WHY CARING COMMUNITIES MUST OPPOSE C.R.A.C.K./PROJECT PREVENTION: HOW C.R.A.C.K. PROMOTES DANGEROUS PROPAGANDA AND UNDERMINES THE HEALTH AND WELL BEING OF CHILDREN AND FAMILIES

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INTRODUCTION

Many people have lauded C.R.A.C.K. (Children Requiring a Caring Kommunity), also known as Project Prevention,[1] as a sensible and socially responsible program.[2] This program offers $200 for current

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1. At some point in its organizational development, the founders of C.R.A.C.K began referring to it as "Project Prevention." Because the organization continued to use the name "C.R.A.C.K." in public documents and statements at the time this article was written, this article will refer to the organization as C.R.A.C.K.

2. *See e.g.,* George Will, *A Furor Over Sparing Babies From Chemical Assault*, ORLANDO SENTINEL, Nov. 12, 1999, at A17 (noting that "[p]eople concerned about the right of addicted women to inflict their addictions on their babies ignore the baby's right not to have its life blighted by a chemical assault in the womb."); Kathleen Parker, *Crazy Idea Saves Babies of Crack Addicts*, ORLANDO SENTINEL, Jan. 6, 1999, at E1; Clarence Page, *Being Paid to Be Sterile Might Beat Alternatives,* SOUTH COAST TODAY, Aug. 16, 1999, at B4.

and former drug users to get sterilized or to use certain long-acting birth control methods. It was founded by Barbara Harris, a committed individual who believes sincerely in what she is doing.[3]

Many people, however, have also challenged this program as a violation of informed consent,[4] exploitive, coercive,[5] racist and a form of eugenic population control.[6] A few have addressed the question of

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3. E-mail from Barbara Harris to Lynn Paltrow (Sept. 5, 2003, 12:39:48 PM EST)("You don't even know me and if you did you'd realize that I am a very loving person!")(on file with author).

4. *See, e.g.,* Judith M. Scully, *Cracking Open C.R.A.C.K.: Unethical Sterilization Movement Gains Momentum,* DIFFERENT TAKES, Spring 2000, *at* http://hamp.hampshire.edu/~clpp/DTNo2.htm (last visited Apr. 23, 2004) ("In the C.R.A.C.K. sterilization program, women are improperly coerced by cash incentives during a time in their lives when they are addicted to drugs and therefore clearly vulnerable. Consent obtained through cash coercion does not constitute voluntary or informed consent. Consequently, C.R.A.C.K.'s program is not only unethical but may be illegal in so far as it has decimated the foundation for informed consent.").

5. Salim Muwakkil, *Cracked Logic,* IN THESE TIMES, Sept. 19, 1999, at 14 ("'Dangling $200 in front of addicted women seriously calls into question whether participation is voluntary,' says Steve Trombley, president of Chicago Planned Parenthood. 'Where is the consent?'"); *see also* Basu Rekha, *Paying Women Addicts to Be Sterilized is Wrong Approach*, DES MOINES REGISTER, Jul. 30, 1999, at 1T.

6. *See, e.g.,* Muwakkil, *supra* note 5, at 14 (stating that C.R.A.C.K. "also legitimizes the notion that children born to certain populations are potential social liabilities. It is that underlying logic that poses such a danger to vulnerable populations."); Committee on Women, Population, and the Environment, *Fact Sheet on the C.R.A.C.K. Organization* (listing "C.R.A.C.K.'s mission is essentially eugenic as one reason to oppose the mission of C.R.A.C.K."); National Black Women's Health Project, *Comments on Crack: Discrimination in Disguise,* Health Issues, *at* http://www.nationalblackwomenshealthproject.org/healthissues/fs-crack.htm (last visited Apr. 15, 2001); Women's Economic Agenda Project, *Lots of People Just Don't Get It, at* http://www.weap.org/crack_editorial.htm (last visited Apr. 23, 2004) (arguing that "C.R.A.C.K. is just the latest in a long line of efforts to marginalize and snuff out the lives of the poor" and "that C.R.A.C.K. could do lots of good with its money if instead of buying the souls of desperate women for a mere $200, it would instead support the current Just Health Care campaign, which promises universal health care for all people, including treatment on demand."). Interestingly, Concerned Women for America also seems to have published an article describing C.R.A.C.K. as a eugenics

whether the program creates a valid contract under standard contract law principles.[7] Still others have argued that at its core, this program invites people to sell their reproductive capacity, and that like the sale of organs, sex, and children, selling the ability to reproduce should be outlawed as a matter of public policy.[8]

While this article addresses many of these arguments, it focuses more broadly on the question of whether or not people concerned with the problems C.R.A.C.K. purports to address—including drug addiction, unwanted pregnancies, child welfare, and public health—should support it.[9] This article takes seriously what the C.R.A.C.K. program says and what it does, closely examining the data it relies on, the rhetoric it uses, and the influence it is having, and is likely to have in the future.[10]

This examination makes clear that, far from providing a useful response to problems associated with drug use and pregnancy, C.R.A.C.K. instead acts as a dangerous vector for medical misinformation and political propaganda that has significant implications for the rights of all Americans. Under the guise of openness, "voluntary" choice, and personal empowerment, C.R.A.C.K. not only promotes a

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program. *See* Tanya Green, *Sterilization Program Resists Eugenics Issue,* CONCERNED WOMEN FOR AMERICA, *at* http://www.cwfa.org/articledisplay.asp?id=3003&department=CWA&categoryid=life (last visited Apr. 23, 2004).

7. Juli Horka-Ruiz, *Preventing the Birth of Drug-Addicted Babies Through Contract: An Examination of the C.R.A.C.K. Organization,* 7 WM. & MARY J. WOMEN & L. 473 (2001); Jennifer Mott Johnson, *Reproductive Ability for Sale, Do I Hear $200?: Private Cash-for-Contraception Agreements As an Alternative to Maternal Substance Abuse*, 43 ARIZ. L. REV. 205 (2001).

8. Adam B. Wolf, *What Money Cannot Buy: A Legislative Response to C.R.A.C.K.,* 33 U. MICH. J.L. REFORM, 173 (1999-2000).

9. *See* Lynn Paltrow & Robert Newman, *Treatment, Not Sterilization, Is The Way To Help Addicted Moms*, *Viewpoints*, HOUS. CHRON., Jan. 30, 2000, at 4C, *available at* http://advocatesforpregnantwomen.org/articles/oped.htm (last visited Apr. 23, 2004).

10. Richard Wexler, *Family Preservation and Substance Abuse*, NATIONAL COALITION FOR CHILD PROTECTION REFORM, *at* http://www.nccpr.org (last visited Apr. 23, 2004).

vicious image of the "eternal drug addict,"[11] it has won significant support for a program and an ideology that is at the core of civil rights violations and eugenic population control efforts.[12]

As this article documents, much of what C.R.A.C.K. says about its clients is untrue or unsupported. Instead of research, legitimate data, and honest inquiries, C.R.A.C.K. too often presents anecdotes, false information and horrific images of bad women who not only do not deserve to have children, but also do not deserve any form of compassion or support. As Assata Zerai and Rae Banks argue, this kind of "dehumanizing discourse" has a significant influence on public policy responses.[13]

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11. I borrow this phrase from the Nazi propaganda film "The Eternal Jew." *See, e.g.,* Stig Hornshoj-Moller, *Der Ewige Jude*, *at* http://www.holocaust-history.org/der-ewige-jude/stills.shtml (last visited Apr. 23, 2004). The film and other propaganda devices sought to convince the German public that all Jews had certain characteristics that threatened the well-being of the society. Many of these stereotypes fed into long held beliefs, and despite the fact that many of the characterizations were in fact blatantly contradictory, public saturation of these damaging and negative images made it virtually impossible to counteract the impression created. *Id*. Similarly negative stereotypes of black Americans, perpetuated to justify slavery and segregation, continue to this day in such books as THE BELL CURVE: INTELLIGENCE AND CLASS STRUCTURE IN AMERICAN LIFE. The stereotype is similarly strong and difficult to challenge by science and experience. *See* ANGELA Y. DAVIS, WOMEN, RACE AND CLASS (1983). Like these images, the "eternal addict," the "druggie" who threatens our society, seems particularly resistant to challenge by science, research and experience. *See*, *e.g.,* the oral argument in Bd. of Ed. v. Earls, 536 U.S. 822 (2002), in which Justice Kennedy, with both disdain and an apparently strong stereotype of a drug user in mind, commented: "No parent would send their child to the 'druggie' school, except perhaps for your client." Mark Walsh, *Supreme Hears Case on Expanded Drug Testing*, EDUCATION WEEK, *at* http://www.edweek.org/ew/newstory.cfm?slug=28drug.h21 (Mar. 27, 2002).

12. *See* Rakos, *infra* note 105. As Professor Rakos succinctly noted: C.R.A.C.K.'s "[f]ocus and language mask the underlying causes of the problem and divert attention and resources to superficial interventions that are unlikely to meaningfully impact the problem but are very likely to promote and exaggerate negative stereotypes." *Id*. *See also infra* notes 99-114.

13. ASSATA ZERAI & RAE BANKS, DEHUMANIZING DISCOURSE, ANTI-DRUG LAW, AND POLICY IN AMERICA (2002).

Those who support C.R.A.C.K. are not simply helping to pay the two hundred dollar incentive, they are also contributing to an extensive outreach and ideologically based public education campaign.[14] C.R.A.C.K. maintains a website, has had a billboard campaign, distributes flyers by hand and mail,[15] and produces significant media coverage through well organized and well funded press conferences and press releases.[16] In 1999, C.R.A.C.K. was the "focus of thirty television interviews, four magazine articles and several newspaper articles."[17]

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14. *See, e.g.,* Stryker, *infra* note 18 (describing how Ms. Harris "took her plea to the media" and her numerous successful efforts in appearing on such programs as Oprah and becoming "a darling of talk radio hosts and newspaper pundits across the nation."). *See also infra* note 17.

15. Teri Sforza, *Cash Birth-Control Incentive Opposed Social Issues*, THE ORANGE COUNTY REGISTER, Oct. 21 1999, at B06 (reporting about their billboard campaign and that "C.R.A.C.K. will also do a mass mailing to households in the Oakland area.").

16. *See, e.g., C.R.A.C.K.'s Project Prevention Coming to Florida to Speak on Its Offer-GET BIRTH CONTROL, GET CASH!,* PR NEWSWIRE, Feb. 27, 2001; *Program Featured on 60 Minutes II, Brings Its Controversial Offer To Get Birth Control, Get Cash!*, PR NEWSWIRE, Mar. 28, 2001; *C.R.A.C.K.'s Project Prevention and Its Controversial Offer, GET BIRTH CONTROL, GET CASH, Garners Support From African-American Bishop in Fresno, CA*, PR NEWSWIRE, Apr. 24, 2001; *Organization Which Offers $200 to Men and Women Addicts to Use Permanent Or Long-Term Birth Control Opens South Bend Chapter!*, PR NEWSWIRE, July 25, 2001; *C.R.A.C.K. Gains African-American Supporter,* PR NEWSWIRE, May 22, 2002. Using the PR Newswire to publicize events is not inexpensive. In addition to an annual $100 membership fee, a national release of 400 words costs $610 and $150 for each additional 100 words. (There is a 10% discount for non-profits). Regional and local releases of 400 words range from $310 to $130. A national 400-word release with a photo is $2010.

17. *See* Scully, *supra* note 4. *See also 1998 Year in Review,* ORANGE COUNTY WEEKLY, *at* http://www.ocweekly.com/newsletter/popup.php (Jan.-Mar. 1998) ("An organization that pays crackhead women $200 to get their tubes tied moved out of its founder's Stanton home on March 20 and into a new office in Anaheim. 'I feel like it's a reality finally,' Barbara Harris, who founded Children Requiring a Caring Kommunity (C.R.A.C.K.) in 1994, told *The Orange County Register*. 'We're going to be a household name.' That's pretty much already the case, thanks to intense media coverage of her crusade to stem the tide of crack babies. When a Los Angeles woman approached her in October 1997 and accepted $200 in exchange for undergoing a tubal

Through these public events, C.R.A.C.K. promotes a vision of pregnant women with health problems as "child abusers," portrays healthy children as damaged, and fosters stereotypes, prejudice, and medical misinformation. As a result, C.R.A.C.K. undermines, rather than promotes, the welfare of children and caring communities. For these reasons, this article argues that those truly committed to the well-being of children and families must oppose the C.R.A.C.K. program.

The Program

In 1994, Barbara Harris founded C.R.A.C.K.. Ms. Harris identifies her motivation as coming from her very personal experiences as a foster and then adoptive mother of four children. According to Ms. Harris, all of these children came from the same drug-using biological mother, and they suffered significant damage as a result of that drug exposure. Out of Ms. Harris' frustration that one woman would be allowed to produce so many "damaged" children, she began to take political action.[18] Specifically, she tried to persuade the California State Legislature to pass a law that would punish women who gave birth to drug-exposed infants.[19]

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ligation, the local media pounced on the story, which was picked up by the wire services and led to Harris appearing on *Oprah*, *The Today Show* and *CBS Evening News*. People in six states have offered to open C.R.A.C.K. chapters (don't call 'em "houses") *Id. See also* Project Prevention, *Media Page* (last visited Apr. 23, 2004) (listing over seventy television appearances between September 1996 and April 2004, and stating "[h]owever, due to the large amount of media attention, the list does not include every television appearance or show." The website also lists more than forty radio appearances, the site cautions that "Project Prevention has been featured on countless radio shows over the years. This is just a small portion of those interviews."). *Id. See also 60 Minutes II*: *C.R.A.C.K. BABIES/Sterilization* (CBS television broadcast, Mar. 13, 2001) (Barbara Harris explaining with reference to C.R.A.C.K.: "The goal is to be a household name.").

18. Jeff Stryker, *Cracking down*, SALON, *at* http://www.salonmagazine.com/mwt/feature/1998/07/cov_10feature.html (July 10, 1998).

19. *Id.*

Today, C.R.A.C.K. has recast this part of its organizational history in more benign terms. The organization's history page on its website states that "Barbara Harris . . . tried to get legislation passed in California that would have made it mandatory that after giving birth to a drug-addicted baby the birth mother use long-term birth control."[20] Ms. Harris' own account, however, clarifies her attempts to seek the arrest and punishment of pregnant women and new mothers: "I started calling district attorneys' offices and police departments, asking whether there was anything I could do as a concerned citizen, perhaps make a citizens' arrest. I got nowhere. I was told there was nothing I could do."[21] At this point,

> Harris started a campaign to effect legal change. Harris attracted the attention of Assemblyman Phil Hawkins, who agreed to sponsor legislation making it a crime to give birth to a drug-addicted child in California. The Prenatal Neglect Act proposed creating the crime of prenatal child neglect. A person who "knowingly uses a specified controlled substance at a time when the person knows or reasonably should know that she is pregnant and the use of that controlled substance results in the child with whom the woman is pregnant being drug-exposed at birth" is guilty of prenatal child neglect. Depending upon whether the exposure to drugs resulted in serious physical harm to the child, the proposed crime would be punishable either as a misdemeanor or felony. The Prenatal Neglect Act was defeated on November 30, 1996.[22]

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20. Project Prevention, *Frequently Asked Questions*, Why Did Barbara Harris start this organization? *at* http://cashforbirthcontrol.com/program/faqs.html (last visited Apr. 23, 2004). An older version of the website stated "Mrs. Harris had first lobbied legislators to pass a bill that would make people accountable for their inhumane acts against their own newborns. But when the bill did not pass, she designed an alternative plan . . ." Project Prevention, *Frequently Asked Questions*, *at* http://www.cashforbirthcontrol.org (last visited Sept. 6, 2003).

21. Horka-Ruiz, *supra* note 7, at 473 (citing Interview with Barbara Harris, Founder, Children Requiring a Caring Kommunity, *The Two Hundred Dollar Solution: Sterilizing Crack Moms*, Cal. Healthline Features, at http://www.chf.org/features/archive/980504.html (May 4, 1998).

22. Horka-Ruiz, *supra* note 7, at 473-74 (citations omitted).

When this bill failed, Ms. Harris created a non-profit organization that offers $200 to current or former drug addicts or alcoholics who agree to be sterilized or to use selected long-acting contraceptive such as Norplant or Depo-Provera. In addition to the $200 cash incentive, C.R.A.C.K. has offered an extra $50 to individuals who refer other current or former drug users to the program.[23]

This program might be seen as a more humane alternative to criminal punishment, reflecting an evolution away from state-administered punishment to something more akin to voluntary family planning.[24] As will be discussed below, however, C.R.A.C.K. differs in significant ways from voluntary family planning programs that are based on principles of individual rights, personal empowerment, and bodily integrity. C.R.A.C.K.'s ideology, including the belief that drug use during pregnancy can be thought of as a form of "child abuse," in fact creates the foundation for punishing pregnant women in the manner sought by Ms. Harris through her original legislative proposal.

What is C.R.A.C.K.'s Mission?

C.R.A.C.K. states its goals in broad terms: "Our Mission is to reduce the number of drug and alcohol related pregnancies to zero."[25] C.R.A.C.K. also states that its program is open to both men and women and, despite using an acronym that highlights just one drug (crack, the

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23. C.R.A.C.K. Client Survey Form (on file with author).

24. As People Magazine asserted: "Harris turned her attention from punishment to prevention." Anne-Marie O'Neill & Kelly Carter, *Desperate Measure, Barbara Harris offers $200 to stop crack addicts from having more babies,* PEOPLE , Sept. 27, 1999, at 149. *See also* Project Prevention, *Objectives*, *at* http://cashforbirthcontrol.com/cause/objectives.html (last visited Oct. 1, 2002) ("Unlike incarceration, Project Prevention is extremely cost effective and does not punish the participants.").

25. Project Prevention, *Objectives*, *supra* note 24 (last visited Apr. 23, 2004). *See also* PRI Newswire Association Press Release, *Program Featured on 60 Minutes II, Brings Its Controversial Offer to Salt Lake City*, March 28, 2001 ("C.R.A.C.K.'s Project Prevention continues toward its goal of reducing substance exposed pregnancies to zero.").

smokeable form of cocaine),[26] C.R.A.C.K. claims the program applies to people who use all illegal drugs as well as alcohol. Taking C.R.A.C.K.'s mission seriously, how many Americans would need to be sterilized or put on long-acting birth control?

Of an estimated 19.5 million Americans, 8.3% of the population ages twelve and older, were current users of illicit drugs in 2002 (meaning that they used an illicit drug during the month prior to being interviewed).[27] The number of *heavy* drinkers (individuals who consumed five or more drinks on the same occasion on at least five different days in the past thirty days) was estimated at 15.9 million, or 6.7%.[28] Based on studies conducted in 1999 and 2000, it has been estimated that one in four children lived in a family where a parent drank too much,[29] and that more than 76 million Americans admitted to having tried marijuana.[30] Even excluding those people who are not of childbearing age (women younger than fifteen and older than forty-four[31] and men younger than age 13.4)[32] there are still millions of Americans who,

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26. *See* John P. Morgan & Lynn Zimmer, *The Social Pharmacology of Smokeable Cocaine: Not All It's Cracked Up to Be, in* CRACK IN AMERICA 131 (Craig Reinarman & Harry G. Levine eds., 1997).

27. Substance Abuse and Mental Health Services Administration, Department of Health & Human Services, Results from the 2002 National Survey on Drug Use and Health, p. 11 (2003).

28. *Id.* at 15.

29. *Id.*

30. Substance Abuse and Mental Health Services Administration, Department of Health & Human Services, *Summary of Findings From the 1999 National Household Survey on Drug Abuse*, p. G-4, Table G.4 (2000).

31. *See* http://www.samhsa.gov/ (last visited Oct. 2003) (contains the definition "fertility" for American women).

32. 13.4 years is the median age at which the production of sperm occurs. William Adelman, M.D. & Jonathan Ellen, M.D., *Adolescence, in* RULDOLPH'S FUNDAMENTALS OF PEDIATRICS 70, 72 (Abraham M. Rudolph, et al. eds., 3rd ed. 2002).

according to C.R.A.C.K., ought to be sterilized or using long-acting birth control.

In some contexts, however, C.R.A.C.K. appears to limit its focus to people who are actually addicted. For example, C.R.A.C.K. states "[i]f someone is a drug *addict* or *alcoholic* and could get pregnant, then we hope they will take our cash incentive offer and get on birth control until they get off drugs."[33] Nevertheless, C.R.A.C.K. also offers its services to people who are not addicted, but who "*use*" drugs or alcohol.[34] This distinction is important because it is well established that both alcohol and illicit drugs may be used in controlled ways that do not inevitably result in addiction or debilitation.[35] Moreover, not only do they recruit non-addicted users as well as addicts, C.R.A.C.K. specifically recruits both the "active and recovering addict."[36] As one of their flyers states, "[t]he offer is open to any man or woman of childbearing years who is, *or has been*, addicted to drugs and/or alcohol."[37] Indeed, one C.R.A.C.K. chapter specifically encourages advertising the program at Alcoholics Anonymous and Narcotics

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33. C.R.A.C.K. Flyer: "GET BIRTH CONTROL GET CA$H," Offering $200 for Sterilization (Tubal Ligation), IUD, Depo-Provera, and Norplant (on file with author).

34. A banner featured in a C.R.A.C.K. brochure states "If you *use* drugs or alcohol get Birth Control." PROJECT PREVENTION Glossy Brochure (on file with author) (emphasis added). C.R.A.C.K. seeks to prevent all pregnancies "related" to drugs or alcohol, making clear that the drug-using, as well as the drug *addicted,* man and woman would be eligible for the birth control methods as well. *Id.*

35. *See* NORMAN E. ZINBERG, M.D., DRUG, SET AND SETTING: THE BASIS FOR CONTROLLED INTOXICANT USE (1984) (demonstrating that illicit drugs may be used in controlled ways that do not inevitably result in addiction, depending on the context in which they are used); Edith Springer, *Taking Drug Users Seriously*, HARM REDUCTION PARTICIPANT'S WORKBOOK at 9 (depicting a range of drug use, including experimental, occasional, regular, heavy and chaotic/out of control).

36. Project Prevention, *at* http://www.cashforbirthcontrol.com (last visited Mar. 14, 2002) ("Project Prevention seeks to empower the active or *recovering* addict . . .") (emphasis added).

37. C.R.A.C.K. Flyer*, supra* note 33 (emphasis added).

Anonymous meetings, where people in recovery go for support and help.[38] So the offer of cash for sterilization or long-acting birth control would also apply to millions of people who are not even using drugs or alcohol, much less actively addicted to them.[39]

A key question then is whether C.R.A.C.K. and its supporters really mean that millions of employed, non-poor people, America's "typical

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38. A Seattle Project Prevention-Cash for Birth Control advisory called the "Do's and Don'ts of Pamphleteering" includes, under "Best Places," the advice to promote the C.R.A.C.K. program at "AA and NA Meeting Places." Ella Sonnenberg, Volunteer Coordinator, Seattle Chapter, *DO's and DON'Ts of PAMPHLETEERING, Project Prevention—Cash for Birth Control*.

39. Wyndi Anderson recounts her experience with the program in a public letter:

> Last year, while doing some research on the CRACK program, I made a phone call to the number listed on the website for the office in California. I asked some questions about their offer to pay for a tubal ligation for recovering and active drug addicts. It then occurred to me that I could ask if I were eligible for the money. At the time I was 30 years old and had been sober for 13 years (14 now). So, I asked the woman on the telephone if I would be eligible for the program even though I had been in recovery since I was 16 when I had been using alcohol. She said yes.
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> I was not expecting her to say yes and frankly I was really taken aback when she did. I immediately began to wonder if they thought I was still a threat to a child I might want to have? Would a program really pay me $200 to get a tubal ligation even though I was totally sober and a completely productive member of society? The answer she gave still rings in my ears. "Yes you are eligible," she said, explaining that they would pay for any addict's birth control/sterilization no matter how long they had been sober. She also made some comment about how responsible I was being given that addiction can run in the family and could be hereditary.
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> I hung up the phone and just cried. I felt angry and boxed in and insulted. My sobriety and contributions to the world didn't matter. According to the CRACK program representative with whom I spoke, I apparently carry within me generations of alcoholism and drug addiction that I would inevitably pass along to any child I might someday have, making me somehow forever unworthy of giving birth and parenting . . .

Letter from Wyndi Anderson to General Public, *at* http://www.advocatesforpregnantwomen.org/issues/WyndiCRACKltr2.htm (last visited Apr. 23, 2004).

drug user[s],"[40] need to be on permanent or long-acting birth control or require a $200 incentive to do so? If the C.R.A.C.K. program applied its mission consistently, we could expect many prominent Americans to be targeted by the program. For example, President Bush was arrested for drunk driving a year or two before fathering his first daughter, and attributes his interest in recovery to the fact that his ongoing drinking problem was interfering with his parenting abilities.[41] Nevertheless, neither C.R.A.C.K. nor its supporters suggest that his children were damaged, or that his capacity to reproduce could pose a threat to his children or society.[42]

Cindy McCain, the wife of Arizona Senator John McCain, "was the mother of four children at the time she admits to using [illegal] drugs; between 1989 and 1992. Her children were born in 1984, 1986, 1988 and 1991."[43] Mrs. McCain was not only using illegal drugs, she stole

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40. *Typical Drug User Not Poor, Jobless*, THE POST & COURIER, Sept. 9, 1991 (describing a Substance Abuse and Mental Health Service's Administration report finding that seven in ten people who used illegal drugs in 1997 had full-time jobs and quoting Barry McCaffrey, White House Drug Policy Director, "the typical drug user is not poor and unemployed").

41. Interview with George Bush, Governor of Texas with Steve Cooper, WMUR Correspondent for the *"First in the Nation" Special: George W. Bush*, *at* http://www.cnn. com/ALLPOLITICS/stories/1999/02/03/fin.transcripts/bush.html (Feb. 2, 1999). ("When[sic] I was drinking too much at times . . I was a Dad"); s*ee also* George W. Bush's Arrest Record Card, Kennebunkport Police Department, Operating Under the Influence, *at* http://www.thesmokinggun.com/archive/bushdui1 .html (last visited Apr. 23, 2004).

42. *See O'Reilly Factor* (Fox News Channel, June 4, 1999) (C.R.A.C.K. spokesperson explaining that recruiting people in recovery is appropriate because alcoholics and drug addicts are likely to relapse).

43. Stanton Peele, *McCain's Double Standard: Hawk In The Drug War, Yet His Wife Got No Penalty,* LOS ANGELES TIMES, *at* http://www.commondreams.org/views/021400-102.htm (Feb. 14, 2000); Amy Silverman, *How Cindy McCain Was Outed for Drug Addiction,* SALON, *at* http://www.salon.com/news/feature/1999/10/18/drugs/ (Oct. 18, 1999); Maia Szalavitz, *Mrs. McCain's Drug Problem How the Media Missed the Story*, *at* http://www.tompaine.com/feature2.cfm/ID/2639 (Jan. 20, 2000) ("While John McCain has supported some of the most stringent drug laws in American history,

them from a nonprofit medical relief organization that she was directing at the time. Mrs. McCain avoided criminal penalties for her behavior. She also apparently avoided the suggestion that her drug use threatened her children's well-being or that as a society we would be better off if she had been sterilized or put on some form of long-acting birth control.

In fact, while C.R.A.C.K. claims to have a broad based mission applicable to men and women and people of all races and classes, its mission might be better understood as one designed to stigmatize certain people and to make them seem appropriate targets for sterilization and other forms of population control. Even the suggestion that a particular group of people needs a financial incentive to take responsibility for their reproductive lives is arguably stigmatizing in and of itself.[44]

A review of C.R.A.C.K.'s literature, public statements, and outreach efforts reveals that this program focuses on the stereotype of the "typical" drug-using woman. According to C.R.A.C.K., drug-using women abandon their children; they make them suffer,[45] they "smoke

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his wife escaped prosecution for forging prescriptions and taking drugs intended for foreign relief from a charity she headed.").

