Criminalizing Pregnancy — The Downside of a Kinder, Gentler Nation?

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The fetus in utero has become a metaphor for "man" in space, floating free, attached only by the umbilical cord to the spaceship (Rothman, 1986: 114).

1. Introduction

The subjugation of a woman’s right to privacy, autonomy, and bodily integrity to that of her fetus is no longer the futuristic scenario of feminist fictions. It is fast becoming one of the harsh realities of post-Reagan America.

The public face of an emerging social problem presents itself as the increased incidence of individual fetal harms resulting from perinatal exposure to drugs and, in particular, to cocaine and its derivatives. The vision is one of concerned governments and criminal-justice agencies working together to protect the ultimate in innocent victims from that most dangerous and predatory of species, the druggie mum. The “solution” thus advanced is the criminalization of pregnancy; specifically, the pregnancies of poor women and women of color.

Although perhaps no longer “criminologically sound” (e.g., Cohen, 1988), this article rejects the objectivist or empiricist approach to social problems in favor of a constructionist perspective. Such a perspective entails defining public problems by and through the public concern they generate. It involves an exploration, and indeed a deconstruction of, the “collective definition of a problem as a problem” (Blumer, 1969). Spector and Kitsuse (1977) argue that issues become public problems only when they are defined and constituted as problematic. A realist interpretation of this approach suggests that some social problems, although subject to the same constitutive process, are not wholly

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subjective and may possess an objective manifestation. As Goode (1989) has pointed out in arguing for a synthesis of the constructionist and objectivist approaches, the objective dimensions of social problems are relevant. However, the current American drug panic must also be considered in the context of a country where “legal drug use easily outstrips illegal drug use as a source of death by some 20 to 30 times” (Ibid.: 339).

As Ben-Yehuda (1986) has pointed out, content and timing have been particularly important in the process of defining and constructing drug use as a public problem. These questions of content and timing take on additional significance when one considers the “moral panic” that emerged during the late 1980s surrounding crack cocaine (Reinarman and Levine, 1989b). A consideration of content and timing in this context implies that any analysis of “crack pregnancies” will need to ask both why pregnant women use crack and why they use it now. This article attempts to answer both these questions by seeking to locate the emergent phenomena of “crack pregnancies” within the political, economic, and cultural context of post-Reagan America.

2. Drugs and the Post-Reagan Condition

The advent of Reaganite politics brought about the systematic delegitimization of progressive social-policy discourse, prompted the decimation of vestigial images of a welfare state, and resulted in a resounding silence on the structural sources of social problems. Within such a context, social problems such as drug use have been increasingly and readily redefined as the consequence of morally defective individual choices. Compounding the demographics of poverty (U.S. Bureau of the Census, 1984; Bane and Ellwood, 1983; Bawden and Palmer, 1984) and racism (Lieberson, 1980; Harrington, 1984) that constitute the pock-marked landscape of post-industrial urban America is the specter of drugs. While drugs clearly have a complex and interactive impact on the social fabric, the increasing tendency of popular discourse and political rhetoric, however, has been to merge the characterization and definition of a number of conceptually distinct drug problems with “the crime problem.”

In this regard, crack cocaine has proven the ultimate politically expedient and morally utilitarian drug. The timely appearance of crack in the mid-1980s and its apparent spatial confinement to the ghetto presented the political Right with a subcultural scapegoat and an ideal vehicle for “blaming the victim,” thus avoiding any form of social-policy imperative. Crack cocaine has served to deflect both attention and resources from the social-policy arena and has exacerbated the cultural myopia that occludes any recognition of the endemic social, economic, and political sources of public problems.

However, this scarcely comes as a surprise. The history of American public policy evinces something of a predilection for short-term, simplistic
"solutions" to long-term social problems. Punitive responses to poverty, race, and gender inequality characterize a culture intent on individualizing social problems. The profound ideological marginalization that accompanies race and sex discrimination in contemporary American society has been bolstered by segmented labor markets and conflated by Reaganite economic policy. The complex interactions between class, race, and gender constitute powerful ideological dynamics that operate to produce variant "subcultural solutions" in the form of adaptations to a particularistic vision of the "good life" in post-Reagan America.

The claims-making activities that have sought to define the crack "epidemic" to date have relied heavily on the invocation of the moral lexicon and the use of scare tactics calculated to engender and exacerbate both the fear of an evil drug and the "Other" that uses it. Since late 1985, the mainstream media has consistently bombarded the American public with lurid images of crack as a "demon drug" (e.g., see Inciardi, 1987; Reinarman and Levine, 1989b). The form, content, and level of media discourse has served to imprint an omnipotent image of crack as "different" — as highly potent, instantly addictive, and conducive to hydraulic sex and systemic violence. Moreover, media accounts have had a profound effect on the collective imagination. They have served to reify the time-honored drugs/crime connection, strengthen the symbolic and racist link between dangerous drugs and dangerous classes, and sound a moral siren in the form of the crack-sex nexus. While the media's collective role in the amplification of crack-related deviance cannot be underestimated (e.g., see Reinarman and Levine, 1989b), this image is not purely a media fiction but rather one supported to some extent by social science research (e.g., see Fagan and Chin, 1989; see also Goldstein et al., 1987, 1990).

