

# Crack is Wack:

Activism, Rhetoric, and the Creation of a Crisis  
Surrounding the Regulation of Prenatal Drug Use in  
New York City from  
1987-1997.

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Salonee Bhaman  
Seminar Advisor: Martha Howell  
Faculty Advisor: Melissa Milewski

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## **Introduction**

The year 1986 is widely regarded as the beginning of the infamous “crack era” in major American metropolises. Crack, crystalline cocaine derived from freebase, was universally seen as the new urban menace—responsible for a slew of social maladies from increasing rates of violence to booming foster child populations. Popular representations of the drug emphasized its uniqueness—both pharmacologically and socially. Unlike heroin addicts, experts insisted, crack addicts were prone to violent outbursts, unable to function within society even minimally, and many more were women. Moreover, the drug was widely available and relatively cheap – though habits quickly grew costly. The compound result, according to both journalists and politicians announced, were communities rendered dysfunctional and decaying, overflowing court systems, failing social service sectors, and escalating legal costs.

Representations of the “crack epidemic,” however, did not just focus on drug use, however. Rather, the epidemic was characterized by several symptoms, many of them presented along gendered lines. Exposés about the epidemic usually also focused at length on the links between crack and street prostitution, sex for crack exchanges, child abuse and neglect, and perhaps the most poignant image of the crack epidemic coverage: the crack baby, disabled by the drug use of their addicted mothers. This thesis examines trends the criminalization of prenatal drug use in the aftermath of the crack epidemic of the late 80s and early 90s by contrasting specific policy initiatives in New York City to the rest of the country. Keen media attention to the role of women and children within this emergent drug epidemic contributed to an overall trend towards punitive governmental policies regarding prenatal drug users. Here, I examine judicial and legal policy pertaining to prenatal drug users in New York City, and argue that pro-

choice judges and Child Welfare officials guided policy away from the fetal-rights dominated ideologies favored by many other states in the late 80s and early 90s.

These progressive trends were disrupted in the aftermath of the death of Elisa Isquierdo, a young girl killed at the hands of her drug-addicted mother in 1995. Following Isquierdo's death the Mayor's office actively pursued policies that would punish, rather than rehabilitate, prenatal drug users and drug-using mothers in conjunction with a larger political platform that drastically reduced budgets for rehabilitative services and restructured the Child Welfare Administration. Isquierdo's death functioned as a political trope for the Giuliani administration to shift attention away from massive budget cuts that terminated services across the city, including holistic drug-treatment programs for pregnant drug addicts. Instead, the administration focused attention on administrative changes within the Human Rights Administration (HRA) and the Child Welfare Administration (CWA). The politically expedient restructuring of the HRA as separate from the CWA resulted in a more aggressive, punitive stance towards prenatal drug users. This stance was echoed by legislation proposed by the Giuliani administration that infringed upon the privacy rights of prenatal drug addicts. These policies placed the Executive administration directly at odds with several prominent public health advocates, legal scholars, politicians, and policy-makers working New York City, who actively articulated concerns about race, class, constitutional privacy rights in response to the legislation.

The Giuliani administration's simultaneous reduction of funding for holistic-family based programs and restructuring of the Child Welfare Administration can be located within a larger framework of regulating and criminalizing the reproductive health of poor, minority populations under the auspices of child welfare throughout the nation. However, unlike states<sup>1</sup>, these

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<sup>1</sup> While there are many examples of punitive policies, South Carolina can be seen as an especially intense example of

changes were mitigated on a legislative and judicial level due to an active network of legal and medical activists. While the intentions behind the Giuliani administration's political agenda cannot be definitively proven, the shift in tone in public statements and attention devoted to Child Welfare by the Mayor's office following the death of Isquierdo (from one of blanket financial austerity to active and robust concern) evidences a conscious shift in administrative stance. I argue that the Mayor's office pursued these policies, despite political opposition, because criminalizing female prenatal drug users allowed the Giuliani administration to respond to public outrage over the issue of prenatal drug use, while continuing to implement a larger platform of fiscal austerity and ambitious Welfare-to-Work reforms. I argue that the legislative measures proposed by the Giuliani administration were not successful because they were opposed by the community of individuals and organizations specifically dealing with rehabilitating prenatal drug users in New York City.

This thesis first explores the legal landscape surrounding prenatal drug use in New York City in the late 80s and early 90s, then moves on to provide a brief history and profile of some of the progressive organizations that were created during the reform efforts of this period. Next, I explore the differences between these organizations and the Office of Mayor Giuliani through analysis of two bills proposed simultaneously in the New York State legislature in 1997. The New York State Hearing about one of them, Assembly Bill A-8217, acts as a useful case study into the various positions held within the debate.

**Historiography:**

Significant research has been undertaken on questions surrounding the issues of female drug use; reproductive rights challenges faced by poor, minority women; and political exigency of gendered- and racialized- tropes such as the "welfare queen" and "crack mother." Related

scholarship has shown that media portrayals of problematic populations affect the social policy employed to deal with them.

In her pivotal work, *Using Women*, Nancy Campbell has studied drug use among female populations and the various ways in which public officials have dealt with it from a legal and media stand point. Campbell argues that female drug use has always occupied a particularly problematic space for policy makers and society as a whole due to social responsibilities, like reproduction, attributed solely to women. Campbell's broad history touches upon theoretical elements of the social regulation of drug use, most notably the importance of female maternal capacity to western society. Women, Campbell argues, are an important population to regulate because they often symbolically represent the reproductive future of a society.

Campbell digs deeper into these issues through an exploration of U.S. congressional hearings on crack cocaine use from 1989-90, noting the emergence of two tropes: the erosion of "maternal instinct" and the "emergence of the 'vulnerable child'." The content of these hearings, she notes, proves that crack was regarded as unique and "qualitatively different" drug — it was believed to depress maternal instincts, induce abortions, and prove "especially seductive for women." Campbell uses testimony from female drug users in the hearings to illustrate the emergence of the unfit mother/vulnerable child paradigm, arguing that it is situated within a larger context that considers female drug use to be inherently more socially problematic (and necessary to regulate) because of the female capacity to reproduce. Accordingly, the hearings conceptualized the "maternal instinct" as a commodity that could be regulated and policed through changes in public policy; at the same time, the hearings inextricably linked the women's identities to their socioeconomic and racial status. Moreover, Campbell astutely observes that the concept of "sex for crack" exchanges constitute a small but "obsessively investigated" portion of

the discourse, which gets to the crux of a fear about “unmarried women on public assistance reproducing addiction.”<sup>2</sup>

This societal anxiety surrounding the threat of female dependence on public assistance is further explored in *The Politics of Disgust*, where Angie Marie-Hancock argues that the public identity of welfare recipients was forged into a distinct trope—that of the welfare queen—based on pervasive misperceptions reinforced by media, popular, and political discourses—eventually coming to serve as a political symbol. The power of the welfare queen as a political symbol to attack, Marie-Hancock argues, incentivized welfare reform as a task for both Republicans and Democrats. She argues that the trope of the welfare queen enabled a “politics of disgust” to take root, fundamentally limiting lawmakers’ ideas and policy recommendations, since they were now obligated to hold the welfare recipient in contempt. The resulting legislation, she argues, ignored the needs of those affected by it. The bureaucratic measures towards punitive treatment of prenatal drug addicts within New York City can be theoretically rooted in Marie-Hancock’s work: the Giuliani administration employed highly publicized cases of child abuse, only loosely related to drug use, as symbolic flash points for the push to formally criminalize prenatal drug use.<sup>3</sup>

In fact, as Dorothy Roberts notes in *Killing The Black Body*, the myth of the “crack mother” relies on many of the same tropes of black womanhood employed in the construction of Marie-Hancock’s “welfare queen.” Moreover, Roberts argues that the fetal rights movement and the criminalization of poor, black female drug users is rooted in a history of slavery and eugenics

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<sup>2</sup> Campbell, Nancy D. *Using Women: Gender, Drug Policy, and Social Justice*. New York: Routledge, 2000.; Campbell, Nancy D. “Regulating ‘Maternal Instinct’: Governing Mentalities of Late Twentieth-Century U.S. Illicit Drug Policy.” *Signs* 24, no. 4 (July 1, 1999): 895–923.

<sup>3</sup> Hancock, Ange-Marie. *The Politics of Disgust: The Public Identity of the Welfare Queen*. New York: New York University Press, 2004.



that laid claim to the bodies and reproductive capacities of black women. She extensively traces practices of formalized eugenics, forced sterilizations, and “Mississippi Appendectomies” historically faced by black women in the United States and roots these practices to the same recurring racist logic: black bodies are burdens on society, and exist only to be regulated and policed.<sup>4</sup> Meanwhile, Katherine Beckett examines the statutes under which women are prosecuted and the problematic elements of many of these in the realm of privacy and reproductive rights. Beckett ties allegations made against the “welfare mother” to prenatal drug users, as well as information on the “fetal rights movement”—centering these arguments on the relative worth different groups of women are believed to have within society. The activists engaged in the debate about prenatal drug use New York City evoke this scholarship when arguing about the racially problematic dimensions of mandatory drug testing and neglect proceedings.<sup>5</sup>

Prostitution surrounding drug markets received particular attention during the crack epidemic, as the number of street-level sex workers rose and prices fell. The general lowering of wages for street level sex workers was understood to be due to the inability of crack-addicted women to make discerning engagements with dates due to their desperation for another fix—often engaging in sex-for-crack work. However, Lisa Maher’s ethnography of crack-using, street-level sex workers in Brooklyn problematizes this construct considerably—instead identifying the consolidation of drug markets and high concentration of workers as a central, structural cause of lowered wages. Maher’s ethnographic subjects also provide a glimpse into the limitations of women’s agency beyond crack—namely violent abuse and lack of social services.

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<sup>4</sup> Roberts, Dorothy E. *Killing the Black Body : Race, Reproduction, and the Meaning of Liberty* /. 1st. pbk. ed. New York :: Vintage., 1999.

<sup>5</sup> Beckett, Katherine. “Fetal Rights and Crack Moms: Pregnant Women in the War on Drugs.” *Contemporary Drug Problems* 22 (1995): 587.

She notes that sex-for-crack exchanges were looked down upon among those she interviewed, and were not a common or preferred method of payment. Sex work was discussed as an economic choice, not solely motivated by drug use or abject reliance upon drugs. In addition, Maher's ethnographic lens enables her to contest the popularized vision of crack-addicted mother as subhuman when on drugs and necessarily indifferent to or abusive of her children. While few of Maher's ethnographic subjects had custody of their children, the majority are in the custody of relatives, and Maher showcases some normally and non abusively engaged with their children while being interviewed.<sup>6</sup> These interventions are critical because there is so little ethnographic research available about these women, while they remain a commonly discussed or referenced aspect of the crack epidemic.

