

UCLA

UCLA Women's Law Journal

Title

The Norplant Solution: Norplant and the Control of African-American Motherhood

Permalink

<https://escholarship.org/uc/item/9861n279>

Journal

UCLA Women's Law Journal, 5(2)

Author

Burrell, Darci Elaine

Publication Date

1995

DOI

10.5070/L352017625

Copyright Information

Copyright 1995 by the author(s). All rights reserved unless otherwise indicated. Contact the author(s) for any necessary permissions. Learn more at <https://escholarship.org/terms>

Peer reviewed

ESSAYS

THE NORPLANT SOLUTION: NORPLANT AND THE CONTROL OF AFRICAN- AMERICAN MOTHERHOOD

Darci Elaine Burrell*

INTRODUCTION

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.¹

On December 10, 1990, the United States Food and Drug Administration (FDA) approved the contraceptive Norplant for general use in the United States.² Norplant was immediately hailed as a revolutionary advance in reproductive technology.³ The contraceptive device offers women a convenient and reliable

* J.D. Candidate, 1995 UCLA School of Law; B.A. 1991, University of California, San Diego. The author would like to thank her family for their continuing support, Professor Kimberlé Crenshaw for providing a framework in which this paper could be written, and the board of the UCLA Women's Law Journal for their true commitment to exploring the diversity of women's experiences.

1. BLACK WOMEN IN NINETEENTH-CENTURY AMERICAN LIFE: THEIR WORDS, THEIR THOUGHTS, THEIR FEELINGS 329 (Bert J. Lowenberg & Ruth Bogin eds., 1976), quoted in Dorothy E. Roberts, *The Future of Reproductive Choice for Poor Women and Women of Color*, 12 WOMEN'S RTS. L. REP. 59, 59 (1990).

2. *Long-Term Contraceptive Approved*, [1990-1991 Developments Transfer Binder] Food Drug Cosm. L. Rep. (CCH) ¶ 42,180 (Dec. 10, 1990).

3. See, e.g., Judy Mann, *New Contraceptive Advances Freedom, Responsibility*, WASH. POST, Dec. 12, 1990, at B3.

alternative to traditional birth control devices.⁴ Norplant consists of six, match-sized, silicon tubes which release a steady stream of the synthetic hormone levnorgestill into the bloodstream to prevent pregnancy. The tubes are surgically inserted under the skin of a woman's arm and prevent conception for up to five years.⁵

Not long after the FDA approved the use of Norplant, several controversial proposals for the use of the contraceptive emerged: (1) on December 12, 1990, the Philadelphia Inquirer published an editorial many perceived as racist and classist,⁶ entitled, "Poverty and Norplant: Can Contraception Reduce The Underclass?";⁷ (2) states quickly moved to incorporate Norplant in their welfare systems, providing either reimbursement for the cost of Norplant to women on AFDC or a cash bonus for those women who agreed to be implanted with the device;⁸ (3) high schools across the country considered offering Norplant to teenage girls in order to prevent teenage pregnancy;⁹ (4) on January 2, 1991, a California judge ordered Darlene Johnson, an African-American¹⁰ woman convicted of child abuse, to receive Norplant as a condition of her probation.¹¹

Proposals to coerce poor women of color¹² to use Norplant took many by surprise, including the contraceptive device's crea-

4. "In some ways [Norplant] is the dream method that people who work on birth control have looked for for decades," said Dr. Daniel Callahan, director of the Hastings Center, a research institution in Briarcliffe Manor, N.Y., that studies issues of medical ethics. "It is long-acting and would make a woman infertile until she takes an active decision not to be." Philip J. Hilts, *U.S. Approves Contraceptives Planted in Skin*, N.Y. TIMES, Dec. 11, 1990, at A1.

5. Janet F. Ginzberg, *Compulsory Contraception as a Condition of Probation: The Use and Abuse of Norplant*, 58 BROOK. L. REV. 979, 979 (1992).

6. See, e.g., Claude Lewis, *Norplant Editorial was Offensive: The Thrust of the Editorial was Aimed at the Black Underclass. Unjustly So.*, PHILA. INQUIRER, Dec. 21, 1990, at A19; see also *infra* discussion part V.B.

7. Donald Kimmelman, *Poverty and Norplant: Can Contraception Reduce the Underclass?*, PHILA. INQUIRER, Dec. 12, 1990, at A18.

8. David S. Coale, *Norplant Bonuses and the Unconstitutional Conditions Doctrine*, 71 TEX. L. REV. 189, 189 (1992).

9. See, e.g., Tim Larimer, *High School Offers Birth Control Implant, Blacks Disagree on Merits of Program*, DALLAS MORNING NEWS, Mar. 17, 1993, at A37.

10. I use the terms "African-American" and "Black" interchangeably in this article.

11. Ginzberg, *supra* note 5, at 979-80.

12. In this essay, I often discuss the impact of the abuse of reproductive technology on "poor women of color." I emphasize class, race, and gender in this manner because African-American women commonly fall at the intersection of these three categories. None of these characteristics can be neatly isolated, particularly in the area of reproductive rights. Just as there are appreciable differences between wo-

tor, Dr. Sheldon Segal.¹³ "The team that worked on Norplant had been concerned that a government would misuse the device to enforce birth control. But, they were worrying about China, not California."¹⁴

In spite of the fact that the nationwide debate over the use and abuse of Norplant has focused¹⁵ on poor African-American women, the legal community has largely abstained from addressing this issue. Although some law review articles have discussed the constitutionality of the coercive use of the Norplant contraceptive device,¹⁶ at the time of this writing, none have specifically addressed the effect of the proposed uses of Norplant on poor women and women of color or have questioned the underlying sentiments behind these proposals.¹⁷ Medical

men of different races, there are differences between women of different classes. For example, the abuse of reproductive technology, such as sterilization abuse, is far more likely to impact a poor African-American woman than a middle- or upper-class African-American woman. While a poor African-American woman may have no choice but to attend a particular physician or hospital, a wealthier African-American woman may have more health care options, and thus, more control over her reproductive capacities.

13. See Ellen Goodman, *Norplant is Changing Politics of Birth Control*, ATLANTA J. & CONST., Feb. 26, 1991, at A13 ("It took 24 years to develop, test and approve an implantable device that can prevent pregnancy for as long as five years. It took less than two weeks for Norplant to be billed as a new method of coercion.")

14. *Id.* Dr. Segal wrote an outraged letter to the editor in response to the *Philadelphia Inquirer* editorial, but Johnson's case was decided before the letter could even be published. *Id.*

15. By the word "focused," I mean that Norplant proposals both *impact* poor, African-American women disproportionately and that these proposals are, in a sense, *aimed* at poor, African-American women. For example, although Norplant bonus programs are facially aimed at all welfare recipients, most people erroneously believe that the majority of women on welfare are African-American. Thus, these so-called bonus programs are aimed at poor, African-American women because many Americans view these women as the problem. See *infra* part V.A. On the other hand, the use of Norplant as a condition of probation for women who use drugs during pregnancy may disproportionately impact poor African-American women because: (1) they are more likely to be reported for drug use during pregnancy; (2) the drugs poor Black women use are more likely to receive attention than the drugs used by white women; and (3) poor Black women may already be viewed as bad mothers. See *infra* part V.B.

16. See, e.g., Kristyn M. Walker, *Judicial Control of Reproductive Freedom: The Use of Norplant as a Condition of Probation*, 78 IOWA L. REV. 779 (1993); Thomas E. Bartrum, *Birth Control as a Condition of Probation — A New Weapon in the War against Child Abuse*, 80 KY. L.J. 1037 (1991-1992); Coale, *supra* note 8, at 198.

17. While doctrinal analyses are certainly important and useful in this area, they may not go quite far enough. "[D]octrinally-focused inquiries fail to examine the historical antecedents of modern coercive interventions in pregnancy, particularly those directed against outsider women, and fail to explore the effect of race and class factors on the treatment women receive." Nancy Ehrenreich, *The Colonization of the Womb*, 43 DUKE L.J. 492, 498 (1993). It is one thing to say, for instance, that a

ethicists¹⁸ and some members of the African-American community¹⁹ have expressed concerns about potential Norplant abuses on poor and/or young African-American women. Some legal theorists, however, have dismissed these concerns as unrealistic or facile.²⁰

Although feminists and feminist legal theorists have analyzed the patriarchal control of reproduction and the use of reproductive technology as social policy,²¹ very few legal scholars have used this groundwork to explore the proposed uses of Norplant. Feminist legal scholars like Dorothy Roberts, Lisa Ikemoto, and Nancy Ehrenreich have demonstrated that, in the past, reproductive technology has been used to control the reproduction of those women whom society, for one reason or another, has labeled as deviant.²² The abuse of reproductive technology has been based in almost every instance on the belief that these women were not "good women" or "good mothers" and therefore were less deserving of motherhood than other women.

In this Essay, I argue that the Norplant proposals aimed at poor, African-American women are based on the notion that poor, Black women are "deviant" and thus less deserving of motherhood than white women.²³ In Part I, I discuss the failure

particular reproductive regulation is or is not constitutionally permissible. It is another to look at the reasons behind the regulation and to explore how and why certain regulations impact one group disproportionately.

18. See *infra* note 55 and accompanying text.

19. See Larimer, *supra* note 9, at A37 ("The first solution proposed for all our social ills is to control the fertility of poor people," said [Julia Scott, public education director for the National Black Women's Health Project]."); Dorothy E. Roberts, *Norplant's Threat to Civil Liberties and Racial Justice*, N.J. L.J., July 26, 1993, at 20.

20. See *infra* note 55.

21. See ANGELA Y. DAVIS, *Racism, Birth Control, and Reproductive Rights, in WOMEN, RACE, & CLASS* 202 (1981); Ehrenreich, *supra* note 17; Lisa C. Ikemoto, *The Code of Perfect Pregnancy: At the Intersection of the Ideology of Motherhood, the Practice of Defaulting to Science, and the Interventionist Mindset of Law*, 53 OHIO ST. L.J. 1205 (1992); Dorothy E. Roberts, *Punishing Drug Addicts Who Have Babies: Women of Color, Equality, and the Right of Privacy*, 104 HARV. L. REV. 1419 (1991).

22. See *infra* part III.

23. Although other women of color have also been subjected to the abusive use of reproductive technology, this paper will deal specifically with African-American women. I have no desire to perpetuate the myth that racism and sexism in this country are simply Black and white issues (so to speak), but I will concentrate on African-American women, in part because I am an African-American woman, and in part because, for reasons I will explore later in this paper, the Norplant proposals have been focused almost exclusively on poor, African-American women.

of feminists and legal theorists to examine the history of African-American women in the United States, and illustrate how this failure has led to a definition of "reproductive freedom" which fails to address the reproductive needs of Black women. In Part II, I explore the patriarchal ideal of motherhood and how poor women and women of color have been unable to meet that ideal. In Part III, I discuss the historical devaluation of African-American motherhood. In Part IV, I discuss how society's concern with the growth of the Black underclass and increasing welfare costs has led to the construction of the African-American welfare mother as the new deviant. I also analyze the Norplant proposals aimed at poor, African-American women in light of this country's growing obsession with the welfare mother. This Essay concludes that the proposed uses of Norplant are based on the belief that poor, African-American women, because of their deviant status, do not deserve to procreate.

I. THE REPRODUCTIVE RIGHTS MOVEMENT: THE ABSENCE OF COLOR AND CRITIQUE

Some problems we share as women, some we do not. You fear your children will grow up to join the patriarchy and testify against you, we fear our children will be dragged from a car and shot down in the street, and you will turn your backs upon the reasons they are dying.²⁴

Most feminists recognize that reproductive freedom is essential to the liberation of women. As Dorothy Roberts states, "Without the ability to determine their reproductive destinies, women will never achieve an equal role in social, economic and political life and will continue to be politically subordinate to and economically dependent on men."²⁵ Throughout history, women have been subjected to the patriarchal control of sexuality, reproduction, and motherhood.²⁶ Although this control has taken many forms, the reproductive rights movement in this country has been very narrowly focused. The Supreme Court has recognized only two areas of reproductive rights — the freedom to decide whether to use contraceptives and whether to terminate a

This is a paper about the devaluation of African-American motherhood. This focus is not intended to lessen the seriousness of the abuse that other women or men of color have suffered. Nor is it intended to suggest that Black women are more oppressed than any other group.