However, recent research on the activity patterns of crack sellers in New York City suggests that although the crack-violence connection is far from spurious and the crack market appears to have intensified the social processes that facilitate violence, "it would be unwise to conclude that the drug business makes people violent or that people are violent in the context of drug selling but not elsewhere" (Fagan and Chin, 1989: 26). These conclusions are consistent with detailed ethnographic accounts, which suggest that increases in crack associated violence can be attributed to the collapse of structures of formal and informal social controls in some inner-city neighborhoods and increased participation in the illegal or informal drug economy because of the depletion of capital and human resources necessary to sustain a formal economy (Hamid, 1990a, forthcoming).

To date, crack use and crack selling have had a disproportionate impact on inner-city minority neighborhoods and have become increasingly problematic in the context of public housing. As one ethnographic account puts it:
Life in Projectville has been substantially transformed by crack. Crack sellers have taken over apartments and buildings. Violence associated with crack use and sales has escalated steadily. Crack-related prostitution by very young female users has become common (Sullivan, 1988: 25).

Although the decade-old practice of free-basing cocaine is not confined to the ghetto/barrio poor (e.g., see Reinarman, Waldorf, and Murphy, 1989), Americans are yet to be confronted by the image of the affluent and middle classes responding to the “call of the pipe.” The potential redefinition of crack as a “plague with no boundaries” (Time Magazine, November 6, 1989) presents as an interesting hypothesis in terms of the prevailing response to crack vis-à-vis the “drug war” and the current administration’s enthusiasm for locating the social epidemiology of the crack problem in Black and Hispanic neighborhoods.

3. Women, Crack, and Pregnancy

The emergence of “crack pregnancies” as a public problem must be viewed in light of the imposition of a conservative political agenda, concerned with asserting “traditional family values” and enforcing the moral discipline that accompanies “saying no” to certain forms of sexual conduct and particular types of drugs. Within this context, however, the questions of women’s participation in the crack economy, their status as consumers and users of the drug, their vicarious experience of crack through family, friends, and associates, and the impact of crack on the social and geographic spaces in which they live their lives, remain to be explored.

Before the Harrison Act of 1914, most addicts in the United States were women. As Datesman (1981: 90) has pointed out, the profile of the “typical” addict has shifted considerably from the middle-aged, rural, middle-class, opiate-consuming white female of the last century, to the 20th-century image of the addict as a young, urban, lower-class minority male. In 1983, women accounted for 16.6% of arrests recorded by the Uniform Crime Reports and 14% of arrests for drug-abuse violations (Federal Bureau of Investigation, 1984). However, research in relation to women who use drugs suggests that the drug/crime nexus may be more complex for women than it is for men insofar as this relationship appears to be mediated by four gender-specific variables. These characteristics of women’s drug use are:

1. Women are more likely to use licit drugs (Williams and Kinsie, 1970; Suffet and Brotman, 1976);
2. Prostitution is available as an additional income source for women (Goldstein, 1979; Rosenbaum, 1981; Inciardi et al., 1982);
3. Some women are supplied with drugs by spouses and sexual partners (Eldred and Washington, 1976; File, 1976); and

4. To a certain degree, dealing or selling opportunities are open to women (James et al., 1979; Moise et al., 1982; Anglin and Speckart, 1986; Anglin and Hser, 1987).

However, to the extent that these factors have been explored by researchers, most studies have focused on women heroin addicts (Chambers et al., 1970; File, 1976; Datesman, 1981; Mauge, 1981; Rosenbaum, 1981; Moise et al., 1982; Anglin and Hser, 1987).

Estimates of the prevalence rates of women among heroin-addict populations suggest that even at times of peak usage (1978), men outnumbered women at a ratio of three to one (Richards, 1981). However, a hypothesis that is fast gaining both popular and academic momentum is that women’s participation in crack cocaine use approaches, or perhaps even exceeds, that of men. Although the extent to which crack-using populations deviate from more traditional user distributions of females relative to males remains unclear, several possible explanations have been advanced as to why this may be the case. Among these, the selling markets and user cultures that have evolved in relation to crack evidence some distinct features, including a low unit cost and conditions such as relative ease of access to street-level markets in some areas (Curtis, 1990) that may make crack use more attractive to women. Other factors that may be conducive to women’s use of the drug include the fact that it is ingested by smoking, which in the minds of some women mediates the “needle barrier” and lowers the risk of HIV infection. There is also some evidence to suggest that the crack-sex connection — at least insofar as it appears to be present in the minds of many male users and journalists — has increased the salience of women’s bodies as a commodity (Maher, fieldnotes, 1990). However, the hypothesis that more women are smoking crack may also be in part the result of a statistical aberration or composition effect, because of the systematic removal of young minority males from the population by the criminal justice system (e.g., Los Angeles Times, April 22, 1990; Malveaux, 1990: 235).