44. It is also misleading. C.R.A.C.K asserts that each woman it has paid represents a woman persuaded by them to use contraceptive services. It is equally likely, however, that women who have already decided to get sterilized or to use one of the birth control methods C.R.A.C.K. endorses are using the C.R.A.C.K. program as a way to supplement their incomes. *See*, *e.g.,* Stryker, *supra* note 18 (describing Sharon Adams and noting "[a]lthough Adams is not exactly the target C.R.A.C.K. client—she had already made her decision [to get sterilized], and the $200.00 was just a little more incentive –she became a veritable poster child for the program, appearing with Harris on radio and TV."); Sarah Dateno, *Coercive Pop Control Comes Home,* POPULATION RESEARCH INST. REV., (Aug./Sep. 1999) *at http://www.pop.org/main.cfm?id=153&r1=1.00&r2=3.00&r3=98.00&r4=7.00&level=4&eid=42.*

45. *See BET Tonight* (BET television broadcast) (tape on file with the author), in which Laura Love, C.R.A.C.K. Houston Chapter representative, says about the people C.R.A.C.K. targets: "These women unfortunately are addicts—they don't care about anything else but getting their next hit. These women have gotten up and left hospitals and abandoned their children . . . and they are living on the street, prostituting themselves just to get a hit."

crack, heroin and speed, they shoot-up everyday,"[46] they give birth to "litters," they are irresponsible, and they don't love their children. "They don't wear condoms, and they prostitute all day long for all, for like, five bucks . . ."[47] "There is no family structure, no support, no ability or resources on the part of the mother, and the one-in-ten thousand situation where there is a husband or a live-in boyfriend, he may also be addicted."[48] They are poor and dependent on social services. They and their children cost the taxpayers billions of dollars.[49] They have abortions—lots and lots of them.[50]

The problem is that C.R.A.C.K.'s numbers and its descriptions of its clients reflect stigma and stereotypes, not facts.

> The vast majority of women in the United States use some type of drug on a regular basis. We use prescription and over-the-counter drugs to help us sleep, stay awake, alleviate pain, lose weight, cope with depression, etc. We drink coffee and tea, and eat chocolate, all of which contain caffeine. We consume alcoholic beverages [and smoke cigarettes] yet when we think of "women and drugs" what comes to mind are users of *illegal* drugs, although in reality, less than 5% of us use such substances on a regular basis.[51]

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46. PROJECT PREVENTION Brochure (revised), Jan. 6, 1999 (on file with the author).

47. Amy Roe, *The Fix,* WILLAMETTE WEEK ONLINE, *at* http://www.wweek.com/flafiles/News3591.lasso (Mar. 29, 2003) (quoting Barbara Harris).

48. Vida Foubister, *Crackdown on Drug-addicted Pregnancies Draws Concern*, *at* http://www.ama-assn.org/sci-pubs/amnews/pick_00prsa1120.htm (Nov. 20, 2000) (quoting Professor Robert Pugsley).

49. *See infra* notes at 97, 99-100.

50. *See infra* notes at 52-54.

51. Marsha Rosenbaum, *Women: Research and Policy*, *in* SUBSTANCE ABUSE, A COMPREHENSIVE TEXTBOOK 654 (Joyce H. Lowinson et al. eds., 1997).

The 5% of women using illegal drugs includes women from every ethnic and socioeconomic group.[52] As the discussion below will demonstrate, C.R.A.C.K.'s portrayal of its typical clients, however, bears little resemblance even to the low-income women in the illicit drug-using group who seek help from publicly supported programs and who are most likely to come to public attention.[53]

Personal empowerment or control of certain populations?

On the surface, the goals and strategies employed by C.R.A.C.K. do not seem coercive or controlling. According to C.R.A.C.K., "[t]he program is completely voluntary for participants,"[54] and the mission that they once highlighted on their website's home page was "to *empower* the active or recovering addict with the ability and freedom to control their lives."[55]

Those who favor family planning and access to contraception and abortion services also speak in terms of voluntary family planning and

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52. *See* Center for Substance Abuse Treatment, *Pregnant, Substance-Using Women* 6 (1993) (U.S. Dept. of Health & Human Services. Publication No. (SMA) 93-1998).

53. *See, e.g.,* SHEIGLA MURPHY & MARSHA ROSENBAUM, PREGNANT WOMEN ON DRUGS: COMBATING STEREOTYPE AND STIGMA 3, 165 (1999) (explaining the difficulty of recruiting middle class women for their study); DOROTHY ROBERTS, KILLING THE BLACK BODY: RACE REPRODUCTION AND THE MEANING OF LIBERTY 79-81 (1997) ("Poor women, who are disproportionately Black, are in closer contact with government agencies and their drug use is therefore more likely to be detected.").

54. Project Prevention, *How We Help the Children, at* http://www.cashforbirth control.com/program (last visited Sept. 12, 2003). *See also* Karen Garloch, *Addicts get cash for birth control; Founder relocates effort critics call wrong, racist to Caburrus County,* CHARLOTTE OBSERVER, July 22, 2003, at 1A ("For them to get on birth control is positive, even if it takes a cash incentive . . . this is voluntary. The women come to us."); Craig Malisow, *Deal of a Lifetime*, HOUSTON PRESS, Feb. 27, 2003 ("Love [C.R.A.C.K.'s Houston chapter director] points out that the program is voluntary. 'There's no compulsory sterilization,' she says. Like the March of Dimes, C.R.A.C.K. is just to trying to prevent birth defects, she says.").

55. Project Prevention, *Our Mission*, *at* http://www.cashforbirthcontrol.com/index .html (last visited Sept. 12, 2003).

empowerment. In fact there is a great deal of evidence that the ability to control reproduction has not only significantly improved public health outcomes, but has also been essential in improving women's economic and social status.[56] Planned Parenthood, like C.R.A.C.K., started out as a private program. Although Planned Parenthood eventually gained government support, it continues to rely on private contributions as well.[57] Other individuals have formed private groups, such as the National Network of Abortion Funds,[58] to help low-income women pay for abortion services that the U.S. federal government will not fund.[59] Ms. Harris' organization insists that, like these programs, C.R.A.C.K. is a purely voluntary program that "empowers" individuals, and thus implicates no human rights concerns. There are, however, significant differences between other privately funded programs and the C.R.A.C.K. program.

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56. *See, e.g.,* Lynn Paltrow, *NARAL Supreme Court Amicus Brief in Thornburgh v. ACOG and Diamond v. Charles,* 9 WOMEN'S RTS. L. REP. 3 (1986).

57. *See generally* http://www.plannedparenthood.org.Planned Parenthood's founder, Margaret Sanger, has also been criticized for using eugenics and race-based arguments to advance her goals of legalizing and developing contraception. S*ee, e.g.,* DOROTHY ROBERTS, *supra* note 53, at 79-81. Planned Parenthood counters that Sanger was neither a eugenicist nor a racist, but does admit that some of her views are "objectionable and outmoded." *See* PLANNED PARENTHOOD, *About Us: Margaret Sanger*, *at* http://www.plannedparenthood.org/about/thisispp/sanger.html (last visited Apr. 23, 2004).

58. *See* NATIONAL NETWORK OF ABORTION FUNDS, *Our Mission*, *at* www.nnaf.org (last visited Apr. 25, 2004) ("The National Network of Abortion Funds (NNAF) is an affiliation of community-based abortion funds throughout the United States."). *Id*.

59. *See generally* Harris v. McRae, 448 U.S. 297 (1980) (upholding the Hyde Amendment, which denies Medicaid coverage for abortion services to low-income women whose health care costs would otherwise be covered by government programs); Maher v. Roe, 432 U.S. 464 (1977) (rejecting an equal protection challenge to a regulation of the Connecticut Welfare Department that limited Medicaid funding for first trimester abortions to those that were medically necessary, thus permitting states as well as the federal government to deny coverage for the cost of abortion services).

Unlike privately funded family planning organizations, C.R.A.C.K. does not focus on the numerous barriers to reproductive health that exist in the U.S., but rather on the harm that women allegedly do to their children and the cost to society of their supposed irresponsibility. It emphasizes the value of controlling their reproduction as a solution to complex public health and economic problems. Instead of providing support for much-needed reproductive health services, outreach, or education, it uses its funds to reward or motivate certain women to be sterilized or use particular forms of birth control, at public expense. As Judith M. Scully argues, "[d]espite its benevolent name, C.R.A.C.K.'s primary goal is to promote population control…"[60]

Indeed, statements by C.R.A.C.K.'s founder and Director Barbara Harris not only provide clear examples of negative stereotyping, they also make clear that control, not empowerment, is in fact C.R.A.C.K.'s primary purpose. As one commentary quoting Ms. Harris observed, "[a]ddict, recovering addict, dirty, clean . . .whatever. The distinction hardly matters to C.R.A.C.K. (Children Requiring a Caring Kommunity), the group that gave [the client] the money. 'As long as they stay on birth control,' says founder Barbara Harris, '[t]hat's all we care about.'"[61]

Similarly, Ms. Harris has stated that "[f]inally I realized…that if I wanted these women to take birth control, I'd have to do it on my own."[62] Ms. Harris candidly admits that "[w]e don't say we're con-

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60. *See* Scully, *supra* note 4. *See also* Theryn Kigvamasud Vashti, *Fact Sheet on Positive Prevention/C.R.A.C.K. (Children Requiring A Caring Kommunity*, Communities Against Rape and Abuse) Feb. 12, 2002.

61. Roe, *supra* note 47. *See also* Russ Oates, *A Money-for-Birth-Control Program Arrives in Nashville*, *at* http://www.oakridger.com/stories/062601/stt_0626010056 .html (June 26, 2001) ("There's really no reason why a drug addict or an alcoholic should get pregnant," Harris said at a Monday news conference. "And if we can prevent that from happening by offering them $200, then it's the best $200 that could be spent.").

62. Margot Hornblower, *Benevolent Bribery-or Racism? A California Mom Stirs Debate by Paying Drug Users to Stop Having Kids*, TIME, Aug. 23, 1999, at 47; Eli Sanders, *$200 to Curb an Addict's Fertility Controversial Program Finds Willing Takers in Seattle*, SEATTLE TIMES, Apr. 13, 2000, at A1.

cerned with the welfare of the mothers. C.R.A.C.K.'s mission is to stop them from having more doomed babies."[63] C.R.A.C.K.'s flyer stating, "[d]on't let a pregnancy ruin your drug habit"[64] is consistent with an organization that is unconcerned with the welfare of mothers.

Contrary to a notion of empowerment that assumes respect for those who are to be "empowered,"[65] C.R.A.C.K.'s chief spokesperson has expressed disdain for the program's targets. Ms. Harris has repeatedly compared the women the program targets to animals, stating that "I'm not saying these women are dogs, but they're not acting any more responsible than a dog in heat."[66] She has also stated: "[W]e don't allow dogs to breed. We spay them. We neuter them. We try to keep them from having unwanted puppies, and yet these women are literally having litters of children."[67] Again, in another context, she compared women to animals, stating, "[t]hey're having litters. They are literally having litters."[68] On the television news program *60 Minutes II*, Ms.

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63. Barbara Harris, *Letter to the Editor*, SALON, *at* http://www.salon.com/archives/date.html (Sept./Oct. 2002).

64. C.R.A.C.K. flyer (on file with author).

65. *See* OXFORD ENGLISH DICTIONARY, *available at* http://www.oed.com (Empowerment 1. trans. To invest legally or formally with power or authority; to authorize, license. 2. To impact or bestow power to an end for a purpose; to enable, permit); THE AMERICAN HERITAGE DICTIONARY OF ENGLISH LANGUAGE, *available at* http://www. dictionary.com ("1: To invest with power, especially legal power or official authority").

66. *Dateline NBC: The Crusader; One Woman's Crusade to Help Babies Born to Drug Addicted Mothers* (NBC television broadcast, Sept. 9, 1998).

67. *C.R.A.C.K. Uses Unethical Tactics to Stop Women with Substance Abuse Problems from Becoming Pregnant*, *in* POLITICAL ENVIRONMENTS 8 (1999) (citing *Mothers Paid to Stop Having Children*, MARIE CLAIRE, Dec. 1998).

68. Stryker, *supra* note 18. S*ee* Sarah Dateno, *Coercive Pop Control Comes Home*, POPULATION RESEARCH INSTITUTE REVIEW, *at* http://www.pop.org/main.cfm?id=153&r1=1.00&r2=3.00&r3=98.00&r4=7.00& level=4&eid=42 (Aug./Sept. 1999) ("[w]e campaign to neuter dogs and yet we allow women to have 10 or 12 kids that they can't take care of."); *see also Children or Crack: Which Would You Choose?*,

Harris was asked about these comments, and given an opportunity to distance herself from them. Instead she reaffirmed them stating, "Well, you know my son that goes to Stanford said '[m]om, please don't ever say that again,' but it's the truth, they don't just have one and two babies, they have litters."[69] The director of C.R.A.C.K.'s Houston Chapter, Laura Love, analogizes their clients to mules who need "smacks" on the head with a stick to get them to move.[70]

Expressing both her desire for control and her contempt for the targets of her program, Ms. Harris told *People Magazine*: "[t]hese women are not getting pregnant because they love children,…but because they're totally irresponsible. It's sad that they're on drugs, but the bottom line is, *I* don't want them to get pregnant."[71] Similarly, Ms. Harris told the Orange County Register, "The bottom line is I don't want them to get pregnant…If the state won't do it, I'll do it myself."[72]

C.R.A.C.K.'s supporters express similar views. Brenda Ulrich of Las Vegas says crack mothers "should be stigmatized,"[73] adding that "[c]hild welfare systems are bulging with children damaged by their mother's use of drugs and alcohol, and these mothers 'need to quit

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THE GUARDIAN (Dec. 3, 1998), *available at* http://www.familywatch.org/library/crack.htm ("[w]e have campaigns to spay cats to prevent them from having unwanted kittens, yet we allow these women to have litters of 14 children.").

69. *60 Minutes II: C.R.A.C.K. BABIES/Sterilization, supra* note 17.

70. Malisow, *supra* note 54.

71. O'Neill, *supra* note 24, at 147 (emphasis added); *See also* V. Dion Haynes, *To Curb Pregnancies, Project Pays Addicts $200 to be sterilized*, CHICAGO TRIBUNE, May 3, 1998, at 3C (quoting Barbara Harris: "These [drug-addicted] women are not getting pregnant for love of children; they're getting pregnant out of irresponsibility.").

72. Tom Berg & Jeff Collins, *Drug Addict Takes Offer From OC Group to Pay for Her Being Sterilized*, THE ORANGE COUNTY REGISTER, Oct. 23, 1997, at B08.

73. Cheryl Wetzstein, *Pregnant Cocaine Users Unfairly Punished,* THE WASH. TIMES, March 28, 2001, at A3.

giving birth to these children.'"[74] A testimonial on C.R.A.C.K.'s website likewise says: "[w]e are both firm supporters of your ideas to *control* and or *stop* crack addicted mothers from having any more addicted babies, by *requiring* such methods as Norplant."[75] Another quotation C.R.A.C.K. chose to highlight on its website states: "[p]ersonally I feel if a 'bribe' is what it takes to get these people from having unwanted and damaged children, then let's bribe them."[76]

In at least one well documented instance, it seems that C.R.A.C.K.'s claim that "[e]very woman that chooses to use birth control does so by choice, we don't talk anyone into making that decision, the decision is up to her and her doctor,"[77] is untrue.

In Michigan, the C.R.A.C.K. program was willing to pay $500 to one woman whose childbearing it found particularly egregious.[78] According to Pam Cade, who started the Michigan chapter of C.R.A.C.K., "this case is so horrible that we want to make her an offer she can't refuse."[79] Barbara Harris said: "[w]e will get this woman on birth control by any means necessary…If she says no, we'll up the ante."[80] Indeed, the news story about C.R.A.C.K.'s efforts reports that "[t]he group has enlisted a Pontiac police officer to find [the woman] and extend the offer."[81]

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74. *Id.*

75. Project Prevention, *Quotes, at* http://www.cashforbirthcontrol.com/cause/quotes.html (last visited Jan. 27, 2002).

76. *Id.*

77. *Stop Child Abuse, An Announcement About the C.R.A.C.K. Program*, AORN Alameda County, CA Newsletter (archives of various articles that used to be on the homepage), Aug. 1997-June 2001, *at* http://a.rn11.com/yh/pu/yhgeouspu2.htm.

78. Kathleen Gray, *Drug-Using Mother is Offered Money to Stop Having Babies*, DETROIT FREE PRESS, May 5, 2001.

79. *Id.*

80. *Id.*

81. *Id.*

Ms. Harris also recounts this particular case and comments: "[h]ow many victims does this person need to have before she doesn't have the right to have children? The day she had the tubal ligation, I was in my office cheering."[82]

Ms. Harris' uncensored comments more than suggest that C.R.A.C.K.'s goal is to deprive certain women of their right to procreate, not enhance their reproductive decision making ability. In 1996, she put it this way: "[i]f you own a handgun and shoot someone, you lose that right. If you drive drunk and injure someone, you lose that right. You can't just say, 'I have the right to have babies.' They're acting totally irresponsible."[83]

Other aspects of the program also contradict the claim that C.R.A.C.K is seeking to empower its clients. By promoting birth control methods that do not prevent HIV and may pose significant health risks compared to other methods, C.R.A.C.K. is doing little to enhance the personal power of the women they pay.[84] Furthermore, C.R.A.C.K. has featured as one of its spokespeople a woman who

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82. Barry Yeoman, *Surgical Strike: Is a Group that Pays Addicts to be Sterilized Defending Children or Exploiting the Vulnerable?, at* http://www.motherjones.com (Nov./Dec. 2001) (in which Harris recounts the story of a woman in Pontiac, Michigan who had given birth to thirteen children before C.R.A.C.K. reached her).

83. Berg, *supra* note 72, at E01.

84. *See* Committee on Women, Population, and the Environment, *Fact Sheet on the C.R.A.C.K. Organization*, *supra* note 6 ("C.R.A.C.K. irresponsibly limits birth control options by compensating only for long-term, provider–controlled methods: tubal ligation, Norplant, Depo-Provera and IUDs. Barrier methods and methods which protect against HIV infection and other sexually transmitted diseases are not compensated."). *See also* Roe, *supra* note 47 (reporting comments from Caroline Fitchett, interim executive director of Oregon NARAL "offering cash incentive to drug addicts is coercive and limiting the kinds of birth control rewarded may induce clients to pick a method that may not be best for them." Many of the methods reimbursed by C.R.A.C.K. have serious risks and or side effects. For example, IUDs can exacerbate infections caused by STDs and the American Association of Family Physicians only recommends IUDs for women in a long–term mutually monogamous relationship). *See generally* discussion *infra* regarding the limited availability of and risks associated with certain methods C.R.A.C.K. gives incentives to use.

apparently did not even know which long-acting contraceptive she was using.[85] This suggests that C.R.A.C.K. is more concerned with demonstrating that it is successful in getting certain women on birth control than with showing that it has assisted women to make fully informed decisions.

Is it true that only mothers are to blame?

While C.R.A.C.K. can say its offer is open to both men and women, the focus and corresponding blame and stigmatization is clearly on women.[86] One C.R.A.C.K. flyer says, "[m]en and women alike, we want to help you," but the same flyer makes plain that C.R.A.C.K's mission is to prevent "drug addicted *women"* from having an endless array of pregnancies resulting in drug babies and babies born with AIDS.[87] In reality, only a small number of men have taken advantage of C.R.A.C.K.'s "offer."[88] When asked why there were so few men, Barbara Harris responded that "the options are limited to one choice;

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85. *See Television Interview with Lynetta Gaskins, C.R.A.C.K. spokesperson* (WNYW-TV (FOC) Channel Five, FOX News at 6:00 television broadcast, Oct. 7, 2002)(on file with author) (Gaskins stated "I received $200 to get a Depo-Provera prevention birth control in my arm. It's for five years." In fact, Depo-Provera is administered through an injection and lasts for only 3 months; during a press conference held earlier that day, Ms. Harris had corrected Gaskins, telling her that she had in fact been given Norplant).

86. *See generally* "BAD" MOTHERS: THE POLITICS OF BLAME IN TWENTIETH-CENTURY AMERICA 23 (Molly Ladd-Taylor & Lauri Umansky eds., 1998) (addressing how the "cipher of the bad mother" has historically been and is increasingly being used to divert political attention and public resources away from efforts to examine and address "poverty, racism, the paucity of meaningful work at a living wage, the lack of access to day care, antifeminism, and a host of other problems" that women and families face).

87. *See* PROJECT PREVENTION Brochure, *supra* note 46; *see also* PRI Newswire, *supra* note 16 (stating that the program was established "in an attempt to greatly reduce the number of *maternal* drug abuser pregnancies (MDA)") (emphasis added).

88. *See* Project Prevention, *Statistics*, *infra* note 105 (reporting as of Jan. 2004 that 1117 women and 24 men "made the responsible and logical choice").

vasectomy . . . A lot of men call, but they don't follow through."[89] However, as it was clear to one interviewer, "[h]er interest isn't the men, in any case . . . 'they are not the ones force feeding the babies drugs for nine months.'"[90]

C.R.A.C.K.'s focus is on women despite the fact that men have a significantly higher rate of illicit drug use than women (10.3% vs. 6.4%),[91] and in spite of the very significant role fathers play, both biologically and sociologically, in the health and well-being of children.[92] Furthermore, there are numerous substances and activities that men engage in that affect fetal health and development.[93] Moreover, while women carry a limited number of children at a time and within a lifetime, men may reproduce many more times, potentially replicating harm

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89. Bill D'Agostino, *Barbara Harris Brings Her Message of Birth Control for Addicts to Menlo Park Rotary Club*, THE ALMANAC, *at* http://www.almanacnews.com/morgue/2001/2001_02_14.harris.html (February 14, 2001).

90. *Id.* (quoting Barbara Harris).

91. Results of the 2002 National Survey on Drug Use and Health, *at* http://www.samhsa.gov/centers/clearinghouse/clearinghouses.html (last visited Apr. 25, 2004).

92. *See* Brief for Amici Curiae South Carolina NOW et al., State v. McKnight, 352 S.C. 635 (2003).

93. *See, e.g.,* International Union v. Johnson Controls, 499 U.S. 187 (1991) (rejecting employer policy barring women (except those who could prove infertility) from holding certain jobs based on the potentially harmful effects of lead exposure on fetuses. The Court found that this policy was discriminatory on its face under the Pregnancy Discrimination Act, since fertile men were not barred from employment despite the proven harm of lead exposure on men's reproductive functioning). *See also* Deborah A. Frank et al., *Forgotten Fathers: An Exploratory Study of Mothers' Report of Drug and Alcohol Problems Among Fathers of Urban Newborns*, 24 NEUROTOXICOLOGY AND TERATOLOGY 339, 345 (2002) (noting that punitive measures directed solely at mothers reflect irrational social, racial and gender bias); Cynthia Daniels, *Fathers, Mothers, and Fetal Harm: Rethinking Gender Difference and Reproductive Responsibility*, *in* FETAL SUBJECTS, FEMINIST POSITIONS 83 (Lynn M. Morgan & Meredith W. Michaels eds., 1999) (collecting studies on male exposure to occupational, behavioral and environmental factors).

far more than women.[94] In addition, studies of drug-using pregnant women and women who experience unintended pregnancies make clear that men play a very significant role in both pregnancy and women's drug use.

For example, drug and alcohol use by pregnant women has been highly correlated to a history of sexual abuse and rape by the men in their lives. According to Rosenbaum, "[r]esearchers have consistently found high levels of past and present abuse in the lives of women drug users. Many have suggested that there is a relationship, if not absolutely causal, between violence experienced by women and drug use."[95] Women are also at significantly greater risk of physical abuse during pregnancy and "the physical abuse that occurs during pregnancy is often more frequent and severe."[96] Some of these women use drugs to self-medicate from the pain and trauma of these experiences. Research also indicates that many women are pressured to use drugs by the men they are involved with.[97] Although C.R.A.C.K. collects information from its clients about such things as the number of pregnancies, miscarriages,

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94. *See* INSTITUTE OF MEDICINE, WOMEN AND HEALTH RESEARCH: ETHICAL AND LEGAL ISSUES OF INCLUDING WOMEN IN CLINICAL STUDIES (Anna C. Mastroianni, et al. eds., 1994).

95. Rosenbaum, *supra* note 51.

96. Daniels, *supra* note 93, at 89 (citing Richard J. Gelles, *Violence and Pregnancy: Are Pregnant Women at Greater Risk of Abuse?*, 50 J. OF MARRIAGE AND FAMILY 841, 841-847 (1988); ALISON MACFARLANE ET AL., BIRTH COUNTS: STATISTICS OF PREGNANCY AND CHILDBIRTH (TABLES) (2000); *see also* Planned Parenthood v. Casey, 505 U.S. 833 (1992) ("Mere notification of pregnancy is frequently a flashpoint for battering and violence within the family. The number of battering incidents is high during the pregnancy and often the worst abuse can be associated with pregnancy . . . The battering husband may deny parentage and use the pregnancy as an excuse for abuse."). *See also* CJ Krulewith, et. al., *Hidden from view: violent deaths among pregnant women in the District of Columbia, 1988-1996,* 46 J. MIDWIFERY & WOMEN'S HEALTH 4 (2001).

97. *See* Wendy Chavkin, et al., *Reframing the Depage: Toward Effective Treatment for Inner City Drug Abusing Mothers,* 70 J. URB. HEALTH 50, 50-68 (1993) (finding in a study of 146 addicted women that half reported they had been involved with men who urged them to use crack cocaine during their pregnancies).

and abortions the women have had, the organization does not seek information about the circumstances surrounding those pregnancies. The C.R.A.C.K. data collection form fails to ask how the woman became pregnant and whether the pregnancies were planned or unplanned. As a result, no information is collected about incidents of rape[98] or contraceptive failure, creating the impression that all of the woman's pregnancies were the result of her own choices or irresponsibility. Similarly, the survey asks how many "miscarriages" and how many stillborn births each client has had, but fails to ask whether or not those pregnancy losses occurred at a time when the woman was using drugs. This makes it appear that the cause must have been drugs, discouraging any exploration of other possible causes, including violence against women or genetic and hereditary anomalies.

The C.R.A.C.K. program also ignores the extent to which men influence women's use of contraceptives. In interviews with drug-using women, "the women confirmed that their partners played a critical role in the decision to use both contraceptives and services."[99]

In some cases men actually destroy the contraception obtained by the women.[100] By excluding condoms, the primary method of pregnancy and STD prevention for men, from the list of contraceptives C.R.A.C.K.

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98. *See* Kigvamasud Vashti, *supra* note 60 (discussing the ways in which C.R.A.C.K. "ignores rape" and the sexual violence present in women's lives).

99. Kay Armstrong et al., *Barriers to Family Planning Services Among Patients in Drug Treatment Programs*, 23 FAMILY PLANNING PERSPECTIVES 264, 266 ("Several men said they would be angry if their partners went for family planning services because, as one said, it would 'imply something negative about our relationship.'"); *see also* INSTITUTE OF MEDICINE, THE BEST INTENTIONS: UNINTENDED PREGNANCY AND THE WELL-BEING OF CHILDREN AND FAMILIES 207 (1995) ("Sonenstein and Pleck (1994) have concluded that males are relatively more involved in females' decisions to use female methods than is often realized. As early as 1978, Thompson and Spanier's multivariate analysis in a college sample found that of all the variables examined, male encouragement to use a method of contraception was the strongest predictor of female use of a method.").