24. AUDRE LORDE, *SISTER OUTSIDER* 119 (1984).

25. Roberts, *supra* note 1, at 60.

26. See Ikemoto, *supra* note 21.

pregnancy.²⁷ In addition, feminists have chosen to focus the reproductive rights movement almost exclusively on the right to abortion. Thus, in the United States "reproductive freedom" has largely been defined as the right to abortion.

Women of color have been noticeably absent from the reproductive rights movement. This is not necessarily because women of color are unaware of their oppression as women or of the importance of reproductive freedom. Rather, women of color have been dissatisfied with the reproductive rights movement, in part, because of the failure of white feminists to adequately address the needs of women of color. Access to abortion is certainly important to all women. What the leaders of the reproductive rights movement have failed to recognize, however, is that for women of color, and, in fact, for all women, reproductive freedom means far more than abortion rights.

"Reproduction encompasses a range of events and conditions from the ability to bear children, to conception, to carrying a fetus, to abortion, to delivering a baby, to caring for a child."²⁸ Therefore, to adequately ensure that all women in this country have true reproductive choice, the definition of "reproductive freedom" must be expanded to include, "for example, . . . decisions about sterilization and medical treatment; it must include access to fertilization technologies and to prenatal and perinatal care."²⁹ These issues are as necessary to reproductive freedom as access to safe and legal abortion. Unrestricted access to abortion will not equal true reproductive freedom to women of color, and thus, until traditional reproductive rights organizations expand their definition of reproductive freedom to include these concerns, "reproductive freedom" will continue to hold very little meaning.

By adhering to such a narrow definition, the reproductive rights movement has effectively ignored the reproductive freedom of women of color. Historically, poor women and women of color have been subjected to the patriarchal control of their reproduction. The patriarchy has abused reproductive technology and criminal sanctions to express its disapproval of these women and to label them as deviant. This abuse has

27. Roberts, *supra* note 1, at 62.

28. *Id.*

29. *Id.*

taken the form of coerced contraception,³⁰ sterilization abuse,³¹ court ordered Cesarean sections,³² and unequal prosecution for drug abuse during pregnancy³³ as well as for perinatal abuse.³⁴ Poor women and women of color have also been denied access to adequate prenatal and perinatal care. In addition, poor women and women of color have also been denied the right to raise their own children.³⁵ In spite of this, the reproductive rights movement has declined to address adequately any of these concerns. The leaders of the reproductive rights movement have largely failed to explore the history of patriarchal control over reproduction,³⁶ particularly where that control affects women of color, and therefore have been unable to define "reproductive freedom" so that it will have meaning for poor women and women of color.

Across the country, women of color are expressing their dissatisfaction with the reproductive rights movement, a movement "that historically has been almost lily-white."³⁷ These women perceive the abortion rights movement to be "white woman-led and white woman-defined."³⁸ Groups like the Women of Color Coalition of Planned Parenthood Southeastern Pennsylvania, the National Council of Negro Women, the National Black Women's Health Project, and the National Latina Health Organization are

30. For instance, a poor woman is denied federal funding for abortion and therefore is forced to carry an unwanted pregnancy to term.

31. Historically, African-American women, Latina women, and Native-American women have been subjected to forced or coerced sterilization. *See infra* part IV.C.

32. *See Ehrenreich, supra* note 17, at 510, 520-21 (discussing how poor women, single women, women of color, and other "outsider women" have been disproportionately subjected to court ordered sterilization).

33. *See Roberts, supra* note 21 (discussing the disparate impact on African-American women of laws against drug abuse during pregnancy).

34. *See Ikemoto, supra* note 21 (discussing the disproportionate prosecution of poor women, women of color, and older women for the death of their newborn infants).

35. Historically, these women have had their children taken from them and placed in foster care, orphanages, and other institutions. *See infra* part III. Interestingly, some of today's conservative political leaders are once again suggesting that the children of poor women (women on welfare) be placed in orphanages.

36. Some feminist legal theorists, like Nancy Ehrenreich, also suggest that white women have been far too accepting and uncritical of the patriarchal control over their own reproduction. Ehrenreich, *supra* note 17, at 493-95. Expanding the definition of reproductive freedom could very well benefit white women as well as women of color.

37. Fawn Vrazo, *Minorities are Joining Fight for Abortion Rights*, PHILA. INQUIRER, Mar. 10, 1993, at C1.

38. *Id.* at C3.

organizing to give women of color a stronger voice in the reproductive rights movement. They are questioning the quick surrender of feminists in the battle over Medicaid funding for abortions,³⁹ demanding greater representation for women of color on the National Abortion Rights Action League, and attempting to expand the definition of "reproductive freedom" to encompass the needs of women of color.⁴⁰ In addition, these organizations are trying to convince members of the majority-white reproductive rights movement to be more critical of new contraceptives like Norplant.⁴¹

Norplant, the first new contraceptive in twenty-five years, is undoubtedly a tremendous advance in reproductive technology. The device has many advantages over other forms of birth control. Norplant has been applauded as nearly infallible with a worldwide failure rate of 0.2 pregnancies per 100 women,⁴² as compared with the pill (progestrogen and estrogen) and the minipill (progestrogen only) which have failure rates of 1 per 100, and the condom with a failure rate of 2 per 100.⁴³ In addition, because Norplant is inserted under the skin of the upper arm, releasing a steady stream of the progestrogen levonorgestrel into the bloodstream, women cannot forget to take it, and it does not interfere with regular sexual activity.⁴⁴

Developers of Norplant also claim that the contraceptive device does not cause many of the same side effects as other contraceptives.⁴⁵ Unlike oral contraceptives, the hormone in Norplant enters the bloodstream directly and does not cause stomach upsets.⁴⁶ Moreover, Norplant ensures that the levonorgestrel is released steadily, which prevents sudden bursts of a high level hormone which occurs when using injectable contraceptives.⁴⁷ Norplant, however, can cause irregular and prolonged menstrual

39. *Id.* at C1, C3. "Only 11 states, including New Jersey, now routinely allow Medicaid-funded abortions. In the other 39, including Pennsylvania, poor women are mostly left to scrape together the money for the procedure themselves." *Id.* at C3.

40. *Id.*

41. *Id.*

42. Jane Seymour, *When the Pill Gets Under Your Skin: Norplant*, *NEW SCIENTIST*, Dec. 4, 1993, at 22.

43. *Id.*

44. *Id.*

45. Ginzberg, *supra* note 5, at 980.

46. *Id.*

47. Seymour, *supra* note 42, at 22.

bleeding, acne, and hair loss.⁴⁸ Nevertheless, studies indicate that most women are satisfied with Norplant and would recommend it to their friends.⁴⁹

Ironically, despite the significant amount of control Norplant offers women over their reproductive lives, the contraceptive was immediately used to curtail rather than promote women's reproductive freedom. As Dr. Sheldon Segal, the contraceptive's developer, declared, "We created a method to enhance reproductive freedom and people keep finding ways to use it for the opposite purpose."⁵⁰ Similarly, journalist Ellen Goodman has noted that "[t]he simple, effective device offers women the liberating possibility of planning their families. But in America the first reactions are not about expanding possibilities. Norplant has been most publicly and ardently taken up by those who want to cap social problems by getting a lock on the womb."⁵¹

Many were not surprised that society quickly accepted Norplant as a means of social control. Shortly after Norplant's introduction, medical ethicists warned that it might be abused by those seeking to prevent certain groups of women, such as retarded women and women on public aid, from procreating.⁵² " 'I told you so,' said Arthur Caplan, director of the Center for Biomedical Ethics at the University of Minnesota. 'I am not surprised by this, but I find it troubling when reproductive capacity is manipulated as a form of punishment. It sure didn't take long.' "⁵³

In spite of the fact that Norplant proposals have been directed at curtailing the reproductive choices of poor women of color, particularly poor African-American women, the impact of these proposals on the reproductive freedom of poor women of color has received little attention. Norplant as a condition of probation or as part of a bonus program for women on public assistance has been debated to some extent on the pages of this country's law journals. Most articles, however, focus on the con-

48. *Id.*

49. Dick Kaukas, *Birth-Control Implants Work for Teens, Alliant Finds*, COURIER-J., Sept. 28, 1993, at 1C.

50. Ellen Goodman, *Norplant Dilemma: Choice vs. Coercion*, ST. LOUIS POST-DISPATCH, Feb. 20, 1991, at 3C.

51. *Id.*

52. Tamar Lewin, *Implanted Birth Control Device Renews Debate Over Forced Contraception*, N.Y. TIMES, Jan. 10, 1991, at A20.

53. *Id.*

stitutionality of the coercive use of the Norplant contraceptive device⁵⁴ without analyzing the motivation behind such proposals or the reproductive history of women of color in America. I have found none that explore or adequately address the concerns expressed by African-Americans and medical ethicists about the potential abuses of Norplant, although some legal theorists quickly dismiss these apprehensions.⁵⁵

Whether one accepts or discounts the concerns of medical ethicists and African-Americans, such a decision should be based on a thorough examination of the history of the patriarchal control of reproduction and how that control has impacted women of color. It is unwise to reject these concerns in light of the historical abuse of reproductive technology and the reasons behind that abuse. I argue that the Norplant proposals which have been directed at poor African-American women are based on the same motives which have fueled the abuse of reproductive technologies in the past: the devaluation of African-American women as mothers and the attempt to control the reproduction of these women because of their deviant status.

II. GOOD WOMEN/BAD WOMEN: THE HISTORICAL PATRIARCHAL CONSTRUCTION OF MOTHERHOOD

Motherhood has always been, and continues to be, a colonized concept — an event physically practiced and experienced by

54. See *supra* note 16.

55. See, e.g., Stacey L. Arthur, *The Norplant Prescription: Birth Control, Woman Control, or Crime Control?*, 40 UCLA L. REV. 1, 9 (1992) (footnote omitted) ("The argument that mandatory contraception for probationers amounts to unauthorized eugenic sterilization is . . . for the most part . . . a red herring."); John R. Kramer, *Introduction*, 67 TUL. L. REV. 1725, 1733-34 (1993) ("Whites may or may not wish to discourage black reproductive freedom, but there is no evidence of a governmental program designed to accomplish this. Black women need not fear that their right to bear children is under serious attack through fetal abuse prosecutions nor do black birth rates suggest that they do so. This wolf is more imaginary than Peter's's.").

I must emphasize that neither Professor Arthur nor Dean Kramer deal extensively with the abusive use of reproductive technology. Their written work does not reveal a thorough analysis of the reproductive history of African-American women in America which would warrant a conclusion that the present Norplant proposals bear no relation to the abuses of reproductive technology in the past. Dean Kramer's discussion of the prosecution of African-American women for drug abuse during pregnancy is only two paragraphs of a thirteen-page paper, and Professor Arthur dismisses charges of racism and sexism in Norplant proposals with a footnote.

women, but occupied and defined, given content and value, by the core concepts of patriarchal ideology.⁵⁶

Feminist legal scholar Lisa Ikemoto describes the "Code of Perfect Pregnancy" as "the idea and practice of controlling women with regard to conception, gestation, and childbirth in ways that express dominant cultural notions of motherhood."⁵⁷ The Code is based on the social definition of good motherhood, as established by the patriarchy, as well as the control of information and the disempowerment of women with regard to their own reproductive capacities.⁵⁸ The Code of Perfect Pregnancy is rooted in the ideology of motherhood developed during the Nineteenth and early Twentieth Centuries.