Thus far, media accounts also tend to show that besides being the drug of “choice” of the minority poor, women are more evenly distributed among crack users than other types of drug users (New York Post, April 11, 1989; New York Times, April 17, 1989). Qualified support for this hypothesis is also suggested by ethnographic research. Bourgois (1990: 28) reports that a series of 10 random surveys undertaken at selected crack franchises in New York City revealed that women accounted for just under 50% of the customers. Bourgois also provides us with a vivid image of “the frequent visits to the crack houses by pregnant women and by mothers accompanied by toddlers and infant children” (p. 29). Unfortunately, this researcher then goes on to cite
the "fact" that women "comprise a large share of the crack addict population and are the fastest growing segment of the population being arrested for street crimes" as "proof" of the "emancipated status of women on inner-city streets" (pp. 29-30).

Empirical studies also provide qualified support for this hypothesis. Preliminary research conducted in Miami using a sample of "drug-using street delinquents" collected self-report data from 308 youth. These data indicate that, although the sample sizes differ significantly with respect to gender, similar proportions (86% and 85% respectively for the 14-15 age group and 100% and 87% for the 16-17 age group) of females and males reported "regular crack use" (Inciardi, 1987: 477). However isolated studies such as these do not a literature make, and while there is clearly a dearth of empirical research in relation to women crack users, explorations of the context, extent, and nature of women's participation in crack use and selling may ultimately provide a more fruitful avenue of inquiry.

Most recently, however, it is "crack pregnancies" that appear to have captured the attention of newsmakers. In New York City, where some 3,837 newborn infants tested positive for cocaine in 1988, some social indicators — including increases in reported cases of child abuse and neglect and increases in the number of children in foster care — are being attributed to "crack mothers" (New York Times, March 17, 1990; Drucker, 1990). Examples can be found in a New York Times article headlined "Addiction to Crack Can Kill Parental Instinct" (New York Times, March 17, 1990) and the New York Post's three part series entitled "Children of the Damned" (New York Post, May 8, 9, 10, 1990).

In New York State, a positive toxicology at birth is considered presumptive evidence of neglect or abuse by the mother. Such a practice is rendered inherently problematic given recent research, which suggests that even though maternal substance abuse is evenly distributed among racial groups, doctors are 10 times more likely to suspect a Black pregnant woman of drug abuse (Miami Herald, September 19, 1989). Infants who test positive are generally kept by the hospital until a decision is made about their placement. For most mothers, this means losing custody of their child, and almost half of these infants in New York State are placed in state-sponsored foster care (Drucker, 1990).

This situation occurs despite considerable uncertainty about the causal relationship between cocaine use and adverse birth outcomes. As Koren et al. have recently argued, cocaine is almost "expected" to have an adverse effect on the fetus (Koren, Graham, Shear, and Einarson, 1989: 1441). Research reports of adverse fetal outcomes frequently fail to effectively control for confounding effects in the form of "use of other illicit drugs, heavy alcohol and cigarette consumption, and poor medical follow-up" (Ibid.). As Drucker has
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recently argued, “even cocaine used in high doses during pregnancy is not unequivocally linked to any fetal defect other than low birthweight and small size. The vast majority of infants born to drug-using mothers are as “healthy” as other infants born in poverty” (Drucker, 1990: 11). The research on this subject is complex and often conflicting. (See Lockwood [1990] and Fink [1990] for excellent summaries of research to date.) Nonetheless, babies born of crack-using mothers have exhibited serious medical and emotional problems, requiring further studies that incorporate the effects of poverty and other attendant factors. While there are many descriptions of the serious medical and emotional problems exhibited by infants and children of crack users, not all children suffer these effects, as seen in my own field research.

Field Research

L. is an African-American woman in her thirties who has been using free-base and crack cocaine for over a decade now. Two and one-half months ago, she gave birth to her first child, a rather sturdy eight-pound baby boy. L. received no prenatal care and continued to smoke crack until shortly before the birth. J. is from the Caribbean and has been in the United States for about 20 years. She is in her late 20s and eight months pregnant with her fourth child. Two of her children, now aged three and two, weighed eight pounds, eleven ounces, and five pounds, seven ounces respectively and tested positive for cocaine at birth. Both children were placed in foster care and J. subsequently lost her eligibility for public assistance. She has been repeatedly advised by social workers to enter drug rehabilitation. As she puts it:

Drugs — not going to rehab.... I bin a ass — I need to be [pause] beaten.... I still haven’t gone to rehab. I don’t know what was wrong wit me.... She [the social worker] helps me but I’m not doin’ the right thing.... I don wanto get into this.... I don’t have the proper papers that I need if you know what I mean.... You have to have Medi-caid.... I could have been into Daytop in the city...but den when they all interview me and the orientation and everything like dat and they tell you what’s needed, I have to have Medicaid.... This gone be a natural baby...no but my second kid I dint go to Doctor neither and all my kids born good — they ain’t got no crack addiction... (Maher, fieldnotes, 1990).

