁸⁶ See West, *Progressive and Conservative Constitutionalism*, *supra* note 14, at 693-94. Professor Tribe and others have argued that the antisubordination view of equality is more faithful to the historical origins of the Civil War amendments, which were drafted specifically to eradicate racial hierarchy. See L. TRIBE, *supra* note 164, § 16-21, at 1516; Freeman, *supra* note 167, at 1061. In the Civil Rights Cases, 109 U.S. 3 (1883), for example, the Court asserted that the thirteenth amendment abolishes "all badges and incidents of slavery." *Id.* at 20. In the Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1873), the Court identified as the "one pervading purpose" of the amendments "the freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly-made freeman and citizen from the oppressions of those who had formerly exercised unlimited dominion over him." *Id.* at 71.

frequent reporting of Black drug-users by health care professionals, and in society's acquiescence in the government's punitive response to the problem of crack-addicted babies.

More generally, the antidiscrimination principle mischaracterizes the role of social norms in perpetuating inequality. This view of equality perceives racism as disconnected acts by individuals who operate outside of the social fabric.¹⁸⁷ The goal of the equal protection clause under this world view is "to separate from the masses of society those blameworthy individuals who are violating the otherwise shared norm."¹⁸⁸

The prosecutions of drug-addicted mothers demonstrate how dramatically this perspective departs from reality. It is precisely a shared societal norm — the devaluation of Black motherhood — that perpetuates the social conditions discussed above and explains why Black women are particularly susceptible to prosecution. The Court's vision of equality acquiesces in racist norms and institutions by exempting them from a standard that requires proof of illicit motive on the part of an individual governmental actor. The inability to identify and blame an individual government actor allows society to rationalize the disparate impact of the prosecutions as the result of the mothers' own irresponsible actions. Formal equality theory thus legitimates the subordination of Black women.

In contrast to the antidiscrimination approach, antistatutory theory mandates that equal protection law concern itself with the concrete ways in which government policy perpetuates the inferior status of Black women. The law should listen to the voices of poor Black mothers and seek to eliminate their experiences of subordination. From this perspective, the prosecutions of crack-addicted mothers are unconstitutional because they reinforce the myth of the undeserving Black mother by singling out — whether intentionally or not — Black women for punishment. The government's punitive policy reflects a long history of denigration of Black mothers dating back to slavery, and it serves to perpetuate that legacy of unequal respect. The prosecutions should therefore be upheld only if the state can demonstrate that they serve a compelling interest that could not be achieved through less discriminatory means.¹⁸⁹

Although the state's asserted interest in ensuring the health of babies is substantial, prosecution does not advance that interest in a sufficiently narrow fashion. First, as I have noted, the government's

¹⁸⁷ See Freeman, *supra* note 167, at 1054. Kimberlé Crenshaw similarly demonstrates how the "restrictive view" of antidiscrimination law assumes that a racially equitable society already exists. Crenshaw, *supra* note 14, at 1344.

¹⁸⁸ Freeman, *supra* note 167, at 1054.

¹⁸⁹ See Binion, *supra* note 169, at 447-48.

punitive course of action is inimical to the goal of healthier pregnancies because it deters women from seeking help.¹⁹⁰ In addition, even if the prosecutions could be proved to further the state's interest in children's welfare, they would not survive the "least restrictive alternative" standard. That standard requires that "even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved."¹⁹¹ A public commitment to providing adequate prenatal care for poor women and drug treatment programs that meet the needs of pregnant addicts would be a more effective means for the state to address the problem of drug-exposed babies.¹⁹²

By prosecuting crack-addicted mothers, the government helps to perpetuate the dominant society's devaluation of Black motherhood. The antistatutory analysis better uncovers this institutional, rather than individualistic, mechanism for maintaining racial inequality. The government's policy cannot withstand the scrutiny of an equality jurisprudence dedicated to eradicating hierarchies of racial privilege. Still, the focus purely on equality does not address the unique significance of punishing the decision to bear a child. The remainder of this Article examines how the prosecutions violate Black women's right of privacy and the relationship between that privacy analysis and the goal of racial equality.

VI. A CRITICAL ASSESSMENT OF ARGUMENTS AGAINST INTERVENTION

There is now a substantial body of scholarship challenging state intervention in pregnant women's conduct.¹⁹³ Yet much of the literature has not sufficiently taken into account the experience of poor Black women, the very women who are most affected. In addition, the literature has failed to address adequately the arguments on behalf of fetal protection. In this Part, I will critique various reproductive rights theories that have been used to challenge the control of pregnant women and show why they are not helpful in addressing the prosecution of drug-addicted mothers. In Part VII, I will present a privacy argument that more effectively confronts the government's policy. That analysis better explains the constitutional injury caused by the prosecutions because it recognizes race as a critical factor.

¹⁹⁰ See *supra* notes 156–157 and accompanying text.

¹⁹¹ *Shelton v. Tucker*, 364 U.S. 479, 488 (1960).

¹⁹² See *supra* notes 143–155 and accompanying text.

¹⁹³ See sources cited *supra* note 8.

A. Bodily Autonomy and Integrity

Much of the discourse challenging state intervention in the decisions of pregnant women has occurred in the context of forced medical treatment.¹⁹⁴ Many commentators have argued that judicial decisions that allow doctors to perform surgery and other procedures on a pregnant woman without her consent violate women's right to bodily autonomy and integrity.¹⁹⁵ It is difficult, however, to transfer the scholarship addressing compelled medical procedures to the issue of drug-addicted mothers.

The interests of the drug-addicted mother appear to be weaker for three reasons. First, unlike forced medical treatment, punishing the pregnant drug addict does not require her to take affirmative steps to benefit the fetus. She is not asked to be a good samaritan; rather, she is punished for affirmatively doing harm to the fetus. Second, the prosecution of drug-addicted mothers involves no direct physical intrusion. Nor do prosecutions deprive women of control over their bodies by directly compelling them to undergo an unwanted biological process, as is the case with the prohibition of abortion. On this level, punishing drug-addicted mothers does not seem to implicate a mother's right to bodily integrity at all.

Third, the mother's drug use has potentially devastating effects on the fetus and lacks any social justification. Indeed, forcing a woman to refrain from using harmful drugs through incarceration or court order may be seen as a benefit *to the woman herself*, whereas forced medical procedures often aid the fetus only at the expense of the mother's health or her deeply held religious beliefs. It is therefore harder to identify how the government's action infringes a constitutionally protected interest. Consequently, some commentators who oppose the regulation of some potentially harmful conduct during pregnancy at the same time justify punishment of pregnant drug users.¹⁹⁶ We must therefore draw on another principle of autonomy to describe the infringement caused by these prosecutions: the right to make decisions about reproduction (here, the choice of carrying a pregnancy to term).

In addition, many of the issues raised by forced medical treatment seem disconnected from the experiences of poor women of color.¹⁹⁷

¹⁹⁴ See, e.g., Gallagher, *supra* note 8, at 46-58; Nelson, Buggy & Weil, *Forced Medical Treatment of Pregnant Women: "Compelling Each to Live as Seems Good to the Rest"*, 37 HASTINGS L.J. 703 (1986); Rhoden, *The Judge in the Delivery Room: The Emergence of Court-Ordered Cesareans*, 74 CALIF. L. REV. 1951 (1986).

¹⁹⁵ See, e.g., Goldberg, *supra* note 8, at 618-23; Nelson, Buggy & Weil, *supra* note 194, at 750-57; Rhoden, *supra* note 194, at 1967-75, 1995-99.

¹⁹⁶ See, e.g., Stearns, *Maternal Duties During Pregnancy: Toward a Conceptual Framework*, 21 NEW ENG. L. REV. 595, 629-33 (1985-86); Note, *Maternal Rights and Fetal Wrongs: The Case Against the Criminalization of "Fetal Abuse,"* 101 HARV. L. REV. 994, 1007 (1988).

¹⁹⁷ This is not to say that forced medical treatment has no relevance to the lives of poor

For example, much of the literature focuses on ethical issues arising from treating the fetus as a patient and its impact on the relationship between the pregnant woman and her physician.¹⁹⁸ This debate is largely irrelevant to poor Black women, the majority of whom receive inadequate prenatal care.¹⁹⁹ Their major concern is not having an ethical conflict with their doctor, but affording or finding a doctor in the first place. The issue of whether intricate fetal surgery may be performed against a mother's will is far removed from the urgent needs of poor women who may not have available to them the most rudimentary means to ensure the health of the fetus.²⁰⁰

Forced treatment decisions equate women with inert vessels, disregard their own choices, and value them solely for their capacity to nurture the fetus.²⁰¹ Although this view of women is reflected as well in the prosecution of drug-addicted mothers, it does not grasp the full indignity of the state's treatment of poor Black women. Government control of pregnancy perpetuates stereotypes that value women solely for their procreative capacity. But the prosecutions of crack addicts deny poor Black women even this modicum of value. By punishing them for having babies, they are deemed not even worthy of the dignity of childbearing. Thus, the prosecutions debase Black women

women of color. In fact, court-ordered medical procedures are performed disproportionately on pregnant minority women. A study of 15 court-ordered cesarians published in 1987 found that 80% involved women of color; 27% of the women were not native English speakers. See Kolder, Gallagher & Parsons, *Court-Ordered Obstetrical Interventions*, 316 NEW ENG. J. MED. 1192, 1193 (1987); see also Daniels, *Court-Ordered Cesareans: A Growing Concern for Indigent Women*, 21 CLEARINGHOUSE REV. 1064, 1065 (1988) (comparing the general distribution of cesarian sections with that of cesarians performed pursuant to court order); Gallagher, *Fetus as Patient*, in REPRODUCTIVE LAWS FOR THE 1990S, *supra* note 125, at 157, 183-84 (discussing the discriminatory impact of forced medical treatment).

¹⁹⁸ See, e.g., Fletcher, *The Fetus as Patient: Ethical Issues*, 246 J. A.M.A. 772 (1981); Comment, *The Fetal Patient and the Unwilling Mother: A Standard for Judicial Intervention*, 14 PAC. L.J. 1065, 1065-79 (1983).

¹⁹⁹ See *supra* notes 147 & 148.