Laura Gomez provides a framework for understanding these issues legislatively in *Misconceiving Mothers*, as she examines the reasons why California did not pass proposed legislation that would have criminalized prenatal drug use—instead favoring a non-punitive approach to rehabilitation and reform. Gomez interviews judges, prosecutors, and other experts, while putting their testimonies in the context of prominent case studies. She devotes considerable time in her analysis to media representations of “crack babies” and prenatal drug use, arguing that they played a significant role in making such legislation a priority in California. Gomez's case study of California is interesting because it explores the various dimensions in the struggle

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<sup>6</sup> Maher, Lisa. *Sexed Work: gender, race, and resistance in a Brooklyn drug market*. Oxford University Press, August 24, 2000.

between fetal rights activists, feminist activists, and the unique political infrastructure of California.<sup>7</sup>

A number of other scholars join Gomez in considering public discourse and media representation to be critical elements to understand the bounds and specific nature of the ‘crack epidemic’ and the political responses to it. Sociologists Craig Reinerman and Harry Levine argue that media representations of crack cocaine usage significantly shaped legislative agendas during the late 80s and 90s. Their work examines several claims made by mainstream national media outlets alongside official statistical evidence (from the U.S. government) to contend that both media sources and politicians knowingly misrepresented statistical data in order to pursue a “war on drugs.” The authors explore national “drug war” spending across three presidential administrations (Regan, Bush, and Clinton) in order to trace the bias involved in the allocation of federal funding for criminalization and enforcement, as well as the ways in which media language was parlayed into political speech.<sup>8</sup> In addition, Jimmie Reeves and Richard Campbell have written about media representations of the crack epidemic in local news sources.<sup>9</sup>

More recently, scholars, like Erika Derkas, and legal activists, like Lynn Paltrow, have written about the ways in which media representations of crack using women have spawned groups such as Project Prevention (formerly C.R.A.C.K.) Both Derkas and Paltrow argue that

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<sup>7</sup> Gómez, Laura E. *Misconceiving Mothers : Legislators, Prosecutors, and the Politics of Prenatal Drug Exposure* /. Philadelphia, PA :: Temple University Press,, 1997.

<sup>8</sup> Reinerman, Craig, and Harry Gene Levine. *Crack in America Demon Drugs and Social Justice*. Berkeley: University of California Press, 1997.

<sup>9</sup> Reeves, Jimmie Lynn. *Cracked Coverage: Television News, the Anti-Cocaine Crusade, and the Reagan Legacy*. Durham: Duke University Press, 1994.

Project Prevention's use of tactics like incentivizing sterilization demonstrate a social construction of crack addicted women as untrustworthy, inhuman, and expendable.<sup>10</sup>

Reviewing Gomez's *Misconceiving Mothers*, Dorothy Roberts locates her work within a constructionist school of thought: one that argues that "social actors create social problems and compete to control their initial definition and ultimate resolution." Roberts notes that the majority of Gomez's work is centered on how prenatal drug use became institutionalized as a social problem.<sup>11</sup> Both Gomez and Lisa Maher utilize such a constructionist framework when analyzing the bounds and structure of the problems surrounding women in the "crack epidemic": recognizing that representations of women played an integral part in the framing of issues such as prenatal drug use and the "boarder baby" epidemic. Like Hancock, Gomez and Maher<sup>12</sup> argue that while it is difficult to prove a *causal* connection between public policy and public discourse, public perceptions of the causes of social ills does greatly influence the political expediency of certain techniques used to address these issues. This thesis relies a great deal on this scholarship to frame an analysis of New York City polices towards prenatal drug users between 1986 and 1997 as a case study in how these tropes function politically and socially.

## Methodology

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<sup>10</sup> Derkas, Erika. "'Don't Let Your Pregnancy Get in the Way of Your Drug Addiction': CRACK and the Ideological Construction of Addicted Women." *Social Justice* 38, no. 3 (September 2011): 125–44. ;

Paltrow, Lynn M. "When Becoming Pregnant Is a Crime." *Criminal Justice Ethics* 9, no. 1 (Winter/Spring //Winter/Spring90 1990): 41.

<sup>11</sup> Roberts, Dorothy E. "Punishing Drug Addicts Who Have Babies: Women of Color, Equality, and the Right of Privacy." *Harvard Law Review* 104 (1991 1990): 1419.

<sup>12</sup> Maher, Lisa. "Reconstructing the Female Criminal: Women and Crack Cocaine." *Southern California Review of Law and Women's Studies* 2 (1993 1992): 131.

I will first be illustrating the challenges to privacy and reproductive autonomy faced by women as a result of the crack epidemic on a national scale by a close-reading one of many Congressional hearings regarding the problem of prenatal drug use and situating this national conversation locally in New York, which was regarded as the epicenter of the crack epidemic. I will continue by examining the legal history as it pertains to prenatal drug users in New York City's family and criminal courts. I argue that the final judicial opinions and legal precedents set by New York City courts follow a different pattern than the one outlined by Roberts for the country as a whole: courts largely protected the privacy and custodial rights of drug-using mothers. In addition, New York City's role as the center of the crack epidemic directed attention towards developing and funding programs specifically targeted at prenatal drug users.

I will then trace the political context that led to the implementation and subsequent defunding of a unique set of gender-specific rehabilitative services known under the umbrella of "Family Rehabilitative Programs" (FRP). I argue that the successful implementation of these programs evidences the robust activist network and liberal political sentiment regarding female drug use held by public health officials and politicians alike and that their eventual defunding is due to a large-scale budget overhaul by the Giuliani administration focused on reducing social services across the board rather than an ideological rejection of treatment methodology.

I will then analyze media representations and political rhetoric (through speeches, press releases, the language of proposed legislation, and hearing testimony offered by representatives of the Mayoral administration) around the death of Elisa Isquierdo to argue that the Giuliani administration's restructuring of the ACS into the CWA and proposed punitive legislature drew on tropes of the "crack mother" discussed by Reinerman and Levine. Further, I argue that the media and political rhetoric surrounding the death of Isquierdo functions in the same theoretical

capacity as the discourse around the “Welfare Queen” as discussed by Hancock: public outrage is continually invoked in order to vilify drug-using mothers. Accordingly, the Mayoral administration presents penalizing drug-using mothers as a morally righteous solution that leaves the administration’s larger ideological agenda of fiscal conservatism and a reduction in social services intact.

Here, I argue that the rift between the ideologically conservative stance of the Giuliani administration and the largely liberal views of the New York State Legislature, City Council, and established public health figures and policy makers comes to a head. I explore the rift between these two groups by analyzing New York State Assembly Bill (A-8215) proposed by Nicholas Scopetta and the CCI in contrast to the hearing New York State Assembly Bill (A-8271) proposed by democratic Brooklyn Assemblymen Roger Green. Using this testimony, I argue that New York presents itself as a unique case study because of the dichotomy between a well-organized, vocal, and active liberal majority and a conservative minority: while the Giuliani administration is unable to pass laws mandating urine testing or automatic findings of neglect based on a positive toxicology within the State legislature, their budgetary and administrative policies effectively rendered it impossible for prenatal drug users to seek preventative care (making them far more likely to face criminal charges later on.)

## **Chapter 1: Construction of an Epidemic**

In November of 1985, a *New York Times* article reported a spike in the rate of crystalline cocaine usage in urban areas—a substance created through a combination of freebase-cocaine with a base-element (like baking soda).<sup>13</sup> The result proved to be enormously popular within

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<sup>13</sup>Gross, Jane. “A NEW, PURIFIED FORM OF COCAINE CAUSES ALARM AS ABUSE INCREASES.” *The New York Times*, November 29, 1985, sec. N.Y. / Region.

poor urban populations. ‘Crack’ cocaine was conducive to street selling, sold at a lower price point than powder cocaine, and produced a short, intense high. The alleged pharmacological uniqueness of the drug became subject of media frenzy. American cities were said to be embroiled in a “crack epidemic” characterized by high rates of violence, female drug-use and promiscuity, and life-long addiction unique to crystalline forms of cocaine. In reality, as many researchers later noted, the areas most heavily affected by crack cocaine were already the most structurally prone to the types of visible violence represented by the media.<sup>14</sup> Crack cocaine was so detrimental to these communities because it flourished in an environment with high unemployment rates, poor access to services, and high rates of endemic poverty because of the way it was produced, sold, and distributed— not because of its chemical properties alone.<sup>15</sup>

Fears about the social ramifications of the epidemic (and, some argue, structural racism) resulted in harsher sentencing for those convicted of possession or distribution of the drug— dramatically inflating prison populations and earning the scrutiny of scholars and activists who remarked upon the skewed racial demographics of *crack* cocaine users as overwhelmingly poor minorities.<sup>16</sup> While the male crack cocaine user was constructed as compulsively violent, female crack users were constructed differently. Crack cocaine, according to media outlets, hypersexualized destitute female users, who participated in “sex-for-crack” exchanges.<sup>17</sup> While

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<sup>14</sup> Brownstein, Henry H. “The Media and the Construction of Random Drug Violence.” *Social Justice* 18, no. 4 (46) (December 1, 1991): 85–103.

<sup>15</sup> The practice of freebasing cocaine was first introduced into mainstream culture by wealthy cocaine users (the practice was expensive), most prominently in Hollywood. The practice received attention after the accidental burning of comedian Richard Pryor while cooking freebase.

<sup>16</sup> Lowney, Knoll D. “Smoked Not Snorted: Is Racism Inherent in Our Crack Cocaine Laws.” *Washington University Journal of Urban and Contemporary Law* 45 (1994): 121.

<sup>17</sup> Lisa Maher counters this claim in *Gendered Work*, an ethnography of crack-using sex workers in Brooklyn. She argues that sex-for-crack exchanges were widely perceived to be high-risk interactions avoided by most professional sex workers. Maher’s interviews show that though these women were addicted to crack cocaine, they adhered to a strict set of community-defined standards when engaging in sex-work, often pooling resources-- contrary to the perception that they operated as free agents concerned only with getting high.

these accounts are now believed to be exaggerated, crack did appear to be more popular with women than heroin; female use rates were roughly on par with male use.

In 1985, the *New England Journal of Medicine* published the first study examining the effects of prenatal cocaine use on fetal health, authored by Dr. Ira Chasnoff. Dr. Chasnoff points to preliminary findings indicating that cocaine use had the potential of causing permanent physical and developmental defects in infants.<sup>18</sup> Though the article cautioned that further study was necessary, newspapers across the country reported thousands of permanently disabled ‘crack babies’ as consequence of an increase in cocaine use.<sup>19</sup> From these statistics emerged another powerful trope of the era: the “crack mother”—a crack-addicted woman who continued abusing drugs during her pregnancy, likely giving birth to a drug-addicted, premature, and permanently disabled “crack baby.” If the child did survive, the consensus seemed to be, the crack mother would inevitably be abusive and neglectful, as she had been robbed of her maternal instincts by crack cocaine.<sup>20</sup> Cocaine use during pregnancy was not harmless: premature births, lower birth weights, and symptoms of withdrawal were common. However, these symptoms were rarely permanent and drew outsize media attention compared to the far more prevalent and severe symptoms of Fetal Alcohol Syndrome.<sup>21</sup>

Countless stories bolstered the image of the “crack mother” by reporting, in detail, horrifying cases of neglect and abuse of innocent children by their drug-addicted mothers. These

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<sup>18</sup> Chasnoff, Ira J., William J. Burns, Sidney H. Schnoll, and Kayreen A. Burns. “Cocaine Use in Pregnancy.” *New England Journal of Medicine* 313, no. 11 (1985): 666–69.

<sup>19</sup> Chasnoff’s study doesn’t focus on crack cocaine—but on nasal use of powder cocaine.

<sup>20</sup> Campbell, Nancy D. “Regulating ‘Maternal Instinct’: Governing Mentalities of Late Twentieth-Century U.S. Illicit Drug Policy.” *Signs* 24, no. 4 (July 1, 1999): 895–923.

Nancy Campbell makes note of the use of this particular phrase within the Congressional hearings involving female crack users, arguing that that the hearings conceptualized of “maternal instinct” as a commodity that could be regulated and policed through changes in public policy.

