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BOOK REVIEW

CREATING AND SOLVING THE PROBLEM OF DRUG USE DURING PREGNANCY

MISCONCEIVING MOTHERS: LEGISLATORS, PROSECUTORS, AND
THE POLITICS OF PRENATAL DRUG EXPOSURE. By *Laura E. Gomez*.
Philadelphia: Temple Press. 1997. 207. \$59.95

DOROTHY E. ROBERTS*

I. INTRODUCTION

In the mid-1980s newspapers began to report an explosion of babies born affected by drugs in the womb.¹ The crisis of drug-exposed babies cried out for action. Prosecutors across the country decided to tackle the problem by prosecuting the babies' mothers. Between 1985 and 1995, at least two hundred women in thirty states were charged with crimes arising from drug use while pregnant.² At the same time, state lawmakers seized upon the problem as a topic of legislation. In 1990, legislatures in thirty-four states debated bills concerning prenatal substance abuse.³ In California alone, some twenty different

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¹ See, e.g., Jane E. Brody, *Widespread Abuse of Drugs by Pregnant Women in Found*, N.Y. TIMES, Aug. 30, 1988, at C1; *Primetime Live: The Most Innocent* (ABC television broadcast, Sept. 7, 1989).

² DOROTHY ROBERTS, *KILLING THE BLACK BODY: RACE, REPRODUCTION, AND THE MEANING OF LIBERTY* 153 (1997); LYNN M. PALTROW, *CRIMINAL PROSECUTIONS AGAINST PREGNANT WOMEN: NATIONAL UPDATE AND OVERVIEW* (Reproductive Freedom Project, ACLU Foundation 1992).

³ *KEY BATTLE IN WAR ON DRUGS: SAVING PREGNANT WOMEN, ENDANGERED BABIES*, STATE HEALTH NOTES 1 (George Washington University Intergovernmental Health Policy Project, June 1990).

bills relating to the problem of drug use during pregnancy were pending before the legislature at one time.⁴ Within a decade, however, the frenzy to criminalize pregnant women abated. Women's advocates, public health organizations, and physicians successfully campaigned to redefine prenatal drug use as a health problem rather than a crime.

*Misconceiving Mothers: Legislators, Prosecutors, and The Politics of Prenatal Drug Exposure*⁵ is a fascinating study of the career of prenatal drug exposure as a social problem. Professor Laura Gomez tracks the life cycle of this issue from its initial "discovery" as a social problem arising from its alarming portrayal in the media and medical research to its institutionalization in state bureaucratic agencies as a public health concern. The responses of California state legislators and district attorneys provide a case study of how social problems are defined and solved. The book's sociological approach is a refreshing departure from the now-familiar legal analysis that frames the prosecution of prenatal crimes as a contest between maternal and fetal rights.

Gomez discovers that the career of a social problem is a dynamic process: the interpretation of prenatal substance abuse changed dramatically as social actors competed for ownership of its meaning. In the course of its investigation of prenatal drug exposure, *Misconceiving Mothers* seeks to solve two mysteries. First, why did the California legislature reject measures to criminalize drug use during pregnancy despite the public's initial support for a punitive approach? Second, why did some California prosecutors pursue criminal charges when most of their counterparts did not? To answer these questions, Professor Gomez explores various dimensions of social life that determined the state's response to prenatal drug use. She examines the social understanding of this problem at various stages of its life cycle. She also focuses on the set of institutions that address the social problem and help to determine its meaning. Professor Gomez includes several institutions in her study: state legislators, prosecutors, judges, social agencies, advocacy organizations, and doctors. Finally, she recognizes that the construction of the social problem is governed by social norms. In this case, the norms of motherhood—influenced by race, class,

⁴ Paul Marcotte, *Crime and Pregnancy*, A.B.A. J., Aug. 1989, at 14.

⁵ LAURA E. GOMEZ, *MISCONCEIVING MOTHERS: LEGISLATORS, PROSECUTORS, AND THE POLITICS OF PRENATAL DRUG EXPOSURE* (1997).

and gender politics—were critical to the public's understanding of prenatal substance abuse. While these forces initially produced an alarming portrayal of the problem that called for criminal punishment, they ultimately transformed the problem into a public health concern best treated by social and medical services.