²⁰⁰ The punishment of drug-addicted mothers raises ethical issues affecting poor women of color, however, because drug-addicted mothers are often reported to government authorities by their own physicians. In the Johnson trial, for example, Johnson's obstetricians provided the most damaging evidence against her by testifying that Johnson had admitted to them that she had smoked crack soon before both of her children were delivered. See Trial Transcript, *supra* note 4, at 15, 70. Punishing pregnant women based on information from their doctors undermines the confidential doctor-patient relationship and deters women from sharing important information with health care providers or even from obtaining prenatal care. See Berrien, *supra* note 156, at 247; Moss, *supra* note 49, at 1411-12; Roberts, *supra* note 2, at 60-61.

²⁰¹ See, e.g., Annas, *Predicting the Future of Privacy in Pregnancy: How Medical Technology Affects the Legal Rights of Pregnant Women*, 13 NOVA L. REV. 329, 345 (1989) ("Treating the fetus against the will of the mother requires us to degrade and dehumanize the mother and treat her as an inert container."); Gallagher, *supra* note 8, at 27 ("The individual women themselves become invisible or viewed only as vessels — carriers of an infinitely more valuable being.").

even more than forced medical treatment's general devaluation of women.²⁰²

B. The Right to Make Medical and Lifestyle Decisions

A second approach challenges restrictions on maternal conduct during pregnancy by advocating a woman's right to make medical and lifestyle decisions.²⁰³ Rather than focus on a woman's right to protect her body from physical intrusion, this approach focuses on a woman's right to engage in activities of her choice free from government interference. This argument also loses its force in the context of maternal drug addiction. While the danger of government restrictions on a pregnant woman's *normal* conduct may be apparent, drug use during pregnancy arguably belongs in a separate category. The pregnant drug addict is not asked to refrain from generally acceptable behavior, such as sexual intercourse, work, or exercise. Rather, society demands only that she cease conduct that it already deems illegal and reprehensible.

Arguments based on a woman's right to make decisions about her pregnancy and her fetus also appear weak in the context of maternal drug addiction. Unlike healthy mothers,²⁰⁴ pregnant drug addicts are not better able to make lifestyle and medical decisions that affect the fetus than the state or physicians. Nor can we say that a decision to carry a fetus to term automatically demonstrates that a drug-addicted mother cares deeply for it and is in a better position to monitor her own conduct during pregnancy than the state. Most would agree that the pregnant drug addict has exercised poor judgment in caring for herself and her fetus. The state should not substitute its judgment for that of the "normal" mother, but intervention in the case of the drug addict seems more justified.

Although the government is arguably better able to make decisions about the care of the fetus than the drug-addicted mother, it is quite a different matter to allow the government to determine who is entitled to be a mother. State interference in the decision to bear a child is

²⁰² See *supra* notes 94-95 and accompanying text.

²⁰³ See, e.g., Goldberg, *supra* note 8, at 601-04; King, *Should Mom Be Constrained in the Best Interests of the Fetus?*, 13 NOVA L. REV. 393, 397 (1989); Note, *supra* note 8, at 613; Note, *supra* note 196, at 998-1002.

²⁰⁴ See, e.g., Note, *supra* note 8, at 613 ("[B]ecause the decisions a woman makes throughout her pregnancy depend on her individual values and preferences, complicated sets of life circumstances, and uncertain probabilities of daily risk, the woman herself is best situated to make these complex evaluations."); Note, *Rethinking (M)otherhood: Feminist Theory and State Regulation of Pregnancy*, 103 HARV. L. REV. 1325, 1339-41 (1990) (arguing that "the pregnant woman's physical and psychological position with respect to the fetus makes her a uniquely appropriate decisionmaker").

constitutionally more significant than state control of lifestyle decisions.

The interference-in-women's-lifestyles approach also neglects the concerns of poor women of color. A common criticism of the prosecution of drug-addicted mothers is that the imposition of maternal duties will lead to punishment for less egregious conduct. Commentators have predicted government penalties for cigarette smoking, consumption of alcohol, strenuous physical activity, and failure to follow a doctor's orders.²⁰⁵ Although valid, this argument ignores the reality of poor Black women whom are currently being arrested. The reference to a parade of future horrors to criticize the fetal rights doctrine belittles the significance of current government action. It seems to imply that the prosecution of Black crack addicts is not enough to generate concern and that we must postulate the prosecution of white middle-class women in order for the challenge to be meaningful.²⁰⁶

C. The Focus on Abortion

Another aspect of the reproductive rights literature that limits our understanding of reproductive choice is its focus on abortion rights. One problem is that this focus provides an inadequate response to a central argument in support of the regulation of pregnancy. John Robertson, for example, has contended that if a woman forgoes her right to an abortion, she forfeits her right to autonomy and choice.²⁰⁷ If abortion is the heart of women's reproductive rights, then state policies that do not interfere with that right are acceptable.²⁰⁸ Similarly, if the full extent of reproductive freedom is the right to have an abortion, then a policy that encourages abortion²⁰⁹ — such as the

²⁰⁵ See, e.g., Moss, *supra* note 2, at 288–89; Note, *supra* note 8, at 606–07.

²⁰⁶ I recognize, however, the tactical benefit of demonstrating that the prosecution of pregnant crack addicts should be the concern of *all* women. It may be more effective politically to convince affluent women that such government policies also jeopardize their lifestyles.

²⁰⁷ See Robertson, *supra* note 13, at 437–38, 445–47 (“[The woman] waived her right to resist bodily intrusions made for the sake of the fetus when she chose to continue the pregnancy.”); Robertson, *The Right to Procreate and In Utero Fetal Therapy*, 3 J. LEGAL MED. 333, 359 (1982); see also Shaw, *Conditional Prospective Rights of the Fetus*, 5 J. LEGAL MED. 63, 88 (1984) (arguing that the mother's duty to protect the fetus from harm increases after viability “because she has forgone her right to choose abortion”).

²⁰⁸ See, e.g., Mathieu, *Respecting Liberty and Preventing Harm: Limits of State Intervention in Prenatal Choice*, 8 HARV. J.L. & PUB. POL'Y 19, 32–37 (1985) (arguing that the right to an abortion is not inconsistent with the duty to prevent or not cause harm to the fetus); Walker & Puzder, *State Protection of the Unborn After Roe v. Wade: A Legislative Proposal*, 13 STETSON L. REV. 237, 241, 253 (1984) (arguing that extending the fourteenth amendment's protection to unborn children would not impair women's right to abortion).

²⁰⁹ The prosecution of drug-addicted mothers can be seen as encouraging abortion because pregnant drug-addicts may feel pressure to abort the fetus rather than risk being charged with a crime.

prosecution of crack-addicted mothers — does not interfere with that freedom.²¹⁰

As in the previous approaches, the emphasis on abortion fails to incorporate the needs of poor women of color. The primary concern of white, middle-class women are laws that restrict choices otherwise available to them, such as statutes that make it more difficult to obtain an abortion. The main concern of poor women of color, however, are the material conditions of poverty and oppression that restrict their choices.²¹¹ The reproductive freedom of poor women of color, for example, is limited significantly not only by the denial of access to safe abortions, but also by the lack of resources necessary for a healthy pregnancy and parenting relationship.²¹² Their choices are limited not only by direct government interference with their decisions, but also by government's failure to facilitate them. The focus of reproductive rights discourse on abortion neglects this broader range of reproductive health issues that affect poor women of color.²¹³ Ad-

²¹⁰ See Stearns, *supra* note 196, at 604 ("It is inconsistent to argue that a [pre-natal duty] rule unconstitutionally removes the right to abort if in fact the rule actually encourages women to exercise that very right.").

²¹¹ If the facilities necessary to effectuate a reproductive decision cost money, poor women may not be able to afford to take advantage of them. Prenatal care, abortion services, artificial insemination, fetal surgery, contraceptives, and family planning counseling are some examples of the means to realize a reproductive choice that may be financially inaccessible to low-income women. See generally Gertner, *Interference with Reproductive Choice*, in REPRODUCTIVE LAWS FOR THE 1990s, *supra* note 125, at 307, 307-12 (discussing economic and legal obstacles to reproductive choice); Nsiah-Jefferson, *supra* note 125, at 20-23, 50-51 (discussing limitations on access to abortion services and new reproductive technology).

In Roberts, *The Future of Reproductive Choice for Poor Women and Women of Color*, 12 WOMEN'S RTS. L. REP. 59 (1990), I describe the constraints on the reproductive choices available to a hypothetical pregnant young woman in the inner city. See *id.* at 62-64.

²¹² See *supra* note 144.

²¹³ An example of how the unilateral focus on abortion has neglected — and even contradicted — the interests of poor women of color is the pro-choice opposition to sterilization reform in the 1970s. In 1977, the Committee to End Sterilization Abuse introduced in the New York City Council guidelines to prevent sterilization abuse, an important issue for women of color. See *supra* notes 124-130. The Department of Health, Education, and Welfare also considered the guidelines in 1979. The guidelines had two key provisions: they required informed consent in the preferred language of the patient and a 30-day waiting period between the signing of the consent form and the sterilization procedure. Representatives of the National Abortion Rights Action League and Planned Parenthood testified *against* the New York and national guidelines as restrictions on women's access to sterilization. See Tax, *Tax Replies*, NATION, July 24/31, 1989, at 110, 148 (1989) (letter to the editor); see also Petchesky, *supra* note 124, at 35-39 (discussing arguments asserted by opponents of the federal sterilization regulations).

The abortion rights of women of color have also been overlooked. One example is the belated political mobilization on the part of the pro-choice movement triggered by the Supreme Court's decision in *Webster v. Reproductive Health Servs.*, 109 S. Ct. 3040 (1989). There was no similar response to the Court's decisions in *Maher v. Roe*, 432 U.S. 464 (1977), and *Harris v. McRae*, 448 U.S. 297 (1980), which allowed the government to deny poor women public funding for abortions. The pro-choice movement was relatively complacent about the Court's effective denial of access to abortions for poor women until the reproductive rights of affluent

addressing the concerns of women of color will expand our vision of reproductive freedom to include the full scope of what it means to have control over one's reproductive life.²¹⁴

VII. CLAIMING THE RIGHT OF PRIVACY FOR WOMEN OF COLOR

A. Identifying the Constitutional Issue

In deciding which of the competing interests involved in the prosecution of drug-addicted mothers prevails — the state's interest in protecting the health of the fetus or the woman's interest in preventing state intervention — it is essential as a matter of constitutional law to identify the precise nature of the woman's right at stake. In the *Johnson* case, the prosecutor framed the constitutional issue as follows: "What constitutionally protected freedom did Jennifer engage in when she smoked cocaine?"²¹⁵ That was the wrong question. Johnson was not convicted of using drugs. Her "constitutional right" to smoke cocaine was never at issue. Johnson was prosecuted because she chose to carry her pregnancy to term while she was addicted to crack. Had she smoked cocaine during her pregnancy and then had an abortion, she would not have been charged with such a serious crime. The proper question, then, is "What constitutionally protected freedom did Jennifer engage in when she decided to have a baby, even though she was a drug addict?"