With the rise of manufacturing and the development of factories, the need for female employees began to increase.⁵⁹ Which women would fill that need, however, quickly became a question of class position, resulting in a differentiation between privileged motherhood and devalued motherhood.⁶⁰ "Distinctions were made between those women who could afford to cultivate domestic skills without pay . . . and those women . . . who needed income either for themselves or their families."⁶¹ By the 1830s the distinction evolved into the "domestic code." The public and private spheres became increasingly separate, and women became the managers of the private sphere. The private sphere, and the mother as the manager of that sphere, became the source of virtue, morality, and tradition.⁶² It became the role of the "good mother" to inhabit the private sphere and to "conceiv[e], giv[e] birth to, and rais[e] children who would grow up to contribute to the social order and not detract from it."⁶³ Those women who remained at home were defined as respectable, good women while those who worked outside of the home came to be viewed as deviant, selfish, and neglectful of their families.⁶⁴

Due partly to plain economics, status as a "good mother" was reserved for privileged middle- and upper-class women. The

56. Martha L. Fineman, *Images of Mothers in Poverty Discourses*, 1991 DUKE L.J. 274, 289-90.

57. Ikemoto, *supra* note 21, at 1207.

58. *Id.*

59. JOEL F. HANDLER & YEHESEKEL HASENFELD, *THE MORAL CONSTRUCTION OF POVERTY* 51 (1991).

60. Ikemoto, *supra* note 21, at 1210.

61. HANDLER & HASENFELD, *supra* note 59, at 51-52.

62. Ikemoto, *supra* note 21, at 1211.

63. *Id.*

64. HANDLER & HASENFELD, *supra* note 59, at 52.

middle-class and upper-class imposed their values on poor women, single women, and women of color regardless of their ability to conform. Although poor women, single women, and women of color were never morally excused from work, they were still expected to fulfill the good mother role.⁶⁵ In other words, at the same time these women were expected to work outside the home in order to resist becoming public charges, they were criticized for not staying home to fulfill their proper roles of wives and mothers. They were neither exempted from the work ethic that required them to work nor exempted from the domestic code that required them to stay at home.

From a moral standpoint, poor women, single women, and women of color were in a no-win situation. African-American women in particular suffered from this contradiction. They were seen as deviant for failing to fulfill the role of the good mother, although they were often expected to leave their own homes and children to be nannies and wet nurses for white women's children.⁶⁶

In order to preserve the public/private dichotomy and maintain social order, the patriarchy promulgated laws restricting women to the private sphere⁶⁷ and imposed criminal laws that treated women who could not fit social norms, like race, class, religion, and sexual morality, "as deviants, as the cause of disorder."⁶⁸ Unsurprisingly, because poor women, single women, and women of color could not conform to these norms, the use of state power to preserve the public/private distinction and to maintain social order fell most heavily on them.⁶⁹

65. Ikemoto, *supra* note 21, at 1220.

66. *Id.*

67. *Id.* at 1212. For example, in *Bradwell v. Illinois*, 83 U.S. (16 Wall.) 130 (1872), the United States Supreme Court affirmed an Illinois Supreme Court decision denying a woman's application to practice law. "That God designed the sexes to occupy different spheres of action, and that it belonged to men to make, apply, and execute the laws, was regarded as an almost axiomatic truth." *Id.* at 132, *quoted in*, Ikemoto, *supra* note 21, at 1212.

68. Ikemoto, *supra* note 21, at 1215. The struggle to maintain the sanctity of the family and thereby save America from perceived social destruction included crusades against prostitution, alcohol, and pornography. *Id.*

69. *Id.* at 1220. Immigrant girls were disproportionately punished for juvenile delinquency and blamed for social problems. In addition, the stereotypical prostitute was often depicted as ethnic. *Id.*

The patriarchy apparently viewed these women's racial, class, and religious differences as extremely threatening to the social order. Perhaps this fear was based on the notion that these women held vastly different, even dangerous, moral beliefs,

The perpetuation of the private sphere and the use of state power to control poor women, single women, and women of color were closely related to society's desire to maintain social order. Working women threatened the traditional family, the vehicle for the promotion of traditional values.⁷⁰ Those opposed to working women attributed numerous social ills to the employment of women.⁷¹

Working women and poor women were also considered a threat to the social order by virtue of their roles as child rearers. Poor women, single women, and women of color, because of their failure to conform to the good mother standard and their deviant status as women, were seen as incapable of transmitting appropriate values, such as the work ethic, to their children.⁷² "Throughout this period, the reformers were strongly concerned about deviant behavior, and especially the transmission of the wrong values and habits from the parent to the child."⁷³ The children of these women were considered to be "predelinquent — if not controlled, they were likely to become paupers and criminals."⁷⁴

Social workers and so-called child protectors expanded the definition of cruelty to include all kinds of neglect.⁷⁵ Poor women and single women were over-represented in neglect cases.⁷⁶ Due to economic necessity, these women were forced to work outside the home and could not supervise their children like middle- and upper-class women could. This lack of supervision became one of the defining elements of neglect.⁷⁷ Social reformers

which, if not contained, would contaminate and destroy white, middle-class, Christian society.

70. HANDLER & HASENFELD, *supra* note 59, at 55. This criticism applied to all working women, regardless of race. It should not be surprising, however, that because women of color were often required to work to support their families, sanctions against working women affected them disproportionately.

71. Reformers feared that working women would become discontented, that their maternal functions would be impaired, and that they would produce deformed children. They also feared that working women would become prostitutes. *Id.*

72. Although African-American women often served as nannies for white women's children, they were only responsible for the physical needs of these children. They were not expected to pass on social values to their charges.

73. HANDLER & HASENFELD, *supra* note 59, at 65.

74. *Id.*

75. *Id.* at 60.

76. LINDA GORDON, HEROES OF THEIR OWN LIVES: THE POLITICS AND HISTORY OF FAMILY VIOLENCE — BOSTON, 1880-1960, 92, 94-95 (1988).

77. *Id.* at 96, 121.

were convinced that this type of neglect would lead to delinquency, and children were often removed from their homes.⁷⁸

The fear that poor women, women of color, and other "bad women" would produce and rear children who would detract from the social order also led to the creation of juvenile courts. The juvenile courts were intended to intervene in "bad families" — those headed by poor women, single women, and women of color — and rescue delinquent, dependent, and neglected children.⁷⁹ The juvenile court judge could remove these "predelinquent" children from their homes and send them to reformatories and state schools for dependents, institutions intended to "help them."⁸⁰

Because poor women, single women, and women of color were never morally excused from work, they found themselves caught between the proverbial rock and a hard place. If they stayed at home to devote the "proper" amount of care and attention to their children, they and their children would become public charges, and the women would be labeled as deviant because of their failure to conform to the work ethic and to take care of their families. If, however, they went into the workforce, they would be labeled as deviant for their failure to conform to the middle- and upper-class good mother standard. Thus, regardless of which path they chose (if one can say that they really had a choice if they wanted to feed their families), these women were viewed as deviant and as threats to the social order. In addition, they would pass on that deviance, one way or another, to children who would grow up to pose a continuing threat to the social order.

As discussed above, the patriarchy attempted to preserve social order by maintaining the private sphere, penalizing women who failed to conform to social norms, and removing children from atmospheres that would lead them to detract from the social order. Additionally, the patriarchy began to use reproductive technology to control deviant women. For example, during the eugenics period,⁸¹ sterilization laws were used to prevent

78. *Id.* at 73.

79. *Id.* at 138-40. "*Delinquent* meant committing acts that would be criminal if done by an adult. *Neglected* meant abandoned, either in fact or by poor parental caretaking. *Dependent* meant poverty that was inflicted or caused by misconduct." *Id.* at 63.

80. *Id.* at 138-40.

81. See *infra* part IV.B.

prostitutes from genetically transmitting their deviant traits.⁸² Other “bad” women, such as women who expressed their sexuality, women suffering from postpartum depression, and women of color, were placed in institutions, where they were more commonly forcibly sterilized.⁸³

The use of reproductive technologies like sterilization to control the reproduction of deviant women did not end during this period. Reproductive technology increasingly is being used to control women who do not fit the ideal of womanhood. As Lisa Ikemoto points out, “over the past century, these laws [which speak to women’s biological capacity to conceive and bear children] have begun to take the shape of an increasingly comprehensive regulatory scheme These regulations elaborate upon the ideology of motherhood by stating preferences about who should and who should not become pregnant and hence become mothers.”⁸⁴ This regulatory scheme restricts a woman’s ability to decide whether to conceive, how to conceive, whether to terminate the pregnancy, and how to behave during pregnancy.⁸⁵

African-American women in particular have been subjected to the abuse of reproductive technology as a result of their deviant status. In the next Part, I will discuss various ways in which the reproductive capacities of African-American women have been governed as a means of social control.

III. THE HISTORICAL DEVALUATION OF AFRICAN-AMERICAN MOTHERHOOD

It is not my child who tells me: I have no femaleness white women must affirm. Not my child who says: I have no rights black men must respect. It is not my child who has purged my face from history and herstory, and left mystory just that, a mystery; my child loves my face and would have it on every page, if she could, as I have loved my own parents’ faces above all others We are together, my child and I. Mother and child, yes, but *sisters* really, against whatever denies us all that we are.⁸⁶

82. Ikemoto, *supra* note 21, at 1230.

83. *Id.* at 1231–33.

84. *Id.* at 1221–22.

85. *Id.*

86. Alice Walker, *One Child of One’s Own: A Challenging Personal Essay on Childbirth and Creativity*, Ms., Aug. 1979, at 47, 75.

Historically, African-American women have been seen as deviating from the ideal of true womanhood. "Real" women were expected to be pious, pure, submissive, and domestic, middle-class and white.⁸⁷ Black women, on the other hand, were presumed to conform to an entirely different set of characteristics — characteristics which precluded them from ever being seen as ideal women. Generally, four controlling images of African-American women have emerged, all of which deviate from the middle- and upper-class standard of womanhood: (1) "mammy," the faithful, obedient, nurturing, and caring domestic servant;⁸⁸ (2) the "matriarch," who is overly aggressive, unfeminine, and emasculating;⁸⁹ (3) the "welfare mother," who is irresponsible, lazy, and immoral;⁹⁰ and (4) the "Jezebel," who is sexually aggressive.⁹¹ These images, linked both to the Black woman's sexuality and her maternity, combine to present African-American mothers in a negative light. Thus, the African-American woman is constructed as deviant, both in her role as mother and in her role as woman.⁹² The traits associated with Black women stand in direct contrast to those associated with the ideal standard of motherhood. As a result, African-American women are seen as "somehow less female, perhaps even less human as well."⁹³ Thus, they are not maternal nor are they deserving of motherhood.⁹⁴

The notion that African-American women are deviant, both in their roles as women and in their roles as mothers, has justified the historical abuse of Black women's reproductive liberty. Only through exploring this history can one truly understand and therefore evaluate the Norplant proposals aimed at poor, African-American women. Because dominant society has consistently used reproductive regulations and reproductive technology

87. PATRICIA HILL COLLINS, *BLACK FEMINIST THOUGHT: KNOWLEDGE, CONSCIOUSNESS, AND THE POLITICS OF EMPOWERMENT* 71 (1990).

88. *Id.*

89. *Id.* at 74.

90. *Id.* at 77.

91. *Id.*

92. In this context, the African-American woman's role as "mother" is almost indistinguishable from her role as "woman." Because she is a "bad" woman, the African-American woman is likely to pass her "bad" characteristics, such as laziness, irresponsibility, and immorality, on to her children. Therefore, she is a "bad" mother. The use of reproductive technology to curtail the reproductive freedom of women of color is based on this concept.

93. Ehrenreich, *supra* note 17, at 510.

94. Roberts, *supra* note 21, at 1436-44.

to curtail the reproductive liberty of so-called deviant women, any proposal to limit the reproductive freedom of African-American women should be evaluated in light of the historical denial of reproductive freedom to Black women. In this Part, I discuss various ways in which dominant society has used reproduction and reproductive technology to control deviant Black women.