This review essay discusses Gomez's analysis of the relationship among these social actors and forces that helped to define and solve the problem of prenatal drug exposure. The book's focus on the institutionalization of this problem within the California legislature and district attorneys' offices yields many important insights into the construction of social problems in general and the strategies that transformed the government's response to this particular issue. In Part II, I argue that the constructionist approach to social problems also suggests important alternative avenues for study. In addition to comparing the internal processes of state agencies, students of social problems should also examine the impact that the institutionalization process of key state agencies has on each other. The success of feminist activists and doctors in converting the problem from a crime to a public health issue also begs for further investigation. How did these groups mobilize so successfully and why were they far more influential in California than in South Carolina, where prosecutions for prenatal crimes continue? I also discuss how race and class, along with gender, shaped the social norms that contributed to the problem's career.

Finally, the victory for feminists in defeating the punitive approach to maternal substance abuse also raises critical questions about strategies for furthering gender equality. Gomez attributes their success to their ability to disconnect prenatal drug exposure from poor women of color who were more likely to be criminalized, linking it instead to issues that affected all women. In Part III, I critique the strategy of universalizing women's problems as a means of unifying women and gaining popular support for their interests.

II. CREATING A SOCIAL PROBLEM

Professor Gomez, who is trained as a sociologist, uses sociological theory to analyze prenatal substance abuse. Gomez adopts a constructionist approach to studying social problems. The constructionist approach "views social problems as the product of interactions among social actors, whether individu-

als, organizations, or institutions."⁶ The constructionist approach can be compared with the objectivist model, which "assumes that social problems exist naturally in the social world" and seeks to measure them and evaluate possible solutions.⁷ Constructionists, on the other hand, examine how social actors *create* social problems and compete to control their initial definition and ultimate resolution.⁸

Constructionists see the competition surrounding social problems as a political process that unfolds in two basic stages. These stages constitute the career or life cycle of a social problem.⁹ In the discovery phase, social actors make claims about the social problem to attract public attention. In the subsequent institutionalization phase, social problems that have attracted enough attention become routinized, typically in bureaucratic government agencies. In the second phase, social actors can no longer argue that a problem does not exist; they must respond with an effort to "do something about it."¹⁰ This response, however, is not predetermined by the initial definition of the problem. Rather, the institutionalization phase is a dynamic process in which the problem takes on new life that may completely redefine it. "The significance for students of social problems," Gomez concludes, "is that even in the postdiscovery stage, social problems take on a life of their own and emerge institutionalized in ways that are both quite unpredictable and different from claims-makers' agendas."¹¹

Among the forces that help to determine a social problem's career are social actors and social norms. Gomez focuses on two California agencies that played a principal role in the interpretation of prenatal substance abuse as a social problem—state legislators and prosecutors. I discuss below Gomez's analysis of the institutionalization of prenatal drug exposure within these agencies, as well as alternative avenues of investigation that the constructionist model suggests.

⁶ See *id.* at 5.

⁷ *Id.*

⁸ See *id.* at 6.

⁹ See *id.* at 7.

¹⁰ *Id.* at 39-40.

¹¹ *Id.* at 115.

A. SOCIAL ACTORS AND THE INSTITUTIONALIZATION OF PRENATAL DRUG EXPOSURE

Although Gomez includes a chapter on “discovering ‘crack babies,’” the book’s main focus is on the institutionalization of prenatal drug exposure as a social problem. Gomez investigates how two critical sets of social actors—prosecutors and legislators—responded to the initial claims made by the media and the medical researchers about prenatal drug use. Gomez borrows her method, like her theoretical orientation, from sociology. She uses the life cycle of the problem in California as a case study for applying the constructionist model to this issue. In addition to reviewing government documents and newspaper articles, Gomez interviewed twenty-one legislative insiders, including legislators, aides, and lobbyists, and nineteen prosecutors in the state.¹²