With a month to go, J. is still smoking crack but is trying to “cool out” [cut back]. She says she will try not to smoke before she goes to the hospital for the birth, because she does not want them to take the baby.
Although these are only two examples, they point to the need for a critical assessment of the research into the effects of drugs and other factors on fetal development and infant behavior.

4. Criminalization and the Intersection of Medical, Legal, and Moral Interest

The politics and claims-making activities surrounding the definition and construction of "crack pregnancies" as a public problem are closely intertwined with a moral agenda that reasserts traditional norms of female sexuality and motherhood. This agenda has arguably been aided by recent advances in reproductive technologies that make possible the assessment of maternal behavioral practices on fetal well-being, extended surveillance and social control of pregnant women, and neonatal interventions. The cultural context takes root in the powerful consequences of gender- and race-specific forms of social stigma that have attached to women's crack use. The move to criminalize crack pregnancies is clearly a product of the cultural and political climate that is post-Reagan America.

Within this context, however, specific responses or strategies for dealing with the "crack pregnancy" scenario are depressingly familiar — a social problem is recast as a crime problem. The assumptions of positivistic social science are aided and abetted by the visual terrains of popular culture and mass media, as well as by the discourses of law and medicine. Both law and medicine have long subscribed to an ethic of substance abuse problems that locates the pathology within the user and warrants an individualized response. As Klein (1983) has pointed out, both legal and medical approaches to deviance in the form of drug use emanate from a control model. Moreover, as Noble's (1990) insightful analysis suggests, the historical collusion between law and medicine makes for considerable overlap between current medical and legal attempts to deal with the problem of drug abuse by pregnant women. This complex set of interactions has produced a minefield of punitive social and legal sanctions for women who use crack. Compounded by the advent of sophisticated reproductive technologies, this war zone has already begun to produce casualties.

Recent estimates suggest that there have been at least 35 attempts at prosecutions nationwide\(^1\) (*New York Times*, February 5, 1990). These cases, and others like them, are bolstered by more general popular assumptions that the state has an obligation to protect the fetus *in-utero* from harm. However, in this instance, the assumption only extends to a certain set of harms — those that can be identified with deviant social conduct by a specific group, in the form of the use of a particular drug by poor and minority pregnant women. The assumption does not extend to any broader consideration of the role of the state; in fact, the notion that pregnant women — whether they are drug addicts
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or not — “are their babies worst enemies” represents a clumsy attempt to obscure the role of the state in failing to address systemic social problems. When women have inadequate access to proper prenatal health care (Hughes et al., 1986; Guttmacher Institute, 1987) and drug treatment needs (McNulty, 1989); when women and children represent the great bulk of persons living below the poverty line (Ross and Sawhill, 1975; Pearce, 1978; Malveaux, 1990; McLanahan, Sorenson, and Watson, 1989); when women and children are homeless (Women in Need, 1989); when the lives of women and children are controlled by the threat or reality of male violence (e.g., Dobash and Dobash, 1979; Stanko, 1985; Hamner and Maynard, 1987), punishing pregnant addicts merely serves to divert attention from these larger social failures.

Moreover, attempts to criminalize women’s conduct during pregnancy are also inherently discriminatory and unjust since many low-income and minority women are effectively denied access to both drug treatment and prenatal care (Hughes et al., 1986). The “choices” available to these women are radically circumscribed by the state through its denial of adequate health care. Census Bureau estimates show that somewhere between 31 and 37 million Americans lacked any form of health insurance during 1986 (New York Times, November 22, 1987; see also Guttmacher Institute, 1987). Poor and minority women are disproportionately represented among these uninsured Americans and consequently are often denied prenatal, delivery, and other forms of medical care (Hughes et al., 1986; McNulty, 1988).

This basic problem is compounded for pregnant addicts. Not only are they denied access to adequate prenatal care by virtue of their status as poor minority women, but there is also a reluctance by drug treatment centers to accept pregnant women, fearing obstetric malpractice suits (Perkins and Stoll, 1987). If, and once a woman has been accepted to a program, the prospect of a six-months-plus waiting list (San Diego Union, October 16, 1986) often renders the exercise meaningless. A recent survey of drug-treatment programs in New York City reveals that 87% refused to accept pregnant crack addicts on Medicaid (Chavkin, 1989). Because most substance-abuse programs emanate from a male-centered treatment model, the neglect of gender differentials in meeting the needs of women addicts is compounded. The lack of childcare provision often means that women addicts seeking residential treatment are faced with the “choice” of placing other children in state care to protect their own health and, if pregnant, that of their fetus (McNulty, 1988: 301; see also Philadelphia Tribune, June 3, 1988, and more generally, Rosenbaum, 1981).