A. Slavery

The experience of Black women during slavery typifies the control of African-American women's reproduction as an expression of their deviant status, as well as the devaluation of African-American motherhood. During slavery, Black women were valuable both for their labor and for their reproductive capacities.⁹⁵ The majority of slave women were field workers.⁹⁶ Like boys, when slave girls came of age, they were sent to the fields to "work the soil, pick the cotton, cut the cane, [and] harvest the tobacco."⁹⁷ Women, however, were also subjected to sexual abuse as a means of increasing the slaveowner's wealth. With the abolition of the international slave trade, slave women's reproductive capacities became essential to the perpetuation of the slave population.⁹⁸ For the young cotton-growing industry to flourish or for new slaveowners to increase their labor force, slave masters had to rely on Black women to reproduce.⁹⁹

In order to reproduce the slave labor force, female slaves were encouraged and often forced to engage in sex frequently, both with other slaves and with their masters.¹⁰⁰ "Rape, in fact, was an uncamouflaged expression of the slaveholder's economic mastery and the overseer's control over Black women as workers."¹⁰¹ As Barbara Omolade, an African-American feminist theorist, describes it, the Black woman became a fragmented

95. See DAVIS, *supra* note 21, at 202; Roberts, *supra* note 1, at 59.

96. DAVIS, *supra* note 21, at 5.

97. *Id.* at 6. A former slave described her introduction to slave labor: "I tended to the children when I was a little gal and tried to clean house just like Old Miss tells me to. Then as soon as I was ten years old, Old Master, he say, 'Git this here nigger to that cotton patch.'" TO BE A BLACK WOMAN: PORTRAITS IN FACT AND FICTION 16 (Mel Watkins & Jay David eds., 1970), *quoted in* DAVIS, *supra* note 21, at 6.

98. COLLINS, *supra* note 87, at 51.

99. See DAVIS, *supra* note 21, at 6-7.

100. Barbara Omolade, *Hearts of Darkness, in* POWERS OF DESIRE: THE POLITICS OF SEXUALITY 350, 354 (Ann Snitow et al. eds., 1983) ("My mother was young — just 15 or 16 years old. She had 14 chillen and you know that meant lots of wealth.").

101. DAVIS, *supra* note 21, at 7.

commodity, with every part of her body, including her womb, subject to the master's control:

[H]er head and her heart were separated from her back and her hands and divided from her womb and vagina. Her back and muscle were pressed into field labor where she was forced to work with men and work like men. Her hands were demanded to nurse the white man and his family as domestic servant whether she was technically enslaved or legally free. Her vagina, used for his sexual pleasure, was the gateway to the womb, which was his place of capital investment — the capital investment being the sex act and the resulting child the accumulated surplus, worth money on the slave market.¹⁰²

Thus, during slavery, Black women were not just seen as failing to conform to the good mother standard; they were never conceived of as mothers at all. They were breeders: incubators for the master's labor force, the tools of economic growth. This is the ultimate expression of the African-American woman's devalued status as woman and as mother. Her womb was seen as separate from her, like an empty box, unconnected to her humanity or any desire she might have to conceive, bear, and nurture a child.

The complete disregard of Black women's status as mothers was also codified in law. Around 1662 Virginia passed a law which ensured that "Children got by an Englishman upon a Negro woman shall be bond or free according to the condition of the mother."¹⁰³ Similarly, one year after the abolition of the international slave trade, a South Carolina court held that female slaves had no claims to their children.¹⁰⁴ As a result of such legislation, slave owners were encouraged to replenish their slave population through sexual exploitation of their female slaves, knowing that any children born as a result of such a union would legally be slaves. Thus, Black women lost all rights to their children. They not only lost control over their reproductive capacities, but were forced to watch as their children were taken away from them to be sold or pressed into work in the fields.

Society's refusal to view African women as human beings, much less mothers, justified both the cooption of their reproductive capacities and the loss of their children. Black women during this period were never given the chance to conform to the

102. Omolade, *supra* note 100, at 354.

103. PAULA GIDDINGS, *WHEN AND WHERE I ENTER: THE IMPACT OF BLACK WOMEN ON RACE AND SEX IN AMERICA* 37 (1984).

104. DAVIS, *supra* note 21, at 7.

good mother standard. They were never viewed as mothers. Black women were seen as having no more attachment or right to their children than animals. They were, in fact, seen as “‘natally dead,’ with no obligations to their offspring”¹⁰⁵ Therefore, violation of their reproductive rights meant nothing.

B. *Margaret Sanger and the Eugenics Movement*

The control of African-American women’s reproductive liberty during slavery was based on their devaluation as women and as mothers. In addition, their status as property precluded any consideration of their reproductive or maternal rights. However, even as Black women came to be viewed as people rather than property, they were still viewed as deviant. Although they had gained status as mothers, in the sense that they were allowed to nurture their own children, they were still far from the patriarchal notion of the ideal mother. Moreover, because of their deviant position, Black women began to be viewed more clearly as a threat to the social order as both women and mothers.¹⁰⁶ As a result, the eugenics movement, which sought to control the genetic transmission of deviant characteristics, attempted to control the reproduction of African-American women as a means of social control.

During the first decades of the Twentieth Century, the eugenics movement gained rising popularity in the United States. The movement embraced the notion that intelligence and other personality traits, both positive and negative, were hereditary.¹⁰⁷ “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.”¹⁰⁸ Eugenecists attempted to halt the reproduction of undesirable characteristics by preventing those believed to carry those characteristics from procreating:

Society has been brought to a greater realization than ever of the evils that attend the presence of the growing number of the socially undesirable people in our population. The men-

105. TONI MORRISON, *PLAYING IN THE DARK: WHITENESS AND THE LITERARY IMAGINATION* 21 (1992).

106. See *supra* part III.

107. Robert L. Burgdorf, Jr. & Marcia P. Burgdorf, *The Wicked Witch is Almost Dead: Buck v. Bell and the Sterilization of Handicapped Persons*, 50 *TEMP. L.Q.* 995, 997–98 (1977); Dorothy E. Roberts, *Crime, Race and Reproduction*, 67 *TUL. L. REV.* 1945, 1961 (1993).

108. Roberts, *supra* note 21, at 1961.

tally diseased, the feeble-minded, the idiots, the morons, and the criminals are regarded as the Nemeses of our civilization and the prohibition of their propagation is considered the salvation of society and the race.¹⁰⁹

Around the turn of the century, many states began to enact involuntary sterilization laws intended to preclude such undesirables from reproducing.¹¹⁰

Eugenic sterilization laws sought to control the reproduction of those who deviated from the social norm. Besides criminals, individuals suffering from mental instability or intellectual disability, and persons addicted to alcohol or drugs, this group included women who deviated from the ideal of true womanhood: prostitutes, single mothers, immigrant women, poor women, and women of color.¹¹¹ Those who supported eugenic sterilization saw the control of reproduction as a means of social control. By preventing individuals with undesirable characteristics from reproducing, society would be improved and problems like crime, poverty, and drug abuse could be prevented.

Some white reformers, increasingly concerned about the growth of the Black community, an inherently deviant group, and the decrease of the white race, began to pick up the eugenics banner as a means of controlling the procreation of African-Americans.¹¹² As early as 1903, white Americans, including President Theodore Roosevelt, began to fear "race suicide" or that "Yankee 'stock,' which displayed the lowest birth rates, would be overwhelmed, numerically and hence politically, by immigrants, nonwhites, and the poor."¹¹³

By 1919, the influence of the eugenics campaign on the birth control movement headed by Margaret Sanger was clear.¹¹⁴

109. *Id.* (quoting JACOB HENRY LANDMAN, *HUMAN STERILIZATION: THE HISTORY OF THE SEXUAL STERILIZATION MOVEMENT* vii (1932)).

110. See generally Elyce Z. Ferster, *Eliminating the Unfit — Is Sterilization the Answer?*, 27 OHIO ST. L.J. 591, 591-96 (1966) (describing various sterilization statutes around the turn of the century).

111. Ikemoto, *supra* note 21, at 1230. See, e.g., *Buck v. Bell*, 274 U.S. 200 (1927). Although Carrie Buck, the plaintiff in *Buck*, was to be sterilized ostensibly to prevent the spread of mental illness, Ms. Buck was in fact sterilized because she was poor and had a child out of wedlock. Ms. Buck's daughter turned out to be an average child who even excelled in some areas. See Stephen J. Gould, *Carrie Buck's Daughter*, 2 CONST. COMMENTARY 331, 336 (1985); Paul A. Lombardo, *Three Generations, No Imbeciles: New Light on Buck v. Bell*, 60 N.Y.U. L. REV. 30, 51 (1985).

112. DAVIS, *supra* note 21, at 214.

113. See DANIEL J. KEVLES, *IN THE NAME OF EUGENICS: GENETICS AND THE USES OF HUMAN HEREDITY* 88 (1985).

114. DAVIS, *supra* note 21, at 213.

Sanger started her crusade for birth control based on a belief that working-class women, who could not afford multiple children, had a need for family planning and reproductive choice.¹¹⁵ However, Sanger's vision of reproductive freedom did not extend to African-American women either as women or as mothers.¹¹⁶ In fact, Sanger felt that the manipulation and domination of the reproduction of Black women was fully justified. Sanger stated in an article published in the American Birth Control League's journal that "the chief issue of birth control is more children from the fit, less from the unfit."¹¹⁷ In a number of articles and books, Sanger promoted the use of sterilization, abortion, and contraception to eliminate "human weeds."¹¹⁸ In addition, the American Birth Control League began to make room for other eugenicists in its ranks. The author of *The Rising Tide of Color Against White World Supremacy* was offered a seat on the board, and articles by the director of the American Eugenics Society began to appear in the *American Birth Control Journal*.¹¹⁹

Sanger and her associates on the Birth Control Federation of America began to directly undertake the control of the African-American population. In 1939 they started the "Negro Project" to regulate the "mass of Negroes, particularly in the South, [who] still breed carelessly and disastrously, with the result that the increase among Negroes, even more than among whites, is from the portion of the population less fit, and least able to rear children properly."¹²⁰ The Federation intended to enlist the aid of Black ministers to propagandize for control among African

115. *Id.* at 211. Sanger recounts the story of a twenty-eight-year-old woman who had attempted self-abortion. When the woman begged the doctor for information on birth prevention, he advised her to force her husband to sleep on the roof. When the woman died three months later after attempting another self-abortion, Sanger vowed to pledge herself to promoting birth control. "I went to bed, knowing that no matter what it might cost, I was finished with palliatives and superficial cures; I resolved to seek out the root of evil, to do something to change the destiny of mothers whose miseries were as vast as the sky." DAVIS, *supra* note 21, at 212 (quoting MARGARET SANGER, AN AUTOBIOGRAPHY 92 (1971)).

116. At this time, working women, as well as women of color, were considered to be deviant. See *infra* part III. I am not sure why Sanger relaxed her perception of womanhood to include working-class women but not Black women. I would guess, however, that her vision of motherhood was tainted by racism.

117. LINDA GORDON, WOMAN'S BODY, WOMAN'S RIGHT: BIRTH CONTROL IN AMERICA 281 (1976).

118. See GEORGE GRANT, GRAND ILLUSIONS: THE LEGACY OF PLANNED PARENTHOOD 63-65 (1992).

119. DAVIS, *supra* note 21, at 214.

120. GORDON, *supra* note 117, at 332.

Americans. Sanger wrote in a letter to a colleague, "We do not want word to get out that we want to exterminate the Negro population and the minister is the man who can straighten out that idea if it ever occurs to any of their more rebellious members."¹²¹

Thus, supporters of the eugenics movement saw African-Americans as an inherently deviant class, likely to produce individuals with undesirable characteristics. In addition, African-American women were not seen as proper mothers. Those in favor of eugenic sterilization and the use of birth control to restrict the reproduction of African-Americans feared that Black women would raise children destined to detract from the social order. Moreover, Margaret Sanger, a crusader for women's reproductive freedom, supported and promoted the use of reproductive technology to diminish the reproductive liberty of African-Americans. The devaluation of African-American women as mothers and the fear of their perceived inability to inculcate their children with proper values led to the denial of their reproductive freedom.

C. *Sterilization Abuse*

Sterilization as a method for controlling the reproductive capacities of African-American women did not occur only in the early Twentieth Century. As late as the 1970s, sterilization abuse of women of color in general and Black women in particular was rampant.¹²² One study revealed that, in 1973, 43% of the women sterilized under a federally-funded program were African-American, although only 33% of the total number of patients were Black.¹²³ While the use of sterilization to control undesirable characteristics such as criminality fell into disfavor,¹²⁴ it was still acceptable to control the reproduction of women who failed to meet the ideal of true womanhood. As during the eugenics movement, the sterilization of African-American women during the 1970s served as a means of social control. The sterilization abuse of African-American women was closely linked to the notion that excessive childbearing by poor women of color was un-

121. DAVIS, *supra* note 21, at 215.

122. *Id.* at 215-19.