In California, the problem of prenatal substance abuse was dramatically redefined during the institutionalization phase. The discovery stage was marked by sensationalist news stories that exaggerated the number of drug-exposed infants as well as the harm caused by their mothers’ addiction.¹³ Early medical studies, moreover, reported speculative associations between cocaine exposure and serious birth defects.¹⁴ This representation of the problem led to immediate punitive responses by prosecutors in a number of states. Yet in California, none of the punitive bills proposed by state legislators won passage. Instead, the state legislature enacted measures that provided funding for public education, health care, and social services for mothers and children at risk for prenatal drug exposure.¹⁵

Gomez’s empirical research explains this apparent paradox: “A coalition composed of professional organizations (employing professional lobbyists), practitioners in the public health and drug treatment spheres, and women’s rights activists opposed the punitive response.”¹⁶ Women’s groups were concerned that

¹² See *id.* app. at 126-33.

¹³ See *id.* at 13-18.

¹⁴ See *id.* at 18-23. Later medical research has questioned the scientific validity of this first generation of studies and contradicted the dire conclusions they reached. See *id.* at 23-25.

¹⁵ See *id.* at 41.

¹⁶ *Id.* at 41-42.

proposals to criminalize women's drug use would lead to broader state control over pregnant women's lives, including restrictions on abortion.¹⁷ Doctors were concerned that punitive measures would drive women away from prenatal care and drug treatment, require doctors to "police" their female patients, and threaten doctors' hegemony over the treatment of reproduction and pregnancy.¹⁸

Gomez similarly found that prosecutors' actions did not match their alarmist rhetoric about substance abuse during pregnancy. Despite prosecutors' expressed concerns about this serious social problem, criminal charges were brought against women only in a few cases. Gomez links the uniquely prosecution policy of Riverside County to its proximity to more urban areas and the recent influx of minority groups. The Chief Assistant District Attorney, Randall Tagami, saw his job as preventing Riverside from importing the problems that plague Los Angeles, problems he attributed to Blacks: "All we have to do is look down the road [to Los Angeles] and see what's happening. We're witnessing, quite frankly, a lot of low-class Blacks coming into Riverside. These people bring their problems with them."¹⁹ This siege mentality made Riverside prosecutors more proactive in their response to social problems like substance abuse and less deferential to police or state legislators to generate cases. But most California prosecutors confronted institutional features that constrained their ability to pursue a punitive campaign against substance-abusing women. Prosecutors had to be concerned about whether they could win prenatal drug exposure cases, which would likely turn on medical evidence and public attitudes.²⁰ They were also constrained by the legislature's failure to pass a law expressly making prenatal exposure a crime and other social agencies' non-punitive approach to the problem.²¹

Gomez treats the California legislators and prosecutors she studied largely as separate spheres. She focuses on the relationship between claims-making, especially by the media, and the

¹⁷ See *id.* at 42-46.

¹⁸ *Id.* at 49-50.

¹⁹ *Id.* at 99.

²⁰ See *id.* at 102-08.

²¹ See *id.* at 108-14.

legislature's and prosecutors' responses. Gomez notes that prosecutors "provide an interesting counterpoint to legislators" because they operate in a less political arena and are more insulated from public and media scrutiny.²² In addition, legislators and prosecutors function at different stages in the implementation of the penal code—legislators enact criminal statutes, while prosecutors decide whether or not to enforce them in particular cases. Thus, Gomez's purpose is mainly to *compare* the responses of legislators and prosecutors to a social problem, as well as their "patterns of second-round claims-making."²³ Gomez focuses on the internal process of each institution and then contrasts the two.

Ultimately, both agencies eschewed their initial punitive response to prenatal drug exposure and adopted a more health-oriented approach. But Gomez also notes differences between the two bureaucracies. Prosecutors felt freer to explicitly racialize the issue of prenatal drug exposure. San Diego County District Attorney Ed Miller, for example, "believed that street gangs, especially those composed of Black, Latino, and Asian-American youths, controlled the country's crack cocaine market."²⁴ Prosecutors were also quicker than lawmakers to acknowledge the news media as the source of their information about the social problem.²⁵

Another avenue of investigation suggested by Gomez's constructionist approach is to study more closely the *relationship* between the institutionalization process in the legislative and prosecutorial arenas, as well as within other agencies and organizations. Gomez notes that the legislature's failure to make prenatal substance abuse a crime constrained prosecutors' ability to pursue a punitive approach. There is also evidence that the early criminal prosecutions of prenatal crimes, in turn, galvanized opposition to punitive legislation. For example, the 1987 prosecution of Pamela Rae Stewart, a white woman who used methamphetamine during pregnancy, triggered the mobilization of feminists and civil libertarians.²⁶ I was interested in

²² *Id.* at 63.