<sup>21</sup> Paltrow, Lynn. “Punishment and Prejudice: Judging Drug-Using Pregnant Women.” In *Mother Troubles: Rethinking Contemporary Maternal Dilemmas*, edited by Julia E. Hanigsberg and Sara Ruddick. Boston: Beacon Press, 1999.



national reports were accompanied by frequent news stories about the crisis of “boarder babies”<sup>22</sup> abandoned at hospitals and requiring expensive, publicly funded care due to prenatal drug exposure, compounding societal anxieties.<sup>23</sup> In addition to national news pieces and magazines, *New Yorker*’s were often presented with narratives of the crack epidemic in the form of television specials and long-form feature articles. In 1986, Channel 2 broadcast a special feature entitled “War Zone,” detailing the harsh conditions in Bushwick. A *New York Times* review of the program notes that the producers were “evidently on the lookout for the worst cases—and didn’t have to look far.” CBS News aired an investigative report on the epidemic in 1986, “48 Hours on Crack Street”: the expose opens on a hospital birthing room. Ominous music plays while a narrator speaks: “11:24 p.m.: Doctors prepare a mother to be. The moment of birth. The moment of truth. The mother uses crack—supercharged cocaine. The son has trouble breathing. Is he born addicted? The doctors will know in 48 hours.” Viewers are then transported around New York City, through crack houses and interviews with teens—suburban and urban alike—who confess to using drugs. At one point, a CBS news correspondent questions an emaciated, black woman about her son: “Do you want to see him?” She responds negatively, shamefully noting that she is “too sick.”<sup>24</sup> Motherhood as a casualty of crack-cocaine use is featured prominently in these reports.

In reality, while there was an escalating drug problem among women using crack cocaine, the vast majority of ‘crack babies’ survived and grew to be healthy. Moreover, the new

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<sup>22</sup> A “boarder baby” was defined as any child kept in the hospital for longer than ten days after it was medically fit for discharge. The “boarder baby” crisis resulted from large numbers of children testing positive for drugs, resulting in mandatory removal from maternal custody.

<sup>23</sup> Lambert, Bruce. “‘Boarder Babies’ Burden Hospitals.” *New York Times*, Late Edition (East Coast). February 8, 1987.

The boarder baby crisis will later be referenced in the debate over whether positive drug tests should constitute *prima facie* evidence of neglect. Dr. Wendy Chavkin testifies that over two-thirds of boarder babies were ultimately returned to their biological families, many with no additional services provided or action taken.

<sup>24</sup> “48 Hours on Crack Street.” CBS, 1986.

numbers of pregnant drug-addicts during the crack epidemic was often attributed to the pharmacological properties of crack-cocaine, rather than the sharp reduction of rehabilitative and preventative services in most states as a result of Reagan-era drug-policy<sup>25</sup>

### **National Trends in Negotiating Prenatal Drug Abuse**

The media did not act in a vacuum. Panic about possibly sky-rocketing drug use rates also spurred a series of Senate Subcommittee hearings on the subject. One of these hearings, entitled *Born Hooked*, dealt solely with the issue of prenatal drug use.<sup>26</sup> Establishing that the number of drug-exposed newborns had indeed increased, the hearing foreshadowed the various ideological positions that would spring up across the nation regarding how to address the problem. Testimony from the hearing is useful in understanding national attitudes and beliefs about the problem of prenatal drug use.

First to testify, Senator Bliley (R-VA) set the tone for the way the constitutional rights of these women were framed, remarking:

This epidemic causes newborns, only hours old, to suffer painful withdrawal from the drugs their mothers ingested, tremors, prenatal strokes, irritability, defects in language, mental and motor development, and a litany of other threats to life. (...) There is no constitutionally protected right for a pregnant woman to abuse drugs.<sup>27</sup>

Next to testify was Margaret Gallen, head Nurse-Midwife at the DC General Hospital.

Noting that the staff had seen a marked increase in crack-affected pregnancies, Gallen shared three particularly tragic patient stories. One is as follows:

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<sup>25</sup>Paltrow, Lynn. "Punishment and Prejudice: Judging Drug-Using Pregnant Women." In *Mother Troubles: Rethinking Contemporary Maternal Dilemmas*, edited by Julia E. Hanigsberg and Sara Ruddick. Boston: Beacon Press, 1999; Zerai, Assata, and Rae Banks. "Maternal Cocaine Use and Infant Survival: Interrogating the Intersection of Race, Class, and Gender." *Race, Gender & Class* 6, no. 2 (January 1, 1999): 99–129.

<sup>26</sup>Retro Report. "Crack Babies: A Tale From the Drug Wars." *The New York Times*, May 20, 2013. More contemporary research has shown that the vast majority of "crack babies" grow up to be normal and healthy.

<sup>27</sup>United States. Congress. *Born Hooked : Confronting the Impact of Perinatal Substance Abuse : Hearing before the Select Committee on Children, Youth, and Families, House of Representatives, One Hundred First Congress, First Session, Hearing Held in Washington, DC, April 27, 1989*. Washington :: U.S. G.P.O. :, 1989.

One of our worse tragedies was a 38 year old woman who came in semi-comatose having had seizures at home, still clutching the crack in her hand and had to be opened and the crack given to our security guard. The woman was dead in a matter of hours. They were able to do a C-section, get a live baby, but the woman died in the delivery room itself.<sup>28</sup>

Gallen also testified to the medical effects of crack cocaine use on a fetus in utero<sup>29</sup>—a

scientific explanation that would be repeated by countless magazines and newspapers:

To make matters worse, the baby too excretes his cocaine through his kidneys, but into the amniotic fluid. He now takes his own supply of cocaine by mouth independent of his mothers' and his supply will last for days, until it is all filtered out of his amniotic fluid. Because constriction of the baby's blood vessels goes on for so much longer than does those of his mothers', babies are born with symptoms of having had brain strokes while in the mothers uterus.

Gallen's testimony was part of a larger body of knowledge that explained (without the benefit of peer-reviewed studies or repeatable data) the effects of cocaine on infants in graphic detail.

Additionally, Gallen's testimony makes an emotional appeal, rather than an explicitly scientific one: she personifies the affected child as "him", while remaining vague about what "symptoms of brain strokes" may actually look like. Scientific studies conducted since the trial have noted that the birth defects found in so called "crack babies" are temporary and caused not just by cocaine, but by the fact that many women lack adequate prenatal access to healthcare. While cocaine use certainly did result in premature births, low birth weights, and withdrawal symptoms at birth, these symptoms proved to be life-threatening only when coupled with a lack of access to adequate medical care or facilities. One study even notes that many of the birth defects faced by crack-exposed infants could have been prevented by earlier access to prenatal vitamins.<sup>30</sup>

Equipped with this knowledge, the subcommittee went on to consider the opinions of various experts regarding how to best prevent or address drug use. The ensuing debate produced

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<sup>28</sup> Ibid. 16

<sup>29</sup> These statements are necessarily speculative due to a lack of substantive research conducted at the time about these pregnancies. See: Paltrow, 1999.

<sup>30</sup> Paltrow, "Punishment and Prejudice: Judging Drug-Using Pregnant Women", 1999.

two schools of thought: one advocating a dramatic examination and increase to services provided to women, and the other advocating a combination of an increase in services and the adoption of statutes criminalizing prenatal drug use in various forms. Speaking first to lay the legal foundation for the logic of “protection of potential life,” Jeffrey Parness, a professor of Law, spoke about the various postures expressed towards the issue in state-penal codes and the legal questions raised by the possibility of taking injunctive or criminal action against a pregnant woman on behalf of her child, phrasing the legal question as:

May there ever be a sufficient cause in pre-birth conduct for the court to terminate at birth the woman’s interest in the later born child? (...)Because prenatal care of the pregnant mother and unborn child is critical to the well being of the child and of society, the biological father, wed or unwed has a responsibility to provide support during the pre-birth period, should not the same ruling hold true for the woman?<sup>31</sup>

Offering directly contradictory testimony, Dr. Wendy Chavkin of Columbia University spoke to the central conflict between these two schools of thought, noting that suggesting prosecution reflects a “deep ambivalence about whether addiction is willful criminal behavior or medical illness.”<sup>32</sup> Chavkin notes that this seems to be a symptom of broader change in attitudes towards pregnant women as “willfully” inflicting harm on a fetus, rather than ill and in need of help. Prosecution, Chavkin argued, did not account for the fact that most prenatal drug users simply did not have access to rehabilitation services—it simply left them “between a rock and a hard place.”<sup>33</sup>

When questioned as to whether or not an effective treatment model exists for prenatal drug addicts by Senator Rangel, Chavkin is quick to respond: “I’ve seen several (...) in the City

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<sup>31</sup> U.S. Congress. House of Representatives. *Born hooked : confronting the impact of perinatal substance abuse : hearing before the Select Committee on Children, Youth, and Families*, 101st Cong., 1st seas., (April 27, 1989), 103

<sup>32</sup> Ibid.

<sup>33</sup> Chavkin continues: “I recently concluded a survey of 78 drug treatment programs in New York City. Fifty four percent of them categorically refused to treat pregnant women. Sixty seven percent of them refused to treat pregnant women on Medicaid and 87 percent of them had no services available for pregnant women on Medicaid addicted to crack” (*Born Hooked*, 112)

of New York—P.A.M program; located at Metropolitan hospital and run by New York medical College. They offer comprehensive services under one roof so you don't have to chase around town.”<sup>34</sup> The problem, in Chavkin's estimation, was not the lack of a working model or lack of punitive measures, but a shortage of programs that took into account the realities of many poor women's lives. She states: “if you've got no treatment program that will accept you, no place to leave your child when you finally find a treatment program that will take you in, no one, you know, and then for somebody to suggest that indeed you deserve to be in those circumstances is punishment (...) it's hard to imagine somebody maneuvering positively forward from that.”<sup>35</sup> Chavkin would continue to advocate the importance of holistic-rehabilitation programs for prenatal drug users, specifically in New York City.

Parness argues the opposite, insisting that rehabilitative services do not go far enough and finally stating:

Apparently inadequate on their own are voluntary governmental programs involving prenatal care, educational advancement, drug treatment and the like. The tragedies of premature infant deaths and preventable birth disabilities are hard to forget or to forget about. These tragedies will and should continue to be addressed by the law.<sup>36</sup>

In many ways, the subcommittee debate can be viewed as a microcosm of the rest of the nation. Reports of increased rates of prenatal drug use and its harmful effects spawned a series of attempts to more formally criminalize pregnant women who abused drugs. State prosecutors led the charge against prenatal drug abusers, charging women who gave birth to children that tested positive for cocaine under a variety of creatively interpreted statutes: including drug trafficking, criminal narcotics possession, manslaughter, assault with a deadly weapon, and reckless endangerment. Dorothy Roberts writes that between 1985 and 1989, over 200 women faced

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<sup>34</sup> Ibid.

<sup>35</sup> Ibid., 151.