123. See Dick Grosboll, Note, *Sterilization Abuse: Current State of the Law and Remedies for Abuse*, 10 GOLDEN GATE U. L. REV. 1147, 1153 n.30 (1980).

124. See, e.g., *Skinner v. Oklahoma*, 316 U.S. 535 (1942) (holding a state statute that provided for the sterilization of habitual criminals unconstitutional).

desirable.¹²⁵ This notion was grounded in the belief that poor women of color and their children placed a financial burden on the state,¹²⁶ as well, perhaps, as the fear that children raised in the neglectful atmosphere of poor homes would grow up to pose a threat to the social order.

Black women were often induced or coerced into submitting to sterilization. Some doctors required African-American women to consent to sterilization before they would deliver babies or perform abortions.¹²⁷ In 1974 in *Relf v. Weinberger*,¹²⁸ a federal district court found that 100,000 to 150,000 poor women had been sterilized under federally funded programs.¹²⁹ An unidentified number of women chose sterilization under the threat that their welfare benefits would be withdrawn unless they submitted to the operation.¹³⁰

The *Relf* case exposed other incidents of sterilization abuse. In Montgomery, Alabama alone, in addition to the two teenage plaintiffs, eleven other teenage girls were subjected to similar op-

125. See, e.g., GENA COREA, *THE HIDDEN MALPRACTICE: HOW AMERICAN MEDICINE TREATS WOMEN AS PATIENTS AND PROFESSIONALS* 180-81 (1973) (quoting doctors who believed that sterilization of poor women was appropriate to control the population growth of the poor).

126. *Id.*

127. See Laurie Nsiah-Jefferson, *Reproductive Laws, Women of Color, and Low-Income Women*, in *REPRODUCTIVE LAWS FOR THE 1990s* 23, 44-45 (Sherill Cohen & Nadine Taub eds., 1989).

128. 372 F. Supp. 1196 (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). The *Relf* case involved two sisters, Minnie Lee, twelve years old, and Mary Alice, fourteen years old, who were sterilized. The operation was ordered by the Department of Health, Education, and Welfare-funded Montgomery Community Action Committee. The girls' mother, who could not read, consented to the operation by placing an "X" on a document whose contents were not described to her. She believed she was merely consenting to Depo-Provera injections, a contraceptive drug which had been previously administered to Minnie Lee and Mary Alice. DAVIS, *supra* note 21, at 216.

The fact that two Black girls, barely in their teens, had previously been injected with a contraceptive bears mention. One can very well ask why such a precaution appeared to be necessary. I am sure that middle- and upper-class white teens were not subjected to contraceptive injections. This only provides further support for the proposition that African-American women were never perceived, even at a young age, as good women. Clearly, they were seen as sexually promiscuous even as girls, and sexual promiscuity was seen as a potential threat to the social order — hence the need to regulate the reproduction of young, Black girls.

129. *Relf*, 372 F. Supp. at 1199.

130. *Id.* One such woman, Nial Ruth Cox, was sterilized at the age of eighteen because officials had threatened to cut off her family's welfare payments. Ms. Cox was assured that her infertility would be temporary. Les Payne, *Forced Sterilization for the Poor?* S.F. CHRON., Feb. 26, 1974, at 19.

erations, and Department of Health, Education, and Welfare (HEW)-funded birth control clinics in other states had been subjecting young girls to sterilization abuse for years.¹³¹ The Eugenics Commission of North Carolina was responsible for 7,686 sterilizations since 1933 and about 5,000 of the sterilized persons were Black.¹³² HEW's Population Affairs Office estimated that in 1972 between 100,000 and 200,000 sterilizations were funded by the federal government.¹³³

Today, poor African-American women are still most likely to be subjected to sterilization abuse. Although HEW mandated informed consent as a prerequisite to sterilization, presumably to ensure neutrality on the part of the hospital, a 1975 ACLU study revealed that many hospitals were ignoring the regulations and continuing to coerce women of color to consent to sterilization.¹³⁴ Presently, 42 U.S.C. section 300a-8 prohibits public officials and authorities from forcing sterilization on welfare beneficiaries. As both Professor Dorothy Roberts and Professor Lisa Ikemoto point out, however, the practical effect of recent government enactments is to do just that.¹³⁵ Since subchapters XIX and XX of the Social Security Act authorize matching Medicaid reimbursement for sterilization, but other enactments, such as the Hyde Amendment, restrict the use of federal payments for abortion, ". . . sterilization is the only publicly-funded birth control method readily available to poor women of color."¹³⁶

Although statistics indicate that direct sterilization abuse may no longer occur, indirect means may still be employed to convince women of color to submit to sterilization.¹³⁷ In addition, the attitudes which prompted many doctors to coax African-American women to undergo sterilization still exist. Poor women of color are still charged with excessive child-bearing which poses both a financial drain on the system and the threat of children who will become criminals and paupers. "Gena

131. See *Relf*, 372 F. Supp. at 1199.

132. DAVIS, *supra* note 21, at 218.

133. *Id.*

134. See Ikemoto, *supra* note 21, at 1232 n.109.

135. See Roberts, *supra* note 21, at 1443; Ikemoto, *supra* note 21, at 1232 n.109.

136. Roberts, *supra* note 21, at 1444. Sterilization was the only readily available form of birth control until Norplant.

137. See Adele Clarke, *Subtle Forms of Sterilization Abuse: A Reproductive Rights Analysis*, in TEST-TUBE WOMEN: WHAT FUTURE FOR MOTHERHOOD? 188, 200 (Rita Arditti et al. eds., 1984).

Corea reports a conversation with Dr. C., chief of surgery in a northeastern hospital: "The doctor feels that a girl with lots of kids, on welfare, and not intelligent enough to use birth control, is better off being sterilized." "Not intelligent enough to use birth control" is often a code phrase for "black" or "poor."¹³⁸ Another doctor said, "As physicians we have obligations to our individual patients, but we also have obligations to the society of which we are a part The welfare mess . . . cries out for solutions, one of which is fertility control."¹³⁹ Thus, poor African-American women are still subjected to coercive sterilization because they are perceived as having too many children. Implicit in this view is the belief that poor women of color are less deserving of motherhood, and that at some point, their right to have children is subsumed by the right of the State and the American people to be free from the financial and social burden ostensibly caused by their child-bearing.¹⁴⁰

A thorough examination of history reveals that African-American women consistently have been subjected to various forms of reproductive abuse. These abuses have been justified and grounded in the belief that African-American women deviated from the ideal of true womanhood. Black women were the antithesis of the patriarchal standard of good motherhood. They were perceived as unable to pass on the correct values to their children and to ensure that their children would grow to contribute to the social order. As such, they were seen as undeserving of both reproductive choice and motherhood. These same beliefs underlay the Norplant proposals of today and the notion that it is acceptable to restrict the reproductive freedom of poor, African-American women.

V. AFRICAN-AMERICAN WOMEN AND NORPLANT

[A]t the center of the tangle of pathology is the weakness of the family structure. Once or twice removed, it will be found to be the principal source of most of the aberrant, inadequate,

138. COREA, *supra* note 125, at 180–81.

139. *Id.* at 181.

140. Although this notion could apply to all poor women, there is a strong belief in this country that the majority of poor people in America are people of color. Therefore, when people discuss "poor women" and the problems they present to society, they often mean poor women of color. See *infra* part V.A.

or antisocial behavior that did not establish, but now serves to perpetuate the cycle of poverty and deprivation.¹⁴¹

Over time, the ideal standard of womanhood has changed. The idea of women as sexual beings is no longer as shocking to the conscience. Women are no longer expected to stay in the home,¹⁴² and men play a greater role in childcare. Some things, however, remain the same. "Women of color, those who live in poverty, and those made outsiders by virtue of cultural or religious practices are stigmatized by the dominant society and are never presumed good mothers, as are white middle- and upper-class women."¹⁴³ White women have to prove that they are unfit mothers; Black women have to prove that they are fit mothers. Moreover, the use of reproductive technology to control the reproduction of Black women persists,¹⁴⁴ and the Norplant proposals promise to continue this control.

In this Part, I argue that the specter of the African-American welfare mother and society's growing fear of the Black underclass have led to attempts to curtail the reproductive freedom of African-American women with Norplant. Like the reformers of the Progressive Era,¹⁴⁵ dominant society devalues poor African-American women as mothers and sees them as a threat to the social order. Norplant is used, not as an option intended to enhance Black women's reproductive freedom or to protect Black children, but as yet another method of curtailing the reproductive liberty of African-American women as a means of social control. Over the past decades, the country has become more and more concerned with "the welfare mess" and with the growth of the Black underclass. Society's latest attempts to regu-

141. OFFICE OF POL'Y PLANNING & RESEARCH, U.S. DEP'T OF LABOR, *THE NEGRO FAMILY: THE CASE FOR NATIONAL ACTION* 30 (1965).

142. Arguably, a stay-at-home mother is still seen as more dedicated than one who works. For example, a couple of years ago, I was watching a talk show on women who had had difficulties with violent and abusive nannies (one of the unfortunate costs of mothers who work). The audience applauded wildly for a woman who had given up her job as a lawyer to stay home and take care of her children.

143. Ikemoto, *supra* note 21, at 1207.

144. For example, there have been charges that doctors have been using the contraceptive injection Depo-Provera on teenagers and women of color without their consent. Liz Hunt, *U.S. States Use Contraceptive Implant as Social Control*, *IRISH TIMES*, Aug. 5, 1993, at 8. Also, because of their devalued status as mothers, African-American women and other women of color are more likely to be given court-ordered cesarean sections. See generally Ehrenreich, *supra* note 17 (describing how "outsider" women are disproportionately subjected to court-ordered Cesarean sections).

145. See *supra* part III.

late the reproduction of poor, African-American women is inextricably intertwined with these concerns.

The image of the welfare mother is that of an irresponsible, lazy, and sexually promiscuous African-American woman with more children than she can possibly hope to support, "content to sit around and collect welfare, shunning work and passing on her bad values to her offspring."¹⁴⁶ The African-American welfare mother has no ambition to improve her lot, and because of her tendency toward sexual promiscuity, will continue to have children (often to increase her welfare benefits) who will constitute a further drain on the welfare system. In time, these children will grow up and either become pregnant or impregnate, furthering the chain of "generational" welfare dependency.

The African-American welfare mother is never seen as a good mother. She is considered to be deviant both because of her poverty, a condition eugenicists and some modern day theorists see as a personal failing,¹⁴⁷ and because of her lack of connection to men.¹⁴⁸ Moreover, she is expected to pass on these undesirable characteristics to her children. Feminist legal theorist Martha Fineman finds that poor, single mothers, except those who are single due to the death of their spouse or perhaps divorce, are assumed to be bad mothers.¹⁴⁹ "[I]n addition to providing a basis to determine who is undeserving in our culture, the rhetoric constructs single motherhood as dangerous and even deadly, not only to the single mothers and their children, but to society as a whole."¹⁵⁰ Thus, the welfare mother is perceived as posing a threat to society both through her status as a deviant woman and as a mother. This has not always been the case. Providing public aid to single mothers has always been a concern. When the concept was first introduced, professional social workers feared that so-called "mothers' pensions" would weaken the traditional family by encouraging, rather than discouraging single

146. COLLINS, *supra* note 87, at 77.

147. See HANDLER & HASENFELD, *supra* note 59, at 9-11 (describing the theories of Charles Murray and other moralists who link poverty to faults in the individual rather than to faults in the social system).

148. See Ehrenreich, *supra* note 17, at 512.

149. Fineman, *supra* note 57, at 285-86. Lisa Ikemoto points out that one example of how women of color are perceived to be less than ideal mothers is the misconception that more women of color than white women obtain abortions when, in fact, the opposite is true. Ikemoto, *supra* note 22, at 513 n.64 (citing *Ethnic Pilfering in American Society*, S.F. CHRON., June 11, 1986, at 48).