100. Armstrong, *supra* note 99, at 270 (describing one interviewee whose boyfriend "cut up the condoms and sponges that she had received from the family planning counselor at the drug treatment center.").

promotes through financial incentives, C.R.A.C.K. reinforces the conviction that preventing unintended pregnancies is the responsibility of the woman alone.

Despite the significant role that men play in reproduction, C.R.A.C.K. does not similarly target or stigmatize them. Neither C.R.A.C.K.'s website nor its spokespeople say such things as: "men love their drugs more than their babies," "men are irresponsible in their reproduction," or "these men could prevent unwanted pregnancies—they just don't choose to."[101] This kind of criticism is reserved exclusively for women. The failure to criticize men and address their personal responsibility perpetuates the myth that women are solely responsible for ensuring the birth of a healthy child.[102]

This not only encourages stigmatization and punishment of women in particular, it discourages discussions of interventions and solutions that include everyone responsible for creating caring communities for children, including men and fathers.[103]

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101. *See* Sara E. Gutierres, Ph.D. & Alicia Barr, Ph.D., *The Relationship Between Attitudes Toward Pregnancy and Contraception Use Among Drug Users*, 24 J. SUBSTANCE ABUSE TREATMENT 19, 26 (2003) (reporting that women in their study expressed more concern than men about becoming pregnant and using birth control). Addressing similar issues, Communities Against Rape and Abuse ("CARA") created a flyer entitled "$200 Cash, If you are white, middle/upper class, male and there is a possibility that you may procreate. THIS MESSAGE IS FOR YOU!" The flyer then details such facts as "white males are twice as likely to bring a weapon to school as are black males" (on file with author). Communities Against Rape and Abuse, *Statement of Opposition to Project Prevention/C.R.A.C.K. (Children Requiring a Caring Kommunity)*, *at* http://www.cara-seattle.org/crack_statement.html (last visited Apr. 23, 2004).

102. Thus, for example, a search for the word "father" in several law review articles discussing C.R.A.C.K. finds that the word does not come up even once. *Cf.* Johnson, *supra* note 7 (discussing only issues of maternal drug use).

103. *See* INSTITUTE OF MEDICINE, *supra* note 99; *See also* Armstrong, *supra* note 99 (both argue that successful efforts to reduce unintended pregnancies must include men).

Are they all having litters?

C.R.A.C.K.'s primary spokesperson has on numerous occasions stated that its clients give birth to "litters." Through the use of animal metaphors C.R.A.C.K. portrays "these" women as "bestial in their sexual reproduction."[104] As a result, it is particularly important to examine the basis for this assertion.

Relying on data from their client survey form and other sources lacking scientific validity,[105] C.R.A.C.K. claims that "[w]omen who are using and/or addicted to drugs are getting pregnant *at alarming rates*."[106] The organization also asserts that: "Women and men who are using or addicted to drugs are often responsible for an extraordinary number of pregnancies (5-10 or more)"[107] and claims that "most partici-

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104. CAROL MASON, KILLING FOR LIFE: THE APOCALYPTIC NARRATIVE OF PRO-LIFE POLITICS, 96 (Cornell U. Press 2002).

105. C.R.A.C.K.'s survey instrument is unverified, s*ee O'Reilly Factor, supra* note 42. (On the show, Ms. Harris admitted that their numbers are "anecdotal" and that C.R.A.C.K. has not yet had the information verified), and lacks any of the normal indicia of scientific validity. *See* Daubert v. Merrel Dow Pharmaceuticals, 509 U.S. 579, 590 (1993) (discussing indicia of scientific validity for evidence admissible in federal court); M. Elizabeth Karns, *Statistical Misperceptions,* FEDERAL LAWYER, June 2000, at 19. Nevertheless C.R.A.C.K.'s statistics have been published in news articles and relied upon by the media as if they constitute legitimate, scientifically valid data. For example, talk show host Bill O'Reilly cited C.R.A.C.K.'s "stats" as proof that "these are obviously irresponsible women." *O'Reilly Factor, supra* note 42. *See also* Project Prevention, *Statistics, at* http://projectprevention.com/reasons/ statistics.html (last visited Apr. 23, 2004); Richard F. Rakos, C.R.A.C.K.: An Assessment of its Scientific, Ethical, and Social Status, Remarks made as part of the panel discussion "The C.R.A.C.K. Program: Empirical, Ethical, and Social Considerations in Paying Addicts to Avoid Pregnancy," presented at the annual convention of the Association for Behavior Analysis, Toronto, ON (May 2002) (transcript on file with NAPW and with author).

106. Project Prevention, *How We Help the Children, supra* note 54 (last visited Mar. 13, 2002).

107. Project Prevention, *Sad Reality*, *at* http://www.cashforbirthcontrol.com/ reasons/sad_reality.html (last visited Mar. 13, 2002).

pants who choose permanent birth control are those who have already had far more children than most people in a lifetime."[108]

Although becoming pregnant and giving birth are two different things, C.R.A.C.K. conflates the two. C.R.A.C.K. makes it appear that drug-using women on average have five, ten or even more children.[109] Indeed, C.R.A.C.K. highlights the exceptional, atypical women who have five or more children as though they were the norm. For example, one of C.R.A.C.K.'s brochures features the story of the woman from Pontiac, Michigan, who "had a total of 13 children" (apparently this is the woman that C.R.A.C.K. sought to stop from procreating by "any means necessary").[110] Its press release announcing a Florida press conference offers reporters the opportunity to "hear from a woman paid to be sterilized after giving birth to seven substance exposed children," and another who gave birth to "six damaged babies."[111] Ms. Harris's own story, which involves a woman she claims had eight children, is the centerpiece of her public presentations.

It is thus not surprising that people who support the C.R.A.C.K. program assert that "the typical drug addict has seven children,"[112] and that for the cost of only "$200, *countless* births are avoided."[113] However, studies have shown that low-income women with publicly identified drug problems have an average of two to three children each. As

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108. Project Prevention, *Program*, *at* http://www.cashforbirthcontrol.com/program/index.html (last visited Apr. 23, 2004).

109. *See supra* notes 73-82, 86-87.

110. PROJECT PREVENTION Brochure, *C.R.A.C.K.'S Project Prevention a Working Solution,* (on file with author); *see also* Dateno, *supra* note 68.

111. *C.R.A.C.K.'s Project Prevention Coming to Florida to Speak on Its Offer*—GET BIRTH CONTROL-GET CASH!, *supra* note 16 (on file with author).

112. Demond Reid, *C.R.A.C.K. Saves*, THE SHORTHORN ONLINE, *at* http://www.theshorthorn.com/archive/2003/spring/03-mar-28/o280303-03.html March 28, 2003 (the author attributes this fact to the C.R.A.C.K. program itself).

113. Johnson, *supra* note 7, at 226 (emphasis added).

a report sponsored by an organization of Southern U.S. Governors found:

> Newspaper reports in the 1980s sensationalized the use of crack cocaine and created a new picture of the "typical" female addict: young, poor, black, urban, on welfare, the mother of many children, and addicted to crack. In interviewing nearly 200 women for this study, a very different picture of the "typical" chemically dependent woman emerges. She is most likely white, divorced or never married, age 31, a high school graduate, on public assistance, the mother *of two or three children*, and addicted to alcohol and one other drug.[114]

A study funded by the National Institute on Drug Abuse found that of 120 low-income drug-using pregnant women interviewed, most "had one or two older children and were expecting or had recently given birth to a newborn."[115] Although the data C.R.A.C.K. collects about its clients lacks scientific validity, it is worth noting that dividing the number of births to their clients by the number of paid clients, it appears that on average the women C.R.A.C.K. pays each have 3.5 children.[116] This is somewhat higher than the national birthrate average of two,[117] but it is certainly not the five to fourteen that C.R.A.C.K. deliberately highlights.

Nevertheless, stereotypes and individual experience rather than evidence-based research, seems to guide the C.R.A.C.K. program. In correspondence to this author, Barbara Harris wrote:

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114. Shelly Gehshan, *A Step Toward Recovery: Improving access to substance abuse treatment for pregnant & parenting women* 1 (Southern Regional Project on Infant Mortality 1993) (emphasis added).

115. MURPHY & ROSENBAUM, *supra* note 53, at 3.

116. Project Prevention, *Statistics, supra* note 105 (last visited Dec. 20, 2003).

117. The Alan Guttmacher Institute, *Contraception Counts: Massachusetts*, *at* www.guttmacher.org/pubs/state_data/states/massachusetts.pdf (last visited Apr. 23, 2004) ("The typical American woman wants—and has—two children. She therefore spends roughly three decades trying to avoid becoming pregnant.").

> You and I both know these women do not have the same number of pregnancies as non-addicted women. I've never known any woman in my 50 years that was pregnant 18 times! Have you? I've never known personally any non-addicted woman who has had 7 children! Let's be honest my friends.[118]

Of course, many non-addicted women have had seven or more children. They are observant Catholics, Mormons and Jews. They are people from a range of religious and ethnic groups who value large families.[119] Some of them form organizations and visit websites that help them to respond to the ignorant or hurtful comments people make about the number of children they have.[120]

Is it true that the drug-using women C.R.A.C.K. targets have an extraordinary number of unintended pregnancies?

C.R.A.C.K. portrays its clients as breeding machines, uniquely prone to unintended pregnancies. The truth, however, is that "[a] majority of

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118. E-mail from Barbara Harris, founder of C.R.A.C.K. to info@advocatesforpregnantwomen.org (Dec. 3, 2002, 09:21:49 EST) (on file with author).

119. *See, e.g.,* Margot Liberty, *1975 Population Trends Among Present-Day Omaha Indians*, 20 PLAINS ANTHROPOLOGIST 225, 225-230 (1975) (finding that the Omaha group of Navajo Indians in Nebraska were having many wanted children (4.5 by age thirty-four) and that this was a result of large-family values among this group).

120. *See, e.g.,* A Christian Home, *Life in a Large Family, at* http://www.achristianhome.com/Good_Things/LargeFamily/Large_Family.htm (last visited Apr. 23, 2004) (website provides moral support and practical advice to those who choose to have large families. The website documents the social disapproval frequently directed at those who choose, whether for religious or secular reasons, to have many children. "You know you have a large family when you go to the store and you see people's heads bobbing up and down as they attempt to inconspicuously count the members of your family."). *See also* Moms of Many Young Siblings, *at* http://www.momys.com (last visited Apr. 23, 2004) (this site supports Christian families with many small children who are close in age); Open Directory Project, *at* http://dmoz.org/Home/Family/Large_Families/Mailing_Lists/ (last visited Apr. 23, 2004) (listing 22 list serves for families with many biological children, as well as a few lists devoted to large adoptive families).

all pregnancies in the United States are unintended."[121] A report prepared by the National Academy of Sciences found that almost 60% of all pregnancies in this nation were unintended.[122] Significantly, they concluded that "[u]nintended pregnancy is not just a problem of teenagers or unmarried women or of poor women or minorities; it affects *all* segments of society."[123] "[E]ven among currently married women, 4 in 10 pregnancies were either mistimed or unwanted,"[124] and 45% of all pregnancies among women whose incomes exceeded 200% of the poverty level were unintended.[125] Moreover, an unintended pregnancy does not necessarily indicate a failure to use contraception. "[O]ver half of unintended pregnancies occur to women who are using contraceptives during the month they become pregnant."[126]

While unintended pregnancy occurs in all age, economic, racial, and ethnic groups, it is believed that:

> Among some smaller subgroups, the proportions of pregnancies that are unintended may be appreciably higher than for the nation as a whole. Groups for whom this appears to be the case include, for example, women who are homeless, teenagers who have dropped out of school and engage in multiple high-risk behaviors,

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121. *See* INSTITUTE OF MEDICINE, *supra* note 99, at 21; *see also* Alan Guttmacher Institute, *supra* note 117; Stanley K. Henshaw, *Unintended Pregnancy in the United States*, 30 FAM. PLAN. PERSP. 24, (1998), *available at* http://www.agi-usa.org/pubs/journals/3002498.html.

122. INSTITUTE OF MEDICINE, *supra* note 99, at 25.

123. *Id*. at 250 (emphasis added).

124. *Id.* at 31.

125. *Id*. at 33.

126. *See* Alan Guttmacher Institute, *supra* note 117 (noting that "[n]either contraceptives, nor the people using them are perfect. . ."); *See also* Stanely K. Henshaw, *supra* note 121; INSTITUTE OF MEDICINE, *supra* note 99, at 31.

> of which sexual intercourse without contraception is only one, and women who are heavy abusers of alcohol and illegal drugs.[127]

Although there do not appear to be studies that validate or reject this hypothesis, there is research finding that drug users face more barriers to contraceptive services than other groups of women.[128] In other words, studies on the subject find much more than personal responsibility to explain any differences that might exist between women who have serious drug problems and those that do not.[129]

Studies have found, for example, that "contraceptive and reproductive health services are rarely provided in the traditional drug treatment setting" and "that separate funding streams for family planning and drug treatment services discourages integration of services."[130] This particular barrier appears to be ongoing despite strong recommendations for integration of services and recognition that low-income drug users need such services.[131]

As discussed below in more detail, many women simply cannot afford health care, including reproductive health services. In addition, some women do not understand the nature of the services that might be available to them, mistakenly believing that family planning clinics only provide condoms or sterilization services.[132] Some drug users may also be deterred from seeking care by the hostility they experience from reproductive health care providers who are not trained in drug treatment

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127. INSTITUTE OF MEDICINE, *supra* note 99, at 33.

128. There do appear to be studies among some drug-using populations regarding use of condoms particularly in relationship to HIV and STD prevention. *See generally* Dooley Worth, *Sexual Decision Making and AIDS: Why Condom Promotion Among Vulnerable Women is Likely to Fail*, 20 STUDIES IN FAMILY PLANNING 297 (1989).

129. *See* Armstrong, *supra* note 99.

130. *Id* at 264.

131. *See* Center for Substance Abuse Treatment, *supra* note 52.

132. *See* Armstrong, *supra* note 99, at 265-266.

issues.[133] In addition, drug use and poor nutrition can affect a woman's menstrual cycle causing it to become irregular or to stop altogether. As a result, some drug-using women believe that they cannot become pregnant and therefore believe that they do not need contraception. A federal report concerning drug-using women advises:

> Substance-using women who have a history of irregular menses and involuntary infertility should be warned that sobriety or the successful initiation of a recovery program may result in a resumption of ovulation and an increased risk for unplanned pregnancy.[134]

Other barriers include the fact that many women whose drug use has become debilitating have histories of rape and sexual abuse. Reproductive health care services require intimate and sometimes painful medical exams. Women must undress, climb onto a table, spread their legs, and have an internal vaginal/pelvic exam. As one woman said, "I was abused. I'm afraid of male doctors and male counselors."[135] Further, attitudes of male partners often have a strong influence on whether or not a woman is able to access and consistently use contraception.[136]

By making unintended pregnancies exclusively an issue of personal responsibility (these women, according to C.R.A.C.K., "tragically

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133. Armstrong, *supra* note 99, at 266 ("If you are honest and tell them you are in recovery, they would say, 'You're a junkie! Another woman was called a "crack lady" at a hospital.'"); Center for Substance Abuse Treatment, *supra* note 52, at 7 ("Both prenatal care and drug treatment providers have a poor understanding of treatment issues specific to women."). *See also* Ferguson v. City of Charleston, 532 U.S. 67, 78 n. 17 (2001) (noting that intrusions on a medical patient's expectation of privacy may deter them from receiving proper medical care).

134. Center for Substance Abuse Treatment, *supra* note 52, at 7.

135. Armstrong, *supra* note 99, at 270 ("Many women shared past experiences of violence and repeated incest, sexual abuse and rape that left them 'hating men' and 'scared' to go for family planning services, which they believed might cause them physical or emotional pain.").

136. Armstrong, *supra* note 99, at 265.

ignore the use of birth control"),[137] C.R.A.C.K. discourages any analysis of the barriers, as well as efforts to remove these barriers. Thus, while personal responsibility does clearly play a role in unintended pregnancy, the extraordinary scope of the problem across race, class, age, and marital status reflects issues far more complex than individual responsibility alone.[138]

The National Academy of Science's comprehensive study of unintended pregnancies identified many factors influencing the use of contraception in America. These include the media's willingness to portray vast amounts of sexual material, while refusing to advertise contraceptives or portray situations in which people negotiate contraceptive use, the growing influence of particular religious and political organizations that oppose contraception and comprehensive sex education, the role of racism in the promotion of contraceptive services, limited access to contraceptive services, the anti-abortion movement, and others.[139] The report also concludes that many previous efforts to address the problem have failed, observing that "most proposed remedies ignore the common underlying cause or address only one aspect of the problem and a few vulnerable groups (such as young unmarried women on welfare) are singled out for criticism."[140] The report specifically argues that in order to succeed, efforts to reduce unintended pregnancy must be directed to all Americans.[141] The C.R.A.C.K. program, however, ignores such evidence-based advice, choosing instead to focus its sterili-

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137. PROJECT PREVENTION Glossy Brochure (on file with author).

138. *See* Henshaw, *supra* note 121, at 24-29. "Reduction of unplanned pregnancy can only be achieved by decreasing risky behavior, promoting the use of effective contraceptive methods and improving the effectiveness with which all methods are used. More research is needed on the best ways to accomplish these goals, but we know that sensible strategies are to improve the accessibility of contraceptive services, to dispel misconceptions about the health risks of contraception and to make emergency contraception easily available and widely known." *Id.* at 46.

139. INSTITUTE OF MEDICINE, *supra* note 99, at 189-211.

140. *Id* at 251-52.

141. *Id* at 250.

zation and selective birth control campaign on one vulnerable group of women.

Is it true that these women are irresponsible and decide not to take advantage of birth control options available to them?

C.R.A.C.K. regards its clients as "irresponsible." Ms. Harris asserts that "[t]hey're getting pregnant only because they're irresponsible,"[142] and claims that "[b]irth control is available to these women and it's free, but they're not interested in being responsible."[143] Through such statements C.R.A.C.K. falsely suggests that contraceptive services are widely available and easily accessible. These statements however not only lack any empirical foundation, they deliberately distort the reality that 33.2 million women in the United States are unable to access needed contraceptive services. Half of them need publicly supported contraceptive services because they have incomes under 250% of the federal poverty level (11.6 million women aged twenty to forty-four) or are sexually active teenagers (4.9 million).[144] In California alone, where C.R.A.C.K was founded, 4,258,620 women are in need of contraceptive services and supplies. Of these, 2,205,920 women—including 536,330 teenagers—are in need of publicly supported contraceptive services.[145]

C.R.A.C.K. does not pay for contraceptive services. Instead, it relies on publicly funded programs like Title X.[146] Yet Title X publicly funded family planning clinics are able to serve only one-quarter of all

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142. Rusty Dorin, *Critics Assail Plan to give Women Addicts Money to Use Birth Control*, *at* http://www.cnn.com/US/9910/23/no.crack.babies/ (Oct. 23, 1999) (quoting Barbara Harris).

143. Foubister, *supra* note 48 (quoting Barbara Harris).

144. The Alan Guttmacher Institute, *supra* note 117.

145. *Id.*

146. Title X, 42 U.S.C.A. §§ 300-300a-8 (1984) (Title X of the Public Health Services Act provides federal funding to public or nonprofit entities that establish voluntary programs or services for family planning to those in need).

American women in need of subsidized family planning services.[147] The Title X funding has not kept pace with inflation. In terms of constant dollars, the FY 1998 funding level of $203 million represented a 61% decrease from the FY 1980 funding level of $162 million.[148]

The need for Title X funding has increased dramatically, in part because of the increasing number of Americans without any public or private health insurance. The number of uninsured Americans has increased by 10 million over the last decade to 43 million people.[149] 19% of women of childbearing age who have incomes below the federal poverty level do not have private health insurance or Medicaid.[150]

Ms. Harris nevertheless claims that failure to use contraception is solely about individual responsibility, despite the fact that she has personal knowledge that the very women she labels irresponsible for failing to get contraceptive services have in fact tried to get those services and have been turned away for financial reasons. In a radio interview, Ms. Harris admitted:

> . . .we have had numerous calls from women telling us that they went to Planned Parenthood for birth control and were turned away because they didn't have money. We had a woman call us desperate saying that she went to Planned Parenthood and because she didn't have insurance or money they wound up not giving her birth control and she left with no birth control. She asked for a condom and they told her it would be a quarter. She did not have a quarter and she left with no birth control.[151]

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147. The Alan Guttmacher Institute, *supra* note 117.

148. *Id*. (Chart B).

149. The Alan Guttmacher Institute, *US Policy can reduce cost barriers to Contraception, at* http://www.guttmacher.org/pubs/ib_0799.html (last visited Apr. 25, 2004); *see also* Amy Goldstein, *Health Coverage Falls; Uninsured Numbers Up After 2 Years of Decline*, WASH. POST, Sept. 30, 2002, at A1.

150. The Alan Guttmacher Institute, *supra* note 117.

151. Radio Interview by Stacey Taylor with Barbara Harris, News Radio 600 KOGO San Diego, Cal. (Jan. 8, 2003) (tape on file with NAPW).

Even women who are not among the poorest face financial barriers when trying to obtain contraceptive services. For example, many private insurance companies fail to cover contraceptives to the same extent that they cover other prescription drug devices and outpatient services. Approximately 49% of large group insurance plans do not routinely cover any contraceptive methods.[152] Moreover, only four out of ten women with employer-based health plans receive coverage for the five most commonly used reversible contraceptive methods (oral contraceptives, the IUD, diaphragm, Norplant® and Depo Provera®).[153]

Barriers other than financial ones also exist. While the C.R.A.C.K. program suggests that women are supposed to be responsible, fewer and fewer of them are being educated about what contraceptives are and how to use them. Only nineteen states require school-based sexual education to include information about contraceptive care, and 35% of school districts require that abstinence be taught as the only acceptable option outside of marriage.[154]

Comprehensive sexuality education programs that provide information about both abstinence and contraception, teach communications skills, and provide access to family planning services are more likely both to persuade adolescents to delay the initiation of sexual intercourse and to lead to greater contraceptive use among teenagers when they become sexually active.[155] Despite the evidence in support

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152. The Alan Guttmacher Institute, *Uneven & Unequal: Insurance Coverage and Reproductive Health Services*, 9, 12, 15 (1994).

153. Planned Parenthood of America, Inc., *Equity in Prescription Insurance and Contraception Coverage, at* http://www.plannedparenthood.org/library/birthcontrol/epicc_facts.html (last visited Apr. 23, 2004).

154. Rachel Benson Gold & Elizabeth Nash, *State-Level Policies on Sexuality, STD Education, in* THE GUTTMACHER REPORT ON PUBLIC POLICY 4, 4-7 (2001).

155. The Alan Guttmacher Institute, *Welfare Reform, Marriage and Sexual Behavior*, *at* http://www.agi-usa.org/pubs/ib_welfare_reform.html (last visited Apr. 23, 2004); *see also* Jeff Stryker, *Abstinence or Else! The Just-Say-No Approach in Sex Ed Lacks One Detail: Evidence that It Works*, 264 THE NATION, 19 (June 16, 1997); Cynthia Dailard, *Sex Education: Politicians, Parents, Teachers and Teens, in* THE

of comprehensive sex education, the federal government has adopted the abstinence-only model as its sex education policy and has dramatically increased the resources devoted to such programs, appropriating a total of $102 million in federal funds for abstinence only programs for 2002.[156]

Also, political barriers to the use of contraception exist. For example, emergency contraception is an effective contraceptive pill taken after unprotected sex that can prevent a pregnancy, but is often deceptively characterized as an abortion method. Because of the lack of public awareness, education, and availability, only 1% of women of childbearing age have used emergency contraception and only 11% of women have heard of it.[157]

C.R.A.C.K.'s claim that contraceptive services are widely available ignores other obstacles as well. Two of the long-term contraceptive methods that C.R.A.C.K. offers a $200 incentive for women to use, Norplant and Lunelle, are not necessarily available on the market.[158] Both were subject to recalls after inspection showed that certain lots failed to provide the contraceptive protection they purported to offer.[159]

GUTTMACHER REPORT ON PUBLIC POLICY, 9-12 (Feb. 2001); INSTITUTE OF MEDICINE, *supra* note 99, at 233 ("Sexuality education programs that provide information on both abstinence and contraceptive use neither encourage the onset of sexual intercourse nor increase the frequency of intercourse among adolescents. In fact, programs that provide both messages appear to be effective in delaying the onset of sexual intercourse and encouraging contraceptive use, once sexual activity has begun, especially among younger adolescents.").

156. Planned Parenthood of N.Y. City, *Get the Facts: Issues and Trends in Reproductive Health: Federal Sex Education Policy*, *at* http://www.ppnyc.org/facts/facts/federal_policy.html (last visited Apr. 23, 2004).

157. Kaiser Family Foundation, *Emergency Contraception: Is the Secret Getting Out?, at* http://www.kff.org/content/archive/1352/contraception.html (last visited Apr. 23, 2004).

158. C.R.A.C.K. flyer, *supra* note 64.

159. U.S. Food and Drug Administration, *Important Norplant® System (Levonorgestrel Implants) Update*, *at* http:www.fda.gov/medwatch/safety/2000/norpla1.htm (Sept. 13, 2000) (Norplant®, the hormone implant device that is intended

C.R.A.C.K.'s invitation to women to seek forms of long-term contraception that are not available or only intermittently available is an invitation to encounter one more barrier in the quest for reproductive health services.

By creating the false impression that contraceptive services are readily available to anyone who wants them, and by making pregnancy and contraceptive use simply a matter of personal responsibility, C.R.A.C.K. contributes to an environment in which the focus is on individual blame. Larger issues that could effectively encourage greater use of and access to contraception are ignored.

Is having an abortion irresponsible, or worse, a form of child abuse?

C.R.A.C.K. not only portrays drug-using women as having an inordinate number of pregnancies and births—it also claims that such women have an extraordinary number of abortions. As one journalist observed: "C.R.A.C.K. also works by preventing abortion as a form of birth control—which, according to the organization, is the addict's national

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to prevent contraception for five years, was taken off the market in July 2002, and has been unavailable for new insertions since 2000, when quality assurance tests revealed low "shelf-life stability" of certain supplies. Health care professionals were advised at the time that patients with implants from defective lots should use back-up contraception or have the implants removed); *see* Wyeth News and Announcements, *Back-Up Contraception No Longer Required for Women Using Norplant® System*, *at* http://www. wyeth.com/news/presed_and_released/pr07_26_2002.asp (In July 2002, Wyeth Pharmaceuticals announced that, "[d]ue to limitations in product component supplies," it would not "reintroduce the Norplant System to health care professionals." Instead, Wyeth would "continue to research and develop other contraceptive options."); Leslie Berger, *After Long Hiatus, New Contraceptives Emerge*, N.Y. TIMES, Dec. 10, 2002, at F5 (On the "stormy history of Norplant," including concerns raised by health experts about harmful side effects, problems with removal of the device, and the specter of coercive insertion); U.S. Food and Drug Administration, *Pharmacia Corporation Announces Voluntary Recall of Lunelle™ Monthly Contraceptive Injection*, *at* http://www.fda.gov/oc/po/firmrecalls/pharmacia10_02.html (Oct. 10, 2002) (Lunelle™, the monthly hormone injection contraceptive, was withdrawn in pre-filled syringe form from the market in October 2002 after "sub-potent" doses were discovered in some supplies).

pastime."[160] One of C.R.A.C.K.'s brochures says that the targets of their program engage in "an endless cycle of unwanted pregnancies and abortions,"[161] and their website has claimed that "[m]any of these women use abortion instead of birth control."[162] Radio talk show host Cheryl Martin describes C.R.A.C.K.'s clients as women who routinely "abort their fetuses," and Harris reinforced this view by claiming, "They just keep getting pregnant and aborting the babies." Laura Love said: ". . . the average of the 300 of our clients . . . averaged about seven abortions a piece, up to ten for some of these women. [They] use abortion as birth control; that is not right."[163]

People from a wide spectrum of political and religious beliefs agree that there is significant value in decreasing the need for abortion services. C.R.A.C.K., however, is doing something beyond that. C.R.A.C.K.'s language suggests that it views abortions as well as drug use during pregnancy as a form of "legal child abuse."[164] C.R.A.C.K. says many of its clients, "… engage in a cycle of abortions to *eliminate* children …"[165] The choice of the word "eliminate"—evoking images of murder—supports a political agenda to eliminate the right to choose abortion rather than to reduce the need for them. Moreover, C.R.A.C.K. fails to acknowledge that by having abortions, its clients are acting responsibly—choosing not to bring children into the world who the women feel unable to care for.[166] Ironically, the C.R.A.C.K. program

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160. Malisow, *supra* note 54.