This dearth of adequate programs and facilities for women addicts is further compounded by the fear that seeking medical treatment may lead either to criminal charges or intrusive forms of welfare intervention and regulation. A study conducted in 1974 revealed that 75% of pregnant addicts did not consult a physician at any stage during their pregnancies (Finnegan and MacNew,
1974), and more recent figures indicate that maternal cocaine users in New York City are seven times less likely to receive prenatal care than non-drug users (Drucker, 1990: 11). The use of punitive sanctions would undoubtedly serve to deter pregnant addicts from seeking any form of medical care or assistance even were such services made available. As Willis (1989: 95) has argued:

Faced with the risk of forced treatment, intrusions in their personal lives, or criminal prosecution, many women will simply avoid public hospitals and clinics. They and their babies will be the worse for it.

5. Technology and “Rights”

Both the ideology of mothering (e.g., Chodorow, 1978; Dinnerstein, 1977) and the social construction of women’s sexuality as a result of the intersection of productive and reproductive relations (e.g., Eisenstein, 1979; Petchesky, 1984; Jaggar, 1983) project powerful images that are at the very core of gender relations in American society. The pervasive inequality of existing gendered relations may be exacerbated by recent developments in new reproductive technologies — the control, context, and deployment of which remain to be determined. However, what is becoming increasingly clear is that the introduction of new reproductive technologies into a society ridden with social and economic inequalities not only constrains the reproductive choices of low-income women, but also threatens to exacerbate existing social conflicts. As the Working Group of the Project on Reproductive Laws for the 1990s (1989: 326) has recently pointed out, “the prospect of embryo transfer raises the specter of women of color being used as a breeder class to gestate the fetuses of the dominant race.”

Technology introduces a crucial element that aids and abets what Carol Smart (1989) has defined as the “juridogenic” power of law. Science in the form of new reproductive technologies has, in effect, made the criminalization of “crack pregnancies” possible. However, while “science” is clearly a major player in the sense that it undergirds and facilitates the technology that foreshadows new forms of oppressing, regulating, and controlling women’s bodies, an overemphasis on the technologies themselves:

risks distracting attention away from the politics and organization of health care in general, from the legal system which frames our rights over our bodies and our children, from political struggles over the nature of sexuality, parenthood, and the family, and from the impact of the varied material and cultural circumstances in which people create their personal lives (Stanworth, 1987: 4).
Moreover, it is here that the advent of new reproductive technologies portends as problematic for American feminism’s traditional reliance on the discourse of choice and rights. If it is in large part the social system that structures and constrains women’s reproductive choices, then the terminology of individual “rights” may be rendered useless. Indeed, the notion of law as “refracted” in appearance, intent, application, and material effect has led Carol Smart to conclude that “if law does not stand in one place, have one direction, or have one consequence, it follows that we cannot develop one strategy or one policy in relation to it” (1989: 164). The rewards and punishments distributed because of women’s reproductive choices are differentially allocated by race and social class criteria. Defining social problems exclusively in terms of women’s individual choices allows scant acknowledgment of the differential social, economic, cultural, and political realities that structure, and at times force, women’s choices. As Petchesky (1984: 2) has argued:

reproductive freedom — indeed the very nature of reproduction — is social and individual at the same time; it operates “at the core of social life” as well as within and upon women’s individual bodies.

A fundamental conflict exists between the “rights” of individual women in exercising their freedom of reproductive choice and in ensuring that these individual choices do not disadvantage women of particular classes or races. Rothman (1984: 33) has argued that to confront this problem, American feminism will need to extend its gaze beyond the choices of individual women. It is important to remember that both the legal and medical discourses that surround the “crack pregnancy” scenario derive meaning from the cultural and political context in which they are embedded. Within this context, these discourses create a complex interplay for the deployment of a power that continues to view women as the additive functions of “bits of bodies” (Smart, 1989: 113).

As Smart has recently pointed out, law, as the “traditional mode of power” can “transform appeals couched in the discourse of welfare into issues of rights” (Ibid.: 19). Indeed, in Smart’s analysis, by transforming power conflicts into the rhetoric of rights, law is able to reassert its hegemonic status and perhaps even extend its regulatory function (Ibid.: 19–20). “Feminism” needs to resist law’s temptations in the form of “solutions” that serve to disempower women and to legitimate this “mode of social regulation which is deeply antithetical to the interests of women” (Ibid.: 164). Rather, feminists are advised to focus on the power of law to disqualify and define the “truth of events” and to offer alternate counter-interpretations and (feminist) redefinitions (Ibid.: 164–165).