150. Fineman, *supra* note 56, at 285-86.

motherhood.¹⁵¹ Many others felt, however, that it would be socially beneficial to allow poor but virtuous mothers to remain home and care for their children.¹⁵² "There was sympathy for the widow, for her impaired ability to be a good mother, which threatened the well-being of the child."¹⁵³ "Poor but virtuous" did not necessarily include divorced mothers, mothers who had never been married, or women of color. Although some programs, at least on paper, proposed public aid for these women,¹⁵⁴ by and large, the programs, as administered, were for white widows.¹⁵⁵

Thus, public aid for white widows was believed to benefit the social order. It was not until the welfare program began to change that welfare mothers came to be viewed as a threat to society. Between 1940 and 1975, the welfare rolls increased from slightly over 1 million to 11 million.¹⁵⁶ The expenditures also rose from \$550 million in 1950 to \$9.2 billion in 1975.¹⁵⁷ In addition, program participants changed from mostly white widows to include divorced, never married, and nonwhite recipients.¹⁵⁸

As a result of these changes, welfare reform became federal government policy, and state and local administrators lost their ability to use discretion¹⁵⁹ to exclude those mothers they considered to be unworthy.¹⁶⁰ "[T]he formerly excluded now entered the program, which became more clearly dominated by the undeserving poor — primarily the single African-American mother and her children."¹⁶¹ As the AFDC recipients began to change,

151. HANDLER & HASENFELD, *supra* note 59, at 66.

152. *Id.* at 66-67.

153. *Id.* at 65.

154. *Id.* at 68 ("[S]ubstantial numbers of states did potentially cover children of divorced and deserted mothers; in almost a third of the states, unwed mothers were also included Of course, statutory coverage was only potential.").

155. *Id.* at 70 ("[N]ationwide, widows constituted 82% of the program. In a 1931 survey, 96% of the families were white, 3% African-American, and 1% other.").

156. *Id.* at 113.

157. *Id.*

158. *Id.* ("By 1975, 40% of AFDC parents were white, 44% African-American, and 12% Hispanic.").

159. During the early part of this century, "[i]t was up to the line officials (judges as well as county agencies) to make the day-to-day distinctions, to separate the worthy mothers from the unworthy." *Id.* at 70.

160. For a more complete discussion of historical changes in welfare and welfare policy, see HANDLER & HASENFELD, *supra* note 59.

161. See *id.* at 123. Handler and Hasenfeld define the "undeserving poor" as those people who society views as being poor as a result of individual fault rather than through circumstances beyond their control, such as physical disability. *Id.* at 15-43.

the program was restructured to respond to the new, deviant clientele. "When African-American divorced, separated, and never-married women began to enter the program, deviant behavior social controls began to be enforced — 'man-in-the-house' rules, 'fit and proper homes,' and so forth."¹⁶² The designation of African-American women as deviant and as bad mothers, from as early as the slavery period, caused welfare mothers to be seen as a threat to the social order. Therefore, concern over welfare was really apprehension about deviant, African-American welfare mothers and the threat they posed to society.¹⁶³ This fear was closely intertwined with the growing concern over the Black underclass.

Through their roles as mothers, poor, African-American women are perceived as contributing to America's social problems by their inability to pass on the proper values to their children. African-Americans are among the nation's most visible poor. They dominate the news whenever crime, drugs, and other social ills are discussed. Increasingly, the crime and violence of the inner cities is perceived to threaten middle- and upper-class Americans. In particular, the social unrest in Los Angeles in April of 1992 aroused fears that the discontent and anger of the urban poor would be directed at dominant society. Poor, African-American women have been explicitly blamed for these problems by theorists like Daniel Moynihan in *The Negro Family: The Case for National Action*,¹⁶⁴ and implicitly blamed by Bill Moyers in his television documentary, *The Vanishing Family: Crisis in Black America*.¹⁶⁵

Attempts to regulate the reproduction of poor African-American women are simply manifestations of the apprehension dominant society feels towards African-American welfare mothers, the Black underclass, and the threat they pose to society. African-American women are still seen as deviant and as

162. *Id.* at 25.

163. Concern over welfare may seem to be motivated primarily by the financial burden welfare imposes on the state. However, AFDC, what most people mean when they refer to welfare, constitutes only about 1% of the federal budget. Marlene Cimons, *Myths Blur the Realities of Welfare*, L.A. TIMES, Jan. 29, 1995, at A1, A18. Therefore, the focus on welfare cannot be contributed solely to financial concerns.

164. See U.S. DEPT. OF LABOR, *supra* note 141. In his report, Moynihan invokes the familiar image of the Black matriarch.

165. Bill Moyers, *The Vanishing Family: Crisis in Black America*, (CBS television broadcast, Jan. 25, 1986).

undeserving of motherhood. In this sense, Norplant proposals aimed at poor, African-American women bear striking similarities to the attempts of slaveowners, Progressive Era reformers, and Twentieth Century eugenicists to control the reproduction of African-American women as a means of social control.

A. *Norplant "Bonus" Programs*

Due to dominant society's concern over the African-American welfare mother and the growing Black underclass, various welfare reforms have been proposed.¹⁶⁶ These proposals have included methods intended to "induce" welfare recipients to work (which assumes, of course, that they need inducements, rather than real opportunities to work) and efforts to increase enforcement of child support orders.¹⁶⁷ Proposals for welfare reform have also included various attempts to regulate welfare recipients' sexuality and reproduction, including man-in-the-house rules, under which welfare mothers could lose benefits for cohabitating,¹⁶⁸ and family cap rules, which penalize women on AFDC for having additional children by decreasing monthly benefits or refusing to support additional children.¹⁶⁹ In light of this, the proposed Norplant "bonus" programs should be seen simply as another manifestation of welfare reform rather than as some magnanimous effort on the part of the State to enhance Black women's reproductive options.

Like the reformers of the Progressive Era, the eugenicists of the early Twentieth Century, and those in support of coerced sterilization of women of color during the 1970s, the individuals behind the Norplant "bonus" programs see the regulation of poor, African-American women's reproductive freedom as a solution to social problems, primarily the "welfare mess." The "welfare mess" consists of African-American welfare mothers, generational welfare dependency, and the violent, mostly Black inner city.

166. As discussed above, although welfare reform may appear to be neutral, i.e., not directed at any particular race, because of the widely held perception that the majority of those on welfare are African-Americans, welfare reform is, in fact, directed at African-American women. "Ask the average American who is not on welfare to describe the average American who is, and the response will likely be more wrong than it is right: a black unmarried teen-ager in the inner city who has lots of children and no desire to get a job." Cimons, *supra* note 163, at A1, A18.

167. See HANDLER & HASENFELD, *supra* note 59, at 201-41.

168. *Id.* at 25.

169. *Id.* at 201-41.

On December 12, 1990, two days after the FDA approved the use of Norplant, the *Philadelphia Inquirer* published an editorial entitled *Poverty and Norplant: Can Contraception Reduce the Under Class?* In the editorial, Donald Kimmelman proposed using Norplant to break the “cycle of inner city poverty — one of America’s greatest challenges.”¹⁷⁰ Although Kimmelman mentions in a parenthetical that more whites than Blacks live in poverty, he focuses almost exclusively on the use of Norplant to reduce the number of African-American children born into poverty. “The main reason more black children are living in poverty is that the people having the most children are the ones least capable of supporting them.¹⁷¹ . . . All right, the subject makes us uncomfortable, too. But we’re made even more uncomfortable by the impoverishment of black America and its effect on the nation’s future.”¹⁷² Clearly, Kimmelman, like other Americans,¹⁷³ sees African-American welfare mothers as a threat to the social order. Once again, the image of the welfare mother rears its ugly head. In spite of the fact that more whites than Blacks live in poverty and that African-Americans do not make up the majority of people on AFDC,¹⁷⁴ poor, Black women, rather than poor women in general, are the focus of Kimmelman’s concern. Kimmelman is concerned with the procreation of African-Americans living in poverty because this community, as opposed to poor whites, is perceived to pose a threat to the rest of society in the form of violence and crime.

Across the country, legislatures also see the “induced” use of Norplant as a solution to the “welfare mess.” All fifty states have included the contraceptive in their Medicaid programs to some degree. All states and the District of Columbia now reimburse poor women for the cost of Norplant, and some states have proposed offering cash incentives for the use of Norplant.¹⁷⁵ The Governor of Maryland has even suggested that Norplant should

170. Kimmelman, *supra* note 7.

171. I don’t believe that it has been substantiated that Black women living in poverty have more children than other women. However, even if they do, it does not follow that they should lose their right to procreate because of this fact.

172. See Kimmelman, *supra* note 6.

173. When I say “Americans,” I don’t mean just white Americans. Americans of all races, including Blacks, see the African-American welfare mother as a social problem.

174. In spite of popular belief, “[t]he typical welfare recipient is white, has fewer than two children, and often lives in a rural ‘mixed’ income neighborhood—not a ghetto. . . .” Cimonis, *supra* note 163, at A1, A18.

175. See Roberts, *supra* note 19, at 20.

be mandatory for women on welfare.¹⁷⁶ Under a plan proposed in Kansas, AFDC recipients would receive a free Norplant implant along with a \$500 cash grant.¹⁷⁷ Recipients would also be entitled to a \$50 grant for every year they kept the implant.¹⁷⁸

A Louisiana plan, proposed by David Duke, would offer \$100 to women on AFDC who choose to use Norplant. David Duke, a former Grand Wizard of the Ku Klux Klan, is also a supporter of eugenics. "In 1985, Mr. Duke said the 'real answer to the world's problems' was 'promoting the best strains, the best individuals' — ideas he defined as Nazism."¹⁷⁹ Duke's approval of the Louisiana Norplant program adds further support to the argument that Norplant is being offered to welfare mothers not to increase their family planning options, but to decrease their reproductive freedom based on their status as deviant women. Duke believes that by controlling the reproduction of individuals with undesirable characteristics, social problems will be solved. Presumably, considering Duke's ties to the Ku Klux Klan, these individuals include African-Americans and other people of color.

Although Duke's views on social engineering may be extreme, it is arguably simply a question of degree. The notion that social problems can be affected by regulating the reproduction of those believed to cause society's social problems is not that far removed from the belief that the world's problems can be solved by ensuring reproduction of only the "best" characteristics.

Kimmelman states that while the use of Norplant should not be compelled, women could be given an incentive to use it. As Dr. Segal, the developer of Norplant, recognizes, however, "the line between incentive and coercion gets very fuzzy. . . . [W]hen you single out a welfare mother, wave a \$500 bill in front of her face and say that the government is going to induce you not to have children, you've gotten into a risky area."¹⁸⁰ All women, including poor women, should have access to affordable and effective birth control. Offering Norplant bonuses to women who can barely support their families on existing welfare grants, however, is a questionable activity. For women desperate to feed,

176. Ginzberg, *supra* note 5, at 982.

177. See Coale, *supra* note 8, at 195. Representative Kerry Patrick, who introduced the plan, also introduced a plan which would allow courts to require women convicted of cocaine or heroin possession to use Norplant for a year. *Id.*

178. Kan. H.B. 2089 § 1(a), 74th Leg., 2d Sess. (1991).

179. Craig Flournoy, *Duke Says He's Proud of Years as Klan Chief*, DALLAS MORNING NEWS, Jan. 17, 1992, at A1, A16.

180. Goodman, *supra* note 13.

clothe, and house themselves and their children, the temptation to trade their fertility for extra cash may be overwhelming, whether or not they intend to have more children or engage in further sexual activity. As Dr. Segal has pointed out, the distinction between incentive and coercion is often dubious. Ellen Goodman writes, "A profound gap exists between the promise of birth control and the threat of woman control. It's more than a \$500 difference."¹⁸¹

I commend offering Norplant to women who would be unable to attain it otherwise, but why the unjustified focus on African-American women on AFDC? "Across Appalachia, throughout the Midwest's stricken farm belt, in declining textile regions and heaven knows where else, there are poor women who would welcome the opportunity to use Norplant. Assuring they can get it ought to be the real issue."¹⁸² Proposals to make Norplant, a rather expensive contraceptive device,¹⁸³ available to all women have not emerged. This is because legislatures and social commentators, despite claims to the contrary, are not concerned with expanding women's reproductive freedom. Rather, they are determined to restrict the reproductive liberty of certain women.