Understanding the prosecution of drug-addicted mothers as punishment for having babies clarifies the constitutional right at stake. The woman's right at issue is not the right to abuse drugs or to cause the fetus to be born with defects.²¹⁶ It is the right to choose to be a

women were also threatened. See Stearns, *Roe v. Wade: Our Struggle Continues*, 4 BERKELEY WOMEN'S L.J. 1, 7 (1989).

²¹⁴ The struggle for abortion rights nevertheless continues to play a critical role in advancing women's reproductive autonomy. Expanding the scope of reproductive rights beyond abortion to include the right to bear healthy children may also help pro-choice advocates in the abortion debate. One of the tactics of the right-to-life movement is to characterize the pro-choice movement as people who do not care about children. I participated in a panel discussion in which the right-to-life participants brought along a contingent of supporters — all with young children on their laps. A more complete view of reproductive choice may help to dispel this image. See Colker, *Reply to Sarah Burns*, 13 HARV. WOMEN'S L.J. 207, 212 n.31 (1990). I do not, however, advocate transforming reproductive freedom from a *women's* rights issue into a *children's* rights issue. See Burns, *Notes from the Field: A Reply to Professor Colker*, 13 HARV. WOMEN'S L.J. 189, 205–06 (1990).

²¹⁵ Trial Transcript, *supra* note 4 at 364.

²¹⁶ Supreme Court privacy analysis has similarly mischaracterized the fundamental right at issue in other contexts. The Court has typically identified the constitutional question as whether there is a fundamental right to engage in the conduct forbidden by the law at issue (for example, abortion, adultery, contraception, or homosexual activity). See, e.g., *Michael H. v. Gerald D.*, 109 S. Ct. 2333, 2343 (1989) (identifying the right at issue as "specifically the power of the

mother that is burdened by the criminalization of conduct during pregnancy.²¹⁷ This view of the constitutional issue reveals the relevance of race to the resolution of the competing interests. Race has historically determined the value society places on an individual's right to choose motherhood. Because of the devaluation of Black motherhood, protecting the right of Black women to choose to bear a child has unique significance. In the following section, I argue that the prosecutions of addicted mothers violate traditional liberal notions of privacy. I also demonstrate how the issue of race informs the traditional analysis and calls for a reassessment of the use of privacy doctrine in the struggle to eliminate gender and racial subordination.

B. Overview of Privacy Arguments

Prosecutions of drug-addicted mothers infringe on two aspects of the right to individual choice in reproductive decisionmaking. First, they infringe on the freedom to continue a pregnancy that is essential to an individual's personhood and autonomy. This freedom implies that state control of the decision to carry a pregnancy to term can be as pernicious as state control of the decision to terminate a pregnancy. Second, the prosecutions infringe on choice by imposing an invidious government standard for the entitlement to procreate. Such imposition of a government standard for childbearing is one way that society denies the humanity of those who are different. The first approach emphasizes a woman's right to autonomy over her reproductive life; the second highlights a woman's right to be valued equally as a human

natural father to assert parental rights over a child born into a woman's existing marriage with another man"); *Bowers v. Hardwick*, 478 U.S. 186, 190 (1986) ("The issue presented is whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy."). Jed Rubenfeld has observed that this approach obscures the real danger of laws that abridge the right of privacy — their use as a means for government to control critical aspects of our lives and identity. See Rubenfeld, *The Right of Privacy*, 102 HARV. L. REV. 737, 739 (1989). Rubenfeld writes that "[t]he fundament of the right to privacy is not to be found in the supposed fundamentality of what the law proscribes. It is to be found in what the law imposes." *Id.*; see also Tribe & Dorf, *supra* note 160, at 1065–71 (describing the enterprise of designating fundamental rights as a question of the proper level of abstraction at which to portray those rights).

²¹⁷ Ohio Senate Bill No. 324, which would create a new crime of "prenatal child neglect," forces drug-addicted mothers to choose between going to jail and giving up their right to bear children. See S.B. No. 324, § 2919.221(B), 118th Ohio General Assembly, Regular Session 1989-90. A repeat offender must elect either to undergo tubal ligation or to participate in a five-year contraception program. If she fails to remain drug-free during the five-year program, the judge must sentence her to be sterilized. See S.B. No. 324 § 2919.221(B)(2)(c). If she refuses to make the required election, she will be held guilty of "aggravated prenatal child neglect," a first degree felony carrying a possible 25-year prison sentence. S.B. No. 324, §§ 2919.221(E), 2929.11(B).

being.²¹⁸ In other words, the prosecution of crack-addicted mothers infringes upon both a mother's right to make decisions that determine her individual identity and her right to be respected equally as a human being by recognizing the value of her motherhood.

Inherent in the thesis of this Article is a tension between the reliance on the liberal rhetoric of choice and an acknowledgement of the fallacy of choice for poor women of color. This Article also seeks to incorporate liberal notions of individual autonomy while acknowledging the collective injury perpetrated by racism.²¹⁹ This tension may be an example of what Mari Matsuda calls "multiple consciousness."²²⁰ Professor Matsuda observes that "outsider" lawyers and scholars must often adopt a "dualist approach" that incorporates an elitist legal system and the concept of legal rights while seeing the world from the standpoint of the oppressed. "Unlike the post-modern critics of the left . . . outsiders, including feminists and people of color, have embraced legalism as a tool of necessity, making legal consciousness their own in order to attack injustice."²²¹

This internal struggle between the embrace of legalism and the recognition of oppression characterizes a process of enlightenment.²²² Working through the privacy analysis from the perspective of poor Black women uncovers unexplored benefits to be gained from liberal doctrine while revealing liberalism's inadequacies. This process of putting forth new propositions for challenge and subversion will produce a better understanding of the law and the ways in which it can be used to pursue social justice.

C. *The Right to Choose Procreation*

Punishing drug-addicted mothers unconstitutionally burdens the right to choose to bear a child. Certain interests of the individual —

²¹⁸ Both aspects of the constitutional protection of the individual's personhood satisfy Martin Luther King Jr.'s test for the legitimacy of man-made laws: "Any law that uplifts human personality is just. Any law that degrades human personality is unjust." M.L. KING, JR., *WHY WE CAN'T WAIT* 85 (1963) (Letter from Birmingham Jail); accord West, *Progressive and Conservative Constitutionalism*, *supra* note 14, at 686–87.

²¹⁹ Kimberlé Crenshaw has argued that, although liberal legal ideology has served important functions in Blacks' struggle against racial domination, it is important to develop strategies that minimize the costs of engaging in legitimating liberal discourse. See Crenshaw, *supra* note 14, at 1384–87. She suggests that such strategies must have a community perspective: "History has shown that the most valuable political asset of the Black community has been its ability to assert a collective identity and to name its collective political reality. Liberal reform discourse must not be allowed to undermine the Black collective identity." *Id.* at 1336.

²²⁰ Matsuda, *When the First Quail Calls: Multiple Consciousness as Jurisprudential Method*, 11 *WOMEN'S RTS. L. REP.* 7, 8 (1989).

²²¹ *Id.*

²²² See Harris, *supra* note 14, at 584 (discussing the complex dialogue between the aspirational voices of liberalism and the voices of real people). For a discussion of the importance of aspirational thinking, see Colker, *supra* note 130, at 1018–19.

generally called "rights" — are entitled to heightened protection against government interference under the due process clause of the fourteenth amendment.²²³ The right of privacy is recognized as one cluster of such interests, implicit in the "liberty" that the fourteenth amendment protects.²²⁴ The right of privacy has been interpreted to include the "interest in independence in making certain kinds of important decisions."²²⁵ This concept of decisional privacy²²⁶ seeks to protect intimate or personal affairs that are fundamental to an individual's identity and moral personhood from unjustified government intrusion.²²⁷ At the forefront of the development of the right of privacy has been the freedom of personal choice in matters of marriage and family life.²²⁸ Once an interest has been deemed part of the right of privacy, the government needs a compelling reason to intervene to survive constitutional scrutiny.²²⁹

Considerable support exists for the conclusion that the decision to procreate²³⁰ is part of the right of privacy. The decision to bear

²²³ See cases cited *infra* note 228.

²²⁴ See *Roe v. Wade*, 410 U.S. 113, 152–56 (1973). For a description of the history of privacy jurisprudence, see Rubinfeld, *supra* note 216, at 740–52.

²²⁵ *Whalen v. Roe*, 429 U.S. 589, 599–600 (1977).

²²⁶ For a discussion of the distinction between decisional privacy and privacy in the sense of restricted access, see Allen, *Taking Liberties: Privacy, Private Choice, and Social Contract Theory*, 56 U. CIN. L. REV. 461, 463–66 (1987). See generally Note, *Roe and Paris: Does Privacy Have a Principle?*, 26 STAN. L. REV. 1161 (1974) (analyzing and defining the concept of privacy).

²²⁷ See L. TRIBE, *supra* note 164, § 15-1, at 1302–04; Feinberg, *Autonomy, Sovereignty, and Privacy: Moral Ideals in the Constitution?*, 58 NOTRE DAME L. REV. 445, 446–67 (1983); Gerety, *Redefining Privacy*, 12 HARV. C.R.-C.L. L. REV. 233, 236 (1977) (defining privacy as "an autonomy or control over the intimacies of personal identity"); Henkin, *Privacy and Autonomy*, 74 COLUM. L. REV. 1410, 1412–29 (1974). For the classic liberal defense of personal autonomy, see J.S. MILL, *ON LIBERTY* 77–79 (G. Himmerfaub ed. 1974) (1st ed. 1859).