<sup>36</sup> Ibid.

criminal charges in thirty states due to their prenatal drug use. By 1990, she notes, 34 states debated laws to officially criminalize prenatal drug use,<sup>37</sup> and many hospitals began to test infants for the presence of drugs at birth.<sup>38</sup>

Maternal drug users faced additional reproductive sanctions after FDA-approval of a long-term, easy-to-monitor hormonal birth control method called Norplant. Similar chemically to Depo-Provera injections, Norplant must be inserted into a woman's arm, where it remains until it is professionally removed.<sup>39</sup> The drug was widely distributed and tested in numerous third-world countries as a means of population control<sup>40</sup> and aggressively marketed to poor, minority populations within the United States.<sup>41</sup> In 1992, California Judge Howard Broadman made headlines by offering Darlene Johnson, crack-addict convicted of child abuse, the choice between jail time and court-ordered insertion of the device. Broadman would later mandate that Johnson continue with the insertion despite a physicians' recommendation that her high-blood pressure and diabetes made her a poor candidate for the drug. The ACLU promptly appealed the ruling, but it was dropped before a trial when Johnson violated her probation by failing a drug

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<sup>37</sup> Roberts, Dorothy E. "Creating and Solving the Problem of Drug Use During Pregnancy." *The Journal of Criminal Law and Criminology* (1973-) 90, no. 4 (July 1, 2000): 1353–1370.

The rationale behind criminalizing prenatal drug use is widely debated: on its face, these measures could be said to represent an attempt to discourage maternal drug abuse. However, the constitutionality of these criminal charges was hotly contested: pregnant women maintained a constitutionally protected right to privacy and due process.

<sup>38</sup> It is important to note that the debate over criminalizing prenatal drug use dealt extensively with questions of race and class. These concerns grew more relevant as states began to sanction drug tests for infants as standard procedure. Studies have shown that the babies of poor women and women of color were disproportionately tested for drugs at birth. See:

Spector, Harlan, Andrea Simakis, and Plain Dealer Reporters. "Poor Bear Brunt of Drug Testing Prenatal Screenings Jeopardize Custody; Insured Women Rarely Checked: [Sports Final Edition]." July 22, 2001, sec. National.

<sup>39</sup> Eerily, Jeffrey Parness testifies during the *Born Hooked* hearings that "The justification would certainly be found for laws mandating pregnant women to take a new wonder pill which prevents certain disabilities at birth and has no real significant adverse consequences who took the pill" (*Born Hooked*, 103)

<sup>40</sup> Sen, Gita. *Power and Decision : the Social Control of Reproduction*. Boston, Mass.: Harvard School of Public Health,, c1994.

<sup>41</sup> Roberts, Dorothy E. "Creating and Solving the Problem of Drug Use During Pregnancy." *The Journal of Criminal Law and Criminology* (1973-) 90, no. 4 (July 1, 2000): 1353–1370.

test.<sup>42</sup> In the absence of a formal ruling about the constitutionality of the sentence, a number of states proposed legislation that would require Norplant as a condition of probation for certain crimes.<sup>43</sup>

### **New York: A Case for Rehabilitation over Punishment.**

Despite being at the center of the “crack epidemic” prosecution and legislation surrounding prenatal drug users followed a different trajectory in New York City. It can be argued that the progressivism of New York State law is due in part to the nature of New York City’s political structure: Mayors, beginning in 1946, had been largely democratic; councilmen and women represented active, vocal, and mostly liberal constituencies, many of whom stood to benefit from increased services, not criminalization. After all, though Senator Charles Rangel, long term Congressman from Harlem, testified to his skepticism regarding the effectiveness of some drug treatment programs, his testimony makes clear that he did not participate in the vilification of drug-using women:

It would be easy to point a finger at the mothers of these children, but that will not solve our problem. These mothers are not responsible for the bumper crops of coca, opium, and marijuana in drug producing countries. They are not to blame for the influx of drugs into this country, because our borders are, for all intents and purposes, a sieve. And, it is not their fault that we have not had, until recently, federal funds for drug education or prevention programs. It is not the mothers who have promoted slogans rather than policies as the primary weapon against abuse. Finally, it is not the mothers who determine the availability and accessibility of drug treatment and prenatal care.<sup>44</sup>

New York City was also a hub of feminist activism with active branches of the NYCLU and the home office for the National Advocates for Pregnant Women (in addition to public health

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<sup>42</sup> Roberts, Dorothy E. *Killing the Black Body : Race, Reproduction, and the Meaning of Liberty* /. 1st. ed. New York :: Vintage, 1999.

<sup>43</sup>Mertus, Julie, and Simon Heller. “Norplant Meets the New Eugenicists: The Impermissibility of Coerced Contraception.” *Saint Louis University Public Law Review* 11 (1992): 359.

None of these statutes passed.

<sup>44</sup> U.S. Congress, *Born Hooked*.

advocates like Dr. Wendy Chavkin.) Moreover, as Christine Gottlieb, head of NYU’s Clinic for Families and Children notes, even fairly conservative lawyers within the Child Welfare and Family Court system in New York were Pro-choice and especially cautious of empowering fetal-rights based jurisprudence. The existence of programs like Gottlieb’s meant that poor women who wanted to fight for custody of their children had a slightly improved chance of finding representation and advocacy.<sup>45</sup>

Laws in New York City had not always required proof of actual neglect in order to remove children from their mothers. Prior to the “crack years,”<sup>46</sup> New York State required hospital workers to report suspected prenatal drug use,<sup>47</sup> while child welfare statutes noted that a positive toxicology screening constituted as *prima facie* evidence of neglect—enough to remove a child from parental custody. In other words, an infant’s urine testing positive for drugs triggered a mandated charge of neglect; the child could not return home with the mother. These statutes, debated during New York’s previous heroin epidemic (during the 1970’s) proved to be untenable given increasing rates infant drug exposure.<sup>48</sup> Lisa Maher notes that as a result of increased drug use, the number of abuse and neglect petitions before Family Court quadrupled between 1986-1989.

Following a lawsuit concerning the status and treatment of “boarder babies” left to languish in hospitals, the family court act was modified in 1988<sup>49</sup>. Findings of neglect in New

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<sup>45</sup> Christine Gottlieb, interview with author, New York, November 23, 2013.

<sup>46</sup> This period began, roughly, in 1984.

<sup>47</sup> *Criminology at the Crossroads: Feminist Readings in Crime and Justice*. Readings in Crime and Punishment. New York: Oxford University Press, 1998.

<sup>48</sup> To clarify: findings of neglect and abuse are grounds for severing parental rights with a child. Meanwhile, findings of abuse are explicitly criminal and not only sever parental rights, but may also result in jail time for those found guilty.

<sup>49</sup> Dr. Wendy Chavkin notes in testimony offered during the 1997 hearing on assembly bill A-8217 that policies that kept children in hospitals were widely regarded as ineffectual: “We conducted a survey and found that in 1987, on any given day there were approximately 300 such border babies (10 days after medically ready for discharge) in



York State have been based on Family Court Act section 1046; the portions of the statute that deal with drug use as a finding of neglect are subject to both judicial interpretation and precedent. This change occurred in 1988, when the Bronx Family Court interpreted section 1046 (a)(iii) as requiring an actual finding of neglect as consequence of parental drug use in *In Re: Fletcher*<sup>50</sup>. This ruling clarified that a positive toxicology screen could no longer be used as *prima facie* evidence of *habitual* drug use<sup>51</sup>. More simply, while a positive toxicology screen may trigger an investigation into parental fitness, it could not be used alone to prove that a parent was unfit.<sup>52</sup> The presiding judge held that the ruling was consistent with the statutory interpretation of the Family Court Act, further remarking:

I see no authority for the State to regulate women's bodies merely because they are pregnant. By becoming pregnant, women do not waive the constitutional protections afforded to other citizens. To carry the Law Guardian's argument to its logical extension, the State would be able to supersede a mother's custody right to her child if she smoked cigarettes during her pregnancy, or ate junk food, or did too much physical labor or did not exercise enough. The list of potential intrusions is long and constitute entirely unacceptable violations of the bodily integrity of women. To the extent that this opinion conflicts with those of my learned colleagues in Smith (*supra*) and Gloria C. (*supra*), I respectfully disagree with them.<sup>53</sup>

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NYC hospital nursers that were staying an average of two months and two-thirds of them were ultimately returned to their biological families without any evidence that services had been provided to baby, mother, or family.”

<sup>50</sup> Oberman, Michelle. “Sex, Drugs, Pregnancy, and the Law: Rethinking the Problems of Pregnant Women Who Use Drugs.” *Faculty Publications* (January 1, 1991). <http://digitalcommons.law.scu.edu/facpubs/518>.

<sup>51</sup> That is, a positive toxicology was no longer proof “that a person repeatedly uses a drug, to the extent that it has or would ordinarily have the effect of producing in the user thereof a substantial state of stupor, unconsciousness, intoxication, hallucination, disorientation, or incompetence, or a substantial impairment of judgment, or a substantial manifestation of irrationality” such that it could act as “prima facie evidence that a child of or who is the legal responsibility of such person is a neglected child.”

<sup>52</sup> This change did not result in a radical change. Jane Spinak, counsel of the Legal Defense Fund testified that additional evidence is often common sense, stating: “frequently, in many cases of children born with positive toxicology, the condition of the mother is so clear that she is unable to care for this child that the positive toxicology plus the mother’s condition is going to trigger the child being removed immediately. In cases where it may not be so clear, those are the cases where the caseworkers have got to go out, see where the parent is living, see what arrangements are made. If there are no arrangements made, that also triggers a removal, if there is no place for the mother to care for this child afterwards or, if there is a place but it’s not sufficient for the mother and the child to live in, that may also trigger a removal or it might trigger services immediately to the mother like a drug treatment program or an appropriate place to live” (*New York State Assembly Hearing*, 67)

<sup>53</sup> Matter of Fletcher, 141 Misc. 2d 333 (Family Court 1988).

The court further cites a woman's right to privacy as defined by *Roe v. Wade* as the standing definition by which prenatal drug use must be evaluated, unless contrary legislation was passed by the New York State legislature. This opinion is helpful in understanding the larger political stakes of the judgment: the ruling affirms that the court is not allowed to infringe upon a woman's right to privacy because she is pregnant; the rights of a fetus do not supersede those of the mother. Though this is referenced as a constitutionally protected right, the judgment does allow that legislation could be passed to change the standard for neglect.

In the absence of such a statute explicitly declaring that a positive toxicology constituted as evidence neglect, the New York Family Court continued to reinterpret Family Court Act Section 1048. In May of 1990, the Bronx Family Court further complicated this jurisprudence and ruled in *Matter of Stefanel Tyeshia C.* that the case of two infants who had tested positive for cocaine at birth and been released to the custody of their mothers had been wrongly dismissed. The presiding judge stated that while a positive toxicology screen did not meet the burden of proof to sever parental ties or prove neglect, it warranted additional "fact finding hearings" in light of admitted past maternal drug use and the lack of maternal enrollment in a drug rehab program.

It is important to note that the judge's decision cited articles in the *Washington Post*, *Newsday*, *Newsweek*, and *The Los Angeles Times* entitled "Crack Babies: The Worst Threat is mom herself", "Let's Give Crack Babies a Way Out of Addict Families," "The Crack Children," and "Moms: No 'Safe' Time for Cocaine" respectively to justify his statement that "when women use cocaine while pregnant the blood vessels in the placenta and fetus constrict, cutting off the flow of oxygen and nutrients" and "the prenatal use of cocaine often causes miscarriages, stillbirths, premature, low-weight-births, or leaves the cocaine-exposed babies with various

physical and neurological malfunctions.”<sup>54</sup> These articles did not appear in peer-reviewed medical journals, but rather in mainstream popular publications. The articles are very much part of the same category of literature devoted to dehumanizing and vilifying the ‘crack mother’: they make explicit reference to widely held perceptions of prenatal drug users as solely volatile and dangerous. However, the case did provide a procedure for investigating suspected drug use and referring women to treatment.