161. PROJECT PREVENTION, *supra* note 137.

162. Project Prevention, *Statistics*, *supra* note 105, at 2 (last visited Dec. 20, 2003).

163. *BET Tonight*, *supra* note 45.

164. Project Prevention, *supra* note 137.

165. Project Prevention, *Statistics*, *supra* note 105 (last visited Dec. 20, 2003) (emphasis added).

166. MURPHY & ROSENBAUM, *supra* note 53, at 63-64, 78 (women describing difficulty in obtaining abortion services and prejudice from clinic staff who were aware of their drug problems and describing why they chose abortions).

itself may be encouraging women to have the abortions that the organization seems to oppose. A study funded by the National Institute on Drug Abuse found that some women sought abortions because they believed—as C.R.A.C.K. propaganda urges—that they would otherwise have a damaged baby.[167]

Relying on C.R.A.C.K.'s own numbers, the claim that its clients have an extraordinary number of abortions is without support. Dividing the number of abortions women have had by the number of women C.R.A.C.K. has paid (1,638 "total number of abortions" divided by 1,141 number of women paid by C.R.A.C.K.), results in an average of 1.43 abortions per woman.[168] Although it must be stressed again that data presented by C.R.A.C.K. lacks scientific validity, it is startling that its own numbers so starkly contradict the stories it tells about women they pay.

Would it be better to avoid the pregnancy in the first place? Most people can agree that the answer is yes. That agenda, however, can be promoted without invalidating and stigmatizing a particular group of women—or using language that encourages reversal of *Roe v. Wade*[169] and the denial of the right to choose abortion.

Is it true that drug addicts care about drugs and not babies?

Barbara Harris calls C.R.A.C.K.'s clients "irresponsible" and says, "drug addicts care about drugs, not babies . . ."[170] Once again, however,

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167. *Id*. at 78 ("Rhonda, like most interviewees, believed that her crack use during the first weeks of pregnancy did serious and, more important, irreversible damage."); *Id*. at 132 ("For some women, the belief that their drug use had already damaged the developing fetus provided an acceptable rationale for terminating pregnancies.").

168. Project Prevention, *Statistics, supra* note 105 (last visited Dec. 20, 2003).

169. 410 U.S. 113 (1973). The Court in *Roe v. Wade* held that the privacy right implicit in the Fourteenth Amendment protects a woman's right to choose whether or not to have an abortion. *See id*. at 153.

170. Ashley Estes, *Project Offers Cash to Addicts If They Will Submit to Long-Term Birth Control,* SALT LAKE TRIB., Mar. 13, 2002, at B1.

the research focusing on drug-using women simply does not support such statements.

Far from the C.R.A.C.K. program's negative portrayal of the women it pays, researchers have found that "[i]mpending birth represented choosing life, an opportunity for redemption for past failures, hopes for the future, and a chance to claim a socially acceptable and respectable identity."[171] The NIDA study reported that:

> The crack-using women in our study did not resemble the uncaring, unfeeling monsters portrayed in the popular media . . . On the contrary, they felt a strong sense of responsibility for their children as well as deep shame when they failed. Like other mothers, they expressed maternal goals of nurturing and positive modeling.[172]

Another study of drug-using women in the South found that:

> . . . addicted women did seek and receive care during pregnancy, thus dispelling the stereotype that women suffering from alcoholism or drug addiction don't care about their babies or are ignorant of the need for prenatal care.[173]

As researcher Marsha Rosenbaum found, "Motherhood is at the core of many drug-using women's identities. They love and care very much about their children, who often provide the impetus for harm reduction through exiting 'the life' or instituting safer behaviors."[174] Over and over again, studies have found that drug-using women, including low-

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171. MURPHY & ROSENBAUM, *supra* note 53, at 3.

172. *Id*. at 9; s*ee also* Martha A. Jessup, et al., *Extrinsic Barriers to Substance Abuse Treatment Among Pregnant Drug Dependent Women*, 33 J. DRUG ISSUES 285, 299 (2003) ("Results from this study confirm that mothers themselves also have the child's welfare as their priority concern.").

173. Shelly Genshan, MPP, *Missed Opportunities for Intervening in the Lives of Pregnant Women Addicted to Alcohol or other Drugs*, 50 J. AM. MED. WOMEN'S ASS'N 160, 163 n. 5 (1995).

174. MURPHY & ROSENBAUM, *supra* note 53, at 654-65.

income women, are particularly motivated to seek health services when they discover that they are pregnant.[175]

Indeed many of the women who have been featured in the media, and subject to arrest under the legal theory that Ms. Harris initially sought to have enacted into law in California, have in fact tried to improve the conditions of their lives and those of their children. For example,

> Soon after she learned she was pregnant, [Kimberly] Hardy, convinced she had to get away from her crowd of crack users as well as her crumbling relationship with [her boyfriend] Ronald, took the kids home to Mississippi for the duration of her pregnancy. But by moving, she lost her welfare benefits, including Medicaid. Unable to pay for clinic visits, she had to go without prenatal care.[176]

Without access to prenatal care, Ms. Hardy returned to Michigan where she was unable to overcome her drug problem. When she gave birth to a healthy baby who tested positive for cocaine, she was arrested on charges of delivery of drugs to a minor.[177] Britta Smith also tried to act "responsibly." When Ms. Smith discovered that she was pregnant, she

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175. Jessup, *supra* note 172 (citing studies); *See also* MURPHY & ROSENBAUM, *supra* note 53, at 654-65; Margaret H. Kearney et al., *Mothering on Crack Cocaine: A Grounded Theory Analysis*, 38 SOC. SCI. & MED. 351-61 (1994) (employing a qualitative analysis to investigate how cocaine users perceive motherhood and how they attempt to care for their children).

176. Jan Hoffman, *Pregnant, Addicted and Guilty?,* N.Y. TIMES, Aug. 19, 1990, at 53.

177. People v. Hardy, 188 Mich. App. 305 (1991), *leave to appeal denied*. (Kimberly Hardy, a twenty-two year-old African American woman, was charged with delivery of a controlled substance and second-degree felony child abuse after her newborn child tested positive for cocaine. The circuit judge granted the defendant's motion to quash the child abuse charge but denied the motion to quash the delivery of cocaine charge. On appeal, the Michigan Court of Appeals unanimously ruled that the Michigan Legislature did not intend the statute prohibiting delivery of cocaine to children to apply to pregnant drug users. The Court held, "We are not persuaded that a pregnant woman's use of cocaine . . . is the type of conduct that the Legislature intended to be prosecuted under the delivery-of-cocaine statute, thereby subjecting the woman to the possibility of twenty years in prison and a fine of $25,000.").

looked in the yellow pages for drug treatment programs in Virginia that could help her with her cocaine problem. She was told that because she depended on Medicaid for payment, she would have to wait. Instead of being able to get the treatment she wanted, she was arrested on charges of child abuse.[178] Mary Barr, a former crack cocaine user and current activist, similarly describes her attempt to take responsibility, as she explained in a letter opposing the C.R.A.C.K. program:

> I am a former crack cocaine user. The first thing I did when I found out I was pregnant was to seek help. There were no treatment centers for pregnant women where I lived, but I found a shelter for pregnant women where I attended Narcotics Anonymous meetings and stayed clean through my entire pregnancy. Today I am a wonderful parent. While I am playing Monopoly with my children, I thank God I was never sterilized. We need to stimulate, not sterilize, an abuser's potential.[179]

No one would suggest that drug-using women (or for that matter, any group of mothers or fathers) are all loving and capable parents. Nevertheless, evidence-based research on the subject contradicts C.R.A.C.K.'s cruel characterizations of its clients' attitudes toward their children. The research demonstrates that the drug-using women that C.R.A.C.K. targets do overwhelmingly and profoundly care about their babies. Whether or not they can overcome their drug problems during their pregnancies or can, in fact, adequately parent their children, is a separate issue.

Are C.R.A.C.K.'s clients drug addicts by choice?

"It's not about the women," Ms. Harris says, "it's about the children. The women made a choice to do drugs. The babies don't have a

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178. Mike Hudson, *With Neglect Charge Behind Her, Mother Intent on Staying Clean,* ROANOKE TIMES, Sept. 17, 1991; Commonwealth v. Smith, No. CR91-05-4381, (Va. Cir. Ct., Sept. 23, 1991) (order of dismissal).

179. Mary Barr, *Virile Attacks on Sterilization*, WASH. TIMES, Jan. 10, 2003, at A18.

choice."[180] Ms. Harris says: "If they are drug addicts, they are drug addicts by choice . . . People say it is a disease, fine. But it is a disease of choice—however they got there and whatever their background and however screwed up their life is. The babies don't have a choice."[181]

With a few simple words, Ms. Harris and the program she runs dismiss the consensus of leading medical groups,[182] as well as the United States Supreme Court.[183] These institutions have long recognized that drug addiction is an illness that generally cannot be overcome without treatment and support.[184] The American Medical Association has unequivocally stated: "it is clear that addiction is not simply the product of a failure of individual willpower. Instead, dependency is the product of complex hereditary and environmental factors. It is properly viewed as a disease, and one that physicians can help many individuals control and overcome."[185] "In other words," writes the New York Times health reporter Jane Brody, "addiction is a brain disease, not a moral failing or

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180. Foubister, *supra* note 48.

181. Stryker, *supra* note 18.

182. *See* Charles Marwick, *Physician Leadership on National Drug Policy Finds Addiction Treatment Works*, 279 JAMA 1149 (1998); AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 176 (4th ed. 1994) ("The essential feature of substance dependence is a cluster of cognitive, behavioral, and physiological symptoms indicating that the individual continues use of the substance despite significant substance related problems. There is a pattern of repeated self-administration that usually results in tolerance, withdrawal, and compulsive drug-taking behavior.").

183. *See* Linder v. United States, 268 U.S. 5, 18 (1925) ("[Addicted persons] are diseased and proper subjects for [medical] treatment."); *cf.* Robinson v. California, 370 U.S. 660, 666-67 (1962) (holding unconstitutional a state law making narcotic addiction a crime).

184. *See* Brian Vastag, *Scientists Find Connection in the Brain Between Physical and Emotional Pain*, 290 JAMA 2389 (2003).

185. AMERICAN MEDICAL ASS'N, PROCEEDINGS OF THE HOUSE OF DELEGATES: 137TH ANNUAL MEETING, BOARD OF TRUSTEES REPORT NNN: DRUG ABUSE IN THE UNITED STATES: A POLICY REPORT 236, 241 (1988).

behavioral problem. People do not deliberately set out to become addicts."[186] Dr. Nora D. Volkow, Director of the National Institute on Drug Abuse, reports that she has "never met a patient who wanted to be an addict."[187] Similarly, the California Medical Association admonishes:

> Prenatal substance abuse by an addicted mother does not reflect willful maltreatment of a fetus, nor is it necessarily evidence that the mother will abuse her child after birth. A woman with a substance abuse problem may genuinely desire to terminate the use of such substances prenatally but may be unable, without access to substance abuse treatment programs, to act on her desire.[188]

For many pregnant women, drug use is an all too human response to the severe violence and trauma they have suffered. As Rush Limbaugh's recently publicized drug problem confirms, humans do not like to feel pain.[189] People (and there are millions of them) who do not have access to mental health services or to physicians who can prescribe legal drugs will do what is necessary to treat their pain and to survive. For some people, this means self-medicating with alcohol and illegal drugs.[190] Of these people, some will become physiologically addicted and others will experience severe psychological dependency.[191] Just as

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186. Jane Brody, *Addiction: A Brain Ailment, Not a Moral Lapse*, N.Y. TIMES, Sept. 30, 2003, at F8.

187. *Id*.

188. Brief of Amici Curiae California Medical Association & American College of Obstetricians and Gynecologists, et. al. at 3-4, In Re Adrianna May H., District 9 (No. 3 Civil CO14203); (Cal. Ct. App. 3d filed June 17, 1993).

189. James Barron, *In Show, Limbaugh Tells of a Pill Habit; Plans to Enter Clinic*, N.Y. TIMES, Oct. 11, 2003, at A1.

190. *See* Ann Boyer, *When Pregnant Women Use Drugs: What Are the Real Problems and What Can Society Do to Solve Them*, 5 J. L. SOC'Y. 139 , (2004).

191. According to the National Academy of Science, 32% of people who try tobacco become dependent, as do 23% of those who try heroin, 17% who try cocaine, 15%

people whose lifestyles result in diabetes and hypertensive disease do not want to become sick, drug users do not set out to become addicted.[192]

"Choice" does play a role in drug use and addiction. That is why so many people choose to seek treatment and do eventually gain control over their drug problems. The C.R.A.C.K. program, however, also has a choice about the language it uses. By treating addiction exclusively as a matter of choice, C.R.A.C.K. reinforces the dehumanizing image of the women it targets and ensures that the focus of public attention is on individual blame rather than social responsibility. According to C.R.A.C.K, violence against women, sexual abuse, trauma, extreme poverty, and other common antecedents of women's drug problems do not matter because drug use is simply a matter of choice.

If C.R.A.C.K. really meant that children deserve to grow up in caring communities then one would expect that it would focus on more than personal responsibility, and work not only to prevent unplanned pregnancies but also the violence, abuse and poverty that will not disappear simply because 1,000 or 100,000 women have been sterilized or put on long-term birth control.

Is it true that drug treatment is available "nationwide?"

On its website and in its public statements, C.R.A.C.K. creates the impression that drug treatment is widely and freely available. When

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who try alcohol and 9% who try marijuana. *See* Brody, *supra* note 186, at F8. With regard to alcoholism, it is believed that about 40% of the risk of becoming an alcoholic is hereditary. *Id*.

192. HHS Secretary Tommy Thompson commenting on a study of Type 2 Diabetes, said, "In view of the rapidly rising rates of obesity and diabetes in America, this good news couldn't come at a better time … So many of our health problems can be avoided through diet, exercise and making sure we take care of ourselves. By promoting healthy lifestyles, we can improve the quality of life for all Americans and reduce health care costs dramatically." INDIANA UNIVERSITY SCHOOL OF MEDICINE, LANDMARK NIH STUDY: DIET AND EXERCISE DRAMATICALLY DELAY TYPE 2 DIABETES *at* http://medicine.indiana.edu/news_releases /archive_01/diabetes_01.html (August 8, 2001).

challenged about why it doesn't fund or directly support increased drug treatment: "C.R.A.C.K.'s reply is that there are already plenty of programs and services focused on birth mothers."[193] It says: "We cannot make anyone stop using drugs. That is the focus of drug rehabilitation facilities that exist nationwide."[194]

In fact it is estimated that 48% of the need for drug treatment, not including alcohol abuse, is unmet in the United States. Like contraceptive services, drug treatment is difficult to obtain for people of all classes. The private insurance industry does not support coverage for alcohol and drug treatment. Nearly one in five individuals who are referred by their physicians for substance abuse treatment are denied treatment by insurance companies.[195] As a result of funding cuts, availability of treatment for drug and alcohol-addicted prison inmates has significantly declined over the last decade.[196]

Access to safe and effective treatment for drug addiction is deliberately limited in America today.[197] Indeed, the U.S. government has

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193. *See* Foubister, *supra* note 48.

194. *See* Project Prevention, *Objectives*, *supra* note 24 (last visited Apr. 23, 2004).

195. NAT'L CENTER ON ADDICTION AND SUBSTANCE ABUSE AT COLUMBIA UNIVERSITY, MISSED OPPORTUNITIES: NATIONAL SURVEY OF PRIMARY CARE PHYSICIANS AND PATIENTS ON SUBSTANCE ABUSE 24 (2000), *at* http://www.casacolumbia.org/pdshopprov/files/29109.pdf (last visited Apr. 23, 2004).

196. BUREAU OF JUSTICE STATISTICS, SUBSTANCE ABUSE AND TREATMENT, STATE AND FEDERAL PRISONERS, 1997 10 (1999). (Among those prisoners who had been using drugs in the month before their offense, 15% of both state and federal inmates said they had received drug abuse treatment during their current prison term, down from a third of such offenders in 1991. Among those who were using drugs at the time of offense, about 18% of both state and federal prisoners reported participation in drug treatment since admission, compared to about 40% in 1991.) *Id.*

197. *See generally* MICHAEL MASSING, THE FIX (1998). For example, although "[m]ethadone is the most effective treatment for heroin addiction, . . .government regulations largely block its prescription by primary-care physicians and its sale by pharmacies, instead limiting methadone distribution to special clinics (which tend to be poorly staffed and inconveniently located.) *Id.* "The reality is . . . the system through which methadone is provided is a uniquely oppressive bureaucracy that greatly

made the choice not to fund drug treatment for people who need and want it.[198] The $16 billion budget for drug law enforcement, interdiction and supply reduction represents two thirds of the total federal budget addressing drug use in this country.[199]

Access has also been blocked to many "harm reduction" techniques that are effective both in terms of public health and cost savings.[200] Harm reduction recognizes that overcoming drug addiction is usually a difficult and gradual process. It is a non-punitive public health approach that provides people who are not yet ready or able to achieve

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reduces the benefits of the medication and generates harm where none existed before." Peter Vanderkloot, *Methadone: Medicine, Harm Reduction or Social Control*, 1 HARM REDUCTION COMMUNICATION 4 (Spring 2001). "Methadone's benefits "have been established by hundreds of scientific studies." Drug Policy Alliance, *Methadone Maintenance Treatment, at* http://www.drugpolicy.org/library/research/methadone.cfm (last visited Apr. 23, 2004). Yet "[m]ethadone can be prescribed *exclusively* by 'comprehensive treatment programmes,' and not by physicians in their private offices, in hospital clinics, in community health centres, etc. Collectively, these programmes can accommodate less than 15% of those whom methadone treatment might help." Robert G. Newman, M.D., *Addiction and Methadone: One American's View*, 2 HEROIN ADDICTION & RELATED CLINICAL PROBLEMS 19, 22 (2000)) (emphasis in the original).

198. *See, e.g.*, MIKE GRAY, DRUG CRAZY: HOW WE GOT INTO THIS MESS AND HOW WE CAN GET OUT (1998); DAN BAUM, SMOKE AND MIRRORS: THE WAR ON DRUGS AND THE POLITICS OF FAILURE (1996); MASSING, *supra* note 197; Newman, *supra* note 197, at 19, 22 (2000); Ethan A. Nadelmann, *Commonsense Drug Policy*, 77 FOREIGN AFF. 111, 118 (Jan./Feb. 1998). *See generally*: Drug Policy Alliance, *at* http://www.drugpolicy.org; Common Sense for Drug Policy, *at* http://www.CSDP.org; Harm Reduction Coalition, *at* http://www.harmreduction.org.

199. Ernest Drucker, *Drug Prohibition and Public Health: 25 Years of Evidence*, 114 PUB. HEALTH REP. 14, 15 (Jan. 1999); PETER RYDELL & SUSAN S. EVERINGHAM, CONTROLLING COCAINE: SUPPLY VERSUS DEMAND PROGRAMS (1994) (noting that a 1994 report by the Rand Corporation, looking specifically at efforts to control cocaine, found that treatment accounts for only a 7% share of government expenditures with 73% going to domestic law enforcement, 7% to source-country control and 13% to interdiction).

200. Drucker, *supra* note 199, at 16 (noting that in the United States, "the very use of the term 'harm reduction' is still banned from the Federal policy lexicon and denied funding because it is seen as 'condoning drug use.'"). *Id.* at 28.

complete abstinence with information and assistance that can help them reduce consumption and minimize the risks associated with their continuing drug use.[201] Despite the fact that government-sponsored research has shown that harm reduction programs such as needle exchanges do not lead to increased drug use and do have numerous positive health effects, federal policy prohibits use of government funds for such life- and cost-saving measures.[202]

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201. *See* MURPHY & ROSENBAUM, *supra* note 53, at 100; *see also* The Harm Reduction Coalition, *Principles of Harm Reduction*, at http://www.harmreduction.org/prince.html (last visited Apr. 23, 2004); Andrew Tatarsky, *An Integrative Approach to Harm Reduction Psychotherapy: A Case of Problem Drinking Secondary to Depression*, 14 IN SESSION: PSYCHOTHERAPY IN PRACTICE 9 (Dec. 1998); HARM REDUCTION PSYCHOTHERAPY, A NEW TREATMENT FOR DRUG AND ALCOHOL PROBLEMS (Andrew Tatarsky ed., 2002); PATT DENNING, HARM REDUCTION PSYCHOTHERAPY: AN ALTERNATIVE APPROACH TO ADDICTION (2000); Mothers Against Drunk Driving is an example of harm reduction. They do not expect people to give up drinking, but seek to reduce the harms associated with driving while drunk. Other harm reduction innovations include efforts to stem the spread of HIV by making sterile syringes readily available and collecting used syringes; allowing doctors to prescribe oral methadone for heroin addiction treatment, as well as heroin and other drugs for addicts who would otherwise buy them on the black market; establishing 'safe injection rooms' so addicts do not congregate in public places and dangerous 'shooting galleries'; employing drug analysis units at the large dance parties called raves to test the quality and potency of MDMA, known as Ecstasy, and other drugs that patrons buy and consume there; decriminalizing (but not legalizing) possession and retail sale of cannabis and, in some cases, possession of small amounts of 'hard' drugs; and integrating harm-reduction policies and principles into community policing strategies." Nadelmann, *supra* note 198, at 111, 114. Public health groups including the American Medical Association, the National Institutes of Health, the Centers for Disease Control and Prevention, and the Institute of Medicine, have endorsed needle exchange programs. *Id; AIDS Activists Say Needle Law Adds to Risks in New Jersey*, ASSOCIATED PRESS, Mar. 11, 2001.

202. *See* Sheryl Gay Stolberg, *Clinton Decides Not to Finance Needle Program*, N.Y. TIMES, Apr. 21, 1998, at A1 (describing President Clinton's refusal to lift a nine year funding ban on needle exchanges despite promising to do so once government scientists certified that the programs reduced the spread of AIDS and did not encourage drug use); *see also* Julie Ruiz-Sierre, Research Brief, *Syringe Availability,* THE LINDESMITH CENTER/DRUG POLICY FOUNDATION (1997) (describing how syringe exchange has also been shown to be an important first step in helping drug users obtain

Women, particularly pregnant women and women with children, have been and continue to be especially underserved in the alcohol and drug treatment system.[203] The National Association for Addiction Professionals puts it starkly, stating: "Women are second-class citizens when it comes to treatment for drug addiction and alcoholism."[204] The lack of adequate treatment for women is a significant and ongoing problem that has been well-documented by a variety of measures.[205] For

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drug information, treatment, detoxification, social services and primary health care.); MICHAEL GLADWELL, THE TIPPING POINT 203-06 (2002)(describing the success and efficiency of Baltimore's needle exchange program).

203. *See generally* DRUG STRATEGIES, KEEPING SCORE: 1998 32 (1998), *available at* http://www.drugstrategies.org/KS1998/indexbottom.html (last visited Apr. 23, 2004); "Although significant progress has been made in the past decade in understanding the health and socioeconomic impact of substance abuse among women, treatment is still scarce. Only a small fraction of the estimated nine million women with serious alcohol and other drug problems are able to get treatment, unless they can afford to pay." *Id. See also* Dorothy Roberts, *The Challenge of Substance Abuse for Family Preservation Policy*, 3 J. HEALTH CARE L. & POL'Y 72, 78 (1999); "Government officials have largely ignored the burgeoning need for comprehensive, long-term treatment for women." *Id.* In 1992, it was estimated that only 10 to 12% of women substance abusers received the treatment they needed. *See Holds News Conference on Substance Abuse and Pregnancy*, FDCH Political Transcript, Aug. 11, 1998, *available in* LEXIS, News Library, Poltrn file (Comments of Mary Haack, The George Washington University Center for Health Policy Research); *see also* Wendy Chavkin, *Mandatory Treatment for Drug Use During Pregnancy*, 266 JAMA 1556, 1557 (1991) (noting that "pregnant women . . . have been categorically excluded from most drug treatment programs.").

204. NAADAC, THE ASSOCIATION FOR ADDICTION PROFESSIONALS, *Issue Brief: Addiction Treatment for Women* (on file with author).

205. *See, e.g.*, Chavkin, *supra* 203; Julie Petrow, *Addicted Mothers, Drug Exposed Babies: The Unprecedented Prosecution of Mothers Under Drug-Trafficking Statutes*, 36 N.Y. SCH. L. REV. 573, 604-06 (1991) (arguing for an increase in federal and state funding for drug treatment programs for women); Molly McNulty, Note, *Pregnancy Police: The Health Policy and Legal Implications of Punishing Pregnant Women for Harm to Their Fetuses*, 16 N.Y.U. REV. L. SOC. CHANGE 277, 292-303 (1987) (discussing the lack of access to adequate health care); Wendy Chavkin et al., *National Survey of the States: Policies and Practices Regarding Drug-Using Pregnant Women*,

many years, pregnant women with drug problems were simply denied admission to drug treatment programs.[206] Today, despite research demonstrating the value of programs designed to meet the needs of women,[207] many of the still-too-few programs are in jeopardy due to funding cuts.[208] Although, on a national level, funding for women's

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88 AM. J. PUB. HEALTH 117 (1998); DRUG STRATEGIES, *supra* note 203, at 16-17; Vicki Breitbart et al., *The Accessibility of Drug Treatment for Pregnant Women: A Survey of Programs in Five Cities*, 84 AM. J. PUB. HEALTH 1658 (1994); *see also* Elaine W. v. Joint Diseases N. Gen. Hosp., Inc., 613 N.E.2d 523, 524 (N.Y. 1993) (discussing a New York hospital's refusal to admit pregnant women into its drug detoxification program).

206. *See, e.g.*, *Elaine W.*, 613 N.E.2d at 524 (discussing the hospital's refusal to admit pregnant women into its drug detoxification program and noting that its policy is attributed to its lack of obstetrical resources).

207. *See, e.g.*, Stephen Magura et al., *Effectiveness of Comprehensive Services for Crack-Dependent Mothers with Newborns and Young Children* (1998) (discussing New York City's experience with the Family Rehabilitation Program and citing numerous studies describing how comprehensive, coordinated, holistic treatment is better at engaging pregnant and parenting women); Center for Substance Abuse Treatment, *supra* note 52; Claire McMurtrie et al., *A Unique Drug Treatment Program for Pregnant and Postpartum Substance-Using Women in New York City: Results of a Pilot Project, 1990-1995*, 25 AM. J. DRUG & ALCOHOL ABUSE 701, 701-02 (1999) (describing a comprehensive model of drug treatment for pregnant and postpartum women that included children and did not view relapse as a failure, concluding that it "seem[ed] to improve mothers' lives, fetal drug exposure, and birth outcome significantly"); *see also* Center for Substance Abuse Treatment, *Practical Approaches in the Treatment of Women Who Abuse Alcohol and Other Drugs* 68, 97-98 (1994) (U.S. Dept. of Health & Human Servs. Publication No. (SMA) 94-3006); U.S. Department of Health and Human Services, Center for Substance Abuse Treatment, *Benefits of Residential Substance Abuse Treatment for Pregnant and Parenting Women* (Washington DC: September, 2001).