²²⁸ See, e.g., *Roe v. Wade*, 410 U.S. 113 (1973) (right to choose whether to terminate a pregnancy); *Loving v. Virginia*, 388 U.S. 1 (1967) (right to choose one's spouse); *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965) (right to decide whether to use contraceptives); *Skinner v. Oklahoma*, 316 U.S. 535 (1942) (right to procreate); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925) (right to select the schooling of children under one's control); *Meyer v. Nebraska*, 262 U.S. 390 (1923) (right to determine the language taught to one's children).

²²⁹ See *Roe v. Wade*, 410 U.S. at 155.

²³⁰ Exploring the contours of the right to procreate is beyond the scope of this Article. I focus on the aspect of the right of privacy that guarantees the choice to carry a pregnancy to term. I want to protect the individual from punishment for making a reproductive decision rather than to fulfill the individual's desire to have children. The value at the heart of my argument is not procreation, but autonomy. See L. TRIBE, *supra* note 164, § 15-23, at 1423 ("As the Court itself stressed in *Carey*, the constitutional principle of 'individual autonomy' affirmed in these cases protected not procreation, but the individual's 'right of decision' about procreation." (quoting *Carey v. Population Servs. Int'l*, 431 U.S. 678, 687–89 (1977)) (emphasis in original)).

Delineating the right to procreate is difficult indeed. It involves defining the procreative activities encompassed by the right, as well as the limits on government interference with those activities. New developments in reproductive technology have complicated the problem by

children is universally acknowledged in the privacy cases as being "at the very heart" of these constitutionally protected choices.²³¹ In *Eisenstadt v. Baird*,²³² for example, the Court struck down a Massachusetts statute that prohibited the distribution of contraceptives to unmarried persons. Although the case was decided on equal protection grounds, the Court recognized the vital nature of the freedom to choose whether to give birth to a child: "If the right of privacy means anything, it is 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."²³³

The right of privacy protects equally the choice to bear children and the choice to refrain from bearing them.²³⁴ The historical experiences of Black women illustrate the evil of government control over procreative decisions. Their experiences demonstrate that the dual

allowing people to procreate in ways current law does not contemplate. See, e.g., Andrews, *Alternative Modes of Reproduction*, in *REPRODUCTIVE LAWS FOR THE 1990s*, *supra* note 125, at 259; *Developments in the Law — Medical Technology and the Law*, 103 HARV. L. REV. 1519, 1525–56 (1990); Special Project: *Legal Rights and Issues Surrounding Conception, Pregnancy, and Birth*, 39 VAND. L. REV. 597, 602–52 (1986). For discussions of the right to procreate, see Binion, *Reproductive Freedom and the Constitution: The Limits on Choice*, 4 BERKELEY WOMEN'S L.J. 12, 24–39 (1989); Robertson, *supra* note 13, at 405–20; and Scott, *Sterilization of Mentally Retarded Persons: Reproductive Rights and Family Privacy*, 1986 DUKE L.J. 806, 827–33.

²³¹ *Carey v. Population Servs. Int'l*, 431 U.S. 678, 685 (1977). Although dicta in many of the privacy decisions include the decision to bear a child among those protected by the right of privacy, the holdings of the cases concern the freedom *not* to procreate — the right to avoid unwanted pregnancy through contraception or abortion. See *Carey*, 431 U.S. at 694 (holding that a state law limiting minors' access to contraceptives violated fourteenth amendment); *Roe v. Wade*, 410 U.S. 113, 153 (1973); *Eisenstadt v. Baird*, 405 U.S. 438, 443 (1972) (striking down a state law limiting unmarried people's access to contraceptives); *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965). By contrast, the Supreme Court has hardly addressed the right to bear a child. Its only decision upholding the right to procreate is *Skinner v. Oklahoma*, 316 U.S. 535 (1942). See *infra* pp. 1475–76.

²³² 405 U.S. 438 (1972).

²³³ *Id.* at 453 (emphasis omitted).

²³⁴ Support for the right to procreate can be found in the language of *Roe v. Wade*, in which the Court held that the constitutional "right of privacy . . . is broad enough to encompass a woman's decision *whether or not* to terminate her pregnancy." 410 U.S. at 153 (emphasis added). The Court made the woman's *choice* — either to terminate her pregnancy or complete it — the crux of the privacy right it recognized. Because it is the woman's choice that is guaranteed, the alternative to the abortion decision — the decision to carry the fetus to term — must also be protected. See *Thornburgh v. American College of Obstetricians & Gynecologists*, 476 U.S. 747, 778 n.6 (1986) (Stevens, J., concurring); L. TRIBE, *supra* note 164, § 15-10, at 1340 (arguing that the meaning of the privacy cases is that "whether one person's body shall be the source of another life must be left to that person and that person alone to decide") (emphasis omitted); cf. Tribe, *The Curvature of Constitutional Space: What Lawyers Can Learn from Modern Physics*, 103 HARV. L. REV. 1, 14 (1989) (noting the difficulty in justifying any constitutional distinction between "the state's power to *require* an abortion in certain circumstances and the state's power to *forbid* one" (emphasis in original)).

nature of the decisional right recognized in the privacy cases goes beyond the logical implications of making a choice. The exploitation of Black women's foremothers during slavery to breed more slaves and the sterilization abuse that they have suffered reveal society's pervasive devaluation of Black women as mothers.

Burdening both the right to terminate a pregnancy and the right to give birth to a child violates a woman's personhood by denying her autonomy over the self-defining decision of whether she will bring another being into the world. Furthermore, criminalizing the choice to give birth imposes tangible burdens on women, as well as the intangible infringement on personhood. Punishing women for having babies is in this sense at least as pernicious as forced maternity at the behest of the state.²³⁵

If a woman's decision to bear a child is entitled to constitutional protection, it follows that the government may not unduly burden that choice. In *Cleveland Board of Education v. LaFleur*,²³⁶ the Court invalidated mandatory maternity leave policies that had the effect of burdening the choice to procreate. The Court viewed the school board's policy of forced maternity leave as a form of penalty imposed on pregnant teachers for asserting their right to decide to have children.²³⁷ Although the Court applied a rational basis test to the maternity leave policies in *LaFleur*,²³⁸ the more drastic burden of criminal punishment should warrant strict scrutiny.²³⁹ Even under the

²³⁵ But see Rubinfeld, *supra* note 216, at 796-97 (arguing that laws limiting family size and laws prohibiting abortion are "enormously different in their real, material effect on individuals' lives" and cautioning against being "misled by their formal similarities"). Rubinfeld finds that, although both laws impinge on the child-bearing decision, a law that in effect requires women to bear children takes over women's lives far more than a law that forbids them from having more than a prescribed number of children. See *id.* at 797; see also R. PETCHESKY, ABORTION AND WOMAN'S CHOICE 387-90 (1984) (criticizing the assumption of "a mistaken symmetry between 'the right to have children' and 'the right . . . not to have them'"). Petchesky postulates that in a society where gender, class, and racial equality have been achieved, the state might be justified in denying individuals a right to procreate. Unlike Petchesky, I have endeavored to analyze the political implications of the punishment of drug-addicted mothers only in the context of the current and historical conditions of gender, class, and racial inequality. Petchesky presents just such an analysis of abortion. See *id.* at 12-13. Rubinfeld also may have reached a different conclusion if he had considered the real, material effects on women of color created by the state's interference in the decision to procreate. Of course, the consequences of compelling childbirth and of prohibiting it are not identical, and the government's asserted justifications for intervention are not always of equal weight.

²³⁶ 414 U.S. 632 (1974).

²³⁷ See McNulty, *supra* note 8, at 315; Note, *supra* note 8, at 618.

²³⁸ *LaFleur*, 414 U.S. at 639-48.

²³⁹ Under *Roe v. Wade*, laws allowing the prosecution of drug-addicted mothers would have to meet a strict scrutiny test. As the Court stated in *Roe*, "[W]here certain 'fundamental rights' are involved, the Court has held that regulation limiting these rights may be justified only by a 'compelling state interest,' and that legislative enactments must be narrowly drawn to express only the legitimate state interests at stake." 410 U.S. at 113 (citations omitted). I have already

Court's current analysis, which distinguishes between direct and indirect governmental interference in reproductive decisionmaking,²⁴⁰ government intrusion as extreme as criminal prosecution would unduly infringe on protected autonomy.²⁴¹ The Court has expressly distinguished, for example, the government's refusal to subsidize the exercise of the abortion right from the infliction of criminal penalties on the exercise of that right.²⁴² Criminal prosecutions of drug-addicted mothers do more than discourage a choice; they exact a severe penalty on the drug user for choosing to complete her pregnancy.

These privacy concepts have two benefits for advocating the reproductive rights of women of color in particular: the right of privacy stresses the value of personhood, and it protects against the totalitarian abuse of government power. First, affirming Black women's constitutional claim to personhood is particularly important because these women historically have been denied the dignity of their full humanity and identity.²⁴³ The principle of self-definition has special significance

demonstrated that laws punishing drug-addicted mothers do not meet this test. *See supra* notes 190-192 and accompanying text.

²⁴⁰ In upholding the denial of public funding for abortions, the Court distinguished between a direct governmental burden on the exercise of reproductive choice and the government's refusal to subsidize one choice, abortion, while subsidizing the alternative, childbirth. *See Webster v. Reproductive Health Servs.*, 109 S. Ct. 3040, 3051-53 (1989); *Harris v. McRae*, 448 U.S. 297, 314-18 (1980); *Maher v. Roe*, 432 U.S. 464, 475-77 (1977). *See generally* Appleton, *Beyond the Limits of Reproductive Choice: The Contributions of the Abortion-Funding Cases to Fundamental-Rights Analysis and to the Welfare-Rights Thesis*, 81 COLUM. L. REV. 721, 724-45 (1981) (arguing that after *Maher*, state action will only face strict scrutiny if it is an "impingement" on a fundamental right).