On November 21 of the same year, the Nassau County Family Court held a custody hearing in *In the Matter Dante M.* The case was dismissed and Dante M. was released into the custody of his mother. Unlike in *Fletcher*, the Nassau DSS had provided the court with not only a positive toxicology screen, but evidence of low birth weight (alleging this constituted harm), evidence of a maternal history of cocaine use, the mother having spent time in rehabilitation facilities, as well as the fact that she had lost custody of two previous children. Following the dismissal of the case, DDS appealed on behalf of both infant Dante and his young sister against their mother. The case was heard once more in 1995. The presiding judge held that a finding of neglect on behalf of Dante and Dantia could be sustained given the existence of proof beyond a positive toxicology screen of neglect; the court further affirmed that neglect of one child could allow for the removal of both children from the home.

However, the court additionally held that proving a low birth weight and positive toxicology screen at birth did not constitute proof that they were causally linked. In addition, the court ruled that a series of *negative* toxicology screens from the mother and the testimony of two social workers who considered the family home sufficient affirmed that neither child would be

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<sup>54</sup> *In the Matter of Stefanel Tyeshia C, a child Alleged to be Neglected, Leslie C. Respondent? Commissioner of Social Services of the City of New York Appellant, (Appellate Division of the Supreme Court of the State of New York 1990).*

removed. In short, the court ruled that extra supervision was warranted given previous evidence produced by social workers, but that, and not the severance of parental rights, was appropriate. The *Dante M.* remains the standard by which neglect cases are decided.<sup>55</sup>

Both *Dante M.* and *In the Matter of Stefanel Tyesha* can be read as attempts to define, within precedent, what constitutes adequate evidence of child neglect. The cases determined the extent to which Child Protective agencies were obligated to investigate a household before officially filing a report requiring the family to appear in Family Court. The importance of *Matter of Dante M.* is in its ruling that while such a court proceeding could not be initiated on the basis of a positive toxicology and low birth weight, such factors *could* be used to recommend women for treatment and further follow-ups with a social worker.

Unlike in most of the country, New York State only brought one criminal, not family court, case against a prenatal drug user in 1992: the case of *The People of the State of New York v. Melissa Morabito*, wherein the defendant was charged with criminal possession of a controlled substance and endangering the welfare of a child. Within the second charge, the state alleged that Morabito's decision to smoke a cocaine-laced cigarette (thereby inducing labor and causing her daughter to be born prematurely) violated the statute, as she was "knowingly injurious to a minor under 17." The court dismissed the charge on the grounds that the statute did not apply to a pregnant woman in relation to her child and to hold otherwise would be a constitutional violation of Morabito's right to due process.<sup>56</sup>

These cases demonstrate why New York City and state were in many ways exceptional case studies compared to the rest of the nation. As noted earlier, prenatal drug use came to play a

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<sup>55</sup> Pathway Center Daniel Melore testifies that the majority of Pathway's clients are referred into treatment during this investigative process: they are not compelled by a court order, but choose to enter rehabilitation to ensure continued custody.

<sup>56</sup> *People v. Morabito*, 151 Misc. 2d 259 (City Court 1992).

large role in public discourse during the late 80s and 90s—and as scholars like Gomez have noted, public perceptions led to a strong legislative push to criminalize prenatal drug users. This criminalization functioned alongside a larger historical narrative of controlling and monitoring the bodies of poor, minority women when they chose to reproduce—discussed extensively by Dorothy Roberts. Though New York City was the epicenter of the crack epidemic that created the character of the “crack mother,” legislation and judicial proceedings in the city deviated from this general trend. Despite articles citing thousands of boarder babies and various panics about overwhelmed foster-services agencies, New York State courts moved *towards* protecting the rights of women to due process when facing legal separation from their children.

## **Chapter Two: The Fight For Services and a Vocal Community**

Despite significant media attention to prenatal drug use in the United States, most drug rehabilitation programs did not accept pregnant women as clients. Though recognized as a problem, there were few steps taken on a national level to address the lack of resources available to women. A 1988 Congressional mandate increased the portion of federal Medicaid money allocated to Drug Rehabilitation Services for pregnant women from five to ten percent of the overall budget,<sup>57</sup> making special recommendations for priority enrollment for services like prenatal care, and the establishment of demonstration programs for drug using women.

Prior to the rapid expansion of cocaine as a frequently abused drug, New York City’s publicly financed drug rehabilitation budget relied primarily on contributions made by New York State-funded drug rehabilitation initiatives. Though there were well established protocols for treating heroin and cocaine users, studies show that they have been developed with male addicts

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<sup>57</sup> Chan, Louise Marlane. “S.O.S. from the Womb: A Call for New York Legislation Criminalizing Drug Use during Pregnancy.” *Fordham Urban Law Journal* 21 (1994 1993): 199.

in mind. A 1990 report by Dr. Wendy Chavkin revealed that in New York City, 54% of drug treatment programs refused to take pregnant women; and 84% refused to take pregnant crack addicted women. Moreover, of all these programs, 67% refused treatment to women who relied on Medicaid to make payments. Women, particularly poor women, who sought treatment independently would more than likely not be accommodated by most programs.<sup>58</sup>

In stark contrast to the suits brought against prenatal drug users in many other states in the aftermath of the so-called crack epidemic, the New York Civil Liberties Union and the National Advocates for Pregnant Women filed suit against North General Hospital in the Bronx on behalf of several pregnant drug users on the basis that their refusal to treat pregnant women constituted a violation of the New York State Human Rights Law (Executive Law § 296.)<sup>59</sup> The suit, filed in 1989, alleged that North General Hospital (a voluntary, not-for profit hospital)'s practice of denying in-patient substance abuse program services to patients who "exhibit a serious psychotic illness" or are pregnant, discriminated against prenatal drug users on the basis of gender. The hospital responded affirmatively, noting that they did not provide these services due to their lack of prenatal or obstetrics facilities. They argued:

"Concentrating on the in-patient detoxification unit, it was, and continues to be, the collective medical opinion of the physicians involved in developing the policy and monitoring the medical status of the patients in such program, that pregnant substance abusers cannot, as a result of the limitations in our facilities, be offered the treatment medically required by such patients. Significantly, we are, among other things, unable to: properly evaluate a patient's obstetrical status, monitor the status of the pregnancy and fetus, or provide sufficiently expert emergency

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<sup>58</sup> Paltrow, "Punishment and Prejudice: Judging Drug-Using Pregnant Women", 1999; Chavkin, W, V Breitbart, D Elman, and P H Wise. "National Survey of the States: Policies and Practices Regarding Drug-using Pregnant Women." *American Journal of Public Health* 88, no. 1 (January 1998): 117-119.

<sup>59</sup> "Don't Bar Pregnant Addicts, Court Says: [NASSAU AND SUFFOLK Edition]." *Newsday, Combined Editions*. May 7, 1993, sec. NEWS. The suit was initially against four centers: Join Diseases North General Hospital, St. Barnabas Hospital, Bronx-Lebanon Hospital Center, and PROMESA. Both Bronx-Lebanon and PROMESA agreed to admit pregnant addicts; St. Barnabas settled.

treatment in an obstetrical crisis. In the case of pregnant drug abusers, the high risk nature of their pregnancies compounds this basic problem”<sup>60</sup>

The New York State Appellate Court dismissed the suit on February 18, 1992 with the judge noting that the determination to exclude pregnant substance abusers was “not gender-based discrimination, but a medical determination based in appropriate treatment for its patients.” However, the plaintiffs of *Elaine W.* proved to be tenacious: they appealed the decision of the court in March of 1993, enlisting support and *amicus curiae* briefs from the Center for Reproductive Justice and The Association for the Bar of New York City, among others. The plaintiffs argued that while the hospital may have the right to exclude specific pregnant patients who posed risks, they bore the burden of determining medical fitness via individual examination. To exclude pregnant women as a *category*, they argued, relied on a logic that was discriminatory on the basis of gender. On May 6, 1993, the Court of Appeals reversed the previous judgment, compelling New York City hospitals to evaluate patients on an individual basis, rather than denying them rehabilitative care wholesale due to pregnancy.

The suit was the first against hospitals refusing to admit pregnant addicts into rehabilitation programs<sup>61</sup>, and suggests a particularly nuanced understanding of issues of prenatal health by advocates suing the hospitals. Successfully arguing that women, as a category, were discriminated against when pregnant women were denied rehabilitation services created an imperative for the development of programs uniquely suited to these patients. The number of *amicus curiae* briefs garnered for the suits appeal acts as evidence of the a large network of progressive legal activists working to reduce the stigma associated with prenatal drug addiction within New York City and expand access to rehabilitation services.

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<sup>60</sup> ELAINE W. v. JOINT DISEASES NORTH GENERAL HOSPITAL, (New York State, 2d 617 1993).

<sup>61</sup>“Suit Seeks Drug Treatment for Pregnant Women.” New York Times. December 10, 1989, sec. METROPOLITAN.

The decision was echoed by pledges on behalf of the Dinkins administration in response to reports that prenatal drug users had little to no access to rehabilitative services, a situation made worse by the unwillingness of several rehabilitation programs to accept Medicaid payments. In response to the concerns raised by various advocates, the Dinkins administration pledged to allocate 9.8 million dollars towards increasing prenatal drug rehabilitation facilities (creating 1,340 new treatment slots for pregnant addicts), controversially cutting other services in order to prioritize these new programs.<sup>62</sup> The Human Resources Commission began to accept applications for programs designed to combat prenatal drug use specifically.<sup>63</sup>

Thus, as both *Elaine v. Join Diseases* and the *Morabito* cases were being argued and decided, City funds were allocated towards a series of programs aimed specifically at prenatal drug users—drastically different from the criminalization measures adopted by the rest of the country during this same period. By June of 1990, the City of New York began accepting proposals for treatment programs that would target underserved communities. Fifteen programs granted funding under this initiative were grouped within a newly founded group of Family Rehabilitative Programs (FRP)—designed to provide services to substance abusers with children. Unlike traditional rehabilitative programs, FRP treatment facilities focused on health outcomes that maintained ties between drug-using mothers and their children, employing a gender-specific treatment philosophy.

Despite being stalled by budget deficits, the Dinkins administration allocated 3.4 million dollars initially earmarked (but never spent) by the Koch administration for prenatal drug

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<sup>62</sup> Treaster, Joseph B. “Plan Lets Addicted Mothers Take Their Newborns Home.” *The New York Times*, September 19, 1991, sec. N.Y. / Region.

<sup>63</sup> The funds pledged by Mayor were eventually cut—however, the Dinkins administration finally spent 3.4 million dollars earmarked by the Koch administration in 1992.



programs in 1992.<sup>64</sup> New York City received an additional 3.4 million dollars of federal grant funding to improve existing drug programs for pregnant, homeless, or foster-care addicts in 1990.<sup>65</sup> Funds were granted to programs by the Human Resources Administration by annual contract.<sup>66</sup>

In addition to newly funded programs, New York City had several established programs for holistic drug treatment for drug-using and pregnant mothers. Notably, programs like Odyssey House and the Hale House offered residential and outpatient treatment that allowed mothers and children to remain together. These programs were in existence for the better part of two decades. However, the implementation of additional funds allowed the City of New York to launch seventeen Family Rehabilitation Programs in Manhattan, Brooklyn, the Bronx, Queens, and Staten Island.