²³ *Id.*

²⁴ *Id.* at 68.

²⁵ *See id.* at 70-71.

²⁶ *See id.* at 42-46.

learning more not only about the way prosecutors and legislators influenced each other, but also the relationship among the institutional actors and the advocacy organizations that succeeded in converting prenatal substance abuse from a crime to a health problem.

Another avenue of exploration is the institutionalization process within doctors' and women's organizations. Why were these groups able to mobilize and campaign so successfully? Gomez discusses the motivations and strategies of these groups in working to redefine maternal substance abuse as a health issue. But we know little about the process of claims-making that went on within these groups and the organizing strategies they used to gain the support of their members, consolidate a position opposing prosecution, and push their position on legislators and prosecutors.

It would also be useful to examine why these strategies worked so successfully in California and most other states, yet failed so miserably in South Carolina. The State of South Carolina has prosecuted the largest number of women for maternal drug use and continues to pursue a punitive policy.²⁷ While appellate courts in other states have invalidated criminal charges of prenatal drug exposure,²⁸ the South Carolina Supreme Court in 1997 upheld the child neglect conviction of a woman for smoking crack while pregnant.²⁹ In *Whitner v. South Carolina*,³⁰ the court ruled that a viable fetus is a child for purposes of the state child abuse and neglect statute. The Attorney General of South Carolina, Charles Condon, who hailed the decision as "a triumph for all those who want to protect the children of South Carolina,"³¹ affirms prosecution as an effective way of dealing with the state's prenatal drug problem.

Social agencies, such as those that provide drug treatment, social work, and health services, also played an important role in advocating the public health perspective in California. These agencies provide another important focus for the study of social problems. It would be enlightening to compare the institutionalization process in these California agencies with the same

²⁷ See ROBERTS, *supra* note 3, at 164.

²⁸ See *id.* at 167.

²⁹ See *Whitner v. South Carolina*, 492 S.E.2d 777, 786 (S.C. 1997).

³⁰ *Id.* at 780-81.

³¹ ROBERTS, *supra* note 3, at 171.

agencies in South Carolina, which have not defeated the official punitive approach to prenatal drug exposure. Indeed, law enforcement officials collaborated with social agencies in Charleston, South Carolina, to develop a punitive policy. In 1989, Charles Condon, then a Charleston prosecutor, held a series of meetings with staff from the Medical University of South Carolina, the police department, child protective services, and the Charleston County Substance Abuse Commission to develop a strategy to address drug use by pregnant patients at the hospital.³² These meetings led to the implementation of the "Inter-agency Policy on Cocaine Abuse in Pregnancy," a series of internal memos that provided for nonconsensual drug testing of pregnant patients, reporting results to the police, and the use of arrest for drug and child abuse charges as a threat or punishment.³³ The collaboration between social agencies and law enforcement officials in Charleston helps to account for the longevity of a punitive policy in that city.

Social agencies, on the other hand, may also prove valuable in blocking or diluting the state's punitive measures. As gatekeepers between substance-abusing patients and clients and law enforcement authorities, social service workers wield a great deal of power in determining the reach of punitive policies. These agencies, then, deserve special attention in the continuing study of the career of this social problem.

B. SOCIAL NORMS AND THE INSTITUTIONALIZATION OF PRENATAL DRUG EXPOSURE

Gomez acknowledges that the creation of prenatal drug exposure as a distinct social problem fell within a broader societal pattern of mother-blaming.³⁴ The news media's horror stories about crack-addicted mothers reinforced social norms of motherhood by condemning women guilty of their violation and by warning women to conform to social expectations.³⁵ The initial punitive response to the problem of drug use during pregnancy

³² *See id.* at 164.