It is increasingly apparent that the law will provide little recourse in what is, in essence, a political battle. Attempts to criminalize “crack pregnancies”
must be placed in the context of what Petchesky (1987: 57) has argued is "a more long-term ideological struggle over the symbolic meanings of foetuses, dead or alive." In the United States, the visual terrain of mass culture has been crucial to the "pro-life" movement's appropriation of the word "life" and its accompanying emotional force. Petchesky's excellent article explores both the processes whereby the moralists of the Right have used symbols and fetal imagery to transform pregnancy into a "moving picture" and their subsequent impact on reproductive politics. "Chaste silhouettes of the foetal form, or voyeuristic-necrophilist photographs of its remains, litter the background of any abortion talk. These images float like spirits through the courtrooms..." (Ibid.: 57).

However, Petchesky points out that these images are not immutable; on the contrary, they present the potential for empowering women through changing the "contexts, media, and consciousnesses" by which fetal imagery is defined. A feminist capture and redefinition of fetal imagery is consistent with Smart's (1989) call for feminist counter-interpretations. Only by creating new images that anchor the fetus firmly within the bodies of individual women can we then attempt to situate women's bodies within social, economic, and political spaces. Or as Petchesky has argued, to construct a discourse that "without capitulating to ideologies that reduce women to a maternal essence...[situates the pregnant woman] not as an abstraction, but within her total framework of relationships, economic and health needs and desires" (Petchesky, 1987: 79).

When one casts aside the political posturing and rhetoric couched in the pretext of fetal rights, it is patently apparent that the move toward criminalizing pregnancy is not in any sense directed at improving anyone's health and certainly not at eradicating gendered experiences of poverty, ill-health, or drug addiction. Criminalizing the conduct of pregnant addicts will do absolutely nothing to enhance any kind of collective social responsibility for healthy women and healthy babies. Moreover, scapegoating drug-addicted women "will only reinforce the pervasive lack of understanding that the sad spectacle of addicted babies stems, ultimately, from the despair of women who need more, not less, control over their fates" (Willis, 1989: 96).

6. The Limits of Legal Analysis

That the "right" to abortion is currently under threat illustrates precisely the nature of the rights problematic. Roe v. Wade did not guarantee American women abortion, autonomy, or bodily integrity any more than any "right" can guarantee protection against sexism, racism, poverty, violence, ill-health, or homelessness. The right to privacy and the construction of the privacy doctrine in U.S. constitutional law have hitherto professed to guarantee "individual bodily integrity, personal exercise of moral intelligence and the freedom of intimate association." In actuality, however, freedom from public intervention is
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an uneasy bedfellow with privacy rights that require social preconditions for any meaningful effect.

The privacy doctrine presupposes that government non-interference in the private sphere promotes a woman's freedom of choice, but as MacKinnon (1987, 1989) has pointed out, abstract privacy rights merely serve to abstract autonomy — without asking whose autonomy is being sanctioned at whose expense. A rights-based analysis of crack pregnancies fails to provide insight into the cultural complex and social construction of this public problem. Conceiving of the problem in terms of rights invites an oppositional analysis and the inevitability of a judicial showdown between the "rights" of the fetus and those of the pregnant woman. While rights-based "solutions" to the social problems of women addicts and drug-exposed infants might make the prosecution of some women more difficult, they will do little to alleviate the social pathology that contributes to, or "causes," the problem.

In essence, a "rights" strategy conceives of attempts to prosecute pregnant addicts as constituting a gross invasion of individual rights and, in particular, a woman's right to personal autonomy and bodily integrity. Such a strategy seeks only to delineate yet another boundary. It fails to address the underlying social dimensions of the problem. Using a rights-based analysis of the problem, the best we can hope for is a legal determination as to whom such rights will be extended and under what conditions. Somewhat like a cap or ceiling, the Anglo-American legal apparatus is equipped to provide a formal demarcation of the line beyond which the state cannot go within a given historical era. Women in particular have good reason to trust neither the courts nor the state when it comes to setting such boundaries. The success of "rights" strategies is dependent on contingencies with the social, political, and economic contexts in which they are deployed — facts that are consistently overlooked by those who abstractly insist on the primacy of rights.

A different type of analysis entails drawing on the insights gained from a social constructionist perspective. Within this framework, attempts to criminalize the pregnancies of women who use drugs can conceivably be viewed in terms of fulfilling certain social needs that have given rise to particular forms of claims-making activities. That the criminalization of pregnancy is viewed by some groups within society as a "solution" to the problems of drug-addicted women is surely indicative of underlying cultural anxieties. The current moral and political agenda to criminalize the pregnancies of drug-addicted women is coterminous with a social need to express animus, resentment, and disapprobation at women in general and, in particular, at women who can be labeled part of the unruly urban "underclass." Such an agenda provides a way of redefining cultural and moral boundaries. The criminalization of "crack pregnancies" facilitates the punishment of those who blatantly violate established social mores. It provides a way of striking out simultaneously at mi-
norities, druggies, and women who fail to conform to engendered cultural expectations. At the same time, Middle America can vent its moral indignation by using the rhetoric of compassion for those “poor little [Black] babies.”