208. *See, e.g.*, Laura Lassor, When Success Is Not Enough: The Family Rehabilitation Program and the Politics of Family Preservation (unpublished manuscript, on file with NAPW) (discussing, in part, the elimination by New York City Mayor Rudolph Giuliani of city funding for the Family Rehabilitation Program); Charisse Jones, *A Casualty of Deficit: Center for Addicts*, N.Y. TIMES, Jan. 14, 1995, at A27 (noting the dwindling numbers of treatment programs in New York City).

treatment improved in the 1980's, it decreased again in the early 1990's.[209] At the end of the 1990's, federal categorical programs targeted at pregnant and parenting women were phased out of the budget of the Center for Substance Abuse Treatment.[210] Numerous state commissions have also found that their states have inadequate services.[211]

Even when programs exist, women face a host of barriers to getting appropriate treatment and related health care services. For example, many find that in order to get treatment they must give up custody of their children.[212] If they seek help for the abuse in their lives, they discover that most battered women's shelters do not accept women with drug problems.[213] Stigma, lack of financial resources, lack of child care,

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209. Legal Action Center, *Steps to Success: Helping Women with Alcohol and Drug Problems Move From Welfare to Work* 6 (May 1999); *see also* DRUG STRATEGIES, *supra* note 203, at 22.

210. *Id.*

211. *See, e.g.*, 2 State Council on Maternal, Infant & Child Health, *1991: South Carolina Study of Drug Use Among Women Giving Birth: Prevention and Treatment Services* 2, 10 (1992) (reporting that "specific resources designed to meet the needs of women of childbearing age, especially pregnant women, are not widely available" and that lack of child care and transportation are seemingly insurmountable obstacles to treatment for many women); Substance Abuse & Pregnancy Work Group, *A Report to the Secretary of the Kentucky Cabinet for Human Resources and the Legislative Research Commission* 17 (1994) (noting the lack of treatment services "especially those that provide specific services for pregnant women").

212. Office of National Drug Control Policy, *Treatment Protocol Effectiveness*, *at* http://www.whitehousedrugpolicy.gov/treat/trmtprot.html (last visited Apr. 23, 2004). "Inpatient treatment is generally required at some point in the multi-model treatment process, and because few programs provide childcare services, foster care may be the only option for [parents] who require inpatient treatment. Many women avoid treatment for fear they will be unable to regain custody of their children after completing treatment." *Id.*

213. *See* Maureen Coley, *Substance Abuse and Victims of Domestic Violence: A Comprehensive Program of Recovery*, CSW PROGRAM PLAN (discussing the extent of substance abuse problems among victims of domestic violence); Amy Hill, *Applying Harm Reduction to Services for Substance Using Women in Violent Relationships*, HARM REDUCTION COALITION, Spring 1998, *at* http://www.harmreduction.org/news/

fear of losing custody of children, fear of prosecution and experiences with violence also act as significant barriers.[214]

What is available nationwide are illegal drugs,[215] not drug treatment. Suggesting that drug treatment is widely and easily accessible to those who want it is both misleading and counterproductive. If drug use is simply a matter of choice, and treatment is available, why would the public or politicians feel the need to provide any additional resources for treatment?[216]

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spring98/hill.html (last visited Apr. 23, 2004) (discussing the reasons why the development of services for battered, substance-abusing women is limited).

214. *See generally* MURPHY & ROSENBAUM, *supra* note 53 (discussing the impact of public outrage on pregnant drug-using women and the internal and external barriers they face to getting help); Legal Action Center, *supra* note 209, at 16, 17; Breitbart et al., *supra* note 205; J. Marsh et al., *Increasing access and providing social services to improve drug abuse treatment for women with children*, 95 ADDICTION 237 (2000); L. Nelson-Zlupko et al., *Gender differences in drug addiction and treatment: implications for social work intervention with substance-abusing women*, 40 SOCIAL WORK 45 (1995); Chavkin, *supra* note 203.

215. *See* Drucker, *supra* note 199 ("Drugs are cheaper, more powerful, and more available today than at any time in the past 25 years."); *See also* GRAY, *supra* note 198, at 189 (describing widespread access to a range of illicit drugs in every part of the country and for every age group and noting that continued drug use in America cannot be attributed to the lack of resources: "In the attempt to make America drug-free, the taxpayers laid out over $300 billion in the last fifteen years alone. To put that in perspective, we went to the moon for less than a third of that amount.").

216. People who write about C.R.A.C.K. often simply assume that treatment is or could easily be made available. For example, in arguing that the State could constitutionally adopt a modified C.R.A.C.K. program, student author Juli Horka-Ruiz argues that such a program ". . . would not require drug addicts to enter drug treatment programs or counseling, *although that option should be available upon request.*" (emphasis added) Horka-Ruiz, *supra* note 7, at 493. The author, however, never addresses the fact that treatment is extremely limited and that making treatment available on request would entail a major shift in public health policy and financing. An analysis that just assumes treatment is available simplifies things but has little to do with the reality of drug-using women's lives.

Is it true that "Treatment Does Not Work"?

Not only does C.R.A.C.K. create the false impression that treatment is widely available, it also suggests in both subtle and explicit ways that treatment simply does not work or worse, that it is dangerous. For example, Harris said C.R.A.C.K. supporters wouldn't donate money for drug treatment because they don't think it works. "That's not the solution to the problem," she said. "It's not the women who are the victims. It's the children."[217] People often do not think treatment works, however, because of the kind of misinformation and propaganda the C.R.A.C.K. program promotes. Ms. Harris has said explicitly, "Drug treatment does not work."[218] Moreover, Ms. Harris highlights those cases in which treatment appears to have failed: "Drug treatment is not the solution. Most of our women have been in drug treatment 10 or 12 times and relapsed. That's not the solution."[219]

Treatment for drug addiction works, however, and is cost-effective.[220] In fact, treatment of addiction is as successful as treatment of other chronic diseases such as diabetes, hypertension, and asthma.[221] Research also shows that comprehensive treatment programs that do not separate mothers from their children in particular demonstrate significant success.[222] They are also cost-effective, especially when one compares their price tag to the staggering financial and social costs of

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217. Garloch, *supra* note 54.

218. *Fox the Edge with Paula Zahn: In Focus: Should We Pay Addicts to be Sterilized* (Fox News Network, July 7, 2000).

219. *Id*.

220. *See* Marwick, *supra* note 182. The Physician Leadership on National Drug Policy reviewed more than 600 peer-reviewed research articles and found that addiction to illicit drugs can be treated with as much success as other chronic illnesses such as diabetes, asthma, and hypertension. *Id.*

221. *See* Alan Leshner, *Science-based views of drug addiction and its treatment,* 282 JAMA 1314 (1999).

222. *See supra* note 207 (discussing barriers for women seeking treatment).

separating a mother and her child.[223] "Staying at home with an addicted mother who is actively participating in a rehabilitation program can, in many cases, be the more promising and safer route for the child."[224] In a University of Florida study of children prenatally exposed to cocaine, one group was placed in foster care, while the other half was placed with birth mothers able to care for them.[225] After one year the babies were tested using standard measures of infant development: rolling over, sitting up, and reaching out. Consistently, the children placed with their birth mothers did better.[226] For the foster children, concludes Richard Wexler, being taken from their mothers was more toxic than the cocaine.[227]

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223. *See* Marwick, *supra* note 182, at 1149 (discussing the fact that drug "treatment costs ranged from $1800 per patient for outpatient treatment to $6800 for long-term residential care," which is far less expensive than the $25,900 per year it costs to keep one person in prison); *see also* Center for the Future of Children, *Drug-Exposed Infants: Analysis,* 1 THE FUTURE OF CHILDREN 9, 14 (1991) (noting that "it is extraordinarily costly for government to rear children through foster care, with costs typically around $3,000 per year per child, but reaching as high as $35,000 or even double that when the children have special medical complications such as AIDS"); Claire McMurtie et al., *supra* note 207, at 701, 703 (1999) ("Provision of comprehensive services for women and their families is cost effective compared to incarceration, foster care, and tertiary medical care.").

224. James Willwerth, *Should We Take Away Their Kids? Often The Best Way to Save the Child is to Save the Mother as Well*, TIME, May 13, 1991, at 62.

225. Press Release, University of Florida, To Have and to Hold: US Show Cocaine-Exposed Infants Fare Better With Their Biological Mothers, (May 3, 1998) *at* http://www.napa.ufl.edu/98news/cokebabi.htm (last visited Apr. 23, 2004) (discussing Kathleen Wobie's paper *To Have and To Hold: A Descriptive Study of Custody Status Following Prenatal Exposure to Cocaine* which was presented at joint annual meeting of the American Pediatric Society and the Society for Pediatric Research, May 3, 1998).

226. *Id.*

227. NATIONAL COALITION FOR CHILD PROTECTION REFORM, *Family Preservation and Substance Abuse Fact Sheet* (on file with author); *see generally* http://www.nccpr.org.

Indeed, New York City's experience with Family Rehabilitation Programs proves this point well. This program was launched in 1989 to prevent dissolution of those families at highest risk for foster care placement by combining family-aimed drug treatment services with close child safety monitoring and other social services. It demonstrated significant success both for families and taxpayer dollars.[228] Despite the success, the drug treatment component of the program has struggled for survival, suffering a near total cut in municipal funding in 1995.[229]

Treatment does work, but because addiction, like other chronic diseases, involves relapse as a part of recovery, people often mischaracterize drug treatment as ineffective.[230] Far from the innumerable relapses Harris chooses to highlight, research has found that one-third of addicts recover on their first attempt and another third recover "after brief periods" of relapse.[231] Moreover, research has demonstrated that

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228. *See* Lassor, *supra* note 208 (discussing the elimination by New York City Mayor Rudolph Giuliani of city funding for the Family Rehabilitation Program); Magura, *supra* note 207; Charisse Jones, *supra* note 208, at A27 (noting the dwindling numbers of treatment programs in New York City); Alma J. Carten*, Mothers in Recovery: Rebuilding Families in the Aftermath of Addiction*, 41 NAT'L ASS'N OF SOC. WORKERS 37 (1996).

229. *See* Lassor, *supra* note 208.

230. As with most chronic disease and conditions that can be controlled by diet, exercise and behavioral changes, most people find it difficult to conform to health recommendations even when the consequences involve what has been described as the worst possible pain. *See* Donna Wilkinson, *These Stones Pack a Punch to the Kidneys*, N.Y. TIMES, Sept. 22, 2003 ("Despite good intentions, however, many who suffer from stones revert to their old ways, experts say. 'Studies have shown that only 17-23% of patients will actually keep the diet [that can prevent future episodes],' Dr. Dretler of Harvard said.").

231. Department of Health and Human Services, Blending Perspectives and Building Common Ground: *A Report to Congress on Substance Abuse and Child Protection* (Washington, DC, Apr. 1999). *See also* Charles P. O'Brien & A. Thomas McLellan, *Myths About the Treatment of Addiction*, 347 LANCET 237 (1996) (comparing compliance with treatment attendance for abstinence oriented addiction, treatment compliance with treatment regimens for diabetes, hypertension, and asthma, and finding the highest rate of compliance with drug treatment).

relapses, when handled correctly, need not be a measure of failure, but rather provide an opportunity to learn what treatment and support is still needed.[232] When relapse is handled badly, everyone loses. When a diabetic cheats and fails to adhere to his or her diet, no one says, "You are out of the program! No more insulin for you!" But when an alcoholic or drug addict relapses, she or he is far too often thrown out of the program and away from the community that can help her/him to sustain recovery in the long run. To say someone has failed treatment often ignores the reality that it is the treatment that has failed the person.

Drug treatment takes many different forms, from lay efforts such as Alcoholics and Narcotics Anonymous to therapeutic communities, to short detoxification programs.[233] In order to work, the treatment provided must match the person's needs, and there is undoubtedly much treatment that needs serious reevaluation and improvement.[234] But C.R.A.C.K. is not critiquing a relatively new field of health care; it is deliberately undermining it. In the case of methadone treatment, C.R.A.C.K. has equated this highly successful form of drug treatment with drug use itself and suggested that it is dangerous for pregnant women.

In 2002 Barbara Harris sent letters to methadone programs across the country, urging them to refer patients to the C.R.A.C.K. program. In the letter, dated February 22, 2002, Barbara Harris wrote in part:

> We are currently working with several methadone clinics that make our offer known, and available, to the women and men who come

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232. *See, e.g.*, HARM REDUCTION PSYCHOTHERAPY, *supra* note 201, at 2 ("…relapse should be seen as a common, natural part of the process of changing behavior, which can be an opportunity for learning that might decrease the possibility of future relapses."); *see also* McMurtrie, *supra* note 207, at 706 (describing a comprehensive program for women that recognizes that "relapse is a part of recovery" and that does not dismiss women with positive urine toxicologies from the program).

233. *See* Office of National Drug Control Policy, *supra* note 212.

234. *See, e.g.,* Peggy Orenstein, *Staying Clean*, N.Y. TIMES MAGAZINE, Feb. 10, 2002, at 34 (examining the experiences of people in a Therapeutic Community, discussing a range of treatment approaches including those needed for women).

> through their program. *I'm sure one thing most can agree on is that it is important for those using methadone or other drugs to refrain from getting pregnant.*[235]

After being contacted by methadone providers incensed by the letter, National Advocates for Pregnant Women sought expert advice and eventually helped to organize a letter from over 130 individuals and organizations asking C.R.A.C.K. to correct the suggestion that methadone treatment is somehow dangerous for pregnant women and their future children. The letter stated in part:

> Your statement, suggesting that it is dangerous for a woman who is receiving clinically prescribed methadone treatment to become pregnant, is simply wrong. Methadone is a highly effective treatment for all opiate dependent patients and, most specifically, for women—both before and after they may become pregnant. In fact, methadone treatment during pregnancy has not been associated with congenital abnormalities or fetal demise. In those cases where neonatal withdrawal symptoms occur (and they frequently do not), these symptoms can be treated readily, with no evidence of any adverse impact on physical or cognitive development. In short, there is simply no medical basis for your suggestion that methadone patients should "refrain from getting pregnant."
>
> For over 30 years, in countries throughout the world, methadone maintenance treatment (MMT) has been shown to substantially reduce illegal opiate use and the crime, illness, suffering, and death with which it is associated. The benefits have been shown to accrue, not only to the individual patient, but to his/her family and the community, as well. The most credible and objective governmental and non-governmental organizations in America and abroad have recognized these positive results with MMT. For example, the U.S. Department of Health and Human Services joins the scientific community in recognizing that MMT greatly benefits the patients as well as the general community. It is specifically

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235. NAPW Press Release and Letter, National Advocates for Pregnant Women Condemns C.R.A.C.K. Campaign Targeting Methadone Clinics, *Over 100 Methadone Treatment Experts, Doctors, Advocates Object to Misleading Statement, at* http://www.advocatesforpregnantwomen.org (Apr. 29, 2002).

> recommended for pregnant and breast-feeding patients, which further demonstrates the strong medical consensus supporting methadone treatment, both in general and during pregnancy.
>
> Unfortunately, despite methadone treatment's many benefits, it is available to fewer than 20% of the people who most need it. Women, in particular, face numerous barriers to obtaining this important medical intervention. Your letter and activities, which spread false information and stigmatize current and future mothers who receive this treatment, will make it even more difficult for women who need methadone treatment to receive it.[236]

C.R.A.C.K. refused to withdraw or correct the letter, choosing instead to rely on personal anecdotes rather than expert opinion and evidence-based research.[237]

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236. *See id.* for full letter and list of signatories. Other experts wrote as well. For example, Enoch Grodis, M.D., former director of the National Institute on Alcohol Abuse and Alcoholism (NIAAA), National Institutes of Health wrote to Ms. Harris outlining the benefits of methadone treatment for both mothers and babies, and concluded by saying, "I know you wish the best for pregnant women and their off-spring. We all do. I hope that you might reconsider your position on methadone and instead join the many people who wish to assure all heroin addicts that there is potent, safe, effective treatment for their addiction." (Apr. 26, 2002) (on file with NAPW). *See also* Letter from Mark W. Parrino, MPA, President of the American Association for the Treatment of Opioid Dependence, Inc. to Barbara Harris (March 29, 2002) (on file with NAPW) (quoting the portion of the Harris letter regarding methadone and pregnancy and citing extensive research in support of his response that "there is no medical or scientific basis for this statement.").

237. *See* Letter from Barbara Harris, Project Prevention, to National Advocates for Pregnant Women (Apr. 29, 2002) (on file with author). The letter stated:

> In reference to your faxed letter regarding our letter to methadone clinics. We were encouraged to send out our information to people working in an Albuquerque methadone clinic and a supervisor from San Diego, CA. They told us to mail our information to every methadone clinic. We have also been told by many working at methadone clinics that methadone "IS NOT GOOD FOR BABIES"! We have also been told by many female methadone users that have given birth that they NEVER want to do that to another baby!

C.R.A.C.K.—Disdaining Science, Using Women

As Carol Mason succinctly argues, "C.R.A.C.K. is both predicated on and perpetuates the crack baby myth."[238] In a country that has come to learn that certain drugs, such as thalidomide and DES, can cause serious damage to a child prenatally exposed to these substances, it is not surprising or unreasonable for people to be concerned about the possible effects of prenatal exposure to cocaine and other illegal and legal drugs.[239] However, C.R.A.C.K. seems to deliberately manipulate a well-reasoned concern to advance its program and agenda.

C.R.A.C.K. avoids evidence-based research, choosing instead to rely on anecdotes and personal experience to justify its work and public commentary. As Barbara Harris has declared, "to all those who oppose what we do, until they are ready to step up and adopt the next crack

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> Methadone clinics are not unlike other treatment programs as far as people relapsing, which is why we wanted them to have our information on hand. It is their clients CHOICE whether to call us or not!
>
> Our information about women on methadone not getting pregnant was based on information from not only those working at methadone clinics, but those who use it so we do not feel the need to withdraw our letter. Those clinics who do not agree with us can throw our info away.
>
> If you want to talk about highly misleading and completely inaccurate information read anything that has been written against our organization by [sic] Paltrow for a prime example!! Now there is something that requires withdrawing!
>
> signed,
>
> /s/ Barbara Harris Project Prevention

238. MASON, *supra* note 104, at 95.

239. *See, e.g.,* Daubert v. Merrell Dow Pharmaceuticals, 509 U.S. 579 (1993), Daubert v. Merrell Dow Pharmaceuticals, 43 F.3d 1311, 1313 (9th Cir. 1995) (involving unsuccessful attempts by women in the United States who used the drug Benedectin to control vomiting and nausea for morning sickness to sue the manufacturer based on the belief that the drug caused birth defects similar to those associated with Thalidomide, including malformed limbs).

baby born, their opinion means nothing to me."[240] Another C.R.A.C.K. representative similarly comments: "until you are willing to take one of these children and adopt them, your opinion means absolutely nothing to me, it doesn't."[241] This apparently applies to experts of all sorts, including pediatricians and pediatric researchers who have devoted their lives to the care and protection of children.[242]

Instead, C.R.A.C.K. relies on its clients. In this regard, charges that C.R.A.C.K. is unethical seem justified. In press conferences and television appearances, C.R.A.C.K. puts clients and supporters on the air to describe the devastating effects crack use had on the outcome of their pregnancies.

On the John Walsh Show, C.R.A.C.K. representatives described numerous and often horrific health problems their children faced. One explained:

> I'm not a doctor, but I'm a mother that stays up until two and three in the morning, and go to the hospital thirty-two times from April to June with my son because he had bronchial and pulmonary displasia, he couldn't breathe. Brock had illeostomy, his intestines was on the outside of his stomach, he had to use the bathroom in the bag. He had a [sic] tube in his heart. I had to flush it everyday and if I got one little air bubble in it he would die instantly. So these critics who say that these poor kids—it doesn't happen with them because their parents used drugs that just something that happens to them . . .Tell that to somebody else who doesn't have four kids that are medically fragile, technology dependent.[243]

The "critics," however, are not only political opponents, but also doctors and scientists evaluating the effects of drugs based on scientific

240. Oates, *supra* note 61.

241. *60 Minutes II: C.R.A.C.K. BABIES/Sterilization*, *supra* note 17.

242. *See* discussion *supra* notes 235-36 (discussing the NAPW methadone sign on letter listing over 130 medical groups and health care providers, including some of America's leading pediatricians and pediatric researchers).

243. *The John Walsh Show (*NBC television broadcast, May 14, 2003).

knowledge and peer-reviewed research. C.R.A.C.K., however, effectively uses the women and their stories to trump scientific data and rational discussion.

That C.R.A.C.K.'s clients and supporters believe that crack, rather than a host of more likely causes, explains the real problems some of their children experience is understandable when C.R.A.C.K. itself convinces the women that their cocaine use is to blame for their children's health problems. As one C.R.A.C.K. client explains:

> [C.R.A.C.K.] had to take me to neonatal clinics to see how babies were born crack addicted. I seen so many babies that I can't begin to tell you how deformed, suffering and sick they were, some that can't stop shaking, some emotionally traumatized where they're constantly blinking or moving, hyper, some born with extra parts that are enlarged.[244]

The problem is that science simply does not support the causal connection that the program and its spokespeople draw between crack and the range of devastating and costly health problems it describes.

In fact, research has found that crack-exposed children are not doomed to suffer permanent mental or physical impairment, and that whatever effects may result from the use of this drug are greatly overshadowed by poverty and its many concomitants—poor nutrition, inadequate housing, and insufficient health care.[245] In a recent review of research, the authors concluded that:

> [C]ocaine exposure in utero has not been demonstrated to affect physical growth…it does not appear to independently affect

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244. *Id.*

245. *See* Deborah A. Frank et al., *Growth, Development, and Behavior in Early Childhood Following Prenatal Cocaine Exposure: A Systematic Review*, 285 JAMA 1613 (2001); Wendy Chavkin, *Cocaine and Pregnancy—Time to Look at the Evidence*, 285 JAMA 1626 (2001); Laura Betancourt et al., *Problem-Solving Ability of Inner-City Children With and Without In Utero Cocaine Exposure*, 20 DEV. & BEHAV. PEDIATRICS 418 (1999). *See also* Linda C. Mayes et al., *The Problem of Prenatal Cocaine Exposure: A Rush to Judgment*, 267 JAMA 406 (1992).

> development scores in the first 6 years…findings are mixed regarding early motor development but any effect appears to be transient and may, in fact, reflect tobacco exposure; and that exposure may be associated with modest alterations of certain physiological responses to behavioral stimuli that are of unknown physical clinical importance. *In sum, the data are not persuasive that in utero exposure to cocaine has major adverse developmental consequences in early childhood—and certainly not ones separable from those associated with other exposures and environmental risks.*[246]

As two other researchers explained in lay terms:

> The "crack baby" on which drug policy is increasingly based does not exist. Crack babies are like Max Headroom and reincarnations of Elvis—a media creation. Cocaine does not produce physical dependence and babies exposed to it prenatally do not exhibit symptoms of drug withdrawal. Other symptoms of drug dependence—such as "craving" and "compulsion"—cannot be detected in babies. In fact, without knowing that cocaine was used by their mothers, clinicians could not distinguish so-called crack-addicted babies from babies born to comparable mothers who had never used cocaine or crack.[247]

Mike Gray similarly observes that:

> When the expected tidal wave of brain-damaged, unteachable monsters failed to materialize, a handful of thoughtful people started looking into some of the original assumptions. They discovered that the crack-baby epidemic, like the Nixon heroin scare, was a total fabrication—a blend of distorted data and sloppy journalism. The tiny infants trembling in their incubators were real enough—no question about that—but they were usually the victims of an older, more established ailment. What the cameras were

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246. Chavkin, *supra* note 245, at 1626 (summarizing the findings of Frank et al., *supra* note 245) (emphasis added).

247. Morgan, *supra* note 26.

> capturing were the well-documented effects of malnutrition and poverty.[248]

Indeed, a 1999 study found that poverty has a greater impact than cocaine on a child's developing brain. According to the study's lead author, "[a] decade ago, the cocaine-exposed child was stereotyped as being neurologically crippled—trembling in a corner and irreparably damaged. But this is unequivocally not the case. And furthermore, the inner-city child who has had no drug exposure at all is doing no better than the child labeled a 'crack-baby.'"[249]

As Dr. Larry Siegel, Washington, D.C. health department deputy director in charge of substance abuse services, noted in an interview about the C.R.A.C.K. program:

> Well, even that issue [responding to Bryant Gumble's question about the "agony of babies born addicted"] has been overblown. Most of these kids, including the four kids that Ms. Harris, the founder of this program, have raised have turned out to be OK. And while we don't think it's a good idea for individuals to have a pregnancy while under the influence of drugs, we think that sterilization procedures are a far more onerous response to a basic problem of addiction, which is a medical illness which requires treatment."[250]

C.R.A.C.K. founder Barbara Harris on at least one occasion agreed, stating: "Not all babies exposed to crack are doomed—I have four living in my house that are doing very well."[251] Yet C.R.A.C.K

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248. GRAY, *supra* note 198, at 108.

249. Alan Mozes, *Poverty Has Greater Impact Than Cocaine on Young Brain*, REUTERS HEALTH, Dec. 6, 1999 (citing Betancourt et al., *supra* note 245).

250. *The Early Show* (CBS television broadcast, July 25, 2000).

251. Wetzstein, *supra* note 73, at A3.

continues to highlight stories about children severely damaged from prenatal exposure to cocaine.[252]

Its representatives specifically spread misinformation which inspires hysteria about "crack babies" and rage at the mothers. For example, Laura Love, Director of C.R.A.C.K.'s Houston Chapter, gives talks using a vinyl archetypical "crack-baby" doll to demonstrate the alleged effects of this drug. "The friendly, heavyset blond grandmother throws the switch above the diaper, and it emits the shrill recorded wails of a real baby born in the throes of cocaine withdrawal. That's not all. The thing shakes. Hard. Love says crack babies shake so violently they can shrug off their skin."[253]

This presentation, however, does not represent medical fact. It has long been known that, unlike children exposed prenatally to opiates such as heroin, who may go through a withdrawal syndrome, no addiction or withdrawal syndrome exist for children prenatally exposed

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252. *See* Project Prevention, *at* http://www.cashforbirthcontrol.org (last visited Mar. 13, 2002). In March of 2001, the website provided examples only of children born with "severe disabilities" (deaf, dependent on feeding tubes, one in a wheelchair). Changes in their website (in apparent response to criticism) grudgingly acknowledged that "…there are some children that have minor problems, or even more rarely no problems at all." However, the site's only illustrative example of a child born to a drug-using woman is a child, born with severe disabilities, described as a "victim" and as "drug-addicted." Although this particular story does not identify the drug to which the child was allegedly addicted, the context suggests cocaine. On Sept. 9, 1999, the website spoke only of children born "permanently disabled" and stated that "the chances of a normal life are dim." The website also relies on other data that have repeatedly been shown to be inaccurate. For example, in March of 2001, the website stated that "perhaps as many as 375,000 cocaine-exposed babies are born each year in the U.S." This figure refers to a prevalence study done by Dr. Ira Chasnoff in which, based on the urine samples of recently delivered women at thirty-six public hospitals in urban areas, he extrapolated that 375,000 American babies were prenatally exposed to "some amount of alcohol or illicit drug" every year. LAURA E. GÓMEZ, MISCONCEIVING MOTHERS 23 (D. Kelly Weisberg ed., Temple University Press 1997). In addition to there being significant questions raised about the reliability of the number because of reliance on research done only at public and urban hospitals, the number never applied exclusively to cocaine. *Id.* *See also* ROBERTS, *supra* note 53, at 155.