Facing a persistent budget deficit, rehabilitation programs were under constant threat of being cut.<sup>67</sup> However, while the Dinkins administration did not increase treatment radically, one editorial noted, there was a substantial difference in the rhetoric of the candidates for Mayor: challenger Giuliani spoke enthusiastically of law-enforcement and cracking down on street-level

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<sup>64</sup> Kurtz, Howard. "Juggling N.Y. City's Social and Fiscal Ills; Mayor Dinkins Gets Good Marks for First Six Months, Despite Raising Taxes, Cutting Services: [FINAL Edition]." *The Washington Post* (pre-1997 Fulltext). July 1, 1990, sec. A.

<sup>65</sup> Henneberger, Melinda. "Boarder Babies Get Hand: [CITY Edition]." *Newsday, Combined Editions*. January 7, 1990

<sup>66</sup> Program proposal and operating budget, 1992. Pathway Center Archives. New York Historical Society, New York, NY.

<sup>67</sup> When threatened with cuts, clients enrolled in programs protested and lobbied the Dinkins administration. These protests bolster the claim that these communities functioned as powerful interest-groups. A demonstration of the effectiveness of these tactics is visible in a letter sent from the director of the Pathway Rehab Program to the Mayor's office, reading: "We have been told that the hundreds of letters sent and phone calls made, that many meetings we attended with Council Members helped create the political pressure to restore some services. We are sorry that more restorations weren't made." (July 9, 1991, Pathway Center Archives, New York Historical Society.)

For media coverage of these protests, see: Treaster, Joseph B. "Life on the Bottom Line: How Dinkins's Budget Affects Social Services; Drug Treatment: When Mothers Are Addicted." *The New York Times*, June 24, 1991, sec. N.Y. / Region.

dealers and addicts, while the Dinkins campaign spoke of the need for increased services for addicts.<sup>68</sup>

### **Pathway: An Example of FRP at Work**

The program proposal records for the New York Foundling Hospital's "Pathway" program are a useful example of types of groups that operated as part of the Family Rehabilitation Program—both in terms of methodology and funding. Previously, drug rehabilitation plans relied on a combination of funding sources: private and public funding, and contracts with departments like Child Protective Services. While programs like Odyssey House certainly benefitted from additional funds, they were able to additionally rely on private funding, since they were already embedded within communities.<sup>69</sup>

The grants allocated by the City of New York in 1991 and 1992 to the New York Foundling Hospital's Pathway program provided city moneys in *addition* to referral-based contracts with Children's Services. This meant that women did not have to be sentenced to mandatory drug rehabilitation in order to receive treatment. The programs would still rely primarily on referrals from experienced social workers familiar with the number of vacancies.<sup>70</sup> When they opened in 1992, the Pathway had the capacity to serve 56 families. According to the testimony of Pathway Director Daniel Melore, only two or three of the 60 cases at Pathway in 1997 were there because of court-ordered rehab. The vast majority of clients, Melore stated, were 'indicated for neglect'; recommended into the program as a preemptive measure by a caseworker who had witnessed evidence of drug use during a follow-up investigation. These

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<sup>68</sup> "Help Addicts? Sure. We Promise. Really!" New York Times. October 22, 1993, sec. OP-ED.

<sup>69</sup> Martin, Douglas. "About New York; Helping Parents Reclaim Children And Leave Drugs." The New York Times, October 31, 1990, sec. N.Y. / Region.

<sup>70</sup> Operation notes. Pathway Center Archives. New York Historical Society, New York, NY.

women had never lost custody of their children, and entered the program in order to maintain custody.<sup>71</sup>

Family Rehabilitation Programs emphasized child care and continued motherhood as a significant part of their programmatic goals. An analysis of services provided by “Pathway” includes time and resources, allocated towards parenting classes, mother-child bonding, and career counseling. Moreover, the program provided resources like childcare, transportation, and home-counseling for clients, increasing the likelihood that women who worked would be able to successfully fulfill program obligations. Though minor, it is also important to note the various markers of success provided by the FRP network: organizations under the umbrella hosted graduation ceremonies, provided women with tokens of achievement, and integrated their families into their rehabilitation. It was far from punitive drug-rehabilitation, but rather therapeutic rehabilitation with an emphasis on family unification and healing.

This is especially evident when examining the language within Pathway’s mission statement:

These clients will be angry, exhausted, disillusioned, and depressed. In some cases they will also be differently abled (...) They may also be adult children of alcoholics or victims of domestic violence. They will most likely be minimally motivated and unskilled. They will, however, have the inner resources that most survivors have and the aim of the program will be to identify that inner resource and work to enable the mother to re-establish a sense of self and responsibility as a parent.

Our treatment philosophy is based upon a multi-system perspective which takes into account all factors which make an individual vulnerable to drug or alcohol abuse, i.e. family history of substance abuse, predisposition personality factor, family system, environment, variety of precipitating event, and lack of coping skills<sup>72</sup>

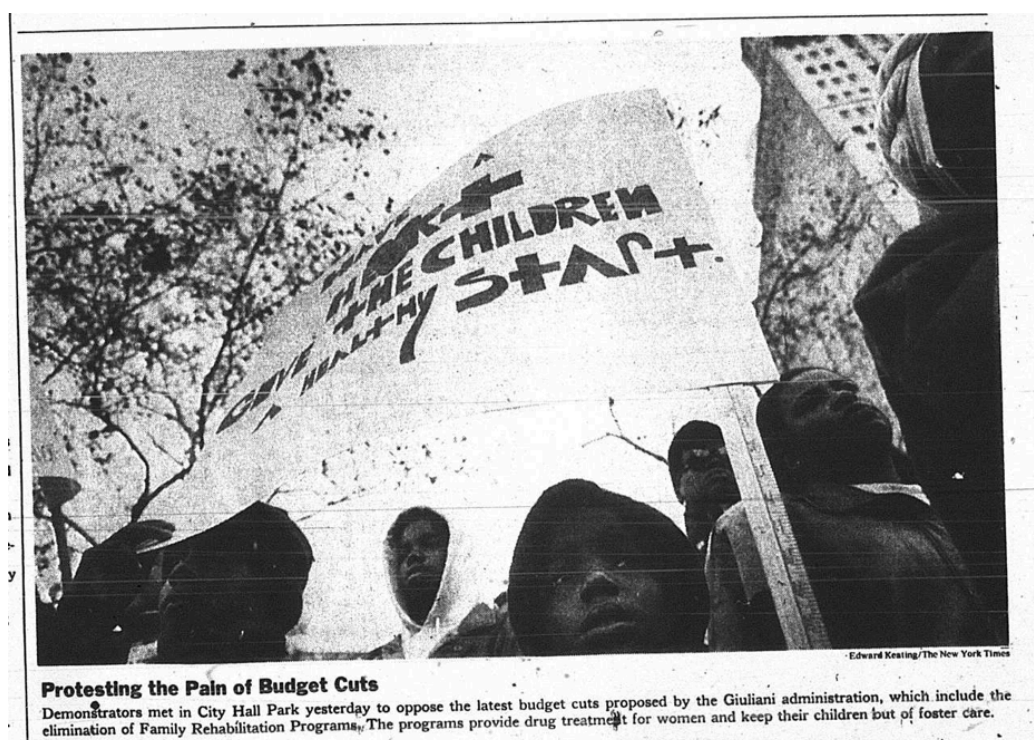
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<sup>71</sup> Melore, Daniel. Testimony. *Public hearing, the positive toxicology in newborns: strengthening testing protocols and providing rehabilitative services*. New York, NY. December 17, 1997.

<sup>72</sup> Statement of Purpose. Pathway Center Archive. New York Historical Society. New York, NY.

Pathway's emphasis on the dignity and humanity of their clients is not simply a measure of the comfort offered to prenatal drug users referred to the agency. Rather, it is an explicit ideological position that identifies clients as addicts in need of help. Program methodologies reflect this: mothers are required to spend time with their infants in bonding classes, required to attend group and individual therapy, and participate in career and parenting workshops. The significance of these measures must be read against perceptions that drug-using mothers (more specifically, crack-using mothers) lack maternal instincts, cannot be redeemed, and present an active threat to their children from the moment of conception. Programs like Pathway relied on a foundational belief that drug-using women could be rehabilitated, that their rehabilitation was more successful when they retained their parental rights, and that in utero drug exposure did not necessarily translate into permanent developmental damage for infants.

### **An Age of Austerity: Cuts to Services under the Giuliani Administration.**



**Figure 1:** "Protesting the Pain of Budget Cuts." *The New York Times*, November 12, 1994, sec. N.Y. / Region.

In 1993, Rudy Giuliani succeeded David Dinkins as mayor of New York City. Running on a platform of restoring safety to the streets and instilling financial responsibility, the Giuliani administration was perceived to be a sharp change from Dinkins'. Giuliani's better known policies targeted so-called "quality of life" crimes—cracking down on street graffiti, drug dealing, and window-washers.<sup>73</sup> These measures were widely regarded as successful: the drops in crime begun during the late Dinkin's administration continued during the 1990s, private industry grew, and the general opinion was that the city had been 'turned around.'<sup>74</sup>

The new mayor's inaugural address reflected many of these goals: Mayor Giuliani pledged to restore New York's status as a cultural and economic capital, proving those who pronounced the city "ungovernable" wrong. Moreover, the Mayor praised the resiliency and strength of New Yorkers—emphasizing that his mayoralty would first and foremost address the "structural budget deficit" and put New Yorkers back to work, while also encouraging citizens to band together and embrace their diversity.<sup>75</sup> The administration would attempt to tackle this "structural deficit" with aggressive cuts, and an even more aggressive welfare overhaul (the Mayor went so far as to announce that he expected to see the end of welfare by the end of his term). In his 1995 State of the City address, Giuliani states:

Compared to the average of ten other major American cities, New York City spends ten times as much on welfare, and four-and-a-half times as much on health care. If our expenditures were in line with the average, we would enjoy a \$6 billion surplus, instead of a structural deficit of more than \$2 billion.

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<sup>73</sup> Greene, J. A. "Zero Tolerance: A Case Study of Police Policies and Practices in New York City." *Crime & Delinquency* 45, no. 2 (April 1, 1999): 171–87.

<sup>74</sup> The effectiveness of these measures debated. Contemporary scholarship indicates that crime had begun to decrease steadily before Giuliani took office and that further crime reduction was the result of a continued trend rather than radical action by the Mayor.

<sup>75</sup> Giuliani, Rudolph. "Inaugural Address" (speech, January 2, 1994.) Archives of Rudolph W. Giuliani: <http://www.nyc.gov/html/records/rwg/html/96/inaug.html>

Rest assured that even after we've made the necessary cuts of more than a billion dollars, New York City will continue to spend more on helping people than any other city in America.

And in the end we will create a better city, one that is more efficient, one that is competitive with other cities in America, one that produces more jobs. But cutting our spending isn't enough.<sup>76</sup>

The City's new welfare program was designed to go hand in hand with the extreme budget cuts proposed by the administration. It is important to note that the rhetoric used to fuel their political capital connected these two platforms. Giuliani's welfare to work program was touted as a way to get New Yorkers back on their feet, and employed the same tropes of dependency discussed by Marie-Hancock.