Because of the fear of generational welfare dependency and the fear that the crime and violence of the inner city will destroy the rest of America, poor, African-American women, as opposed to poor, white women in the Appalachians, are seen as less deserving of motherhood. Dominant society is not concerned with the reproduction of poor, white women in the Midwest because, unlike poor African-American women in the inner city, they appear to pose little threat to the social order. The frightening images of poor, African-Americans, prone to violence and criminality, simply do not exist for poor whites.

B. *Norplant as a Condition of Probation*

In addition to proposals that offer incentives for women on public aid to use Norplant, there has also been a move to use Norplant as a punishment for women convicted of child abuse and drug abuse during pregnancy. For example, the Ohio legislature introduced a bill which would amend the definition of "child

181. *Id.*

182. Cynthia Tucker, *The Real Issue in Norplant Controversy is One of Access*, ATLANTA J. & CONST., Jan. 5, 1991, at A15.

183. The price of Norplant ranges from \$200 to \$500. *Id.*

neglect" to include drug use during pregnancy and which would require women twice convicted of this crime to use Norplant.¹⁸⁴

One cannot deny the importance of protecting children from child abuse.¹⁸⁵ Neither can one disavow the seriousness of drug abuse during pregnancy.¹⁸⁶ The sudden concern over the welfare of African-American children,¹⁸⁷ however, is curious if not dubious. "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 as suspect."¹⁸⁸ In addition, the focus of prosecutors on the use of drugs during pregnancy, to the virtual exclusion of other prenatal dangers, further places dominant society's concern for African-American children in doubt. In spite of the many other dangers women face during pregnancy, legislatures have focused on the use of drugs. "The wealth of evidence regarding maternal and child health conditions in the United States has been ignored in favor of a bizarre and inappropriate obsession with drug use by pregnant women."¹⁸⁹ There has been little if any attention given to the life conditions of poor women and women of color which endanger the lives of unborn children. Aside from environmental hazards women may encounter in the workplace, poor women also experience "limited access to prenatal care due to financial, practical, or cultural barriers, unavailability of decent food because the funds for programs such as the Women, Infants, and Children Food Supplement Program (WIC) have been severely reduced, and lack of adequate shelter and a

184. See Roberts, *supra* note 1, at 59.

185. A study by the United States Department of Health and Human Services demonstrates that 1100 children died from abuse in 1986. See U.S. DEP'T OF HEALTH & HUMAN SERVS., STUDY OF NATIONAL INCIDENCE AND PREVALENCE OF CHILD ABUSE AND NEGLECT: 1988, at 3-10 (1988). Others estimate that nearly 2000 children are fatally abused each year. See *Child Abuse: What We Know About Prevention Strategies: Hearing Before the House Select Comm. on Children, Youth and Families*, 98th Cong., 2d Sess. 10 (1984) (statement of Anne Cohn, D.P.H. Executive Director, Chicago, IL National Committee for Prevention of Child Abuse).

186. "The statistics most frequently cited are that 375,000 newborns per year, 11% of all births, are exposed to cocaine, marijuana, or heroin *in utero*." Michelle Oberman, *Sex, Drugs, Pregnancy, and the Law: Rethinking the Problems of Pregnant Women Who Use Drugs*, 43 HASTINGS L.J. 505, 507 (1992).

187. Drug use during pregnancy is perceived to affect mostly African-American infants because African-American women are perceived to abuse drugs more often than other women.

188. Roberts, *supra* note 21, at 1446.

189. Oberman, *supra* note 186, at 506-07.

stable environment.”¹⁹⁰ If dominant society is so concerned about the welfare of African-American children, why has so little effort been made to address the conditions which continue to endanger their existence?¹⁹¹

Professor Dorothy Roberts, among others,¹⁹² believes the focus on crack cocaine use during pregnancy indicates a bias against African-American women and the devaluation of these women as mothers.¹⁹³ Crack cocaine is a popular drug among many inner city women.¹⁹⁴ Although it is true that crack use may expose unborn children to serious health problems,¹⁹⁵ it is also true that other more readily available and more commonly used drugs, such as tobacco, alcohol, aspirin, and prescription drugs, may prove just as harmful to the fetus.¹⁹⁶ Studies also show that while Black women test positively for cocaine more frequently than white women, the opposite is true for marijuana.¹⁹⁷ Yet the use of these drugs during pregnancy is rarely, to my knowledge, prosecuted, nor is a great deal of attention paid to their use during pregnancy.¹⁹⁸ “The same proliferation of prosecutions against affluent, white women who abuse alcohol or prescription medication would be unthinkable.”¹⁹⁹

190. *Id.* at 507 n.6.

191. It is interesting to note that society is very concerned about the welfare of African-American children when they pose a threat to middle- and upper-class society, but shows very little interest in their welfare when the danger is contained. When upper-class reformers in the Nineteenth Century began to form organizations like the Massachusetts Society for the Prevention of Cruelty to Children, they were more concerned with the threat children in poverty would pose to middle- and upper-class society than with the children themselves. See HANDLER & HASENFELD, *supra* note 59, at 58–61.

192. See, e.g., Oberman, *supra* note 186.

193. See Roberts, *supra* note 21, at 1434–36.

194. *Id.* at 1428.

195. Cocaine abuse during pregnancy can cause strokes, spontaneous abortion, and abruptio placentae (which necessitates a cesarian section). Newborns exposed to cocaine have lower birth rates, smaller head circumferences, a higher incidence of physical abnormalities, including deformed kidneys and neural tube defects, as well as behavioral problems such as mood dysfunction, organizational defects, and poor attention. Board of Trustees, A.M.A., *Legal Interventions During Pregnancy*, 264 JAMA 2663, 2666 (1990).

196. See Oberman, *supra* note 186, at 507 nn.6–7.

197. See Ira J. Chasnoff, M.D. 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, 1204 (1990).

198. Recently, television commercials have begun to caution women about the use of alcohol and cigarettes during pregnancy. Criticism from a television commercial, however, is a far cry from criminal prosecution.

199. Roberts, *supra* note 107, at 1958.

Moreover, studies have shown that African-American women are more likely to be reported for drug use during pregnancy than their white counterparts. In spite of the fact that white women are more likely to abuse drugs than Black women, Black women are ten times more likely to be tested and reported for drug use than white women.²⁰⁰

The focus on drug use during pregnancy by African-American women, to the exclusion of others, demonstrates that unlike white women, African-American women are presumed bad mothers. Professor Nancy Ehrenreich recounts the reaction she received from students in her seminar on law, medicine, and reproduction to the information that whites are just as likely to use drugs as people of color. "During one class's discussion of prenatal substance abuse, it was extremely difficult for me to convince the students that whites use illegal drugs as often as people of color do. Although I referred them to specific data regarding comparative drug use . . . , it was still very difficult to get them to seriously consider the possibility that the disproportionate prosecution of women of color for prenatal drug use did not stem from those women's disproportionate engaging in such behavior."²⁰¹ Thus, because it is assumed that African-American mothers are more likely to abuse drugs during pregnancy, they are more likely to be reported and prosecuted for prenatal drug use.

One study of the prosecution and sentencing of women for perinatal abuse further supports this point.²⁰² Young, white, upper-class women, rather than being perceived as inherently bad mothers, were seen as "good girls gone bad."²⁰³ They were seen as having made a terrible mistake from which they had learned a valuable lesson. They usually received mild criminal sanctions like probation.²⁰⁴ Older white women, low-income women, and all women of color, on the other hand, were perceived much more negatively and received much stiffer sentences.²⁰⁵ They

200. See Dan Holly, *Study: Race Affects Drug-Abuse Testing*, MIAMI HERALD, Sept. 19, 1989, at 2B; Chasnoff et al., *supra* note 197, at 1202.

201. Ehrenreich, *supra* note 17, at 513 n.66.

202. The cases in the study involved women who had given birth alone, outside of the hospital. The babies were either stillborn or died very shortly after birth. The mother disposed of the baby after death, usually in a trash can. Once the baby was found, the mother was charged with murder or some other crime. Anna L. Tsing, *Monster Stories: Women Charged with Perinatal Endangerment*, in UNCERTAIN TERMS 282 (Faye Ginsburg & Anna L. Tsing eds., 1990).

203. Ehrenreich, *supra* note 17, at 518.

204. Tsing, *supra* note 202, at 289, 291.

205. *Id.*

were depicted as willfully refusing to give birth in a hospital the way a proper mother would have. "[T]heir acts were perceived as consistent with their general character, rather than as lapses of judgment. They were seen as deviants who could not be changed but only controlled, and their sentences were shockingly severe."²⁰⁶ Thus, deviant women are perceived as bad mothers, and as a result, undeserving of motherhood. These unwarranted negative images justify the regulation of deviant women's reproductive freedom.

As a result of unequal reporting and unequal emphasis on drugs used primarily by poor African-American women, African-American women are more likely to show up in America's court rooms on charges of drug use during pregnancy. In addition, policies aimed at reducing the number of abused children and the number of women who use drugs during pregnancy will disproportionately affect African-American women. "Because the government is more involved in [the lives of Black women], through their use of public facilities and bureaucracies, they are more susceptible to government monitoring and supervision."²⁰⁷ It is here that the abuse of Norplant as a means of punishment can take place. In the past, judges have imposed contraception as a means of punishing women.²⁰⁸ One month after Norplant was approved by the FDA, a judge in California attempted to require Norplant as part of an African-American woman's probation for child abuse.²⁰⁹ Moreover, some judges have attempted to impose contraception on women even when their crime was unrelated to children or child bearing.²¹⁰ "Norplant presents a special temptation to judges because it's so long lasting and doesn't require any cooperation after it's implanted, and can be monitored by a parole officer just by looking at the woman's arm."²¹¹ No appellate court has ever upheld contraception as a condition for probation,²¹² but it is unclear how many women have submitted to sterilization or other forms of court-ordered contraception

206. Ehrenreich, *supra* note 17, at 518. One white woman on welfare was sentenced to twenty years in prison after she gave birth to a stillborn baby in a toilet, in spite of the fact that she was unaware of her pregnancy, and her boyfriend called "911" as soon as they realized she was in labor. Tsing, *supra* note 202, at 295.

207. Roberts, *supra* note 1, at 61.

208. See Roberts, *supra* note 1, at 59.

209. See Ginzberg, *supra* note 5, at 980.

210. For example, one woman convicted of stealing received Norplant as a condition of probation. Roberts, *supra* note 1, at 59.

211. Lewin, *supra* note 53.

212. See Ginzberg, *supra* note 5, at 981.

without appealing the decision. "This kind of thing happens a lot in lower courts and never gets challenged because the defendant's happy not to be in jail."²¹³ Requiring women to trade their freedom for their fertility in this way sets a dangerous precedent and renders the potential abuses invisible.

Paternalism on the part of judges who see themselves in the role of social crusaders also exposes African-American women to Norplant abuse. In the same way that doctors have been known to use their power to solve what they perceive as a social problem,²¹⁴ judges may be tempted to use Norplant as a means of implementing their own social policy. Judges may see themselves as the social reformers of the Twentieth Century with an obligation to enforce and preserve the social order. For example, Judge Howard Broadman, the Visalia, California judge who attempted to require Darlene Johnson, an African-American woman, to use Norplant as a condition of her probation, is perceived by some who work with him to be a well-intentioned but misguided social engineer. "Broadman is criticized for being naive and arrogant enough to think he can make the world better just by acting on his paternalistic impulses. 'Howard really wants to be a social worker, but he's not, he's a judge,' said a Visalia attorney And even if some of Broadman's orders are in defendants' best interests, said William Muetting, a Tulare County deputy public defender, 'Howard's not their mother. These people should make these decisions on their own.'"²¹⁵

As much as judges and lawyers would like to pretend that justice is blind, judges are affected by the same fears and concerns as the rest of society. Judges too may perceive poor African-American women as improper mothers and feel compelled to restrict their reproductive liberty. Although Broadman denies that the *Johnson* decision involved any social or economic considerations,²¹⁶ in a case similar to *Johnson*, he stated, "I want to make [sic] to make it clear that one of the reasons I am making this order is you've got five children. You're thirty years old. None of your children are in your custody or control. Two of them on AFDC. And I'm afraid that if you get pregnant we're

213. Lewin, *supra* note 52.

214. See *supra* notes 138-39 and accompanying text.

215. Bill Ainsworth, *Tulare's Target of Controversy: Judge Howard Broadman's Creative Sentences Have Won Both Plaudits and Condemnation; One Almost Earned Him a Bullet in the Head*, RECORDER, Mar. 28, 1991, at 1.