²⁴¹ The Court has struck down state regulations of abortion that so restricted women's access to abortion that they effectively denied women a choice. *See, e.g., Thornburgh v. American College of Obstetricians & Gynecologists*, 476 U.S. 747, 759-71 (1986) (striking down informed consent, reporting, and standard-of-care requirements for post-viability abortions); *City of Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416, 431-52 (1983) (striking down provisions of ordinance requiring parental consent, informed consent, 24-hour waiting period, performance of all second-trimester abortions in a hospital, and "humane and sanitary" disposal of fetal remains); *Colautti v. Franklin*, 439 U.S. 379, 389-401 (1979) (striking down viability-determination and standard-of-care requirements as vague); *Planned Parenthood v. Danforth*, 428 U.S. 52, 69-75 (1976) (striking down, *inter alia*, spousal and parental consent requirements).

²⁴² *See Colautti*, 439 U.S. at 386 n.7 (describing criminal penalties as a "direct obstacle" to reproductive choice to be distinguished from denial of funding); *Maher*, 432 U.S. at 474 n.8.

²⁴³ Patricia Williams has explored the differing perspectives on "rights" held by Blacks and whites — in this case the predominantly white critical legal studies movement. She explains that, for Blacks, the stereotyping of human experience created by rights discourse (the focus of the critical legal studies critique) is a lesser historical evil than having been ignored altogether. *See Williams, Alchemical Notes: Reconstructing Ideals from Deconstructed Rights*, 22 HARV. C.R.-C.L. L. REV. 401, 414 (1987) ("The black experience of anonymity, the estrangement of being without a name, has been one of living in the oblivion of society's inverse, beyond the dimension of any consideration at all. Thus, the experience of rights-assertion . . . has been a process of finding the self.") Similarly, Kimberlé Crenshaw observes that dispossessed people use rights rhetoric "to redeem some of the rhetorical promises" of popular political discourse by forcing society to live up to its deepest commitments. *See Crenshaw, supra* note 14, at 1366.

for Black women. Angela Harris recognizes in the writings of Zora Neale Hurston an insistence on a "conception of identity as a construction, not an essence . . . [B]lack women have had to learn to construct themselves in a society that denied them full selves."²⁴⁴ Black women's willful self-definition is an adaptation to a history of social denigration. Rejected from the dominant society's norm of womanhood, Black women have been forced to resort to their own internal resources. Harris contrasts this process of affirmative self-definition with the feminist paradigm of women as passive victims. Black women willfully create their own identities out of "fragments of experience, not discovered in one's body or unveiled after male domination is eliminated."²⁴⁵

The concept of personhood embodied in the right of privacy can be used to affirm the role of will and creativity in Black women's construction of their own identities. Relying on the concept of self-definition celebrates the legacy of Black women who have survived and transcended conditions of oppression.²⁴⁶ The process of defining one's self and declaring one's personhood defies the denial of self-ownership inherent in slavery.²⁴⁷ Thus, the right of privacy, with its affirmation of personhood, is especially suited for challenging the devaluation of Black motherhood underlying the prosecutions of drug-addicted women.

Another important element of the right of privacy is its delineation of the limits of governmental power.²⁴⁸ The protection from government abuse also makes the right of privacy a useful legal tool for protecting the reproductive rights of women of color.²⁴⁹ Poor women

²⁴⁴ Harris, *supra* note 14, at 613 (citing Hurston, *How It Feels to Be Colored Me*, in *I LOVE MYSELF WHEN I AM LAUGHING . . . AND THEN AGAIN WHEN I AM LOOKING MEAN AND IMPRESSIVE* 152, 155 (A. Walker ed. 1979)).

²⁴⁵ *Id.*

²⁴⁶ For examples of Black women who have transcended conditions of oppression, see L. HUTCHINSON, *ANNA J. COOPER: A VOICE FROM THE SOUTH* (1981); and J. ROBINSON, *THE MONTGOMERY BUS BOYCOTT AND THE WOMEN WHO STARTED IT: THE MEMOIR OF JO ANN GIBSON ROBINSON* (1987). The fictional writings of Black women also express this tradition. See, e.g., T. MORRISON, *BELOVED* (1987); A. WALKER, *THE COLOR PURPLE* (1982).

²⁴⁷ See Allen, *supra* note 103, at 141.

²⁴⁸ Rubinfeld, for example, proposes an interpretation of the right of privacy that focuses on the affirmative consequences of laws challenged on the basis of privacy claims. See Rubinfeld, *supra* note 216, at 782-84. It is the "totalitarian" intervention of government into a person's life that the right of privacy protects against. *Id.* at 787. The right of privacy, then, means "the right not to have the course of one's life dictated by the state." *Id.* at 807.

²⁴⁹ Protection from government power need not be the full extent of the Constitution's guarantee of autonomy and personhood. See *infra* pp. 1478-80. Recognizing that "[a]s long as a state exists and enforces any laws at all, it makes political choices," Frances Olsen argues that the distinction between state intervention and nonintervention is a myth. Olsen, *The Myth of State Intervention in the Family*, 18 U. MICH. J.L. REF. 835, 836 (1985). Olsen further argues that the poor have the least to gain from the rhetoric of nonintervention: "The attempt to criticize state 'intervention' instead of criticizing the particular policies pursued may be

of color are especially vulnerable to government control over their decisions.²⁵⁰ The government's pervasive involvement in Black women's lives illustrates the inadequacy of the privacy critique presented by some white feminist scholars.²⁵¹ Catharine MacKinnon, for example, argues that privacy doctrine is based on the false liberal assumption that government nonintervention into the private sphere promotes women's autonomy.²⁵² The individual woman's legal right of privacy, according to MacKinnon, functions instead as "a means of subordinating women's collective needs to the imperatives of male supremacy."²⁵³

This rejection of privacy doctrine does not take into account the contradictory meaning of the private sphere for women of color. Feminist legal theory focuses on the private realm of the family as an institution of violence and subordination.²⁵⁴ Women of color, how-

especially limiting for poor people, who often have to rely on various government programs and are thus less likely to benefit from any political strategy based on the myth of nonintervention." *Id.* at 863.

²⁵⁰ See *supra* pp. 1432-34.

²⁵¹ Some feminist scholars have argued that a gender equality approach to reproductive freedom advances women's rights better than a privacy rationale. See, e.g., Copelon, *Unpacking Patriarchy: Reproduction, Sexuality, Originalism, and Constitutional Change*, in *A LESS THAN PERFECT UNION: ALTERNATIVE PERSPECTIVES ON THE U.S. CONSTITUTION* 303, 322-26 (J. Lobel ed. 1988); Law, *Rethinking Sex and the Constitution*, 132 U. PA. L. REV. 955, 1016-28 (1984); MacKinnon, *Roe v. Wade: A Study in Male Ideology*, in *ABORTION: MORAL AND LEGAL PERSPECTIVES* 45 (J. Garfield & P. Hennessey eds. 1984).

For a dialogue concerning the use of equality doctrine versus privacy doctrine to advocate abortion rights, see Colker, *Feminist Litigation: An Oxymoron? — A Study of the Briefs Filed in William L. Webster v. Reproductive Health Services*, 13 HARV. WOMEN'S L.J. 137 (1990); Burns, *Notes from the Field: A Reply to Professor Colker*, 13 HARV. WOMEN'S L.J. 189 (1990); and Colker, *Reply to Sarah Burns*, 13 HARV. WOMEN'S L.J. 207 (1990). In her response to Ruth Colker's criticism of the emphasis on privacy doctrine in feminist litigation, Sarah Burns raises several important questions:

Why should we not insist that the question whether to have an abortion is a woman's private moral decision outside the public realm and beyond public interference? Why is arguing for equality necessarily more 'radical' and less 'liberally co-opted' than arguing for fundamental liberty and autonomy for women? Are not equality concepts co-opted by liberal interpretation? Can equality work as a concept without the concepts of liberty and autonomy?

Burns, *supra*, at 193. I attempt to answer some of these questions in this Article, especially as they relate to women of color. For a defense of privacy that responds to the feminist critique, see A. ALLEN, *supra* note 160, at 57 (arguing that the "solution to the privacy problem women face begins with promoting greater emphasis on opportunities for individual forms of privacy, rather than in rejecting privacy"); and Olsen, *The Supreme Court, 1988 Term — Comment: Unraveling Compromise*, 103 HARV. L. REV. 105, 117 (1989) (arguing the importance of extending privacy doctrine equally to women and men, "even as we pursue efforts to dismantle the false dichotomies underlying it").

²⁵² See MacKinnon, *supra* note 251, at 51-53.

²⁵³ *Id.* at 49.

²⁵⁴ "[T]he legal concept of privacy can and has shielded the place of battery, marital rape, and women's exploited labor; has preserved the central institutions whereby women are deprived of identity, autonomy, control and self-definition; and has protected the primary activity through which male supremacy is expressed and enforced." *Id.* at 53 (emphasis in original).

ever, often experience the family as the site of solace and resistance against racial oppression.²⁵⁵ For many women of color, the immediate concern in the area of reproductive rights is not abuse in the private sphere, but abuse of government power. The prosecution of crack-addicted mothers and coerced sterilization are examples of state intervention that pose a much greater threat for women of color than for white women.

Another telling example is the issue of child custody. The primary concern for white middle-class women with regard to child custody is private custody battles with their husbands following the termination of a marriage.²⁵⁶ But for women of color, the dominant threat is termination of parental rights by the state.²⁵⁷ Again, the imminent danger faced by poor women of color comes from the public sphere, not the private. Thus, the protection from government interference that privacy doctrine affords may have a different significance for women of color.

D. Unconstitutional Government Standards for Procreation: The Intersection of Privacy and Equality

The equal protection clause and the right of privacy provide the basis for two separate constitutional challenges to the prosecution of drug-addicted mothers. The singling out of Black mothers for punishment combines in a single government action several wrongs prohibited by both constitutional doctrines. Black mothers are denied autonomy over procreative decisions because of their race. The government's denial of Black women's fundamental right to choose to bear children serves to perpetuate the legacy of racial discrimination embodied in the devaluation of Black motherhood. The full scope of the government's violation can better be understood, then, by a constitutional theory that acknowledges the complementary and overlapping qualities of the Constitution's guarantees of equality and privacy.²⁵⁸ Viewing the prosecutions as imposing a racist government standard for procreation uses this approach.²⁵⁹

²⁵⁵ See Jones, *supra* note 108, at 237; Kline, *supra* note 17, at 122-23. Patricia Cain observes that lesbians' experiences of the private sphere may also differ from MacKinnon's description: "lesbians who live our private lives removed from the intimate presence of men do indeed experience time free from male domination. When we leave the male-dominated public sphere, we come home to a woman-identified private sphere." Cain, *supra* note 21, at 212.