The cultural anxiety that allows Americans to entertain the notion of punishing pregnant crack addicts can be further situated within an uncertain historical era and a changing cultural climate. The spirit of U.S. enterprise that spawned Drexel Burnham Lambert appears to have followed them down the plug-hole; minorities are taking all the jobs, women are talking back, have housing leases in their names and welfare checks in their hands, and white Anglo-American males reckon they are getting culturally bum-rushed. Within such a context, poor and minority women who use street drugs such as crack readily epitomize the “Other.” Without knowing anything about these women or their lives, Middle America can safely conclude from its journalists, politicians, doctors, lawyers, and social scientists that they epitomize moral turpitude and social decay. Women who use crack cocaine provide an attractive place for Middle America to circle its wagons, and crack pregnancies provide an ideal opportunity for projecting deep-seated cultural anxieties about the urban minority poor and about drugging, crime, and female sexuality.

7. Conclusion

The criminal law paradigm works best when confronted with conduct that constitutes an intentional and identifiable harm that could reasonably have been avoided. The criminalization of crack pregnancies is ill-suited to this paradigm for three reasons. First, it raises serious questions about the nature and extent of the actual harm that can be causally identified with perinatal exposure to cocaine as opposed to other factors. Second, it raises the issue of whether individual women can be held to have formed the requisite intent to harm a fetus. Finally, one needs to consider whether these women have reasonable alternatives to desist from the behavior in question. Without any meaningful social preconditions conducive to avoidance (i.e., access to publicly funded, gender-sensitive drug treatment, contraception, abortion, and prenatal care for a start), blame or responsibility for the social consequences of maternal drug abuse can hardly be solely attributed to the individual. If culpability is to be derived, it must surely be located in that complex of interactions between social structure and the human agent. It clearly remains inappropriate to punish conduct where a causal relationship cannot be identified, where there is no clear intent to do injury, and where there are insufficient alternatives to desist. To do so renders the application of the criminal law paradigm, even by its own standards, highly problematic.

Perhaps more importantly we need to start thinking not only about when and where criminal law should enter, but also why. The rhetoric of rights bypasses or overlooks a more fundamental objection — i.e., the question of
whether this is the kind of conduct and type of social problem for which the
criminal law is an appropriate response. As Cohen (1988: 257) has rather elo-
quently stated:

Criminalization is a particular reaction to a defined social problem.
The empirical question is: Under what conditions do certain people
consider that a given conflict requires state intervention, and if it
does, should this intervention take the form of criminal justice...?
The political question is why and how this preference became reality.
The pragmatic question is "What do we gain by defining the problem
in terms of crime?"

The current debate is marked by an absence of contextual factors and a
preponderance of rights-based arguments. The emergence of "crack pregna-
cies" as a public problem is a product of the interactions of political process,
social-scientific knowledges, and the pervasive cultural context of post-
Reagan America. The recourse to law has already begun to produce its
"juridogenic" effects (Smart, 1989) in terms of a war within women's bodies,
propelled by the powerful imagery of innocent victims and maternal oppres-
sors. Detailed contextual knowledges will be essential to any attempt to turn
this problem around — to reconceptualize it in light of the knowledge that
criminalizing the pregnancies of poor women and women of color will not
solve any of the health risks associated with drug abuse, but rather will merely
serve to deter pregnant addicts from seeking prenatal care and assistance in
coping with their addiction.

Reconceptualizing women's crack use, and especially crack use by poor
minority women, as a social problem appears to be problematic because of the
nature of American society. It means rejecting the notion of law as the guar-
antor of abstract rights and sole remediator of social ills. For the state to un-
derwrite the necessary preconditions (and a national public health system
would be a good place to start), a confrontation with the collective cultural
phobia in relation to the state, long inculcated by the rhetoric of the liberal
night watchman, will be necessary. This will entail at least a partial
recognition that a world of abstract rights and minimalist state intervention is a
world devoid of positive state obligations and social imperatives. As
MacKinnon (1989: 187) has recently pointed out, "the world without state
intervention, the world of state inaction, the private world of Joshua's abuse
and poor women's unfunded abortions, is 'the free world.' For those who use
and abuse women and children it is."