These fiscal reforms came to be the central issue of the Giuliani administration's first term in office as the Mayor's office first proposed budget for the fiscal year following 1994 attempted to knock out 'administrative bloat and excess': the proposed 31.6 billion dollar budget meant a seven percent reduction in municipal work force, and significant cuts to everything from Educational Services to Park maintenance. The Police and Fire Departments remained exempt from the cuts, instead receiving "record" increases.<sup>77</sup>

The City's drug-addicted population was far from exempt from these budget slashing measures. In January of 1994, as part of a two billion dollar budget reduction proposal, the Mayor's office elected to close down thirteen Family Rehabilitation Programs, including the Pathway Center—eliminating services for 350 mothers and a thousand children. These cuts aimed to save 4.1 million dollars for the City of New York over a year and a half. The cuts reflected changes in the overall budget of the Child Welfare Organization, as the agency's

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<sup>76</sup> Giuliani, Rudolph. "State of the City" (Speech, January 11, 1995.) New York, NY. Archives of Rudolph Giuliani. <http://www.nyc.gov/html/records/rwg/html/96/city95.html>

<sup>77</sup> Mitchell, Alison. "THE GIULIANI BUDGET: AN ASSESSMENT; Mayor's Bet: Safety Carries More Weight With Public." The New York Times, May 11, 1994, sec. N.Y. / Region.

operating budget was “decimated.”<sup>78</sup> The cuts to FRP were a result of the elimination of all “gender based rehabilitation programs” from the CWA budget; the agency also faced personnel cuts across the board, reducing the supervisor-to-counselor ratio from one-to-five to one-to-six.

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Reactions to the proposed budget reflected a growing discord between the Mayor and his constituents. Lengthy budget negotiations between the City Council and the Mayor’s office in June of 1994 restored funding to certain programs— including some Family Rehabilitative Programs (Pathway, for example, had partial funding restored.) The mayor’s style, described by the *New York Times* as “all-or-nothing” didn’t win him favor: Brooklyn Councilman Anthony Weiner remarked that the mayor “mustn’t constantly take the position that it’s my way or the highway.” The Mayor further alienated his few conservative democratic supporters in the City Council by cutting \$40 million from the \$75 million in restored programs finally recommended at the end of June’s budget negotiations.

The Mayor’s use of executive power to override the wishes of the City Council raised questions about the allocation of municipal power and brought to light the extent of the ideological divide between the two branches. The action prompted the City Council to sue the Mayor’s office in the State Supreme Court in Manhattan, requesting that a judge issue an injunction compelling the Mayor to accept their version of the budget. Giuliani, however, held firm and stated that even if the Council were to win the murky legal battle for a more generous budget, he would utilize “his authority under the City Charter to declare a fiscal emergency and

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<sup>78</sup> Jones, Charisse. “GIULIANI JOB CUTS STARTING TO HAVE IMPACT ON SERVICE: Schools; Teacher Cutbacks Overstated So Far.” *The New York Times*, September 5, 1994, sec. N.Y. / Region.

<sup>79</sup> Jones, 1994.

simply impound money the Council wants to spend.”<sup>80</sup> The suit did not result in injunction,<sup>81</sup> and demonstrates the severe rift between the Mayor’s office and other municipal bodies.

The cuts were also opposed by activists from various groups and services targeted for downsizing. FRP leaders, clients, and caseworkers once again demonstrated their sense of organization as a community and vocal presence through heavily protesting these cuts.<sup>82</sup>

In January of 1995, the *Amsterdam News* reported that the Giuliani administration elected once again to cut thirteen of the 33 centers that served pregnant women and women with children, and drastically reduce the budget of twenty more.<sup>83</sup> As a result, the paper reported, only one drug treatment program designed for women (Reality House) would remain open in Harlem, an area closely associated with the boarder baby crises of the late 80s, despite the fact that the programs being terminated had shown clear signs of success: the Pathway Center had been awarded commendations from Harlem Hospital. Further, clients of the various programs had sent 20,000 “positive but imploring” letters Mayor’s office in the eight months between the cuts being announced and enacted.<sup>84</sup>

A letter addressed to the director of Pathway from Marva Livingston Hammons of the Human Resources Administration (HRA) addressed the cuts in funding as follows:

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<sup>80</sup>Myers, Steven Lee. “Giuliani Is Sued By City Council In a Budget Test.” The New York Times, December 8, 1994, sec. N.Y. / Region.

<sup>81</sup> In 1998, the New York City Internal Budget Office (IBO) and sixteen co-plaintiffs filed suit (and won) against the Mayor’s Office in order to gain unmediated access to budgetary information. The IBO’s creation in 1996 reflected a similar desire to “City Council Members and other elected officials on a more equal footing with the Mayor on budgetary and other fiscal issues.” See: <http://www.ibo.nyc.ny.us/pressreleases/pribowins.html> ; <http://www.ibo.nyc.ny.us/pressreleases/press6.html>

<sup>82</sup> For an image of this protest see Figure 1.

<sup>83</sup> Programs cut: Visiting Nurse Service, First Steps, WINS at Presbyterian Hospital, Harlem Dowling, Bronx Family Alliance, Manhattan Valley’s rehab program, Pathway (New York Foundling Hospital), Salvation Army in Brooklyn, National Council of Negro Women, Queens; NARCO Freedom, Bronx; Long Island College Hospital, Brooklyn; Bedford-Stuyvesant Health Program; Betances, Lower East Side, Manhattan, A Way Out, Queens and Family Support Systems, Bronx.

<sup>84</sup> Connors, Cathy. “WOMEN AND CHILDREN FIRST: City Targets Women’s Programs to Close Friday.” New York Amsterdam News. January 14, 1995.



The city must now close an enormous budget gap. The Mayor has asked City agencies to review their programs and propose expense savings and we have been doing so. After careful review and with our recommendation, the Mayor has proposed a funding reduction for the FRP substance abuse programs. Let me assure you that in developing our proposal, we closely considered numerous alternatives to the reconfiguration of FRP services we eventually selected. We are satisfied, given the limited resources available, the mix of programs we have retained offers the best coverage possible for our clients throughout the city.<sup>85</sup>

The cuts forced services to relocate clients rapidly to other centers—with priority given to women compelled to complete substance abuse treatment by a court. Though the Pathway center records indicate that they were able to provisionally place existing clients into other rehab programs, many others were not able to do so: FRP slots had already been reduced from 795 to 585 between 1994 and 1995.

On a budgetary level, the cuts originated in the budget of the Child Welfare Administration. Of 23 FRP Contracts, thirteen programs had included “dual” funding—substance abuse counseling as well as preventative and social services (such as case management, career counseling, and parenting classes.) Women enrolled in these programs did not require additional referrals for outpatient rehabilitation, which enabled them to complete holistic drug treatment while maintaining custody of their children. However, by June of 1995, all of the “dual” FRP had either been closed or lost drug-treatment funding; clients were referred to various local outpatient treatments.<sup>86</sup>

A study by the National Institutes for Health followed 173 mothers at FRP sites for a year, and found that those who were completing or still active in the program had “higher rates of abstinence and substantially lower average levels of cocaine in their hair at follow up.” In addition, they noted that 56% of the mothers studied had been referred into the program through

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<sup>85</sup> “Letter About The Closing of The Pathway Center” January 17, 1995. Pathway Center Archives. New York Historical Society. New York, NY.

<sup>86</sup> Pathway Center Archives. New York Historical Society. New York, NY.

the State Hotline for positive toxicology screenings, following investigation by ACS. The study noted:

It is not New York State policy to place children in foster care solely due to parental use of drugs. However, parents knew that refusal of FRP services would result in placements of their infants and other children if the parents were unable to demonstrate that their children could remain at home safely in the absence of such intensive services.<sup>87</sup>

The elimination of “dual” programs had real consequences for women referred to these agencies in the aftermath of ACS investigations. Existing clients were referred to “cooperating outpatient treatment programs” –ostensibly with lower success rates—and were forced to leave the relationships and communities they may have built. Future referrals would be required to seek outpatient care from separate institutions than the groups providing them with case management, often resulting in higher commute times and a larger bureaucracy to navigate. A reduction in services without a reduction in clients necessitates a scarcity of resources for those seeking treatment.

Directors of various FRP programs responded to claims that the cuts served a budgetary purpose by arguing that FRP treatment prevented large numbers of children from entering foster care, a much more expensive institution. Melba Butler, executive director of Harlem Dowling Adoption Services, remarked to the *Amsterdam News*:

Our families are working on sobriety, and they are particularly vulnerable. And orphanages are exorbitant to keep operating and running. Orphanages such as Boys Town are far more expensive than foster care, and foster care is more expensive than out-patient treatment; and the big plus is our return to the work force people who are drug-free and on jobs, working and caring for their children -- and more importantly, they're paying taxes. After six months with us, parents are drug-free and back to being responsible and responsive citizens. Perhaps success is no longer important.

Daniel Melore, the Executive Director of the Pathway program likewise remarked:

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<sup>87</sup> “US Advisory Board on Child Abuse and Neglect” 1990. Pathway Center Archives. New York Historical Society. New York, NY.

Pathway is wellcare reform and an investment in women and children. It makes no sense to cut lifesaving, money-saving, family-preserving programs. My first reaction was that it was all a mistake. Our mayor is supposed to be committed to drug treatment. The Child Welfare Administration spent a half million dollars preparing a site for Pathway only two years ago. The center was supposed to reduce the high cost of foster care. We offer not only drug treatment for mothers but on-site child care and intensive case planning for future health and education and employment.<sup>88</sup>

Interestingly, the complete elimination of the substance-abuse treatment budget from the overall

ACS budget was articulated in the following language:

Drug abuse treatment under contract to ACS was ended after New York City, compelled by budgetary pressures, made a policy decision to focus funds, now limited by a state block grant, on its mission: local child welfare services. NYS has been the traditional funder of substance abuse treatment and FRP clients were able to access outpatient slots in existing State system.<sup>89</sup>

The state system referred to was, after all, close to the same system that had been deemed grossly inadequate by Chavkin and others merely four years prior to their closing. Moreover, the budgetary reasoning would be the first of many articulations of the same sentiment regarding Child Welfare: the children, not their mothers, were a priority. These cuts also had unexpected long-term effects: as Marlene Halpern, Family Law Coordinator of Legal Services of New York City testified in 1997, the State of New York was not able to apply for sixteen million dollars in federal funds in 1997 for family preservation and support because it could no longer meet the “maintenance of effort requirement” it had met in 1992 in terms of preventative services funding.<sup>90</sup> The political potency of making major budget cuts to FRP did not lie in depriving drug-using women of services, but in the tough fiscal conservatism it implied.

### **Chapter Three: The Political Capital of Child Welfare**

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<sup>88</sup> Connors, Cathy. “Women and Children First.” *Amsterdam News*

<sup>89</sup> US Advisory Board on Child Abuse and Neglect. Pathway Center Archives. New York Historical Society. New York, NY.

<sup>90</sup> Halpern, Marlene. Testimony. Public hearing, the positive toxicology in newborns: strengthening testing protocols and providing Held New York, NY. December 17, 1997. New York State Library, 1997. (157)

## **Creation of the CWA**

The tragic death of six-year-old Elisa Izquierdo in New York City caused massive public outcry. The girl had been beaten to death by her crack-addicted, domestically abused, and mentally ill mother in November of 1996, in what Child Welfare officials would come to call the worst case of child abuse they had ever seen. Further cause for scandal was that it appeared that Elisa's death was preventable: she had demonstrated numerous warning signs of abuse and the Child Welfare Administration was aware of her status as an at-risk child. The press—both in tabloid and mainstream publications—covered Elisa's death and the scandal of the CWA's oversight extensively.