²⁵⁶ See Kline, *supra* note 17, at 129.

²⁵⁷ See *id.* at 128-31 (criticizing a feminist analysis of child custody law that neglects the experiences of Black and Native American women); *supra* notes 109-115 and accompanying text.

²⁵⁸ See L. TRIBE, *supra* note 164, § 16-9, at 1458-60 (discussing the intersection of "preferred rights" and "equality of rights").

²⁵⁹ The issue of the constitutionality of a government standard for procreation raises the question of whether the right to procreate is limited and therefore implies certain requirements for entitlement. Elizabeth Scott, for example, defines the right to procreate as "the right to

Poor crack addicts are punished for having babies because they fail to measure up to the state's ideal of motherhood. Prosecutors have brought charges against women who use drugs during pregnancy without demonstrating any harm to the fetus.²⁶⁰ Moreover, a government policy that has the effect of punishing primarily poor Black women for having babies evokes the specter of racial eugenics, especially in light of the history of sterilization abuse of women of color.²⁶¹ These factors make clear that these women are not punished simply because they may harm their unborn children. They are punished because the combination of their poverty, race, and drug addiction is seen to make them unworthy of procreating.

This aspect of the prosecutions implicates both equality and privacy interests. The right to bear children goes to the heart of what it means to be human. The value we place on individuals determines whether we see them as entitled to perpetuate themselves in their children. Denying someone the right to bear children — or punishing her for exercising that right — deprives her of a basic part of her humanity.²⁶² When this denial is based on race, it also functions to preserve a racial hierarchy that essentially disregards Black humanity.

produce one's own children to rear." Scott, *supra* note 230, at 829. She argues that constitutional protection extends only to the reproductive interests of prospective rearing parents, because it is the objective of rearing the child that elevates the interest in procreation to the status of a fundamental right. The right to procreate, therefore, "requires an intention as well as an ability to assume the role of parent." *Id.* Thus, a retarded person who is "so severely and irremediably impaired that she could never provide a child with minimally adequate care . . . has no [constitutionally] protectable interest in procreation." *Id.* at 833. The irremediable nature of the retarded person's impairment distinguishes her from a drug addict who is judged to be an unfit parent. *Cf. id.* at 833 n.91 (distinguishing on the basis of irremediability retarded people from those who have previously failed at parenting).

²⁶⁰ In the *Johnson* trial, for example, the prosecution introduced no evidence that Johnson's children were adversely affected by their mother's crack use. Indeed, there was testimony that the children were healthy and developing normally. See Trial Transcript, *supra* note 4, at 46–47, 120 (testimony of Dr. Randy Tompkin and Clarice Johnson, Jennifer's mother). A law proposed in Ohio makes drug use during pregnancy grounds for sterilization. See *supra* note 217. Similarly, several states have enacted statutes that make a woman's drug use during pregnancy by itself grounds to deprive her of custody of her child. See *supra* note 50.

²⁶¹ See *supra* pp. 1442–43.

²⁶² See Karst, *supra* note 161, at 32; Stefan, *Whose Egg Is It Anyway? Reproductive Rights of Incarcerated, Institutionalized and Incompetent Women*, 13 NOVA L. REV. 405, 454 (1989) (discussing the systematic barriers to motherhood imposed on incarcerated women as a part of the process of dehumanization); see also Asch, *Reproductive Technology and Disability*, in REPRODUCTIVE LAWS FOR THE 1990S, *supra* note 125, at 106–07 (discussing the importance of the right to choose childbearing for disabled women).

I recognize that there are women who choose not to have children or are incapable of having children and that this choice or inability does not make them any less human. See Cain, *supra* note 21, at 201, 205 n.96 (criticizing feminist discourse that privileges the experience of motherhood over other experiences of female connection). It is not the act of having children that makes an individual fully human; it is society's view of whether she deserves to have children.

The abuse of sterilization laws designed to effect eugenic policy demonstrates the potential danger of governmental standards for procreation. During the first half of the twentieth century, the eugenics movement²⁶³ embraced the theory²⁶⁴ that intelligence and other personality traits are genetically determined and therefore inherited. This hereditarian belief, coupled with the reform approach of the progressive era, fueled a campaign to remedy America's social problems by stemming biological degeneracy. Eugenists advocated compulsory sterilization to prevent reproduction by people who were likely to produce allegedly defective offspring. Eugenic sterilization was thought to improve society by eliminating its "socially inadequate" members.²⁶⁵ Many states around the turn of the century enacted involuntary sterilization laws directed at those deemed burdens on society, including the mentally retarded, mentally ill, epileptics, and criminals.²⁶⁶

In a 1927 decision, *Buck v. Bell*,²⁶⁷ the Supreme Court upheld the constitutionality²⁶⁸ of a Virginia involuntary sterilization

²⁶³ For a discussion of the eugenic sterilization movement in the early twentieth century, see Burgdorf & Burgdorf, *The Wicked Witch Is Almost Dead: Buck v. Bell and the Sterilization of Handicapped Persons*, 50 TEMP. L.Q. 995, 997-1005 (1977); and Cynkar, *Buck v. Bell: "Felt Necessities" v. Fundamental Values?*, 81 COLUM. L. REV. 1418, 1425-35 (1981). George P. Smith II has presented a contemporary justification of eugenic sterilization of the mentally handicapped. See Smith, *Limitations on Reproductive Autonomy for the Mentally Handicapped*, 4 J. CONTEMP. HEALTH L. & POL'Y 71, 72, 88-89 (1988).

The discrediting of eugenic theory, the development of the constitutional doctrine of reproductive autonomy, and the changing view of mental retardation have all spurred a major reform of sterilization law in the last two decades. Reports of Nazi Germany's program of racial eugenics achieved through widespread sterilization precipitated the modern rejection of these laws. See Scott, *supra* note 230, at 811-12.

²⁶⁴ For a description of the origins of eugenic theory, see Cynkar, *supra* note 263, at 1420-25.

²⁶⁵ One report written by a leading scholar of the eugenic movement defined the "socially inadequate" as:

"(1) feeble-minded; (2) insane (including the psychopathic); (3) criminalistic (including the delinquent and wayward); (4) epileptic; (5) inebriate (including drug-habitues); (6) diseased (including the tuberculous, the syphilitic, the leprosy, and others with chronic, infectious and legally segregable diseases); (7) blind (including those with seriously impaired vision); (8) deaf (including those with seriously impaired hearing); (9) deformed (including the crippled); and (10) dependent (including orphans, ne'er-do-wells, the homeless, tramps and paupers)."

Cynkar, *supra* note 263, at 1428 (quoting H. LAUGHLIN, *THE LEGAL STATUS OF EUGENICAL STERILIZATION* 65 (1929)).

²⁶⁶ As late as 1966, 26 states still had eugenic sterilization laws. See Scott, *supra* note 230, at 809 n.11. It has been estimated that over 70,000 persons were involuntarily sterilized under these statutes. See Smith, *supra* note 263, at 77 n.35. For a discussion of the eugenic sterilization statutes, see Ferster, *Eliminating the Unfit — Is Sterilization the Answer?*, 27 OHIO ST. L.J. 591 (1966).

²⁶⁷ 274 U.S. 200 (1927).

²⁶⁸ The Court rejected arguments that the Virginia sterilization law violated the equal

law.²⁶⁹ The plaintiff, Carrie Buck, was described in the opinion as "a feeble minded white woman" committed to a state mental institution who was "the daughter of a feeble minded mother in the same institution, and the mother of an illegitimate feeble minded child."²⁷⁰ The Court approved an order of the mental institution that Buck undergo sterilization. Justice Holmes, himself an ardent eugenicist,²⁷¹ gave eugenic theory the imprimatur of constitutional law in his infamous declaration: "Three generations of imbeciles are enough."²⁷²

The salient feature of the eugenic sterilization laws is their brutal imposition of society's restrictive norms of motherhood. Governmental control of reproduction in the name of science masks racist and classist judgments about who deserves to bear children. It is grounded on the premise that people who depart from social norms do not *deserve* to procreate.²⁷³ Carrie Buck, for example, was punished by sterilization not because of any mental disability, but because of her deviance from society's social and sexual norms.²⁷⁴

protection clause because it applied only to institutionalized persons and that it violated the due process clause because it exceeded the legitimate power of the state. *See id.* at 207-08.

The continued authority of *Buck v. Bell* is highly doubtful in light of the development of reproductive privacy doctrine in the last 30 years. Because sterilization laws infringe what is now acknowledged as a fundamental right, they are subject to strict scrutiny rather than the rational-basis analysis applied in *Bell*. *See* Murdock, *Sterilization of the Retarded: A Problem or a Solution?*, 62 CALIF. L. REV. 917, 921-24 (1974); Sherlock & Sherlock, *Sterilizing the Retarded: Constitutional, Statutory and Policy Alternatives*, 60 N.C.L. REV. 943, 953-54 (1982).

²⁶⁹ 1924 Va. Acts 394. For a discussion of the history of the Virginia sterilization law's enactment, see Lombardo, *Three Generations, No Imbeciles: New Light on Buck v. Bell*, 60 N.Y.U. L. REV. 30, 34-48 (1985).

²⁷⁰ *Bell*, 274 U.S. at 205. Subsequent research has revealed that the Court's factual statement was erroneous. Although Carrie Buck became pregnant out of wedlock, the finding that she was "feeble minded" was based on insubstantial testimony. *See* Gould, *Carrie Buck's Daughter*, 2 CONST. COMMENTARY 331, 336 (1985); Lombardo, *supra* note 269, at 52.

²⁷¹ *See* Holmes, *Ideals and Doubts*, 10 ILL. L. REV. 1, 3 (1915) ("I believe that the wholesale social regeneration . . . cannot be affected appreciably by tinkering with the institution of property, but only by taking in hand life and trying to build a race."); Rogat, *Mr. Justice Holmes: A Dissenting Opinion*, 15 STAN. L. REV. 254, 282 (1963) (referring to *Buck v. Bell* as "a judicial manifestation of [Holmes's] intense eugenicist views").

²⁷² *Bell*, 274 U.S. at 207.