253. Malisow, *supra* note 54.

to cocaine.[254] C.R.A.C.K. nevertheless, uses medically inaccurate but emotionally graphic terms like "crack-addicted babies," even featuring this stigmatizing term in a 30-second public service announcement.[255]

In February of 2004, thirty leading American and Canadian medical doctors, scientists and psychological researchers released a public letter calling on the media to stop the use of exactly these terms, explaining that "crack baby" and "crack addicted baby" and similarly stigmatizing terms, such as "ice babies" and "meth babies" lack scientific validity and should not be used. Specifically they wrote:

> Throughout almost 20 years of research, none of us has identified a recognizable condition, syndrome or disorder that should be termed "crack baby." Some of our published research finds subtle effects of prenatal cocaine exposure in selected developmental domains, while other of our research publications do not. This is in contrast to Fetal Alcohol Syndrome, which has a narrow and specific set of criteria for diagnosis.
>
> The term "crack addicted baby" is no less defensible. Addiction is a technical term that refers to compulsive behavior that continues in spite of adverse consequences. By definition, babies cannot be "addicted" to crack or anything else. *In utero* physiologic dependence on opiates (**not** addiction), known as Neonatal Narcotic Abstinence Syndrome, is readily diagnosed, but no such symptoms have been found to occur following prenatal cocaine exposure.[256]

C.R.A.C.K. not only continues to use these terms and to make unsupported claims of harm from prenatal exposure to cocaine, it also

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254. Barry Zuckerman, *Drug-Exposed Infants: Understanding the Medical Risk,* 1 THE FUTURE OF CHILDREN 26, 31 (1991). "[A]t this time it is inaccurate to describe a cocaine-exposed newborn as crack-addicted." *Id.*

255. Project Prevention, *Media Page*, *supra* note 17 (last visited Oct. 1, 2002) (featuring such statements as "Jenny was born…addicted to crack"); *See also* Muwakkil, *supra* note 5 (article contains pictures of a C.R.A.C.K. billboard which states "Stop the cycle of addicted newborns now!").

256. Open Letter to the Media, *at* http://www.jointogether.org/sa/files/pdf/sciencenot stigma.pdf (Feb. 25, 2004) (emphasis in the original).

exaggerates the number of children harmed by exposure to drugs of any kind. For example, Jim Woodhill, one of C.R.A.C.K.'s financial supporters and spokespeople, stated that "maybe one in one hundred drunk driving episodes ends in tragedy, while essentially every single one of our gestational episodes in our served population ends with tragedy."[257] C.R.A.C.K. similarly claims without citation that: "Every year, hundreds of thousand [sic] of drug/alcohol addicted woman [sic] are birthing and dumping their newborns. Many will die, but for those who live, selfless strangers see these babies through seizures, jitters, withdrawals and horrendous pain as a result of their mother's drug use."[258] As Craig Malisow reported in his story "Deal of a Lifetime,"

> C.R.A.C.K. relies heavily on data from two studies: a 1995 report from the American Academy of Pediatrics stating that approximately one in ten infants is exposed to drugs in utero, and a 1997 report from the National Resource Center for Respite and Crisis Care Services that estimates from 550,000 to 750,000 babies are born each year exposed to drugs and/or alcohol. Neither the National Institute on Drug Abuse nor the Substance Abuse and Mental Health Services Administration, both under the auspices of the DHHS, has a figure for how many drug-addicted babies are born each year.[259]

By conflating estimates of drug *exposed* infants with numbers of those actually harmed by exposure, C.R.A.C.K. creates a sense of urgency that requires immediate and dramatic responses—such as controlling the reproductive capacity of hundreds of low-income women.

By focusing on one drug, ignoring evidence based research, and perpetuating myths about prenatal exposure to cocaine, C.R.A.C.K. gains support and mobilizes action. As Carol Mason observes, "Certainly there is good reason for working to eliminate the damage that

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257. Malisow, *supra* note 54.

258. PROJECT PREVENTION, *supra* note 137 (on file with author).

259. Malisow, *supra* note 54.

drug use can cause before birth. But there is no good reason for perpetuating the ideas that women who use drugs are all uncaring addicts and that children of drug users cannot function normally . . ."[260]

Preventing harm to children or preventing some women from having children?

If C.R.A.C.K.'s goal is child protection, its exclusion of cigarette-smoking pregnant women from its "incentive" program is truly inexplicable. Despite the public hype about the dangers of prenatal cocaine use, the evidence of harm to children from prenatal exposure to cigarette smoking is far greater and more extensive. Cigarette packages carry the warning "Smoking By Pregnant Women May Result in Fetal Injury, Premature Birth, and Low Birth Weight."[261] Moreover, the Campaign for Tobacco Free Kids states in stark terms that "[s]moking during pregnancy creates a more serious risk of spontaneous abortion and a greater threat to the survival and health of newborns and children than using cocaine during pregnancy. It is also a much more pervasive problem."[262]

C.R.A.C.K.'s choice for its name suggests an interest in perpetuating myths and not actually protecting children. Had C.R.A.C.K. chosen other acronyms, such as DRUNK (Don't Reproduce Under Negative Konditions) or SMOKES (Stop Making Offspring Knowing the Effects of Sigarettes)[263] it would have drawn attention to the far greater numbers

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260. MASON, *supra* note 104, at 97.

261. *See, e.g.,* 15 U.S.C. § 1333(a)(1) (2003), making it "unlawful for any person to manufacture, package, or import for sale or distribution within the United States any cigarettes" that do not contain one of a series of prescribed warning labels.

262. Campaign for Tobacco-Free Kids, *Harm Caused by Pregnant Women Smoking or Being Exposed to Secondhand Smoke*, *at* http://tobaccofreekids.org/research/factsheets/pdf/0007.pdf (last visited Apr. 23, 2004)

263. *See* Kigvamasud Vashti , *supra* note 60.

of newborns exposed to these substances and to the more clearly proven harms that they cause.[264]

A 1999 survey found that "an estimated 416,000 pregnant women smok[ed] cigarettes in the past month."[265] Approximately 316,000 pregnant women drank alcohol, and 80,000 pregnant women engaged in binge drinking.[266] An estimated 91,000 pregnant women had used illicit drugs in the month before the survey.[267] Marijuana was the most frequently used drug, followed by the non-medical use of prescription psychotherapeutic drugs.[268] In light of these comparative-use rates, it makes little sense to focus attention upon cocaine use if child protection is the real issue to be addressed.

Many substances and circumstances pose threats to fetal health. Accutane, for example, is a popular anti-acne medication and has been called "the most widely prescribed birth-defect causing medicine in the United States."[269] A Boston Globe Magazine article confirmed the existence of 160 children who had been prenatally exposed to that drug and explained that:

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264. Deanna S. Gomby & Patricia H. Shiono, *Estimating the Number of Substance-Exposed Infants*, 1 FUTURE CHILD 17 (1991). It is important to note, however, that while the evidence of harm from both alcohol and cigarettes is more significant and well-documented, claims of harm from these substances are also subject to exaggeration and race and class-based biases. *See, e.g.*, Elizabeth M. Armstrong, *Diagnosing Moral Disorder: The Discovery and Evolution of Fetal Alcohol Syndrome*, 47 SOC. SCI. MED. 2025 (1998); Elizabeth M. Armstrong & Ernest L. Abel, *Fetal Alcohol Syndrome: The Origins of a Moral Panic*, 35 ALCOHOL & ALCOHOLISM 276 (2000).

265. National Household Survey on Drug Abuse, *The NHSDA Report: Tobacco and Alcohol Use Among Pregnant Women, at* http://www.samhsa.gov/oas/2k2/PregAlcTob/PregAlcTob.pdf. (July 20, 2001).

266. *Id.*

267. *Id.*

268. National Household Survey on Drug Abuse, *The NHSDA Report: Pregnancy and Illicit Drug Use*, *at* http://www.samhsa.gov/oas/2k2/pregDU/pregDU.htm (July 13, 2001).

269. E. Rafshoon, *What Price Beauty?* BOSTON GLOBE MAG., Apr. 27, 2003, at 15.

> Some of these children died before they reached their first birthdays because of major organ system failures. The most seriously affected babies have been institutionalized. The rest live with a variety of severe defects, ranging from heart and central nervous system abnormalities to missing or malformed ears, asymmetrical facial features, and mental retardation.

In addition, women who take fertility drugs and choose to carry three or more embryos to term often experience pregnancy loss and risk severe, lifelong harm to the children who survive.[270] "Women ages 35 and older who bear children are at a significantly increased risk of giving birth to low birth weight babies . . . and may have an increased risk of stillbirth."[271] Additionally, women who work in a variety of jobs that expose them to chemicals, solvents, and other conditions that can impose risks on the developing fetus are similarly at risk.[272] Considering such medical realities, one commentator observed:

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270. Bonnie Steinbock, *The McCaughey Septuplets: Medical Miracle or Gambling with Fertility Drugs? in* ETHICAL ISSUES IN MODERN MEDICINE 375, 376 (John Arras & Bonnie Steinbeck eds., 5th ed. 1998). "Even if they are born alive, 'super-twins' (triplets, quadruplets and quintuplets) are 12 times more likely than other babies to die within a year. . . . Many will suffer from respiratory and digestive problems. They are also prone to a range of neurological disorders, including blindness, cerebral palsy and mental retardation." *Id. See also* Lynn M. Paltrow, *Take Politics Out of Pregnancy*, CHICAGO SUN-TIMES, July 12, 2001 at 32 (contrasting treatment of Cornelia Whitner, who was arrested after giving birth to a healthy baby that tested positive for cocaine with the response to Chris Collins who used a fertility drug, and lost one baby, and had another with a severe disability, yet was lauded in the media.); Sonya Charles & Tricia Shivas, *Mothers in the Media: Blamed and Celebrated-An Examination of Drug Abuse and Mutliple Births*, 28 PEDIATRIC ETHICS 142 (2002) (analyzing the content of news articles on both subjects and comparing how the mothers are portrayed in the media).

271. Suzanne C. Tough et al., *Delayed Childbearing and Its Impact on Population Rate Changes in Lower Birthweight, Multiple Birth, and Preterm Delivery*, 109 PEDIATRICS 339, 399-403 (2002); March of Dimes, *Medical References: Stillbirth*, *at* http://www.marchofdimes.com/professionals/681_1198.asp (last visited Apr. 23, 2004).

272. *See Johnson Controls*, 499 U.S. 187, 195 (1991) ("Employment late in pregnancy often imposes risk on the unborn child").

> As for saving babies, well, it's selective saving. Would you offer $200 to a potential carrier of Tay-Sachs disease or sickle cell anemia to prevent the birth of a child who might suffer from those illnesses? How about an older woman to prevent the chance of a Down syndrome baby?[273]

Given the many things that threaten children's health, C.R.A.C.K.'s focus on certain women and certain drugs should raise significant doubts about its mission and its methods for achieving it. Not only does C.R.A.C.K. fail to focus on the range of significantly more dangerous substances than crack, its willingness to label certain children born to certain mothers as inevitably and irredeemably harmed is also potentially damaging to children.

The group of scientists who wrote the open letter to the media decrying the use of the term "crack baby" did so specifically in response to a case where the label had been used to excuse and distract attention from the fact that a New Jersey family was apparently starving to death four of their adopted sons.[274]

A study designed to identify cocaine-exposed children provides another example of the danger of such labeling. In this study, evaluators who were not told which children were exposed prenatally to cocaine were asked to observe 163 four-year-old children and to determine which children had actually been exposed to cocaine prenat-

273. Rekha, *supra* note 5, at 1T.

274. Open Letter to the Media, *supra* note 256 (citing to Lydia Polgreen, *Uneven Care Not Unusual in Families*, *Experts Say*, N.Y. TIMES, Oct. 28, 2003, at B8 (describing how in a case where adoptive parents allegedly starved four of their children the parents ". . . told friends, neighbors and people who went to their church that the four brothers had been born addicted to crack cocaine and had an eating disorder.")); Leslie Kaufman & Richard Lezin Jones, *Amid Images of Love and Starvation, a More Nuanced Picture Emerges*, N.Y. TIMES, Nov. 2, 2003, at 31 (reporting that "if anyone asked about the little ones, they were told that the children had some fetal alcohol and crack baby syndromes, and that's why they would never grow.").

ally.[275] The study found that the people making the evaluation were not able to identify accurately the children who had actually been exposed prenatally to cocaine and that they were more likely to believe children to be cocaine-exposed if the children demonstrated poorer cognitive function or behavior.[276] The researchers warned in strong terms that "[s]tigma itself is a social and developmental risk to children who were cocaine-exposed prenatally, regardless of the pharmacological effects of the drug or the reasons for assuming cocaine exposure."[277] Other researchers similarly "…fear…that these children won't be given a fair chance."[278]

As Theryn Kigvamasud'Vashti suggests:

> Consider Project Prevention/C.R.A.C.K.'s decision to refer to babies born to the drug users as "damaged babies." This is not a casual choice of language. C.R.A.C.K. has intentionally chosen this negative reference to establish that infants born to drug users are worth less than those born to non-drug users.[279]

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275. Ruth Rose-Jacobs, *Do "We Just Know"? Masked Assessors' Ability to Accurately Identify Children with Prenatal Cocaine Exposure*, 23 DEVELOPMENTAL & BEHAV. PEDIATRICS 340, 340 (2002).

276. *Id.*

277. *Id.* at 345.

278. Hallam Hurt, *Slow Development in "Crack Babies" May Be Caused by Conditions of Urban Poverty, Says New Study,* NEWS BRIEFS, *at* http://www.ndsn.org/SEPOCT97/POVERTY.html (Sept.–Oct. 1997).

279. *See* Kigvamasud Vashti, *supra* note 60, at 3. *See also* Stryker, *supra* note 18 (Harris referring to children born to the drug-using woman from whom she adopted her children as "damaged babies."); Garloch, *supra* note 54 (Harris stating, "[w]omen are allowed to drop off as many *damaged* babies at the local hospital as they can drop off. . . . They don't even have to stick around to watch the children suffer.") (emphasis added); Rodney Harris, Project Prevention, *at* www.cashforbirthcontrol.com (last visited Sept. 21, 2001) ("[w]ithout you, our numbers would not continue to climb, and without you, we would not have been able to prevent the tragedies that we have thus far.").

Similar language choices have been noted by Carol Mason in her book *Killing for Life*.[280] In the context of the debates over the so-called "partial birth abortion ban,"[281] proponents of the ban "insist that late-term abortions terminate the pregnancies even when fetuses are 'normal' and 'healthy'." Those fetuses protected by the ban are described as "'whole,' 'intact,' 'normal,' 'healthy' and free from 'genetic or developmental abnormalities.'"[282] Such descriptions are used despite the fact that abortions after twenty weeks of pregnancy are rare and may occur because of the discovery of severe fetal anomalies incompatible with life.[283] Such anomalies include anencephaly, a medical term describing a condition in which the fetus's brain has failed to form.[284] Mason notes that:

> In stark contrast to those fetuses considered to be "intact" by pro-life advocates hoping to pass legislation detailing partial birth abortion restrictions, fetuses gestating in women who use cocaine are . . . branded . . . as "genetically inferior," "troubled," "tormented," and unable to cope with kindergarten.[285]

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280. MASON, *supra* note 104.

281. *See* Memorandum from ACLU Washington National Office to All Interested Parties (June 18, 2003) *at* http://www.aclu.org/ReproductiveRights/ReproductiveRights.cfm?ID=12020&c=148 (last visited Apr. 23, 2004) (Stating that the bill prohibits more than a single procedure. It bans safe and common abortion methods used in the second trimester of pregnancy, well before fetal viability).

282. MASON, *supra* note 104, at 90.

283. *See, e.g.*, JUDICIARY COMMITTEE DEMOCRATIC MEMBERS' LEGISLATIVE VIEWS, 105TH CONG. REPORT ON PARTIAL-BIRTH ABORTION BAN ACT OF 1997 DISSENTING VIEWS *at* http://www.house.gov/judiciary_democrats/dlv50003.htm (March 14, 1997).

284. *See* Suzanne Batchelor, *Abortion Procedure Ban Limits Ending for Doomed Pregnancies*, WOMEN'S E-NEWS, *at* http://www.now.org/eNews/sept2003/092903ban.html (last visited Sept. 29, 2003).

285. MASON, *supra* note 104, at 91 (citing STEPHEN R. KENDALL, SUBSTANCE AND

She asks specifically if programs like C.R.A.C.K. are protecting children or protecting society from "degenerate black fetuses who presumably will become burdensome black babies."[286]

Many children are born with disabilities and many others acquire them later in life. Some of these disabilities are preventable and some are not. Focusing responsibility on individual women, and particularly on their drug use, however makes it very unlikely that other contributing, and possibly more significant, factors including welfare sanctions[287] and environmental hazards[288] will be addressed. Moreover, as discussed below, it is unlikely that the government will increase funding for education and health services for children labeled as irredeemably damaged.

Protecting Children from Bad Parenting

The C.R.A.C.K. program also asserts that the children of drug-using mothers are at risk because they are likely to be abandoned.

SHADOW: WOMEN AND ADDICTION IN THE UNITED STATES (Harvard University Press, 1999)).

286. *Id.* at 92. *See also* ROBERTS, *supra* note 53, at 21 ("The new bio-underclass constitutes nothing but a menace to society—criminals, crackheads, and welfare cheats waiting to happen.").

287. *See, e.g.,* Children's Sentinel Nutrition Assessment Program, *The Impact of Welfare Sanctions on the Health of Infants and Toddler*, CHILD. SENTINEL NUTRITION ASSESSMENT PROGRAM, *at* http://dcc2.bumc.bu.edu/CsnapPublic/publications.htm (July 2002) (examining the impact of welfare sanctions on the health of infants and toddlers and finding that children in families whose benefits were terminated or reduced were at a 30% higher risk of hospitalization, a 90% higher risk of hospitalization at the time of an emergency room visit, and a 50% higher risk of being food insecure—not having "access to nutritionally adequate and safe foods in socially acceptable ways.").

288. *See, e.g.,* Joni Seager, *'Protectors' of unborn put them in peril*, BALT. SUN, Apr. 7, 2004, at 19A, *available at* http://www.commondreams.org/views04/0407-01.htm.

C.R.A.C.K.'s website states that these children are "often bounced around the foster care system, and never given the love and nurturing a young child needs."[289]

No one disputes that drug use can in some circumstances affect parenting ability. As the National Coalition for Child Protection Reform states, "[t]he problem of drug abuse, like the problem of child abuse, is serious and real."[290] The fact, however, that some drug use in some instances affects parenting ability[291] in no way justifies the sweeping and inaccurate claims made by C.R.A.C.K. about parenting and the child welfare system. Because children are harmed, not helped, when they are unnecessarily removed from their parents and families, it is crucial to look at the research regarding the actual abilities or inabilities of drug users to parent.

Those who have bothered to take a serious look at drug-using mothers find very different results from those reported by the C.R.A.C.K. program. Susan C. Boyd documents in her book, *Mothers and Illicit Drugs: Transcending the Myths*, that there is no significant difference in childrearing practices between addicted and non-addicted mothers.[292] This includes mothers who use cocaine many of whom have been found to look after and care for their children adequately.[293] As a book produced by the Foster Care Project of the American Bar Association observes "many people in our society suffer from drug or alcohol dependence yet remain fit to care for a child. An alcohol or drug dependent parent becomes unfit only if the dependency results in

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289. Project Prevention, *Objectives*, *supra* note 24 (last visited Apr. 23, 2004).

290. National Collation for Child Protection Reform, *Family Preservation and Substance Abuse, at* http://www.nccpr.org/newissues/13.html (last visited Apr. 23, 2004).

291. Research is also needed to distinguish between drug use itself and the criminal lifestyle people are forced into by prohibitionist drug laws. *See, e.g.,* GRAY, *supra* note 198; BAUM, *supra* note 198.

292. *See generally* SUSAN C. BOYD, MOTHERS AND ILLICIT DRUGS: TRANSCENDING THE MYTHS 14-16 (1999).

293. *Id.* at 14-16 (listing at least fourteen studies demonstrating that women who use illicit drugs can be adequate parents); *see also* Kearney, *supra* note 175, at 355.

mistreatment of the child or in a failure to provide the ordinary care required for all children."[294] The National Council of Juvenile and Family Court Judges agrees: "Juvenile and family court proceedings are not necessary, and probably not desirable, in most situations involving substance-exposed infants."[295]

Of course, as with parents who do not use drugs, there are instances of drug-using mothers and fathers who are unable to parent adequately. That is something, however, that needs to be determined on a case-by-case basis rather than based on the unsupported assumptions reinforced and promoted by C.R.A.C.K., which treat any and all drug use as synonymous with neglectful parenting.

The C.R.A.C.K. program also fails to acknowledge the fact that in many instances children have been arbitrarily removed by the state, not discarded by their parents.[296] At least three states create a presumption of neglect based on nothing more than a single unconfirmed positive drug test.[297] Mothers in these states are not abandoning their babies; they are having them removed based on exactly the kinds of presumptions and prejudices promoted by C.R.A.C.K.. Even in states without these laws, such removals occur. In California, child welfare workers removed a child from a mother's custody based on a positive drug test for a drug given to the pregnant woman during labor.[298]

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294. MARK HARDIN, FOSTER CHILDREN IN THE COURTS 206 (1983).

295. NATIONAL COUNCIL OF JUVENILE AND FAMILY COURT JUDGES, PROTOCOL FOR MAKING REASONABLE EFFORTS TO PRESERVE FAMILIES IN DRUG RELATED DEPENDENCY CASES 17 (1992).

296. *See* Lynn M. Paltrow, et al., *Year 2000 Overview: Governmental Responses to Pregnant Women Who Use Alcohol and Other Drugs*, WOMEN'S LAW PROJECT & NAT'L ADVOCATES FOR PREGNANT WOMEN, *at* http://www.advocatesforpregnantwomen.org/articles/index.htm (Oct. 2000).

297. *Id.* at 1-2.

298. *Woman Loses Custody of Children After Hospital Botches Drug Test,* 125 DRUG WAR CHRON., *at* http://www.stopthedrugwar.org/chronicle/125/custody.shtml (Feb. 18, 2000) (describing how a California woman lost her job, was forced into drug treatment, and lost custody of her children for three months after her newborn baby

Children in Texas and New York were removed children based on a single positive drug test for marijuana despite the lack of any evidence of harm or any indication of neglect or abuse.[299] In New Jersey, child welfare workers mistakenly viewed methadone treatment as drug addiction and threatened to remove a child if the woman did not enter a program they selected that would require her to stop her successful methadone treatment.[300] In Missouri, a family had all their children including a newborn, removed based on a single positive drug test for THC and an amphetamine.[301] The mother admitted to using marijuana but never took an amphetamine, and no allegations regarding parental neglect were made other than the alleged drug use. The hospital never

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tested positive for the prescription drug Seconal, even though a doctor had provided the woman with the drug when she was in labor); s*ee also* Jan Hoffman, *Challenge Drug Tests*, THE VILLAGE VOICE, July 10, 1990, at 11; *see also* Class Action Complaint, Ana R. v. New York City Dep't of Social Services (S.D.N.Y. filed on June 7, 1990) (on file with author and NAPW) (describing numerous cases of children removed without notice based on false positives or innocent positive test results for drugs administered by physicians during labor).

299. *See* Cathy Singer*, The Pretty Good Mother,* LONG ISLAND MONTHLY, Jan. 1990, at 46 (reporting that a mother who had smoked marijuana to ease labor pain lost custody of her baby even though all involved in her case argued she would be an excellent and loving parent); Cathy Zollo, *When Policy Meets Reality,* TIMES RECORD NEWS, Nov. 11, 1999, at A1 (reporting a case in which the state took into emergency custody a newborn and three older siblings based on a single positive marijuana test on the newborn); Melissa Hung, *Reefer Madness? Angela Took a Hit. And CPS Took Her Babies Away*, HOUSTON PRESS, Nov. 4, 1999, at 8 (reporting another Texas case in which the child welfare agency removed custody of a newborn and a one-year-old sibling based solely on a positive drug test for marijuana).

300. *See* Case Papers (on file with author). *See also* U.S. Department of Health and Human Services, Center for Substance Abuse Treatment, *supra* note 52; U.S. Department of Health and Human Services, Center for Substance Abuse Treatment, *State Methadone Treatment Guidelines*, 85-93 (1993) (discussing efficacy and safety of methadone treatment for pregnant and breastfeeding women).

301. *See* Jeff Lehr, *Parents, Daughter Reunited After Long Battle with State: Asbury Family Questions Test Procedure, Length of Agency's Supervision*, JOPLIN GLOBE, Sept. 2003, at A1.

performed confirmatory tests to determine whether the amphetamine was a false or innocent positive test.[302]

Far from protecting children, C.R.A.C.K.'s rhetoric is likely to encourage unnecessary removals of children from their families by reinforcing medical myths and stereotypes that treat evidence of any drug use as evidence of damage or maternal unfitness. This is especially true in light of the acknowledged lack of training by child welfare workers in substance abuse issues.[303]

The C.R.A.C.K. program also ignores serious problems with the U.S. child welfare system, including the frequent removal of children from families based on such factors as poverty and race.[304]

> The typical foster child is not a crack baby. Far more common are children taken from their parents because the family's poverty has been confused with neglect. Often, these children bounce from home to home, emerging years later unable to love or trust anyone. Far from a last resort, foster care often is the first and only answer offered for every family problem.[305]

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302. *Id.*

303. *See* THE NAT'L CENTER ON ADDICTION AND SUBSTANCE ABUSE AT COLUMBIA UNIVERSITY, NO SAFE HAVEN: CHILDREN OF SUBSTANCE-ABUSING PARENTS (1999) *available at* http://www.casacolumbia.org/pdshopprov/files/No_Safe_Haven_1_11_99.pdf (While this report, based on opinion surveys of people who work in the child welfare system, asserts that drug problems account for increases in child welfare cases, the report admits "few caseworkers and judges who decide for these children have been tutored in substance abuse and addiction. While most child welfare officials say they have received some training, usually it involves brief, one-shot seminars that last as little as two hours. For judges, training tends to be on-the-job. Such training is woefully inadequate for the profound decisions that these officials are called upon to make for these vulnerable children.").

304. *See generally* NINA BERNSTEIN, THE LOST CHILDREN OF WILDER (2001); DOROTHY ROBERTS, SHATTERED BONDS: THE COLOR OF CHILD WELFARE (2002).

305. National Collation for Child Protection Reform, *supra* note 290.

Such removals themselves "damage" children, unnecessarily inflicting grave harm on them.[306] One comprehensive survey of the effects of foster care concluded that removing a child could be more harmful than the harm that is the basis of the removal.[307] Research has also shown that "the increasing placement of drug-exposed children in foster care is coupled with poor growth outcomes in the physical, mental and emotional development of these children."[308]

C.R.A.C.K. also creates the false impression that children removed from custody could easily be reunited with their families, if only the biological mother cared enough. In response to arguments against the program's endorsement of irreversible sterilization procedures, Barbara Harris responded: "If they want to have more children[,] . . . [t]hey can go back and reclaim the kids they left behind."[309] Many women do go to extraordinary lengths to get their children back, only to face a system that too often undermines even the most conscientious reunification efforts.[310] Corrine Carey, former director of the Harm Reduction Law

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306. *See generally* BONITA EVANS, YOUTH IN FOSTER CARE: THE SHORTCOMINGS OF CHILD PROTECTION SERVICES (1997); Scott J. Preston, Note, *"Can You Hear Me?": The United States Court of Appeals for the Third Circuit Addresses the Systemic Deficiencies of the Philadelphia Child Welfare System in* Baby Neal v. Casey, 29 CREIGHTON L. REV. 1653 (1996). S*ee also* Dorothy E. Roberts, *Access to Justice: Poverty, Race and New Directions in Child Welfare Policy,* 1 WASH. U. J.L. & POL'Y 63, 69-70 (1999) (noting that "[c]hildren, even neglected children, typically value and want to maintain a relationship with their parents," and that "[u]necessarily taking children from their families is comparably as harmful to children as returning them to dangerous homes.").