³³ *See id.* at 165. The United States Supreme Court is considering whether the Interagency Policy violated patients' constitutional right against illegal government search and seizure. *See* *Ferguson v. Charleston*, 120 S.Ct. 1239, 1246 (U.S. Feb. 28, 2000) (No. 99-936).

³⁴ *See* GOMEZ, *supra* note 6, at 117.

³⁵ *See id.*

followed a growing trend toward state regulation of pregnant women for the sake of the fetus.³⁶ This regulation included compelled medical treatment, greater restrictions on abortion, and heightened supervision of pregnant women's conduct. Increased state intervention into the lives of pregnant women was accompanied by an explosion of rhetoric that scrutinized mothers and chastised them for failing to live up to social standards.³⁷ This backdrop of mother-blaming and regulation helps to explain the discovery of prenatal substance abuse as a social problem in the late 1980s, the news media's inflammatory rhetoric about crack babies, and the public's alarm about this so-called epidemic. It adds to the puzzle, however, of the eventual institutionalization of prenatal drug exposure as a health problem that should be treated by public health and social service agencies rather than prosecuted as a crime.

Gomez addresses this conundrum briefly in the book's conclusion. The ability of a social problem to metamorphose in unexpected ways is evidence of the dynamic nature of the social problem life cycle and of the power of claims-making within bureaucracies during the institutionalization phase.³⁸ As Gomez observes, "the very nature of the process by which state institutions create and routinize responses to social problems—institutionalization—leads us to predict discontinuity between the discovery-phase representation of a social problem and its later career."³⁹ Gomez also attributes the conversion of prenatal substance abuse from a crime to an illness largely to its connection to a gender-based social movement that defined the problem as "a woman's problem" that involved the interests of all women, including women's right to abortion.⁴⁰ Gomez describes this effective feminist tactic:

³⁶ See Dorothy E. Roberts, *Punishing Drug Addicts Who Have Babies: Women of Color, Equality, and the Right of Privacy*, 104 HARV. L. REV. 1419, 1421 (1991). See also CYNTHIA R. DANIELS, *AT WOMEN'S EXPENSE: STATE POWER AND THE POLITICS OF FETAL RIGHTS* 4 (1993).

³⁷ See generally MARTHA ALBERTSON FINEMAN, *THE NEUTERED MOTHER, THE SEXUAL FAMILY, AND OTHER TWENTIETH CENTURY TRAGEDIES* (1995).

³⁸ See GOMEZ, *supra* note 6, at 119.

³⁹ *Id.* at 119-20.

⁴⁰ *Id.* at 121.

In order to successfully oppose criminalization, the feminist coalition had to recast the social problem as affecting *all* women, rather than the subset of drug-addicted women (or poor women of color presumed to be candidates for drug addiction). This was the crucial step in converting the problem from one that fell under the jurisdiction of the criminal justice system to one that more properly belonged in the medical-public health domain. . . . The criminalization approach identifies the agents of a social problem as morally flawed, as bad persons who should be punished. The medicalization approach, however, identifies these same agents as diseased, as sick persons who need help.⁴¹

It should be stressed that race as much as gender shaped the social norms that led to both the initial definition of the problem as a crime and its ultimate conversion to a health problem. Gomez notes that the image of the "crack baby" was the "product of two converging social trends in the mid-1980s—the war on drugs and the growing recognition of 'fetal rights.'"⁴² Even more crucial to the initial alarming portrayal and punishment of maternal substance abuse was the racialization of the issue. Although prenatal drug exposure is a problem that cuts across racial and economic lines, the media presented it as a problem confined to the Black community. Newspaper articles often attributed all of the cases of drug-affected newborns to crack, a drug stereotypically associated with Black people, although most cases resulted from alcohol or other illicit drugs.⁴³

The leading characters in the public drama that defined the issue—the pregnant crack addict and the crack baby—were irredeemable and Black. The pregnant crack addict was portrayed as an irresponsible and selfish women whose very "maternal instinct" was destroyed by the drug.⁴⁴ The crack baby was supposed to suffer not only from medical complications but also irreversible neurological damage that warped his character.⁴⁵ Just as the pregnant crack addict had no maternal instinct, the crack baby lacked an innate social consciousness. Newspapers frightened readers with predictions of the tremendous burdens

⁴¹ *Id.* at 122.