²⁷³ The distinction I make between punitive and eugenic motive does not depend on the specific provisions of the statute, but on the moralistic versus biological impulse underlying the statute. Compulsory sterilization laws — whether criminal or therapeutic — were often based on punitive motivations disguised as a eugenic rationale. *See* R. PETCHESKY, *supra* note 235, at 85. Petchesky asserts that the sterilization laws were punitive because "[t]heir aim was not only to reduce numbers or root out 'defective genes' but also to attack and punish sexual 'promiscuity' and the sexual danger thought to emanate from the lower classes, especially lower-class women." *Id.* at 88. My focus is on the statutes' punishment of deviance from the standard for motherhood rather than for sexual deviance alone.

²⁷⁴ Apparently, Carrie was sterilized because she was poor and had been pregnant out of wedlock. *See* Lombardo, *supra* note 269, at 51. The deposition testimony of the state mental institution's trial expert, the famed eugenicist Harry Laughlin, implies this underlying motivation: "These people belong to the shiftless, ignorant, and worthless class of anti-social whites of

Explanations of the eugenic rationale reveal this underlying moral standard for procreation. One eugenicist, for example, justified his extreme approach of putting the socially inadequate to death as "the surest, the simplest, the kindest, and most humane means for preventing reproduction among those *whom we deem unworthy of the high privilege*."²⁷⁵ Dr. Albert Priddy, the superintendent of the Virginia Colony, similarly explained the necessity of eugenic sterilization in one of his annual reports: the "sexual immorality" of 'anti-social' 'morons' rendered them 'wholly unfit for exercising the *right of motherhood*."²⁷⁶

Fourteen years after *Buck v. Bell*, the Court acknowledged the danger of the eugenic rationale. Justice Douglas recognized both the fundamental quality of the right to procreate and its connection to equality in a later sterilization decision, *Skinner v. Oklahoma*.²⁷⁷ *Skinner* considered the constitutionality of the Oklahoma Habitual Criminal Sterilization Act²⁷⁸ authorizing the sterilization of persons convicted two or more times for "felonies involving moral turpitude."²⁷⁹ An Oklahoma court had ordered Skinner to undergo a vasectomy after he was convicted once of stealing chickens and twice of robbery with firearms.²⁸⁰ The statute, the Court found, treated unequally criminals who had committed intrinsically the same quality of offense. For example, men who had committed grand larceny three times were sterilized, but embezzlers were not. The Court struck down the statute as a violation of the equal protection clause. Declaring the right to bear children to be "one of the basic civil rights of man,"²⁸¹ the Court applied strict scrutiny to the classification²⁸² and held that the government failed to demonstrate that the statute's classifications were justified by eugenics or the inheritability of criminal traits.²⁸³

Skinner rested on grounds that linked equal protection doctrine and the right to procreate. Justice Douglas framed the legal question as "a sensitive and important area of *human rights*."²⁸⁴ The reason

the South." *Id.* After reviewing the record of the case, Professor Gould concluded: "Her case never was about mental deficiency; it was always a matter of sexual morality and social deviance. . . . Two generations of bastards are enough." Gould, *supra* note 270, at 336.

²⁷⁵ M. HALLER, *EUGENICS: HEREDITARIAN ATTITUDES IN AMERICAN THOUGHT* 42 (1963) (quoting eugenicist W. Duncan McKim) (emphasis added).

²⁷⁶ Lombardo, *supra* note 269, at 46 (quoting REPORT OF THE VIRGINIA STATE EPILEPTIC COLONY 27 (1922-23)) (emphasis added).

²⁷⁷ 316 U.S. 535 (1942).

²⁷⁸ OKLA. STAT. ANN. tit. 57, §§ 171-195 (West 1935).

²⁷⁹ *Id.* § 173.

²⁸⁰ See *Skinner*, 316 U.S. at 537.

²⁸¹ *Id.* at 541.

²⁸² See *id.* at 541.

²⁸³ See *id.* at 542.

²⁸⁴ *Id.* at 536 (emphasis added). The right of procreation is also considered a human right

for the Court's elevation of the right to procreate was the Court's recognition of the significant risk of discriminatory selection inherent in state intervention in reproduction.²⁸⁵ The Court also understood the genocidal implications of a government standard for procreation: "In evil or reckless hands [the government's power to sterilize] can cause races or types which are inimical to the dominant group to wither and disappear."²⁸⁶ The critical role of procreation to human survival and the invidious potential for government discrimination against disfavored groups makes heightened protection crucial. The Court understood the use of the power to sterilize in the government's discrimination against certain types of criminals to be as invidious "as if it had selected a particular race or nationality for oppressive treatment."²⁸⁷

Although the reasons advanced for the sterilization of chicken thieves and the prosecution of drug-addicted mothers are different, both practices are dangerous for similar reasons. Both effectuate ethnocentric judgments by the government that certain members of society do not deserve to have children. As the Court recognized in *Skinner*, the enforcement of a government standard for childbearing denies the disfavored group a critical aspect of human dignity.²⁸⁸

The history of compulsory sterilization demonstrates that society deems women who deviate from its norms of motherhood — in 1941, teenaged delinquent girls like Carrie Buck who bore illegitimate children, today, poor Black crack addicts who use drugs during pregnancy — "unworthy of the high privilege" of procreation.²⁸⁹ The government therefore refuses to affirm their human dignity by helping them overcome obstacles to good mothering.²⁹⁰ Rather, it punishes them by sterilization or criminal prosecution and thereby denies them a basic part of their humanity. When this denial is based on race, the violation is especially serious. Governmental policies that perpetuate racial subordination through the denial of procreative rights, which threaten both racial equality and privacy at once, should be subject to the highest scrutiny.

E. Toward a New Privacy Jurisprudence

Imagine that courts and legislatures have accepted the argument that the prosecution of crack-addicted mothers violates their right of

under international law. See Universal Declaration of Human Rights, art. 16 § 1, G.A. Res. 217 (III), at 74, U.N. Doc. A/810 (1948) ("Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family.").

²⁸⁵ See L. TRIBE, *supra* note 164, § 15-10, at 1339, § 16-12, at 1464.

²⁸⁶ *Skinner*, 316 U.S. at 541.

²⁸⁷ *Id.*

²⁸⁸ See *id.*

²⁸⁹ See *supra* note 275 and accompanying text.

²⁹⁰ See *supra* notes pp. 1448-50.

privacy. All pending indictments for drug use during pregnancy are dismissed and bills proposing fetal abuse laws are discarded. Would there be any perceptible change in the inferior status of Black women? Pregnant crack addicts would still be denied treatment, and most poor Black women would continue to receive inadequate prenatal care. The infant mortality rate for Blacks would remain deplorably high. In spite of the benefits of privacy doctrine for women of color, liberal notions of privacy are inadequate to eliminate the subordination of Black women. In this section, I will suggest two approaches that I believe are necessary in order for privacy theory to contribute to the eradication of racial hierarchy. First, we need to develop a positive view of the right of privacy. Second, the law must recognize the connection between the right of privacy and racial equality.

The most compelling argument against privacy rhetoric, from the perspective of women of color, is the connection that feminist scholars have drawn between privacy and the abortion funding decisions.²⁹¹ Critics of the concept of privacy note that framing the abortion right as a right merely to be shielded from state intrusion into private choices provides no basis for a constitutional claim to public support for abortions. As the Court explained in *Harris v. McRae*,²⁹² "although government may not place obstacles in the path of a woman's exercise of her freedom of choice, it need not remove those not of its own creation."²⁹³ MacKinnon concludes that abortion as a private privilege rather than a public right only serves to perpetuate inequality:

Privacy conceived as a right from public intervention and disclosure is the opposite of the relief that *Harris* sought for welfare women. State intervention would have provided a choice women did *not* have in [the] private [realm]. The women in *Harris*, women whose sexual refusal has counted for particularly little, needed something to make their privacy effective. The logic of the Court's response resembles the logic by which women are supposed to consent to sex. Preclude the alternatives, then call the sole remaining option "her choice." The point is that the alternatives are precluded *prior* to the reach of the chosen legal doctrine. They are precluded by conditions of sex, race, and class — the very conditions the privacy frame not only leaves tacit but exists to *guarantee*.²⁹⁴

This critique is correct in its observation that the power of privacy doctrine in poor women's lives is constrained by liberal notions of

²⁹¹ See *supra* notes 213 & 240.

²⁹² 448 U.S. 297 (1980).

²⁹³ *Id.* at 316.

²⁹⁴ C. MACKINNON, *supra* note 19, at 101 (emphasis in original). Rhonda Copelon and Rosalind Petchesky draw similar conclusions about the limits of liberal privacy theory in the abortion funding context. See R. PETCHESKY, *supra* note 235, at 295-302; Copelon, *supra* note 251, at 322-25.

freedom. First, the abstract freedom to choose is of meager value without meaningful options from which to choose and the ability to effectuate one's choice.²⁹⁵ The traditional concept of privacy makes the false presumption that the right to choose is contained entirely within the individual and not circumscribed by the material conditions of the individual's life.²⁹⁶ Second, the abstract freedom of self-definition is of little help to someone who lacks the resources to realize the personality she envisions or whose emergent self is continually beaten down by social forces. Defining the guarantee of personhood as no more than shielding a sphere of personal decisions from the reach of government — merely ensuring the individual's "right to be let alone" — may be inadequate to protect the dignity and autonomy of the poor and oppressed.²⁹⁷

The definition of privacy as a purely negative right serves to exempt the state from any obligation to ensure the social conditions and resources necessary for self-determination and autonomous decisionmaking.²⁹⁸ Based on this narrow view of liberty, the Supreme

²⁹⁵ See *supra* note 211. Dependence on public largesse, for example, means that the government can determine which reproductive decisions indigent women may carry out. The Supreme Court erroneously reasoned in the abortion funding decisions that the denial of public funding imposes no new obstacle to reproductive choice. If an indigent woman is unable to effectuate her decision to have an abortion, the Court argued, her inability is due to her poverty and not the government's funding policy. See *Maier v. Roe*, 432 U.S. 464, 474 (1977); *Harris*, 448 U.S. at 314–15. But the Court's reasoning ignores the real-life effect of the government's funding choices on poor women. An indigent woman who is unable to pay for either childbirth or abortion has no choice but to accept the government's determination. By funding only one option, the government has really made the woman's choice for her. See Binion, *supra* note 230, at 19; Goldstein, *A Critique of the Abortion Funding Decisions: On Private Rights in the Public Sector*, 8 HASTINGS CONST. L. Q. 313, 315–17 (1981); Tribe, *The Abortion Funding Conundrum: Inalienable Rights, Affirmative Duties, and the Dilemma of Dependence*, 99 HARV. L. REV. 330, 336–37 (1985).