307. *See* Michael Wald, *State Intervention on Behalf of Neglected Children: A Search for Realistic Standards*, 27 STAN. L. REV. 985 (1975).

308. Michelle Jackson & Gordon Berry, *Motherhood and Drug Dependency: The Attributes of Full-time Versus Part-time Responsibility for Child Care*, 29 INT'L J. ADDICTIONS 1521, 1521 (1994).

309. Haynes, *supra* note 71, at 3C.

310. *See generally* ROBERTS, *supra* note 53 (following a family struggling to reunite despite numerous obstacles including poverty and child welfare authorities); *see also*

Project, who represented former drug users attempting to reclaim their children from foster care, notes that "untrained case workers misdirect her clients on a routine basis."[311]

Finally, the concern over an alleged inability to parent seems disingenuous in light of the organization's statement that: "The offer is open to any man or woman of childbearing years who is, *or has been*, addicted to drugs and/or alcohol."[312] A focus on people who previously used drugs suggests that the program is targeting a group of people because of their status and historic stigma, not because of a current or actual inability to parent. Indeed, the C.R.A.C.K. program must be understood in light of the existing political context in the U.S.—namely, a context that already stigmatizes drug-users and deliberately chooses to deprive them of access to cost-effective drug treatment.[313]

Does C.R.A.C.K. target poor women and women of color?

Although C.R.A.C.K.'s leadership vehemently denies that it is racist,[314] their statements, statistics and practices strongly suggest that

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Love and Diane (PBS television broadcast, Apr. 21, 2004) (chronicling the efforts of one family seeking reunification).

311. Paromua Basu, *C.R.A.C.K. comes to New York*, VILLAGE VOICE, Nov. 5, 2002, at 30.

312. Sonnenberg, *supra* note 38 (emphasis added). The fact that they would seek out people in recovery, many of whom no longer use drugs and who would not, by any theory pose a threat to their children, further raises questions about the program's agenda. *Id.*

313. *See generally* GRAY, *supra* note 198; BAUM, *supra* note 198; Newman, *supra* note 197; Nadelmann, *supra* note 198; Drug Policy Alliance, *at* http://www.drugpolicy.org; Common Sense for Drug Policy, *at* http://www.CSDP.org; Harm Reduction Coalition, *at* http://www.harmreduction.org.

314. *See* Project Prevention, *Frequently Asked Questions*, *supra* note 20 (last visited Apr. 23, 2004) ("Are you targeting blacks? Definitely not. It is racist, or at least ignorant, for someone to learn about our program and assume that only black addicts will be calling us. Not all drug addicts are black. Project Prevention targets a behavior not a racial demographic").

they in fact engage in class and race based targeting.[315] To begin with, the organization's founder chose to name her group after a drug that has wide public association with African Americans.[316] C.R.A.C.K.'s infamous billboard campaign was located in predominantly poor neighborhoods and neighborhoods of color. "To solicit 'clients,' C.R.A.C.K. has placed large billboards in Black and Latino communities in Los Angeles."[317]

> Far from being placed randomly throughout the nation, they are positioned strategically in low-income, minority neighborhoods,

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315. Media coverage of the program reinforces racial stereotypes of drug users. When the O'Reilly Factor did a segment on the C.R.A.C.K. program, they used images of African-American women to advertise the segment. *O'Reilly Factor, supra* note 42. Perhaps more subtle, but also more insidious, is how Ms. Harris' family is described. Ms. Harris uses the fact that she is married to an African-American man as a defense against all claims of racism and racial targeting. She and her husband had several (two to six, depending on which article you read) biological children and adopted four other children. *See* O'Neill, *supra* note 24, at 149. While any biological children she had with this husband are necessarily black or interracial, most articles assign a racial designation (black) only to her adoptive, drug-exposed children. *See* Roe, *supra* note 47, at 8 (Having already explained that Harris had adopted four children of a "crack addict," the article goes on to address claims that Harris is not racist, noting that "though Harris is white, the children she adopted are black, as is her husband."); Malislow, *supra* note 54, at 1A; Haynes, *supra* note 71, at 3C ("To Harris, 45, the charges of racism seem absurd. Harris, who is white, is married to a black man. She and her husband, who have children of their own, adopted four black babies born to a heroin addict").

316. *See* Drew Humphries, *Crack Mothers at 6: Prime Time News, Crack/Cocaine, and Women*, VIOLENCE AGAINST WOMEN, Feb. 1998, at 45 ("Socially constructed as Black and urban, the media demonized crack mothers as the threatening symbols for everything that was wrong with America."). *See also* Roe, *supra* note 47, at 8 (quoting Theryn Kigvamasud Vashti who observes that "the program is not called DRUG, it's called C.R.A.C.K.. In America, there's a very specific image when you say crack: poor, urban and black").

317. Scully, *supra* note 4 (C.R.A.C.K. advertises its offer via billboards in Los Angeles, Chicago, Florida and Minnesota). *See also* Pam Belluck, *Addicts Offered $200 to Get Sterilized*, PLAIN DEALER, July 25, 1999, at 19A.

> often at bus stops or welfare agencies. This advertising campaign targets women in economically depressed communities of color.[318]

Indeed much of their outreach is to poor communities disproportionately represented by people of color. Soup kitchens have also been identified as good recruitment locations.[319] The Seattle C.R.A.C.K. affiliate flyer advised:

> The offer of $200 appeals more to the poor than it does to the rich. Unfortunate, but a fact of life. Therefore, it is more practical to post fliers in areas where poor people live and congregate. A person who can easily afford the cost of birth control is more likely to be using birth control, while the cost of birth control can appear out of reach to a struggling addict or alcoholic.[320]

A New York City C.R.A.C.K. representative puts up flyers and handouts scouting out what she calls "prostitution-infected neighborhoods."[321] The Houston chapter director "spreads the word [about the C.R.A.C.K. program] by dropping off pamphlets at methadone clinics, social services agencies, probation offices—anywhere an addict is likely to be found."[322] Drug users and addicts are likely to be found at every social and economic level.[323] It is primarily the poor addicts and drug users, however, who will be found at social service agencies and pro-

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318. Wolf, *supra* note 8, at 176.

319. *See* Sonnenberg, *supra* note 38.

320. Sonnenberg, *supra* note 38.

321. Cecilia M. Vega, *Sterilization Offer to Addicts Reopens Ethics Issue*, N.Y. TIMES, Jan. 6, 2003, at B1.

322. Malislow, *supra* note 54, at 1A.

323. *See* Drucker, *supra* note 199, at 23 ("A common stereotype, fostered by the media, is that some 'racial' or ethnic groups use drugs more than others. This is not borne out by the data").

bation offices. Jim Woodhill apparently believes that C.R.A.C.K.'s clients and welfare mothers are synonymous:

> If we could get successful, productive members of our next generation out of these *welfare mothers*, we would take more. We'd ask them to have more babies for us," Woodhill says. As it stands, these babies might as well be born with a stamp on their forehead reading, "Predoomed: This kid's not gonna make it."[324]

Moreover, the program's own data reflects a focus on African-American and other women of color. Although African-Americans make up approximately 12% of the population, and use drugs at the same rate as people of other races,[325] a full 40% of the women paid by the C.R.A.C.K. program, are African-American.[326] When one takes into account other non-white people who have been paid by the program, more than half of the people paid by C.R.A.C.K. are people of color. A program that did not target African-Americans would be expected to have results that reflected the actual population. In other words, one would expect that approximately 12% or one in eight, of those being paid by C.R.A.C.K. would be African-Americans if this group had not been targeted. Targeting one narrowly defined segment of the population (drug users—especially drug users of color) for sterilization and birth control is distressingly reminiscent of several tragic chapters of recent history, such as the American eugenics movement and compulsory sterilization of Jews.

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324. Malisow, *supra* note 54.

325. *See* Drucker, *supra* note 199.

326. According to C.R.A.C.K.'s website, a total of 1199 clients have been paid. Of these, 391 were African-American. If the program were reaching a proportionate share of African-Americans, we would expect to see that 144 African-Americans had been paid. Instead, 391 African-Americans were paid and more than half of all recipients (613) are, according to C.R.A.C.K., non-Caucasian: 391 African-American, 121 Hispanic, and 101 of other ethnic backgrounds. Project Prevention, *Statistics, supra* note 105 (last visited Apr. 23, 2004).

Will the C.R.A.C.K. program lead to government-sponsored eugenics?

C.R.A.C.K. suggests that a variety of social problems, including high taxes, poverty, and the overburdening child welfare systems can be improved by controlling the birth rates of drug-using pregnant women.[327] C.R.A.C.K. warns that "[t]his is a national problem that costs tax payers billions of dollars a year for the treatment of these children."[328] In 1999, Harris reported that "its $8,800 cost to me [payments by C.R.A.C.K.] has saved the taxpayers millions of dollars, not to mention the human costs to the kids."[329] C.R.A.C.K. claims that "[n]umerous children suffer from problems related to being substance exposed, and the cost to taxpayers can often be over a million dollars per child."[330] After citing a variety of statistics suggesting huge numbers of damaged children being born to drug-using mothers, the website asks:

> Could this be why (according to a 3/7/99 L.A. Times article) special education costs in California have risen 35% in the last decade? Special education costs per child range from $3,000 to $125,000 per year depending on the severity of the child's learning disabilities and behavior problems.[331]

As Professor Judith Scully argues:

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327. *See* Stryker, *supra* note 18 (citing C.R.A.C.K. data about the number of children born to its clients and the fact that those in foster care were "being supported by taxpayers.").

328. PR Newswire, *supra* note 16.

329. Tom Berg, *Woman's Drug-Baby Campaign Goes National*, THE ORANGE COUNTY REGISTER, Apr. 4, 1999, at B1.

330. *Id.*

331. Project Prevention, *Statistics*, *supra* note 105 (last visited Mar. 13, 2002).

> Like earlier sterilization movements in the United States, C.R.A.C.K.'s program is based in eugenic philosophy. In C.R.A.C.K.'s own words, its primary goal is to "put an end" to "drug babies." C.R.A.C.K. vows to eliminate children born with drug addictions from the population because, according to C.R.A.C.K., these kids cost the taxpayer too much money when they wind up in special education classes, foster care and/or state sponsored nurseries. But one has to wonder what really is the difference in terms of the cost to society between a disabled child born to a drug-addicted woman and a disabled child born to a physically or mentally disabled woman? If the cost to society is really the issue, as C.R.A.C.K. claims it is, the "logical" extension of this argument would be to expand the sterilization campaign to all of society's "burdens"—the poor, the disabled, the homeless, as well as the drug addicted. Does society really need to be reminded of the consequences of such thinking?[332]

Similarly, Dorothy Roberts warns that:

> America's recent eugenic past should serve as a warning of the dangerous potential inherent in the notion that social problems are caused by reproduction and can be cured by population control.[333]

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332. Scully, *supra* note 4. *See also* Wolf, *supra* note 8, at 194 ("Why would the natural progression of C.R.A.C.K. not be to pay for sterilizations of people with hereditary diseases? What about the mentally handicapped? Or the physically handicapped? Members of these groups, like drug addicts, are easy targets for such a program. They have minimal political power and are often viewed as burdens on the state.").

333. ROBERTS, *supra* note 53, at 59; s*ee also* "Jackie," *Children Requiring a Karing Community (C.R.A.C.K.)*, CollegeTermPapers.com, *at* http://www.collegetermpapers.com/TermPapers/Social_Issues/Children_Requiring_a_Karing_Community_CRACK.shtml (last visited Apr. 25, 2004) (Whatever C.R.A.C.K.'s intent, some at least understand it to be an effort to control the population of poor women. On a website that appears to make pre-prepared college term papers available, one of the offerings is a report on the C.R.A.C.K. program. It says, in part, "[s]ome women have a child every year just to increase the amount of money they get each month. Many Americans are angered by this situation, but the politicians refuse to listen. There have been attempts to reform the welfare system, but people always find a way to take

History matters. It demonstrates that programs and political philosophies that start out as private ideology can become government enforced law. The eugenics movement of the nineteenth century began as a "humanitarian" experiment in reproductive technology with the goal of producing only fit human specimens, while weeding out "inferior stock."[334] Many social progressives supported eugenics, but it ultimately lead to the concept of a master race and an underclass.[335]

As a result of eugenics ideology, the United States adopted restrictive immigration laws as well as state-mandated sterilization laws. Indiana passed the first sterilization law in 1907.[336] By the 1930's more than thirty states had passed similar laws. Some included alcoholism and drug addiction in their list of so-called hereditary diseases and others even included blindness and deafness.[337] In 1927, the U.S. Supreme

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advantage of the situation. This is why Barbara Harris decided to step in and give these women an alternative."). *But see* INSTITUTE OF MEDICINE, *supra* note 99 (documenting lack of relationship between the AFDC welfare program and the number of children women receiving this support had).

334. *See generally* Eugenics Archive, *Image Archive on American Eugenics, at* http://www.eugenicsarchive.org (last visited Apr. 23, 2004).

335. *See id.* At its height, many prominent Americans supported eugenics. President Roosevelt once complained that the American middle class was committing "racial suicide" by not having enough children. Hence, the eugenics movement was pitched to the educated public as an element of family management." *Id.*

336. *Id.*; ROBERTS, *supra* note 53, at 59-76.

337. STEPHEN J. GOULD, THE FLAMINGO'S SMILE: REFLECTIONS IN NATURAL HISTORY 307-313 (1985), *at* http://www.stephenjaygould.org/library/gould_eugenics .html (last visited Apr. 23, 2004); *see also* Eugenics Archive, *Image Archive on American Eugenics, at* http://www.eugenicsarchive.org (last visited Apr. 23, 2004); ROBERTS, *supra* note 53, at 59-76; Michael Ollove, *The Lessons of Lynchburg,* BALT. SUN, May 6, 2001, at 7F (describing the rise of eugenic sterilization laws in the United States including interviews with some people who had been forcibly sterilized).

Court upheld a law permitting the sterilization of a young woman claimed to be an imbecile.[338]

How did this happen? Eugenics started as an academic pursuit, privately funded and supported by ordinary Americans who heard about it in lectures and read about it in popular magazines.[339] These stories presented highly stigmatized portrayals of groups of people who were deemed inferior and who produced an extraordinary number of damaged children that hardworking Americans were forced to support through their tax dollars. For example, social scientists presented the Jukes Family as follows:

> A case study of dysfunction, a bunch of genetically linked paupers, criminals, harlots, epileptics and mental defectives, whose care had placed a huge financial burden on taxpayers. The family's pedigree was used for decades as a textbook example of how heredity shaped human behavior and helped lead to calls for compulsory

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338. *See* Buck v. Bell, 274 U.S. 200, 207 (1927) (upholding a Virginia statute providing for sterilization of women since "[t]hree generations of imbeciles are enough." The Court further held as follows:

> We have seen more than once that the public welfare may call upon the best citizens for their lives. It would be strange if it could not call upon those who already sap the strength of the State for these lesser sacrifices . . . in order to prevent our being swamped with incompetence. It is better for all the world, if instead of waiting to execute degenerate offspring for crime[,] . . . society can prevent those who are manifestly unfit from continuing their kind).

See also Jana Leslie-Miller, *From Bell to Bell: Responsible Reproduction in the Twentieth Century*, 8 MD. J. CONTEMP. LEGAL ISSUES 123, 124 (1997) (stating that the seventy-year-old case "has never been overruled"); Roe v. Wade, 410 U.S. 113, 154 (1973) (citing *Buck v. Bell* as an example of permissible state regulation limiting the right to privacy); *In re* Sterilization of Moore, 221 S.E.2d 307 (N.C. 1976) (citing *Buck v. Bell* as an example of permissible state regulation). *But see* Skinner v. Oklahoma, 316 U.S. 535, 541 (1942) (striking down a law mandating the sterilization of certain habitual criminals and concluding that "[m]arriage and procreation are fundamental to the very existence and survival of the race.").

339. *See* ROBERTS, *supra* note 53, at 62.

> sterilization, segregation, lobotomies and even euthanasia against the "unfit."[340]

The book upon which much of the "eugenics craze" relied presented "data" hauntingly similar to that used by the C.R.A.C.K. program.[341] The author describes the family's social ills and estimated that "their care had cost the taxpayers, through relief, medical care, police arrests and imprisonment, a total of $1.3 million (about $20.9 million in today's dollars)."[342]

These stories and others about the "vicious, disobedient, drunken Negro" became accepted stereotypes.[343] The stereotype then became the "mobilizing force for government enforced laws" from eugenic sterilization laws to the Kansas castration law for any "Negro or mulatto who was convicted of rape."[344] These stereotypes, though false, provided the basis for terrible assaults on human rights and liberties,[345] including the Nazi sterilization program that ultimately led to genocide.[346] The stereotype of the selfish, irresponsible, drug-using woman also has the capacity to become the mobilizing force for punishing pregnant women, if not government-sponsored eugenic sterilizations.

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340. Scot Christianson, *Bad Seed or Bad Science?: The Story of the Notorious Jukes Family*, N.Y. TIMES, Feb. 8, 2003, at B1.

341. *See* ARTHUR H. ESTABROOK, THE JUKES IN 1915 (1916), *available at* http://www.disabilitymuseum.org/lib/docs/759.htm.

342. Christianson, *supra* note 340, at B1.

343. ROBERTS, *supra* note 53, at 66.

344. *Id.*

345. *See* GOULD*, supra* note 337, at 306-18 (revealing the truth about Carrie Buck and her daughter in a moving philosophical essay); *see also* Christianson, *supra* note 340, at B1 (reporting that the Jukes family produced many notable and highly successful descendants and that the vicious Negro simply never existed).

346. Paul Lombardo**,** *Eugenic Sterilization Laws* at 6, *at* www.eugenicsarchives.org (last visited Apr. 25, 2004).

Context also matters. The C.R.A.C.K. program does not exist in isolation. In the last fifty years, there have been numerous legislative attempts to create legal mandates for sterilizing certain populations. From the 1950's through the 1990's, American legislators proposed bills calling for punitive sterilization for unwed mothers who are on welfare and cash rewards for welfare recipients to use long-acting birth control.[347] In 1991, three years before C.R.A.C.K. was founded, David Duke, a white supremacist, proposed a government-sponsored voluntary sterilization program. He introduced a bill to the Louisiana House of Representatives that would "pay cash to welfare recipients who agreed to accept Norplant implants or an equivalent long-term contraceptive."[348] Mandatory sterilization and forced Norplant implantation have also been proposed as government enforced legislative solutions to the problems believed to be caused by drug use and pregnancy.[349] Just last year the Wisconsin Supreme Court set out on a new path in *State v. Oakley* holding that prohibiting a low-income African-American man from having more children as a condition of his probation did not violate the state or federal constitution.[350]

These pre-existing efforts, as well as the recent court ruling, make it plausible that C.R.A.C.K.'s message will someday become the basis for

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347. INSTITUTE OF MEDICINE, *supra* note 99, at 199-201.

348. MASON, *supra* note 104, at 96.

349. Significantly, some of the bills proposed over the last decade specifically called for controlling certain women's reproductive capacity. *See* Memorandum from Kary Moss & Kitty Kolbert, ACLU, Update of State Legislation Regarding Drug Use During Pregnancy 1-14 (May 22, 1990) (on file with author) (surveying legislation in the 50 states, the District of Columbia, and Puerto Rico). *See also* Cheri Hass, State v. Gray: *De-Criminalization of Maternal Drug Abuse or a Momentary Reprieve?*, 25 U. TOL. L. REV. 1013 (1995) (discussing a 1991 Ohio bill proposing to make maternal drug abuse a felony, punishable by temporary forced sterilization); GEORGE WASHINGTON UNIVERSITY LEGISLATIVE TRACKING SERVICE, FIRST QUARTERLY OVERVIEW OF 1992 STATE LEGISLATIVE ACTIVITY 2 (1992) (In 1992, another bill proposed in Washington State would require a woman who gave birth "to a child with fetal alcohol syndrome to have the contraceptive Norplant involuntarily inserted in her.").

350. 629 N.W.2d 200 (Wis. 2001), *cert. denied* 537 U.S. 813 (2002).

government-sponsored sterilization and population control efforts. Indeed, C.R.A.C.K.'s status as an exclusively private organization funded by private donations may only be temporary. The organization specifically asks its supporters to contact public officials regarding the value of the program. Their website states: "Please take a few minutes to write or call your local politicians with your concerns about this growing problem. If you support our program financially please tell them that as well. You can find the addresses and phone numbers of your local politicians in the front of your phone book . . . . Thank you so much for caring enough to make your voice heard."[351] Increasingly, C.R.A.C.K. has sought and obtained collaboration with government agencies and officials.[352] According to one article, "[a]ddicts who are directed to C.R.A.C.K. by public employees now account for a quarter of the program's participants."[353] Further, there are some commentators beginning to encourage direct government support of C.R.A.C.K.'s program and strategy.[354]

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351. Project Prevention, *Speak Out*, *at* http://www.cashforbirthcontrol.com/help/speak_out.html (last visited Mar. 13, 2002). *See also* PROJECT PREVENTION, *supra* note 137 (One of C.R.A.C.K.'s brochures also suggests that Ms. Harris has not given up hope of government support for her program: "Although she continued to fight the government, urging them to do something about a problem she considered out of control, she knew that it was her newly formed organization that would be key to making a significant difference.").

352. C.R.A.C.K. seeks to solicit clients through flyers it sends to jails and police and probation departments. *See* Lynn Smith, *Cash for Sterilization: Coercing Poor Women*, CHICAGO SUN-TIMES, Apr. 19, 1998, at 27. *See also* Berg, *supra* note 329, at B1 ("On Monday, she'll meet with Los Angeles County Sheriff Lee Baca, who wants to hear more, possibly introducing the program to the 21,000-inmate population within L.A.'s seven county jails.").

353. Daniel Costello, *Is C.R.A.C.K. WACK*, SALON, *at* http://archive.salon.com/mwt/feature/2003/04/08/crack/index_np.html (Apr. 8, 2003). "What's more, the group is increasingly getting referrals from unlikely and controversial sources: publicly funded jails, probation centers, drug treatment centers and even hospitals." *Id*.

354. *See* Horka-Ruiz, *supra* note 7, at 493 (recommending "adoption of a modified [C.R.A.C.K.] program by the state").

There are other connections that suggest links to eugenics ideology. Jim Woodhill, one of C.R.A.C.K.'s key funders, spokespeople, and board members also supports Chris Brand, "a self-proclaimed 'race realist,' [who] claims that blacks are intellectually inferior to whites, and advocates taking a 'eugenic' approach to 'wanton and criminal females.'"[355] Journalist Craig Malisow specifically asked Mr. Woodhill about the C.R.A.C.K. program's possible connections to eugenics. Woodhill responded by saying that accusations that C.R.A.C.K. is the modern face of eugenics "makes him sick," and argued that:

> The implication that the . . . parents of the babies we're trying to prevent from being born drug-damaged are somehow . . . not worthy, [or] not good, is another thing that I find abhorrent . . . and unproven. I don't think [anyone's] done any studies that say that the[se] people are any different than anybody else.[356]

Malisow, however, goes on to explain:

> But someone has done such studies. Someone has done studies that say black people are genetically dumber than whites and that pedophilia can be good for children. And that someone [(Chris Brand)] is subsidized by the Woodhill Foundation.[357]

Chris Brand himself says that the C.R.A.C.K. program demonstrates that "Shockley's eugenic ideas are being vindicated."[358] William Shockley is the author of a theory called "dysgenics," which argues that African-Americans are inherently less intelligent than whites, and based

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355. Yeoman, *supra* note 82 (This article also asserts that "Woodhill has hired Chris Brand, a British psychologist, who is working to expand C.R.A.C.K. overseas."). *See also* Leah R. Henry-Tanner, *Racism Falling Through the Cracks* (on file with author) (discussing C.R.A.C.K.'s links to Chris Brand and his racist, eugenicist ideologies).

356. Malisow, *supra* note 54.

357. *Id*.

358. Chris Brand, *IQ & PC: C.R.A.C.K. Attacked* (on file with author); *See also* Leah R. Henry-Tanner, *supra* note 355.

on this, asserted that remedial education programs are a waste of public resources.[359]

While eugenics is not C.R.A.C.K.'s explicit goal, Barbara Harris makes clear that C.R.A.C.K. is not especially concerned with distancing itself from this philosophy. Harris, in a letter to Mother Jones magazine, writes:

> As for Chris Brand, "the British psychologist who is working to expand [C.R.A.C.K.] overseas," that's news to me. I talked to him once and thought he was pretty strange. His ideas about blacks being inferior aren't welcome to me. Still, if this man causes [C.R.A.C.K.] to work overseas, fine. I care about results. His motives are his own business."[360]

The "results," however, too easily could be more government-sponsored punishment and control of certain populations, not more voluntary birth control. Indeed, someone who apparently supports C.R.A.C.K. eloquently demonstrated in an e-mail message to NAPW how easily C.R.A.C.K.'s rhetoric and ideology can lead to both eugenic and genocidal thinking:

> Subj: SOFT-MINDED LIBERALS
> Date: 1/6/03 5:26:05 PM Eastern Standard Time
> From: tkurzeja@yahoo.com (Tom Kurzeja)
> To: info@advocatesforpregnantwomen.org

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359. See Gordon Moore, *Solid-State Physicist; William Shockley; He fathered the transistor and brought the silicon to Silicon Valley but is remembered by many only for his noxious racial views,* TIME MAG., Mar. 29, 1999 at 160, *available at* http://www.time.com/time/time100/scientist/profile/shockley03.html. "In 1963 Shockley left the electronics industry and accepted an appointment at Stanford. There he became interested in the origins of human intelligence. Although he had no formal training in genetics or psychology, he began to formulate a theory of what he called dysgenics. Using data from the U.S. Army's crude pre-induction IQ tests, he concluded that African Americans were inherently less intelligent than Caucasians—an analysis that stirred wide controversy among laymen and experts in the field alike." *Id.*

360. Letter from Barbara Harris, to Mother Jones Magazine, *Addicts and Advocates*, *at* http://www.motherjones.com/magazine/JF02/backtalk.html (Jan./Feb. 2002).

> You said that Project Prevention's offer to sterilize drug addicts is akin to saying that they don['t] have the right to reproduce, and that that's horrible.
>
> I'm saying to you right now, chronic drug abusers represent a menace to society and I question their right to exist, much less get pregnant and bear a child that my tax dollars will have to support. America has serious problems, and it's time to decide which problems we can fix and which problems are too far gone. Problems like crack whores having babies they can't take care of are too far gone.
>
> My solution is not to sterilize them. I say we euthanize them. Involuntarily.[361]

Depriving Americans of their rights

While it may seem unlikely that the C.R.A.C.K program will lead to government-sponsored eugenic efforts, it is indisputable that C.R.A.C.K's core ideology has already been the basis for depriving Americans of their rights, including the right to life and liberty. This core ideology is not that family planning is worthwhile, but rather, the conviction that the conditions, circumstances, and health problems a woman experiences during pregnancy can and should be viewed as a form of "child abuse."

A flyer C.R.A.C.K. distributes states:

> If you are now or have been addicted to drugs and/or alcohol, this offer is for you! Babies born with drugs in their system often die at birth. The surviving infants don't stand much of a chance at life, especially when they bounce around foster homes—rarely getting adopted. *You can prevent this kind of "legal" child abuse* when

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361. E-mail from Tom Kurzeja to NAPW website (Jan. 6, 2003, 17:26:05 EST) (on file with author). *See also* Johnson, *supra* note 7, at 206 (arguing that "[a]lthough C.R.A.C.K.'s goals are narrowly focused . . . other groups with less benevolent or downright evil motives may create copycat programs," citing to one in Scotland that offered money to potential parents not to procreate based on the argument that "[a] child has the right to be born to parents free from terrible diseases.").