⁴² *Id.* at 1.

⁴³ See ROBERTS, *supra* note 3, at 156.

⁴⁴ See, e.g., Cathy Trost, *Born to Lose: Babies of Crack Users Crowd Hospitals, Break Everybody's Heart*, WALL ST. J., July 18, 1989, at A1.

⁴⁵ See Ira J. Chasnoff et al., *Cocaine Use in Pregnancy*, 313 NEW ENG. J. MED. 666 (1985); Judith Kleinfeld, *Crack Impaired Children Show Strange Behavior in School*, ANCHORAGE DAILY NEWS, Feb. 20, 1995, at B8.

crack babies were destined to impose on taxpayers as they inundated hospitals, foster care systems, and public schools and ultimately preyed on the rest of society as criminals and welfare dependants.⁴⁶ Thus, prenatal crack exposure was presented as a racial problem with uniquely devastating social consequences. What later became viewed as a health problem was initially conceived as an example of Black mothers' depravity that warranted harsh punishment.

The racialized discovery of prenatal drug exposure translated into racially discriminatory policies. The vast majority of women charged with prenatal substance abuse were poor Black women who smoked crack.⁴⁷ The racial disparity in prosecutions did not stem from a greater propensity of Black women to use drugs while pregnant. Rather, it was the result of drug testing and reporting practices that targeted Black substance abusers for detection by law enforcement authorities.⁴⁸ Testing of pregnant patients and newborns—the government's main source of information about prenatal drug use—occurs almost exclusively in public hospitals that serve poor minority communities. There is also evidence that doctors and staff are more likely to test and report Black patients based on biased screening criteria.⁴⁹ A study of pregnant women in Pinellas County, Florida, found that despite similar rates of substance abuse, Black women were *ten times* more likely than whites to be reported to government authorities.⁵⁰ The hospital in South Carolina that instituted the Interagency Policy had records that showed that drug use among pregnant patients was evenly distributed among Black and white patients.⁵¹ Yet all but one of the women arrested under the policy were Black.⁵²

The racial focus of the initial discovery of prenatal substance abuse helps to explain the state's subsequent punitive response. Making these disparaged women the targets of

⁴⁶ See Rich Connell, *The Hidden Devastation of Crack*, LOS ANGELES TIMES, Dec. 18, 1994, at A1.

⁴⁷ See ROBERTS, *supra* note 3, at 172.

⁴⁸ See *id.* at 172-75.

⁴⁹ See *id.* at 175-76.

⁵⁰ Ira J. Chasnoff, et al., *The Prevalence of Illicit-Drug or Alcohol Use During Pregnancy and Discrepancies in Mandatory Reporting in Pinellas County, Florida*, 322 NEW ENG. J. MED. 1202 (1990).

⁵¹ See ROBERTS, *supra* note 3, at 172.

⁵² See *id.* at 166.

prosecution made this policy palatable to the public. In addition to legitimizing fetal rights enforcement, prosecuting crack-addicted mothers shifted attention away from poverty, racism, and inadequate health care as the source of Black children's poor health. Turning prenatal drug exposure into a women's health problem required eliminating race from the definition of this social problem. I turn to this strategy in the following section.

III. FEMINIST STRATEGIES FOR ADDRESSING RACIALIZED SOCIAL ISSUES

The success of the campaign to recast maternal substance abuse as a women's health problem raises important questions about feminist strategies for addressing racialized social issues. Gomez attributes the feminist victory in California largely to its erasure of race from the portrayal of prenatal drug exposure. Gomez explains:

Part of the strategy to medicalize rather than criminalize prenatal drug exposure, then, depended on recasting it as a more generic women's problem rather than as one limited to the subset of women presumably more apt to be viewed as having criminal propensities. Feminist claim-makers (with allies in the medical profession) *chose to downplay racial and class specificity⁵³ and, alternatively, to emphasize threats to all women's reproductive autonomy.*

Downplaying race to emphasize the problem's universality requires highlighting the interests of white middle-class women, who are likely to gain greater sympathy from legislators and prosecutors. Political scientist Cynthia Daniels made a similar argument in her important book about the trend toward greater state regulation of pregnant women, *At Women's Expense: State Power and the Politics of Fetal Rights*. Professor Daniels first stresses the implications of states' punitive approach to prenatal substance abuse for all women:

While the threat of prosecution is not shared equally by women of different races and classes, it is critically important to see that the threat is still shared by all women: no woman is exempt from the threat to self-sovereignty posed by the idea of fetal rights. The successful prosecution of poor black women for fetal drug abuse has set legal, political, and so-

⁵³ See GOMEZ, *supra* note 6, at 122 (emphasis added).

cial precedents that have been used to prosecute white women of privilege.⁵⁴

Daniels then advocates the strategic promotion of white women's rights as a way of benefiting all women threatened by a punitive approach:

The cultural, economic, and political power that women of privilege use to resist attempts to prosecute them—or to force them to have surgery, or to keep them out of good-paying jobs—can result in critical precedents for the defense of poor women's rights as well The disproportionate privilege of some women, rather than hopelessly dividing rich from poor or white women from women of color, can be used to defend the rights of all women.⁵⁵

While recognizing that racism influenced the discovery and institutionalization of prenatal drug exposure as a social problem and that Black women were the chief targets of punitive policies, this universalist strategy focuses on potential interference in the liberties of white middle-class women.

Attorneys who represent substance-abusing women employ related litigation strategies that divert attention away from their clients' race toward concern for the health of the babies exposed to prenatal drug use and the potential for interference in medical care.⁵⁶ As Gomez notes, the concerns expressed by medical and public health organizations about the threat to their ability to provide health care was a powerful argument against the punitive approach. Lynn Paltrow, the leading advocate for women charged with prenatal crimes, has described the focus on the prosecutions' interference with medical practice as a way of shifting attention away from her disparaged clients. As an article in *The Los Angeles Times Magazine* described Paltrow's rationale:

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

⁵⁴ See DANIELS, *supra* note 37, at 134.

⁵⁵ See *id.* at 135.

⁵⁶ Dorothy E. Roberts, *Unshackling Black Motherhood*, 95 MICH. L. REV. 938, 954-57 (1996).

way to avoid this perilous choice. "Even if you care only about the baby, even if you don't give a damn about the mother, you should still oppose Charleston's policy," Paltrow finds herself able to argue.⁵⁷

The universalist strategy employed successfully by California feminists is based on two premises. First, calling attention to the potential infringement of privileged women's rights is more likely to defeat punitive policies than denouncing the actual injury to poor minority women. Second, it is hoped that the benefit of establishing a strong theory of reproductive liberty and medical privacy for white middle-class women will trickle down to their less privileged sisters. I have doubts, however, about the potential for this strategy to safeguard the interests of poor women of color. Protections afforded white middle-class women have historically been withheld from women of color based on social norms that treat the two groups differently.⁵⁸ The ideology that devalues Black mothers, which helped to create the disparaging image of the crack head and crack baby, and perpetuates a racial division among women, thwarts the universal application of gains achieved by white, professional women.

Although the strategy may have succeeded in California to end prosecutions in most counties and generate funding for social services, it failed to provide complete protection for many women of color. As Gomez points out, racism continued to fuel prosecutions in Riverside County. Moreover, South Carolina has maintained a punitive policy that targets primarily poor Black women. Furthermore, racially discriminatory policies addressing prenatal drug exposure have moved from the criminal to the civil realm in the form of removal of newborns from substance abusing mothers and termination of these mothers' parental rights.

I propose the following hypothesis about the career of prenatal substance abuse as a social problem that takes account of its racial dimension: (1) Prenatal drug exposure was initially defined as an urgent social problem by "crack baby" images that

⁵⁷ See *id.* at 56 (quoting Barry Siegel, *In the Name of the Children: Get Treatment or Go to Jail, One South Carolina Hospital Tells Drug-Abusing Pregnant Women*, L. A. TIMES, Aug. 7, 1994, (Magazine), at 14, 17).