Reformulating the problem of "crack pregnancies" in order to analyze it in
these terms will necessitate deconstruction of the dominant political, media,
legal, medical, and social-scientific discourses that structure the current debate.
Inherent in this process is a recognition that the crack culture is not the cumu-
lative result of the decadent excesses of the 1960s, but rather the product of Reaganite social policy. Every dollar spent on the cops, courts, corrections, and bureaucratic infrastructures required to sustain the drug-war machine is a dollar diverted from reversing the social policies that gave birth to the ghetto, nurtured sexism and racism, and spawned the crack culture.

By raising what I have interpreted as important elements in the social construction of "crack pregnancies," pointing out some limitations of "rights-talk" and legal analyses, and perhaps suggesting why we may not want to deal with this problem in the manner it is currently being dealt with, this article will be seen in the minds of some as having merely sought to recast or reformulate rhetoric in line with a socialist ethic of collective responsibility. It is important, however, to recognize that both the current legal and medical discourses in relation to substance abuse are informed by a view of human agency as dominant. Strategies that seek to use such discourses and fail to acknowledge the interactive effects of cultural conditioning and social structure permit us to punish individuals or, alternately, to treat them — perhaps even both. However, control models usually do not provide effective vehicles for changing society.

To transgress these discourses as they manifest themselves in relation to women and substance abuse, women-centered contextual analyses informed by feminist methods are needed. Instead of framing our research questions in terms of crime, deviance, punishment, treatment, drugs, rights, and rehabs, we need, as Maureen Cain (1990) has recently argued, to center our questions on and about women — about who they are and how they became who they are, in their own terms. In this instance, this will probably require us to place these problematic pregnancies in the context of what are often problematic lives and in the complex interface between private lives and public institutions.

The social epidemiology of pregnant crack addicts would appear to present us with a problem of poor minority women. Does it have to become a problem of middle-class white women before we attempt to recast the question, the problem, and the response — or are poor Black women in this country regarded merely as fodder for both the crack pipe and the cannons of law and order?

NOTES

1. A List of Casualties:
One of the earliest attempts to impose legal sanctions on women for prenatal conduct was a 1977 California case where a woman addicted to heroin gave birth to twins suffering an addiction and was subsequently charged with two counts of felony child endangerment (Reyes v. Superior Court, 75 Cal.App.3d 214 [Ct. App. 1977]). The court subsequently ruled that the inclusion of the fetus was not within the legislative intent of the statute at issue (Ibid. at 218). In the next decade,
the state sought to justify the involuntary civil commitment of pregnant women on grounds of forced medical treatment (in re Steven S); found child neglect as the basis of prenatal maternal conduct by a heroin addict (in re Baby X; see also in re Male R); and an alcoholic (in re Smith); and held that a viable fetus was a child under existing child-abuse statutes and that harm to the fetus constituted child abuse (in re Ruiz).


Recent estimates suggest there have been at least 35 cases nationwide (ibid.). South Carolina is the state with the highest number of reported prosecutions to date. The ACLU’s Reproductive Freedom Project reports that some 18 pregnant or newly delivered women have had charges brought against them for delivery of drugs to a minor or criminal neglect of a child. In addition, three other women in this state have lost their children based on similar allegations, but without charges having been laid (Paltrow, 1990). Florida also has at least six recorded attempts at prosecution, one of which has resulted in a woman receiving a sentence of 15 years probation and another woman receiving 18 months imprisonment. Jennifer Johnson was the first woman to be convicted under a drug-trafficking statute for delivery of drugs through the umbilical cord (State of Florida v. Johnson, No. 89–1765 [Cir. Ct., July 13, 1989]). Subsequently sentenced to 15 years probation supervision, Ms. Johnson had previously sought assistance in dealing with her addiction from a drug treatment center but had been refused treatment. Although the court was unable to find evidence of “child abuse,” Ms. Johnson was convicted of “delivery of an illegal substance to a minor.” This conviction is currently being appealed and, to date, some 14 public health and interest groups have sought to file amicus briefs in the case (Paltrow, ACLU Reproductive Rights Project, 1989).

There have also been several cases in other states that resulted in convictions. In Washington, D.C., a judge justified his decision to jail Brenda Vaughn, a pregnant woman found to have traces of cocaine in her bloodstream, by asserting that: “I’m going to keep her locked up until after the baby is born.... She’s apparently an addictive personality and I’ll be damned if I’m going to have a baby born that way” (Washington Post, July 23, 1988, and September 15, 1988; United States v. Vaughn, No. F–2172–88B [Superior Court of D.C., August 23, 1988]). In Alaska, the mother of a two-week-old baby (who purportedly died of a heart attack attributed to perinatal cocaine exposure) was found guilty of criminally negligent homicide and sentenced to six months imprisonment (Arizona Republic, December 7, 1989).

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**Other Resources**

In 1989, the Women in Crime Division of the American Society of Criminology established a task force on the criminalization of pregnancy. The collective work of the task force will be presented at the Society meetings in Baltimore in November 1990. Further information can be obtained by contacting the Division.