²⁹⁶ See R. PETCHESKY, *supra* note 235, at 295–302; Copelon, *supra* note 251, at 322–23.

²⁹⁷ Thomas Grey notes the distinction between the civil rights and civil liberties perceptions of the personality: "The former tend to see the personality as more socially-constructed, hence socially destructible; the latter see it as more naturally self-reliant and autonomous." T. Grey, *Civil Rights vs. Civil Liberties: The Case of Discriminatory Verbal Harassment 1–2* (Mar. 1990) (unpublished manuscript on file at the Harvard Law School Library); see also Colker, *supra* note 130, at 1019–21 (describing a group-based and individual-based concept of the "authentic self"). While relying on the right to individual autonomy, I am suggesting that the legal doctrine that protects it should adopt what Professor Grey calls the civil rights perspective of personhood. This concept of autonomy protects the right to make certain choices but recognizes that choices are made in the context of a community and in relation to others. See T. Grey, *supra*, at 1. I also recognize that the individual's personhood may be denied as a means of attacking the community as a whole and that the community's support may be necessary for nurturing the individual's personhood. I do not believe that the recognition of these connections between the individual and the community are inherently inconsistent with the notion of autonomy.

²⁹⁸ See Copelon, *supra* note 251, at 323. For a thorough critique of the prevailing conception of the Constitution as solely a charter of negative liberties, see Bandes, *The Negative Constitution: A Critique*, 88 MICH. L. REV. 2271 (1990).

Court has denied a variety of claims to government aid.²⁹⁹ MacKinnon notes that "[i]t is apparently a very short step from that which the government has a duty *not* to intervene in to that which it has *no* duty to intervene in."³⁰⁰ An evolving privacy doctrine need not make the step between these two propositions. Laurence Tribe, for example, has suggested an alternative view of the relationship between the government's negative and affirmative responsibilities in guaranteeing the rights of personhood: "Ultimately, the affirmative duties of government cannot be severed from its obligations to refrain from certain forms of control; both must respond to a substantive vision of the needs of human personality."³⁰¹

This concept of privacy includes not only the negative proscription against government coercion, but also the affirmative duty of government to protect the individual's personhood from degradation and to facilitate the processes of choice and self-determination.³⁰² This approach shifts the focus of privacy theory from state nonintervention to an affirmative guarantee of personhood and autonomy. Under this post-liberal doctrine, the government is not only prohibited from punishing crack-addicted women for choosing to bear children; it is also required to provide drug treatment and prenatal care. Robin West has eloquently captured this progressive understanding of the due

²⁹⁹ See, e.g., *DeShaney v. Winnebago County Dep't of Social Servs.*, 489 U.S. 189, 196 (1989) ("[O]ur cases have recognized that the Due Process Clauses generally confer no affirmative right to governmental aid, even where such aid may be necessary to secure life, liberty, or property interests of which the government itself may not deprive the individual.").

³⁰⁰ C. MACKINNON, *supra* note 19, at 96 (emphasis in original); see also Copelon, *supra* note 251, at 316 (observing the "sharp tension between the liberal idea of privacy as the negative and qualified right to be let alone as long as nothing too significant is at stake and the more radical idea of privacy as an affirmative liberty of self-determination and an aspect of equal personhood"); West, *Progressive and Conservative Constitutionalism*, *supra* note 14, at 646-47 ("[P]rogressives tend to support an 'affirmative' understanding of the liberty protected by the due process clause of the fourteenth amendment . . . while conservatives read the clause as protecting 'negative liberty' only, i.e., the right to be free from certain defined interferences.").

³⁰¹ L. TRIBE, *supra* note 164, § 15-2, at 1305.

³⁰² Clearly the affirmative guarantee of personhood and autonomy must have boundaries. We cannot expect the government to provide every means necessary to fulfill each individual's sense of identity. Moreover, increased government involvement in the processes of individual choice and self-determination may create new dangers. Finally, there may be advantages to using privacy doctrine to protect against the government's abuse of power and using other concepts, such as equality, to achieve more affirmative goals. It is beyond the scope of this Article to explore all of the questions raised by the new privacy jurisprudence. My point here is to acknowledge the limitations of current privacy doctrine and to suggest the ingredients of a doctrine that overcomes them. Others have explored the scope of the positive role of government in correcting material inequalities. See, e.g., Michelman, *The Supreme Court, 1968 Term — Foreword: On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7, 9-13 (1969) (proposing a vision of social justice in which citizens are entitled to "minimum protection against economic hazard"); Tribe, *Unraveling National League of Cities: The New Federalism and Affirmative Rights to Essential Government Services*, 90 HARV. L. REV. 1065, 1090-96 (1977) (interpreting *National League of Cities* as a recognition of affirmative rights).

process clause in which privacy doctrine is grounded: "The ideal of due process, then, is an individual life free of illegitimate social coercion facilitated by hierarchies of class, gender, or race. The goal is an affirmatively autonomous existence: a meaningfully flourishing, independent, enriched individual life."³⁰³

This affirmative view of privacy is enhanced by recognizing the connection between privacy and racial equality. The government's duty to guarantee personhood and autonomy stems not only from the needs of the individual, but also from the needs of the entire community. The harm caused by the prosecution of crack-addicted mothers is not simply the incursion on each individual crack addict's decisionmaking; it is the perpetuation of a degraded image that affects the status of an entire race. The devaluation of a poor Black addict's decision to bear a child is tied to the dominant society's disregard for the motherhood of all Black women. The diminished value placed on Black motherhood, in turn, is a badge of racial inferiority worn by all Black people. The affirmative view of privacy recognizes the connection between the dehumanization of the individual and the subordination of the group.

Thus, the reason that legislatures should reject laws that punish Black women's reproductive choices is not an absolute and isolated notion of individual autonomy. Rather, legislatures should reject these laws as a critical step towards eradicating a racial hierarchy that has historically demeaned Black motherhood. Respecting Black women's decision to bear children is a necessary ingredient of a community that affirms the personhood of all of its members. The right to reproductive autonomy is in this way linked to the goal of racial equality and the broader pursuit of a just society. This broader dimension of privacy's guarantees provides a stronger claim to government's affirmative responsibilities.

Feminist legal theory, with its emphasis on the law's concrete effect on the condition of women, calls for a reassessment of traditional privacy law. It may be possible, however, to reconstruct a privacy jurisprudence that retains the focus on autonomy and personhood while making privacy doctrine effective.³⁰⁴ Before dismissing the right of privacy altogether, we should explore ways to give the concepts of

³⁰³ West, *Progressive and Conservative Constitutionalism*, *supra* note 14, at 707.

³⁰⁴ The word "privacy" may be too imbued with limiting liberal interpretation to be a useful descriptive term. "Privacy" connotes shielding from intrusion and thus may be suitable to describe solely the negative proscription against government action. Moreover, the word conjures up the public-private dichotomy. "Liberty," on the other hand, has more potential to include the affirmative duty of government to ensure the conditions necessary for autonomy and self-definition. In reconstructing the constitutional guarantees I have been discussing, it may be more appropriate to rely on the broader concept of "liberty." See A. ALLEN, *supra* note 160, at 98-101 (discussing the differences between "liberty" and "privacy").

choice and personhood more substance.³⁰⁵ In this way, the continuing process of challenge and subversion³⁰⁶ — the feminist critique of liberal privacy doctrine, followed by the racial critique of the feminist analysis — will forge a finer legal tool for dismantling institutions of domination.

VIII. CONCLUSION

Our understanding of the prosecutions of drug-addicted mothers must include the perspective of the women whom they most directly affect. The prosecutions arise in a particular historical and political context that has constrained reproductive choice for poor women of color. The state's decision to punish drug-addicted mothers rather than help them stems from the poverty and race of the defendants and society's denial of their full dignity as human beings. Viewing the issue from their vantage point reveals that the prosecutions punish for having babies women whose motherhood has historically been devalued.

A policy that attempts to protect fetuses by denying the humanity of their mothers will inevitably fail.³⁰⁷ We must question such a policy's true concern for the dignity of the fetus, just as we question the motives of the slave owner who protected the unborn slave child while whipping his pregnant mother. Although the master attempted to separate the mother and fetus for his commercial ends, their fates were inextricably intertwined. The tragedy of crack babies is initially a tragedy of crack-addicted mothers. Both are part of a larger tragedy of a community that is suffering a host of indignities, including, significantly, the denial of equal respect for its women's reproductive decisions.

It is only by affirming the personhood and equality of poor women of color that the survival of their future generation will be ensured.

³⁰⁵ In answering the critical legal studies' critique of rights, Patricia Williams notes that oppression is the result not of "rights-assertion," but of a failure of "rights-commitment." Williams, *supra* note 243, at 424 (emphasis in original). In the same way, the concepts of choice, personhood, and autonomy that are central to privacy doctrine are not inherently oppressive, any more than is the concept of equality (which has also been interpreted in ways that perpetuate hierarchy and domination). It is the "constricted referential universe," *id.* at 424, of liberal notions — such as negative rights, neutral principles, the public-private dichotomy, and formal equality — that have limited privacy's usefulness for attaining reproductive freedom. See Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323, 334-35 (1987) (demonstrating how women and people of color can adopt and transform constitutional text for radical objectives).

³⁰⁶ See *supra* p. 1464.

³⁰⁷ I hear this false dichotomy in the words of Muskegon, Michigan, narcotics officer Al Van Hemert: "If the mother wants to smoke crack and kill herself, I don't care.' . . . 'Let her die, but don't take that poor baby with her.'" Hoffman, *supra* note 5, at 34.

The first principle of the government's response to the crisis of drug-exposed babies should be the recognition of their mothers' worth and entitlement to autonomy over their reproductive lives. A commitment to guaranteeing these fundamental rights of poor women of color, rather than punishing them, is the true solution to the problem of unhealthy babies.