⁵⁸ See Dorothy E. Roberts, *Reconstructing the Patient: Starting with Women of Color*, in FEMINISM AND BIOETHICS 116 (Susan M. Wolf, ed., 1996); Dorothy E. Roberts, *Spiritual and Menial Housework*, 9 YALE J. L. & FEMINISM 51, 59 (1997); Dorothy E. Roberts, *Racism and Patriarchy in the Meaning of Motherhood*, 1 AM. U. J. GENDER & L. 1, 31-35.

linked the issue to Black women; (2) California legislators and prosecutors rejected a punitive response after the problem became associated with white middle-class women; and (3) South Carolina, however, has pursued a punitive response because the problem continues to be associated exclusively with Black women. This hypothesis suggests that the feminist strategy presented in *Misconceiving Mothers* carries the risk of benefiting primarily white middle-class women and excluding Black and other disadvantaged women altogether. While the universalist strategy may help to challenge gender inequality, it threatens to heighten inequality among women along race and class lines.

In another review of *Misconceiving Mothers*, Linda Mills criticizes feminist organizing on related grounds.⁵⁹ Mills points to the tension between California feminists' focus on broad issues of reproduction and African-American legislators' interest in obtaining treatment resources in their communities. Mills observes that the universalist approach of women's groups "blinded advocates to the particular treatment concerns of crack-addicted women of color and the unintended effect of derauling efforts to target support for drug treatment programs in minority communities."⁶⁰ Mills argues that, despite its recognition of racial differences among women, the dominant feminist group has no method for self-criticism that would reveal instances where more privileged women exert power over less privileged women. The feminist focus on the problem of male oppression neglects power imbalances among women.

Feminists' universalizing claims, then, risk ignoring and even reinforcing racial harms to women of color. The strategy of emphasizing the interests of white middle-class women comes dangerously close to Derrick Bell's theory of interest convergence. Critical race theorist Derrick Bell makes a compelling case that Black Americans' "at risk status" is created by the dominant society's willingness to "sacrifice black rights, black interests, and even black lives to enhance the status, further the profits, and settle differences among whites."⁶¹ According to Bell, all civil rights gains have been animated by the principle of

⁵⁹ See Linda G. Mills, *Feminist Phallacies: Prenatal Drug Exposure and the Power of Law*, ____ L. & SOC. INQUIRY ____ (forthcoming 2000).

⁶⁰ *Id.*

⁶¹ Derrick Bell, *Black History and America's Future*, 29 VAL. U. L. REV. 1179, 1179 (1995).

"interest convergence," which posits that "[t]he interests of blacks in achieving racial equality will be accommodated only when it converges with the interests of whites."⁶² He points out, for example, that elementary school desegregation in the 1950s and the more recent admission of minorities in higher education occurred only when these efforts became advantageous for whites, and did not threaten white supremacy.⁶³ Under an interest convergence model, state legislatures address poor minority women's problems only when government programs converge with the interests of white middle-class women. The result is a solution that does not radically tackle the underlying social norms and institutional structures that continue to disadvantage women of color.

IV. CONCLUSION

Misconceiving Mothers employs a useful method for studying the career of social problems. Professor Gomez's analysis of prenatal drug exposure reveals important insights about the social actors and social norms that influenced the transformation of this problem from a crime to a women's health problem. The success of the feminist strategy that defeated the punitive approach in California raises troubling questions, however, about claims-making regarding racialized social problems. Universalizing claims that seek to hide injuries to minority women and highlight the interests of more privileged women risk supporting policies that fail to confront racial injustice.

Feminists should craft strategies based on political solidarity among women rather than white middle-class women's interests. This approach would seek to develop theories and implement actions that contest power imbalances among women. It would start with the lives of women at the bottom, not at the top. It is important to distinguish between a strategy that links the interests of poor women and women of color to the interests of more privileged women⁶⁴ versus a strategy dependent on interest convergence. Only by directly confronting racist social norms—not maneuvering around them—can we uproot and

⁶² Derrick A. Bell, Jr., *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 523 (1980).

⁶³ See Derrick A. Bell, Jr., *Bakke, Minority Admissions, and the Usual Price of Racial Remedies*, 67 CAL. L. REV. 3, 14-16 (1979).

⁶⁴ See, generally, FINEMAN, *supra* note 37.

contest the forces that perpetuate policies that criminalize the least privileged women.