> you refrain from getting pregnant while using drugs whether that be long term or permanent.[362]

Barbara Harris "calls having crack babies '*legal child abuse*,'"[363] and has said, "[i]f anybody supports our idea that *child abuse* is not OK and [is] interested in us, we'll take them."[364]

This argument—that fetuses may be viewed as children and pregnant women as child abusers—has been and is increasingly being used to justify civil and human rights violations. In Charleston, South Carolina, a hospital, working in collaboration with local police, developed a policy whereby they secretly searched certain pregnant women for evidence of cocaine use, then turned their private medical information over to the police. Hospital staff then coordinated the in-hospital arrest of the women. Women were taken out of the hospital in chains and shackles, some still pregnant, others still bleeding from their recent deliveries. Although the U.S. Supreme Court ultimately held that the searches that preceded these arrests violated the 4th Amendment prohibition on unreasonable and unwarranted searches,[365] the defendant justified these actions based in part on the claim that such action was necessary to prevent "child abuse" of the unborn.[366] The local solicitor and one of the policy's chief architects defended the policy as a child protection measure and called it virtually the same thing as the

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362. C.R.A.C.K. Flyer, *supra* note 33.

363. O'Neill, *supra* note 24, at 149 (caption with photograph).

364. Kaiser Health Report, *Founder of Controversial Group Advocating Sterilization for Drug Addicts Will Address Canadian Conference* (on file with author).

365. Ferguson v. City of Charleston, 532 U.S. 67 (2001); *See also* Brief of Respondents at 24-29, Ferguson v. City of Charleston, 532 U.S. 67 (2001) (No. 99-936) (arguing that protection of "pregnant patients *and their children*" provided a special needs exception to the 4th Amendment's requirement) (emphasis added).

366. *See, e.g.*, Motion for Leave to File as *Amici Curiae* and Brief in Support of Petition for Certiorari for the Am. Pub. Health Ass'n et al., Ferguson v. City of Charleston, 186 F.3d 469, 479 (4th Cir. 1999) (No. 99-936).

C.R.A.C.K. program, a "crack baby prevention program."[367] The argument that pregnant women who have alcohol and other drug problems are guilty of criminal child abuse has also been used to justify the arrest of hundreds of women across the country.[368] Most courts that have addressed the legitimacy of such arrests have found them to be contrary to legislative intent and a violation of the women's rights to due process.[369] Some courts have also held that such prosecutions violate the right to privacy.[370] South Carolina however has upheld such prosecutions, putting into effect Ms. Harris' original idea that pregnant

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367. Charles Molony Condon*, Bureaucrats Stopped Crack-Baby Prevention Program,* THE GREENVILLE NEWS, May 28, 1995, at 3 (portraying policy as child abuse prevention program). *See also* Frank Heflin, *Charleston Plan Saving Unborn Babies From Addiction,* THE STATE, June 4, 1990, at A2.

368. *See* LOREN SIEGEL, THE PREGNANCY POLICE FIGHT THE WAR ON DRUGS, ON CRACK IN AMERICA 249 (Craig Reinarman & Harry G. Levine eds. 1997) ("[d]uring the late 1980s, as the specter of 'crack babies' haunted American political rhetoric, more than two hundred criminal prosecutions were initiated against women in almost twenty states."). *See also* Lynn Paltrow, *Criminal Prosecutions Against Pregnant Women: National Update and Overview*, Reproductive Freedom Project, American Civil Liberties Union Foundation (1992) (documenting 167 arrests nationwide as of 1992).

369. *See e.g.,* Commonwealth v. Welch, 864 S.W.2d 280 (Ky. 1993) (affirming reversal of child abuse conviction of a pregnant woman who used illegal drugs by concluding that applying the statute would violate the plain meaning of the statute, deprive the woman of constitutionally mandated due process notice, and render the statute unconstitutionally vague); Sheriff, Washoe County, Nevada v. Encoe, 885 P.2d 596 (Nev. 1994) (holding that application of child endangerment statute to a pregnant woman who uses an illegal substance would violate the plain meaning of the statute, deprive the woman of constitutionally mandated due process notice, and render the statute unconstitutionally vague).

370. Commonwealth v. Pelligrini, No. 87-970, slip op. (Mass. Super. Ct. Oct. 15, 1990) (granting motion to dismiss drug delivery charges against a pregnant woman whose newborn tested positive for cocaine by holding that legislative intent, the right to privacy, and due process do not permit the application of such statutes to women who use drugs while pregnant).

women who procreate in spite of a drug or other health problem deserve to go to jail.[371]

> This law came into place through judicial action in the case of *Whitner v. State*. In *Whitner*, a three-justice majority concluded that a viable fetus is a "person" under the Children's Code and that South Carolina Code section 20-7-50 therefore "encompasses maternal acts endangering or likely to endanger the life, comfort, or health of a *viable fetus*."[372] Has South Carolina's approach protected children? The answer appears to be "No." In the years immediately following this decision, South Carolina's infant mortality rate increased for the first time after a decade of steady decline.[373] During roughly the same period of time, the number of abandoned babies in South Carolina increased 20%.[374] South Carolina also remains the state that spends the least amount of state dollars on drug treatment.[375]

Viewing addiction, alcoholism and other health problems women experience during pregnancy as a form of criminal child abuse does not protect children's health and well-being. It is well known that impri-

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371. *See* Whitner v. South Carolina, 492 S.E.2d 777 (S.C. 1997), *cert. denied*, 523 U.S. 1145 (1998); Lynn M. Paltrow, *When Becoming Pregnant is a Crime,* 9 CRIM. JUST. ETHICS 4147 (Winter/Spring 1990).

372. *Whitner*, 492 S.E.2d at 779 (emphasis added); *See* Lynn M. Paltrow, *Pregnant Drug Users, Fetal Persons, and the Threat to Roe v. Wade,* 62 ALB. L. REV. 999 (1999).

373. *See Infant Mortality on Rise in '97*, THE POST & COURIER (Charleston, S.C.), Feb. 19, 1999, at B1. *See also* THE ANNIE E. CASEY FOUNDATION, KIDS COUNT DATA BOOK 160 (reporting that infant mortality decreased from 11.7% in 1990 to 8.4% in 1996, but increased to 9.6% for 1997 and 1998, the two years following the *Whitner* decision).

374. *See* Associated Press, *Discarded Children Increasing*, THE POST & COURIER (Charleston, S.C.), Apr. 19, 1999, at B1.

375. *See* Kim Baca, *South Carolina Spends Least on Substance Abuse Prevention*, ASSOCIATED PRESS STATE AND LOCAL WIRE, Jan. 29, 2001.

soning new mothers is "at the very least disruptive and commonly traumatic."[376] "In 1993, the U.S. House of Representatives summarized the findings of research on the harm of separation and the benefits of maintaining family ties,"[377] finding that, among other things:

> Separation of children from their primary caretaker-parents can cause harm to children's psychological well-being and hinder their growth and development; many infants who are born shortly before or while their mothers are incarcerated are quickly separated from their mothers, preventing the parent-child bonding that is crucial to developing a sense of security and trust in children.[378]

The argument that addiction during pregnancy is child abuse has also been used to justify laws that presume parental unfitness based on

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376. Amnesty International, *United States of America: Rights for All: "Not Part of My Sentence": Violations of the Human Rights of Women In Custody*, Amnesty International, *at* http://web.amnesty.org/library/index/engamr510011999 (Mar. 1, 1999) (The imprisonment of pregnant women and new mothers is a violation of international standards, and the Eighth United Nations Congress has recommended that "[t]he use of imprisonment for certain categories of offenders, such as pregnant women or mothers with infants or small children, should be restricted and a special effort made to avoid the extended use of imprisonment as a sanction for these categories."). *See also* State v. Gethers, 585 So.2d 1140, 1143 n.17 (Fla. Dist. Ct. App. 1991) ("Criminal prosecution would needlessly destroy the family by incarcerating the child's mother when alternative measures could both protect the child and stabilize the family.").

377. Amnesty International, *supra* note 376.

378. *Id*. *See also* THE OSBORNE ASSOCIATION, HOW CAN I HELP? WORKING WITH CHILDREN OF INCARCERATED PARENTS 1 (1993) (noting that "[t]he arrest and incarceration of a parent can have a profound effect on a child. It can cause financial dislocation to the family, family dismemberment or dysfunction, and great social and emotional pain"); Fox Butterfield, *Parents in Prison: A Special Report: As Inmate Population Grows So Does a Focus on Children*, N.Y. TIMES, Apr. 7, 1999, at A1 ("having a parent behind bars is the single largest factor in the making of juvenile delinquents and adult criminals").

nothing more than a single positive drug test.[379] As discussed above, unnecessary removal of children from their families is not only psychologically damaging, it also denies them the right to be with the most appropriate caregivers.

Equating fetuses with children and pregnant women with criminals is also at the core of a number of other attacks on women's civil rights. This argument is at the heart of the effort to end the right to choose to have an abortion. It has also been used to justify forced surgical interventions on pregnant women.[380] One such woman, Angela Carder, was forced, in the name of protecting her fetus, to have a nonconsensual cesarean section. The result of this fetal rights based surgery was that both she and the fetus died.[381]

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379. The eighteen states that address the issue of a pregnant woman's use of drugs in their civil child welfare statutes are as follows: Arizona, California, Florida, Illinois, Indiana, Iowa, Maryland, Massachusetts, Michigan, Minnesota, Nevada, Oklahoma, Rhode Island, South Carolina, Texas, Utah, Virginia, and Wisconsin. *See* ARIZ. REV. STAT. ANN. § 13-3620(B) (2003); CAL. PENAL CODE § 11165.13 (2003); FLA. STAT. ANN. § 39.01(30)(g) (2003); 325 ILL. COMP. STAT. 5/7.3b (2003); IND. CODE § 31-34-1-10, 11 (2003); IOWA CODE ANN. §§ 232.68(2)(f), 232.77(2) (2003); MD. CODE ANN., FAM. LAW § 5-313(d)(1)(iv) (2002); MASS. GEN. LAWS ANN. ch. 119, § 51A (2003); MICH. COMP. LAWS § 722.623a (2003); MINN. STAT. ANN. § 626.5561-5563 (2002); NEV. REV. STAT. ANN. § 432B.330(1)(b) (2003); OKLA. STAT. ANN. tit. 10, § 7103(A)(2) (2003); R.I. ADMIN. CODE § 03-040-420.II.D.4.a; *id.* § 03-141-000.II.F.2.c.1. (2003); S.C. CODE ANN. § 20-7-736 (2002); TEX. FAM. CODE ANN. § 261.001(1) & (7) (2003); UTAH CODE ANN. § 62A-4-404; VA. CODE ANN. §§ 54.1-2403.1, 63.2-1509(A) (2003); WIS. STAT. ANN. § 146.0255 (2002).

380. *See* In re Fetus Brown, 689 N.E.2d 397, 400 (Ill. App. Ct. 1997) (overturning a court-ordered blood transfusion of a pregnant woman in which doctors "yelled at and forcibly restrained, overpowered and sedated" the woman in order to carry out the order); In re Baby Boy Doe, 632 N.E.2d 326 (Ill. App. Ct. 1994) (holding that courts may not balance whatever rights a fetus may have against the rights of a competent woman, whose choice to refuse medical treatment as invasive as a cesarean section must be honored even if the choice may be harmful to the fetus); *See also* Jefferson v. Griffin Spalding Co. Hosp. Auth., 274 S.E. 2d 457 (Ga. 1981); *In re* Madyun, 114 Daily Wash. L. Reptr. 2233 (Sup. Ct. July 26, 1986); Janet Gallagher, *Prenatal Invasions & Interventions: What's Wrong with Fetal Rights*, 10 HARVARD WOMEN'S L.J. 9 (1987).

381. *See In re* A.C., 573 A.2d 1235, 1252 (D.C. 1990) (vacating and remanding a

Moreover, it strongly appears that C.R.A.C.K. does not just view drug and alcohol use during pregnancy as child abuse, but also considers having HIV a form of child abuse.[382] C.R.A.C.K. frequently cites "AIDS" as one of the things that their program seeks to prevent,[383] despite the fact that the level of transmission to the fetus is low and that it can be reduced to zero with appropriate treatment. As with drug use, the women who have contracted this disease are portrayed as perpetrators of a crime and the fetuses as "innocent victims."[384] By equating women's drug use with child abuse, by stigmatizing and dehumanizing pregnant women who use drugs, and by focusing exclusively on personal responsibility, C.R.A.C.K. not only invites punishment of certain women, it provides extraordinary support for a larger conservative effort to expand the war on drugs and to radically curtail public health and social services for all Americans.

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case in which a woman was forced to undergo a cesarean delivery); Lawrence J. Nelson & Nancy Milliken, *Compelled Medical Treatment of Pregnant Women: Life, Liberty and Law in Conflict*, 259 JAMA 1060, 1065 (1988) (noting the "troublesome questions" that surround court-ordered obstetric procedures for the benefit of fetuses and discouraging the recognition of "fetal rights that would create an adversarial relationship between a pregnant woman and her fetus"); Terry E. Thornton & Lynn Paltrow, *The Rights of Pregnant Patients:* Carder *Case Brings Bold Policy Initiatives*, HEALTHSPAN, May 1991, at 10-16 (describing the tragic compelled-treatment case of Angela Carder and urging the implementation of hospital policies to avoid the need for court orders and to restore decision making power to "the patient in consultation with her loved ones and treating physicians").

382. *See* O'Neill, *supra* note 24, at 149 (featuring a picture of a C.R.A.C.K. billboard which the C.R.A.C.K. website listed as www.cracksterilization.com).

383. *See* PROJECT PREVENTION, *supra* note 137 ("AIDS: More than 20% of those afflicted with HIV and AIDS did not contact [sic] this destructive disease by bad luck! Most drug addicts are unaware they carry the virus while willingly having unprotected sex. Every day the AIDS virus is passed on to infants who are also suffering the pain of drug addiction! WE PREVENT AIDS from attacking innocent newborns EVERY TIME a drug addicted women makes the decision to participate in long term/permanent birth control . . . . [S]adly, many babies born addicted to drugs also come into the world with AIDS, *by no fault of their own*.") (Emphasis in the original).

384. *See The John Walsh Show, supra* note 243.

Promoting the Conservative Agenda

Politically using drug users as scapegoats for a range of social problems is not new. C.R.A.C.K.'s version, however, with its veneer of public health and voluntary participation, may be that much more pernicious. As Samuel R. Friedman observes:

> Politically, scapegoating drug users distracts attention from policies that aggravate the problems people face. Blaming unsafe streets, AIDS, poor services in hospitals, and the existence of children who act out in school on drug user's immorality points to certain solutions that are in tune with a belt-tightening, competition-oriented, fundamentalist world-view: More police, longer prison sentences, and family values, and also points to an analysis that says that problems are the result of guilty individuals. This distracts attention from the structural problems that cause problems for people and communities, such as the economic situation . . . governments that accept the need for profitability as a "given"; cutbacks in education, health, and welfare; racism and sexism.[385]

Focusing attention on terrible mothers and the harm they allegedly do to their children provides useful political cover for larger social issues and a perfect excuse not to fund adequately any of the programs that would in fact help them, including Title X family planning.[386] A discussion about the role that the so-called "crack epidemic" played in the politics of the 80's and 90's could easily be applied to the C.R.A.C.K. program:

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385. Samuel R. Friedman, *The Political Economy of Drug-User Scapegoating and the Philosophy of Resistance*, 5 DRUGS: EDUC., PREVENTION, AND POL'Y 15 (1998).

386. *See* Rosenbaum, *supra* note 51, at 657 ("Crack mothers were being scapegoated, diverting attention from *(a)* the realities of the failed, post-Reagan social experiment with cutbacks of needed social problems and *(b)* complex social conditions that would require major political change.").

> Crack [and C.R.A.C.K.] was a godsend to the Right. They used it and the drug issue as an ideological fig leaf to place over the unsightly urban ills that had increased markedly under Reagan administration social and economic policies. "The drug problem" served conservative politicians as an all-purpose scapegoat. They could blame an array of problems on the deviant individuals and then expand the nets of social control to imprison people for causing the problems.[387]

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387. Reinarman & Levine, *supra* note 368, at 41 (The Right was not alone in adopting and promoting the rhetoric of a cocaine epidemic. "Liberals and Democrats too found in crack and drugs a means of recapturing Democratic defectors by appearing more conservative. And they too found drugs to be a convenient scapegoat for the worsening conditions in the inner cities. All this happened at a historical moment when the Right successfully stigmatized the liberal's traditional solutions to the problems of the poor as ineffective and costly. Thus, in addition to the political capital to be gained by waging the war, the new chemical bogeyman afforded politicians across the ideological spectrum both an explanation for pressing public problems and an excuse for not proposing the unpopular taxing, spending, or redistributing needed to do something about them"). *See also* Sheigla Murphy, et al., *Pregnant Drug Users: Scapegoats of the Reagan/Bush and Clinton Era Economics* at 2, INTERNATIONAL JOURNAL OF SOCIAL JUSTICE 2002 (arguing that:

> [P]regnant drug users served as ideological offensives in the United States war on drugs. Pernicious images of drug-using mothers having babies for the sole purpose of qualifying for government handouts in order to buy drugs and then neglecting and abusing these children were promulgated by the media and politicians. This contributed to the passage of legislation and funding allocations that resulted in the wholesale reduction of social welfare services to all poor women and children. The war on drugs has always been a war on the poor, particularly people of color. In 2001 it is very clear that drug use and drug users have played a very important role in defining women and children's poverty as an individual behavioral problem rather than the result of structural economic inequities.);

ROBERTS, *supra* note 53, at 179 ("In addition to legitimizing fetal rights enforcement, prosecuting crack-addicted mothers shifts public attention from poverty, racism, and a deficient health care system, implying instead that poor infant health results from the depraved behavior of individual mothers. Poverty—not maternal drug use—is the major threat to the health of Black Children in America.").

It is no coincidence then that significant support for C.R.A.C.K. comes from conservative foundations and ideologues. C.R.A.C.K. has "received more than $2 million in donations, most of it from wealthy conservatives."[388] Pittsburgh billionaire Richard Mellon Scaife contributed $75,000 through his Allegheny Foundation.[389] Jim Woodhill, a self-proclaimed member of the "Republican Rebel Alliance," contributed $125,000.[390] Indeed, it is interesting to consider the following comparison. When Hillary Clinton suggested that it "takes a village" to raise a family—meaning community, social, and government support as well as individual parental support[391]—she was lambasted by leaders on the right.[392] When Barbara Harris says children require a caring community—by which she means that certain women should be prevented from having children—leading conservatives hail her.[393]

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388. Avram Goldstein, *Group to Pay Addicts to Take Birth Control*, WASH. POST, June 26, 2000, at B1.

389. Roe, *supra* note 47.

390. *See* Roe, *supra* note 47; *see also* AL FRANKEN, LIES AND THE LYING LIARS WHO TELL THEM: A FAIR AND BALANCED LOOK AT THE RIGHT 132-141 (2003) (describing Scaife's extensive efforts to impose a conservative political agenda on America and the extraordinarily nasty tone he has set for public debate on that agenda); Henry-Tanner, *supra* note 355 (discussing Woodhill's extensive contributions to and connection with conservative causes).

391. HILLARY RODHAM CLINTON, IT TAKES A VILLAGE (1996).

392. *See, e.g.*, *The O'Reilly Factor, supra* note 42 (2002) (labeling the notion that "it takes a village" as "ridiculous" and stating: "Chief White House 'enabler' Hillary Rodham Clinton wrote that 'it takes a village' to raise children. My parents and their friends thought that it takes parents. They were sorry that some of my friends had maniacs for parents but they didn't interfere. And they didn't want anyone poking their nose in our house either.").

393. *See, e.g., supra* notes 42, 105, 315 (citing The O'Reilly Factor show on C.R.A.C.K.). *See also* Basu, *supra* note 311, at 30 ("Though Harris has raised thousands from right-wing donors, politics seem far from her mind—but so do ethics, a long history of racial prejudice, and what it means to promote inaccurate stereotypes.

Conservative donors and commentators are supportive because they recognize what others should recognize as well—that C.R.A.C.K.'s greatest impact is not on the number of women giving birth to drug exposed children (1,000 women after five years of operation),[394] but rather, on the public debate about whether or not our society will take responsibility for those who have been left behind by an economy that benefits some over others, an educational system that is severely under-funded, and an extremely expensive health care system that leaves millions without health care coverage.

As Dorothy Roberts observes:

> It could easily be argued that mandatory sterilization laws enforced during the first half of the twentieth century posed no serious danger since they resulted in the sterilization of only 70,000 Americans. But the impact of these laws went far beyond their reduction of victim's birthrates. They affected the way Americans valued each other and thought about social problems.[395]

Conclusion: How to really protect children and build caring communities

The United States remains the only western industrialized country not to have a national system of health insurance.[396] 43 million Americans, including 8.5 million children, lack health care coverage.[397]

She feels she is protecting the rights of unborn children, but in her single-minded and rather simplistic war against pregnant drug addicts, Harris has forgotten that it is far too easy to blame individuals rather than the conditions that thwart them.").

394. *See* Project Prevention, *Statistics*, *supra* note 105 (last visited Apr. 23, 2004).

395. ROBERTS, *supra* note 53, at 103.

396. Ruth A. Sidel*, Needed: A National Commitment to Families,* UNCOMMON SENSE, *at* http://www.njfac.org/us17.htm (Feb. 1997).

397. *See, e.g.,* http://www.americansforhealthcare.org/facts/groups/glance.cfm (last visited Apr. 23, 2004) ("There are nearly 44 million Americans living without health coverage—including 8.5 million children. In 2002, the number of people without

America is one of only three industrialized nations in the world that does not require any paid maternity leave.[398] Nearly one in five children live in poverty.[399] This is the result of choices our country has made about where to direct its tax cuts and its spending. It is not a lack of resources, it is a lack of a real commitment to children that creates the greatest risks for children in America today.

As the organization Family Watch argues: "Addiction treatment, comprehensive healthcare, childcare services, educational opportunities, and decent jobs are the real components of a caring community."[400] Increased access to contraceptive services of all kinds, as well as

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health coverage increased by more than 2 million, the largest one-year increase in a decade."); Press Release, Center on Budget and Priorities, Number of Americans Without Health Insurance Rose in 2002 (Oct. 8, 2003), *at* http://www.cbpp.org/9-30-03health.htm (last visited Apr. 23, 2003); Special Report, Families USA, Working Without a Net: The Health Care Safety Net Still Leaves Million of Low Income Workers Uninsured (Apr. 2004), *at http://www.familiesusa.org/site/DocServer/Holes_2004_update.pdf?docID=3304.*

398. *See, e.g.,* Kirstin Downey Grimsley, *Study: U.S. Mothers Face Stingy Maternity Benefits; U.N. Agency Finds Disparity With Other Nations*, WASH. POST, Feb. 16, 1998, at A10; Catherine Valenti, *Paid Leave for All?; See also, With California Taking the Lead, States Consider Paid Family Leave,* ABC NEWS, *at* http://www.abcnews.go .com/sections/business/US/paidleave_031009.html (last visited Apr. 25, 2004); Andrea Mahony, *Paid Maternity Leave Entitlements Around the World*, PROFESSIONAL UPDATE, *at* http://www.apesma.asn.au/newsviews/professional_update/2001/June/paid_maternity.htm (June 2001) ("In fact the United Nations Convention on the Elimination of all Forms of Discrimination Against Women states: 'Parties shall take all appropriate measures … to introduce maternity leave with pay or with comparable social benefits without loss of former employment seniority or social allowances.'").

399. Catholic Campaign for Human Development, *Poverty USA: The Faces of American Poverty*, *at* http://www.usccb.org/cchd/povertyusa/povfact2.htm. (Dec. 5, 2003) (stating that "the total number of children in poverty increased to 12.1 million in 2002, up from 11.7 million in 2001." (U.S. Census Bureau, *Poverty in the United States: 2002*, Current Population Reports, Sept. 2003)).

400. *Statement of Opposition to C.R.A.C.K.*, FAMILY WATCH, *at* http://www.familywatch.org/crack.htm (last visited Apr. 23, 2004); Communities Against Rape and Abuse, *supra* note 101 ("Caring communities do not coerce women into not having children but seek ways to enhance the lives of its members.").

meaningful education about them, is also part of the solution. There are many helpful and successful approaches to reaching low-income pregnant women and preventing harm to them and their children.[401] None of these support the belief that this group of people must be bribed in order to improve their health and the health of their children.[402]

In fact, C.R.A.C.K.'s own experience may in the end prove this point. C.R.A.C.K. claims that many of its clients are grateful for their services.[403] C.R.A.C.K. interprets this to mean that the bribes are working. Yet it is far more likely that it is finding—to the extent anything can be guessed from its unscientific data collection methods—that women already motivated and interested in using contraception will do so when given a little support. Because low-income drug-using women are routinely mistreated by health care providers and social service agencies, it is not at all surprising they would be receptive to anyone willing to come to offer them any kind of help.[404] Dr. Ann Boyer has found that even without any offer of money she has reached nearly as many women as C.R.A.C.K. claims to have paid, helping women to have healthy pregnancies and to obtain sterilization or contraceptive services as well as other forms of health care.[405]

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401. *See supra* notes 67-71 (discussing some of the non-punitive treatment approaches that work).

402. *See, e.g.*, http://rebeccaproject.org (advocating the stabilization and treatement of low-income parents in recovery combined with the parents advocating for sensible drug treatement options); http://www.jnow.org (working with women and communities to eliminate the need for prisons); http://www.nccpr.org (working with the child welfare system to make it better serve vulnerable children by advocating change concerning child abuse, foster care, and family preservation).

403. *See* Project Prevention, *Quotes*, *supra* note 75 (last visited Apr. 23, 2004).

404. *See* Vega, *supra* note 321, at B1 ("An African-American clergyman explained his support of the C.R.A.C.K. program this way, 'I don't see the controversy,' said the Rev. Charles H. Ellis III of the Greater Grace Temple in Detroit, where Mrs. Harris spoke. 'People in the Betty Ford Clinic have some kind of support. In urban Detroit, a lot of time there is no support system.'").

405. *See* Boyer, *supra* note 190.

Malcolm Gladwell, in his book *The Tipping Point*, suggests that small things can sometimes make a difference.[406] He cites numerous social science studies to support his thesis.[407] In one study he found that booklets describing the risks of tetanus, did not produce a significant increase in the number of college students going to the campus health clinic to get a free vaccination.[408] However, booklets that included a map of the clinic and its hours (something already readily available to the students) seemed to be the small difference that produced a significant increase in the number of students who went.[409]

So, what may be true then is that C.R.A.C.K. has unwittingly hit upon small things that can make a difference even while health care, contraceptive services, comprehensive sex education and drug treatment remain out of reach for millions of Americans. Billboards attracting attention, community outreach, and what is known in the treatment field as case management—assisting people to negotiate often complex, conflicting, and sometimes hostile health care systems—may be very useful tools in enabling low-income women to access contraceptive health services. It is very unlikely, however, that C.R.A.C.K. would have received the funding it has gotten from its conservative donors or the media attention it has so generously received without the population control, drug stigmatizing, and woman dehumanizing messages central to its mission.

Because of these messages, C.R.A.C.K. helps to ensure that the big differences that are desperately needed—drug treatment, contraceptive services, and health care—will never be available to the low-income communities it targets.

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406. MALCOLM GLADWELL, THE TIPPING POINT: HOW LITTLE THINGS CAN MAKE A BIG DIFFERENCE (2002).

407. *Id.* at 34-38, 140-46, 155-168.

408. *Id.* at 96-98.

409. *Id.* at 97 (finding that the percentage of students obtaining vaccinations went from 3% to 28%).