216. See *60 Minutes: Norplant* (CBS television broadcast, Nov. 10, 1991).

going to get a cocaine or heroin addicted baby.”²¹⁷ Thus, negative images that have followed the African-American women all through time motivated Broadman’s decision requiring this defendant to use contraceptives as a condition of probation: she had an excessive number of children, her improper care of those children had caused them to be taken from her, two of the children were public charges, and she was expected to use drugs during pregnancy.

The combination of paternalism with the devaluation of African-American women as mothers can be disastrous for poor, Black women. Rather than attempting to address the conditions of pregnant addicts’ lives which cause them to abuse drugs during pregnancy, or which cause them to become pregnant in the first place,²¹⁸ the legislature and the judiciary have chosen to penalize these women for becoming pregnant. Drug abuse during pregnancy is a serious problem which must be addressed. However, other conditions affecting the health of unborn children should also be addressed. As long as African-American women are disproportionately and unjustifiably subjected to Norplant use as a condition of probation, legislatures, judges, and prosecutors should remain suspect.

C. *Norplant in High Schools*

Access to birth control for young women is a good thing. In light of the realities of teenage sex, affordable and reliable contraception is just as important to them as it is to grown women. Proposals to introduce Norplant to high schools girls, however, raise more than questions of access.

As with other Norplant proposals, supporters have targeted African-American women. The Laurence G. Paquin High School, a predominantly Black school for pregnant girls or girls who have already had babies in Baltimore, Maryland, was the first school to offer Norplant to teens. Paquin High School’s principal, Dr. Rosetta Stith, claims that Norplant is not being targeted for anyone, and that her student body is ethnically di-

217. *People v. Zaring*, 10 Cal. Rptr. 2d 263, 267 (1992). The appellate court reviewing the decision in *Zaring* criticized “the apparent imposition of personal social values in the sentencing decision.” *Id.* at 270.

218. Many female addicts exchange drugs for sex. Roberts, *supra* note 21, at 1428 n.32. In addition, very little consideration is given to the ability of female addicts to resist sexual advances.

verse.²¹⁹ However, all but five of the three hundred girls attending Paquin High School are Black.²²⁰ In addition, according to a report by Esther Oxford, contraceptive counselling at Paquin High School encourages girls to choose Norplant over other contraceptives. "For form's sake, the Pill and the condom will be touched upon. But then the real counselling will begin. By the end of it, the principal confidently predicts, most girls will have agreed to have Norplant."²²¹

That Baltimore, Maryland is the first city to begin the use of Norplant in high schools further supports the notion that African-American teenage girls are being targeted for Norplant. Baltimore has had an increasing problem with teen pregnancy: in 1991, one in ten girls ages 15-17 had babies, three times the national average.²²² Moreover, eighty-nine percent of the city's schoolchildren are Black.²²³ In spite of the fact that the rate of white teen pregnancy in the U.S. is higher than that for teens in France, Sweden, England, Canada, Wales, and the Netherlands,²²⁴ proposals to offer teens nationwide access to Norplant have not been forthcoming.

By and large, proposals to provide young women with access to Norplant have been based, not on a desire to grant teenage girls greater reproductive freedom, but on goals to decrease the burden on the welfare state and to control the social order. Young, African-American girls who become pregnant are expected to go on welfare and continue generational welfare dependency. According to the Congressional Budget Office, fifty percent of unmarried teenage mothers are on welfare within a year of giving birth, and more than seventy-five percent are on welfare within five years.²²⁵ Those concerned with the rise of welfare dependency often point to the fact that teenage mothers

219. *Sonya Live: Birth Control in Schools* (CNN television broadcast, Feb. 11, 1993).

220. Esther Oxford, *What They Learn at Laurence Paquin School*, INDEPENDENT, Oct. 28, 1993, at 25.

221. *Id.* Norplant may be preferable to other forms of contraception because, unlike the pill, teens cannot forget to take it.

222. *Id.*

223. *Id.*

224. Tucker, *supra* note 182, at A15.

225. Donna St. George, *Pregnant Teens Get Norplant, Advice at Boston School*, TIMES-PICAYUNE, Jan. 27, 1994, at A2. However, according to a study conducted by Mike Males of Occidental College, most unmarried teen mothers are married within five years, most have jobs, and few receive welfare. Alexander Cockburn, *Clinton Blast at Teen Sex Missed Point*, STAR TRIB. (Minneapolis), Feb. 22, 1994, at 12A.

on welfare are the children of women who went on AFDC as teens.²²⁶ Thus, these proposals are based on the desire to prevent more welfare dependency and the social problems welfare is believed to create.

When Americans discuss the teenage pregnancy crisis, they are discussing the supposedly skyrocketing pregnancy rate among young African-Americans.²²⁷ African-American girls may be viewed as deviant just as easily as African-American women.²²⁸ In addition, Black teenagers pose as much of a threat to the social order as do Black women. These girls are expected to have babies, go on welfare, continue generational welfare dependency, and perpetuate the "welfare mess." Thus, suggestions to offer Norplant to African-American teens are motivated by the same desire for social order that has motivated the regulation of African-Americans' reproductive liberty for ages.

The use of Norplant by adolescent and teenage girls, rather than other contraceptives, raises other concerns as well. None of the approximately 170 Norplant studies on adults are applicable to teens.²²⁹ Therefore, it is unclear what long term effects, if any, Norplant will have on girls who are still developing. Christine Hohman, a biomedical researcher at Johns Hopkins University, also expresses other concerns about the use of Norplant for teenagers. "Irregular bleeding [the most common side effect of Norplant] is the most worrisome if you are giving Norplant to a population that doesn't regularly see a physician. . . . It can mask things from ectopic pregnancies to ovarian cancer."²³⁰

The prospect of Norplant use by teenagers requires more consideration. Lisa Ikemoto talks about the "practice of defaulting to science" in which the question of whether or not certain

226. For instance, in *The Vanishing Family: Crisis in Black America*, Bill Moyers emphasized the point that the African-American teens featured in his documentary grew up on welfare and that their mothers, and their mothers' mothers also became pregnant as teens. Moyers, *supra* note 165.

227. "We should not be coy as to whom we're talking about — girls in the urban and mainly black underclass." Richard John Neuhaus, *The Wrong Way to Go: What is the Real Problem Among Our Nation's Teenagers? Will Norplant Solve It, or Make It Worse?*, NAT'L. REV., Feb. 1, 1993, at 53.

228. *Relf v. Weinberger*, 372 F. Supp. 1196 (D.D.C. 1974), clearly supports this point; see *supra* note 128. The fact that two African-American girls, only twelve and fourteen years old, were subjected first to contraceptive injections and then to forced sterilization shows that even at a young age African-American women can be viewed as sexually promiscuous.

229. *For High School Girls, Norplant Debate Hits Home*, N.Y. TIMES, Mar. 7, 1993, § 1, at 28.

230. *Id.*

technologies should be used is never addressed once they are introduced.²³¹ By assuming a particular technology should be used, physicians create a need for that technology.²³² In addition, Ikemoto addresses a practice she calls "default upon default."²³³ This is the process through which "[t]he derived technology or information is implemented by default, not by decision. Simultaneously, its necessity becomes lore, and it is assumed that more of the same is desirable, if not necessary."²³⁴ Through all of these processes, technologies are accepted so quickly that no assessment of the risks is performed nor are other alternatives explored.²³⁵

Women have been victims of this process countless times in the past.²³⁶ Yet, as each new technology is introduced, it is met with little or no suspicion. I believe that this can be explained by the tendency of Americans to view science as neutral and apolitical.²³⁷ People are likely to believe that scientists are dedicated individuals with no political agendas. However, scientists are susceptible to the effects of stereotypes and social fears.

Although teenage girls should have access to safe and affordable birth control, I am not convinced that proposals to offer Norplant to teenagers are aimed at achieving this end. Instead, these proposals are based on the same motives which have fueled the control of African-American women's reproduction: the fear of African-American women's deviance and the threat that the deviance poses to the social order. In addition, the questionable safety of Norplant use by teenagers makes these proposals even more problematic. Most importantly, the use of contraception as a quick fix for teenage pregnancy needs to be evaluated. Teenage girls may be motivated to engage in sexual activity by numerous factors, some of which have very little to do with a desire for sex.²³⁸ As long as young women engage in sexual intercourse, contraception is needed, both to prevent pregnancy and to pro-

231. Ikemoto, *supra* note 21, at 1286.

232. *Id.* at 1287.

233. *Id.* at 1290.

234. *Id.*

235. *Id.*

236. Take for instance breast implants, medication to prevent miscarriages, and IUDs.

237. Ikemoto, *supra* note 21, at 1289.

238. "At least two-thirds of pregnant teenagers . . . have childhood histories of violence and sexual abuse in their homes." Cockburn, *supra* note 225. In addition, many girls may feel pressure to have sex. One teen, explaining her reasons for wishing she was still a virgin, said, "Because then you don't get hassled by, 'Come sleep

tect them from sexually transmitted diseases.²³⁹ This does not mean, however, that there should not be some focus on why teenage girls engage in sex in the first place. It may very well be that what African-American girls, as well as other teens, need is a boost in self-esteem, rather than a new contraceptive.²⁴⁰

CONCLUSION

To me, having a baby inside me is the only time I'm really alive. I know I can make something, do something, no matter what color my skin is, and what names people call me. . . . The baby is a good sign, or at least he's *some* sign. If we didn't have that, what would be the difference from death?²⁴¹

The devaluation of motherhood is directly related to the control dominant society exercises over reproduction. Arguably, the patriarchy exercises some degree of control over the reproductive freedom of all women. Once society decides, however, that one group of women does not conform to the ideal of motherhood, that control becomes more overt and more oppressive. For once society devalues the motherhood of a particular group, members of that group become less and less deserving of motherhood, and restrictions on their right to procreate seem more and more appropriate.

For centuries, poor, African-American women have been subjected to this process. Due to their inability to conform to the middle- and upper-class standard of true motherhood, they have been labeled as deviants and bad mothers. As such, their reproductive liberty has been restricted time after time. It is not the fact that they are on AFDC, used drugs during pregnancy, or became pregnant too young that justifies curtailing their reproductive liberty. Rather, it is their previous devaluation as mothers which makes constraint of their reproductive freedom

with me,' or 'Go out with me so I can sleep with you,' or something like that." *Primetime Live: End of Innocence* (ABC television broadcast, Sept. 9, 1993).

239. One of the arguments against Norplant for teens is that Norplant does not prevent the spread of sexually transmitted diseases, like AIDS, and that teenagers using Norplant will stop using condoms.

240. "Young girls who don't get pregnant tend to 'have some belief they are going somewhere,' said one expert who requested anonymity. 'They have some hope for the future, and there are some realistic expectations for them not to do this or put it off for a few years. Find a way to give them this expectation and I think it would be the most powerful way to reduce adolescent pregnancy.'" Cmons, *supra* note 163.

241. GERDA LERNER, *BLACK WOMEN IN WHITE AMERICAN: A DOCUMENTARY HISTORY* 314 (1972) (quoting an anonymous Black woman).

an appropriate solution to the perceived problem, a solution which is often not suggested for other women.

African-American women deserve the right to be mothers. They also deserve the right not to be mothers if they so choose. They need adequate prenatal and perinatal care. They need to be free from the abusive use of contraception, court-ordered cesarean sections, and criminal prosecutions for drug use during pregnancy and perinatal abuse. Most of all, they need a women's movement and a legal community that is responsive to those needs to speak for them when they have no voice. They have been deprived of these rights, not because of what they did, but because of who they are.