This case provoked a sustained public outcry to reform the child Welfare process. Following Elisa's death, New York's Child Welfare Administration came under harsh scrutiny—facing external audits in addition to the city's annual Child Fatality Review Panel. Appearing moved by the tragedy, Mayor Giuliani issued an Executive Order on January 11, 1996, creating an entirely new agency: the Administration for Children's Services. Executive Order 26 effectively removed Children's Services from the auspices of the Human Resources Administration and made it an autonomous agency—endowed with a 1.2 million dollar budget (making it the fifth largest city agency).

The newly created agency would be “charged with protecting children from abuse and neglect, investigating allegations of child abuse and neglect, providing preventative services to families to maintain the safety of children, and placing children in foster care or adoptive homes

when necessary.” Nicholas Scopetta, a former foster child, would be appointed to head the Agency and report directly to the Mayor, rather than within the larger network of the HRA.<sup>91</sup>

The Administration for Children’s Services addressed many issues of basic agency dysfunction: its 1996 Plan For Reform takes note of caseworker burn out, poor inter-agency communication, excessive bureaucracy, and a critical lack of supplies—from printers to folders.<sup>92</sup> The Mayor’s mandate for the new agency, however, did not acknowledge that his Administration had been responsible for severe cuts to its earlier iterations operating budget, drastically reducing personnel and funding for services such as rehabilitation. Instead, the narrative delivered by the Mayor’s office was a mandate to reform a broken system that prioritized family-integrity and parental-rights over the safety of children.

This narrative incited opposition from yet another group against the Mayor: Child-Welfare caseworkers marched outside City Hall on May 14th, 1994 to protest the suspension of two caseworkers. According to the *New York Times*, protestors “mocked Mayor Rudolph W. Giuliani and derided Nicholas Scopetta,” and raised concerns that no senior Child Welfare officials were held accountable for key errors. Moreover, they expressed distrust in Scopetta and the administration as a whole, citing high case loads for workers, shoddy distribution of much publicized training, and expensive renovations on executive floors as proof of the hollowness of new promises.<sup>93</sup>

Rhetoric plays a key part in elucidating the political perspective of CWA and Nicholas Scopetta under the Giuliani administration. Statements made announcing the creation of CWA and later comments by Scopetta clearly emphasize that protecting children *and not mothers* as

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<sup>91</sup>Exec. Order No. 26, 3 C.F.R. 1-5 (1996). Giuliani Papers, La Guardia Community College La Guardia Archive. New York, NY.

<sup>92</sup>“ACS Plan For Reform,” 1996.

<sup>93</sup>Sexton, Joe. “Child-Welfare Caseworkers Stage a City Hall Protest.” *The New York Times*, May 15, 1996, sec. N.Y. / Region.

the priority of the administration, a fact echoed clearly in the mission statement of the CWA. The agency's pursuit of criminalizing prenatal drug use is made most clear in the language of New York State Assembly Bill A-8215, co-authored by Scopetta, which calls for the amendment of Family Court Act 10 to allow for a positive toxicology screen to constitute as *prima facie* evidence of neglect.

The bill was one of two measures proposed regarding infant drug testing in the New York State Assembly in the aftermath of Izquierdo's death. The other bill, A-8271, proposed by New York State Assemblyman Greene of Brooklyn, calls for mandatory drug screening and increased rehabilitation for mothers. Examining the specific language of these two simultaneously debated bills is illustrative of the rift between the Scopetta and other Child Welfare advocates.

### **Rhetorical Representations of Death of Elisa Izquierdo and the Crack Mother**

Understanding the potential political benefits of pursuing a punitive, rather than rehabilitative, policy towards prenatal drug use requires an examination of the public sentiment surrounding Izquierdo's death and prenatal drug-use as a whole.

Public anger surrounding the murder of Elisa Izquierdo was not directed solely at the Child Welfare Administration, but also at her mother and murderer, Awilda Lopez. Lopez, who plead guilty to second degree, was described as a crack cocaine addict with a volatile and abusive partner. It is clear from reports that Lopez believed six-year old Elisa to be possessed by a voodoo curse that she was likely also deeply mentally ill; Elisa had two siblings who were subsequently removed from their mother's custody.

While several articles and stories reveal shock that Elisa could so easily slip through the cracks, few express a similar surprise about the lack of social services accessible to 29-year-old

Lopez. A relatively sympathetic *New York Times* feature immediately after Elisa's murder notes that Lopez, one of thirteen children, began smoking crack in 1988, at 22 years old, and soon found her life in free-fall. The article declares that Elisa was "born a crack baby," and removed from her mother's custody with her siblings in 1989. Lopez regained custody of her older children after proving her sobriety to a social worker in late 1990; and of Elisa in 1994, when her biological father died. During this time, the article claims, Lopez had clearly relapsed and her life was far from stable—Child Welfare Workers were in fact alerted to the suspicions of friends and neighbors, but did not act.<sup>94</sup>

The consequences of Lopez coming to represent all drug-using mothers are clear<sup>95</sup>: she frequently relapses, has a series of unstable partners, and her representation of sobriety to social workers is unreliable. Given this portrayal, it is difficult to advocate for the preservation of custodial ties in the presence of a positive drug screening. Lopez is shown as irredeemable, if unfortunate.

A follow-up article in 1996 about Lopez's plea and sentencing once again perform appropriate responses to her crime. The *New York Times* quotes Nicholas Scopetta, ACS Commissioner, as saying: "The fate of Awilda Lopez pales in comparison to the death of her child and the legacy of that death. The legacy is one of opportunity -- an opportunity to reform

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<sup>94</sup> Alvarez, Lizette. "Report in Wake of Girl's Death Finds Failures in Child Agency," April 9, 1996, sec. N.Y. / Region.

<sup>95</sup> Though there is no way to conclusively prove that Lopez came to represent "crack mothers" as a category, this claim relies on logic employed by Angie-Marie Hancock when discussing the construction of the "Welfare Queen" in *The Politics of Disgust*. Hancock argues that framing the problem with welfare through individual social behaviors of one black woman publicly allowed and justified the anger of "white working class democrats reactions of fear and resentment." Though media outlets profiled individual women, Hancock's survey of attitudes finds that individuals parrot the language used to describe these women when discussing welfare recipients as a category. I argue that process functions in the same way in the case of Lopez as a public case study in what it means to be a "crack mother."

child welfare that should have happened decades ago." <sup>96</sup> Once more, the public is reminded that ACS, created by Mayoral Executive Order, is the legacy of Elisa Isquierdo. As an agency, it is imbued with an almost sanctified purpose: to protect children from a similar fate using unconventional means.

When considering the role played by rhetoric and public sentiment in motivating legislation, note that statistically, the number of child-abuse deaths fell by half between 1991 and 1995 in New York City and State—a change from the rest of the nation, where deaths increased. <sup>97</sup> The policy initiatives pursued by these reformers were not rooted in a sudden alarming rise in neglect-related death. The public outcry surrounding Isquierdo's death served as an agitating force in once again spurring legislation about prenatal drug users.

### **Positive Toxicology Screen As Proof of Neglect, Mandatory Urine Testing**

Mayor Giuliani would announce the creation of ACS once more during his annual State of the City address for 1996, articulating the foundational logic of the agency, beginning with the declaration that Child Welfare requires a new strategy and approach “in much the same way as we devised a new strategy and approach for the NYPD, which has produced such a dramatic improvement in public safety for our entire city.” He continues by saying:

The recent study commissioned by Connecticut Governor John G. Rowland makes clear that the philosophy of child welfare has been too rigidly focused on only holding families together -- sometimes at the cost of protecting children. That must change. And it will change.  
The philosophy first, last, and always must be the protection of children.  
Because when a child is abused...when a child's safety is in question, government must be pro-active.

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<sup>96</sup> Sexton, Joe. “Mother of Elisa Izquierdo Pleads Guilty to Murder in a Pivotal Child-Abuse Case.” The New York Times, June 25, 1996, sec. N.Y. / Region.

<sup>97</sup> Sexton, Joe. “Child Abuse Kills Fewer In New York.” The New York Times, October 10, 1996, sec. N.Y. / Region.



That is not to say that family unification will not be an important goal -- but not when it endangers children. Protecting children must always come first.<sup>98</sup> Though the Plan for Reform published by the Administration of Children's Services (ACS) is much more moderate on the issue, the Mayor's rhetorical, ideological, and political positions are clear: children must be prioritized above all else. He even explicitly compares the new agency's reforms to the NYPD's. Before moving on, the Mayor concludes:

We must change the ill-advised rule that a child born with drugs in its system is not considered an abuse victim. Even though the child's mother totally abandoned her responsibility by using drugs in the last weeks of her pregnancy. We must now have a presumption that a child in that situation is the victim of abuse...to be dispelled only by evidence to the contrary.<sup>99</sup>

It is uncertain whether the intentions of the administration are honest or cynical: ACS centered on various changes and reforms. However, it is clear that at least rhetorically, the drug-using mother once again functioned as a political scapegoat.

A Press Release announcing the swearing in of Nicholas Scopetta echoes the same desire for the office to prioritize the needs of children, and identifies changing the law to reflect prenatal drug use as abuse as part of that goal. The press release reads, in part:

The Mayor's plans for improving the lives of children include a top-top bottom reform of the Child Welfare Administration, radical reform in the public school system, and the most comprehensive anti-drug effort in the City's history. The priorities of the new Administration for Children's Services will include:

- Making each case worker understand that the agency's top priority is protecting children
- Changing the law so that a child born with drugs in his or her system is considered the victim of abuse.<sup>100</sup>

The creation and mandates of the Child Welfare Administration can be interpreted as serving a very specific political purpose when viewed within the context of the Giuliani administration's larger push for fiscal austerity. Beyond the obvious political capital in

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<sup>98</sup> Giuliani, Rudolph. "State of the City" (Speech, January 11, 1996.) New York, NY. Archives of Rudolph Giuliani. <http://www.nyc.gov/html/records/rwg/html/96/city.html>

<sup>99</sup> Ibid.

<sup>100</sup> "Press Release: Scopetta Swearing In Ceremony", February 13, 1996 Giuliani Papers, La Guardia Community College, La Guardia Archive. New York, NY.

protecting the safety of children, the mandates of the CWA also changed the conversation that had previously taken place around Child Welfare. Rather than a lack of services, a more severe attitude towards maternal drug testing and accelerated removal proceedings are offered as necessary steps to ensuring child welfare. Access to rehabilitation services is irrelevant to Child Welfare if mother and child are represented as distinct, even adversarial, individuals.

By 1997, two bills entered the New York State Assembly. The first, proposed by Brooklyn New York State Assemblyman Greene, involved a two part proposition: increased, mandated urine testing for infants born in New York with mandated investigations and referrals to Family Rehabilitative Services for mothers should infants test positive for drugs *or* alcohol. The second, authored in part by Scopetta and proposed by Assemblywoman Mayersohn, from Flushing, Queens, called for a statutory revision that a positive toxicology *prima facie* evidence of neglect. Under the second plan, any child testing positive for a substance would be automatically removed from their mother's custody pending the filing of a neglect petition. Mothers would have the opportunity to rebut the report of neglect in court, and would be appointed counsel with 24 hours of the report being made in order to do so.

Examining the procedure each bill outlines for prenatal drug testing and follow-up, as well as specific language utilized in each bill, is essential to understanding what the respective author's have identified as crucial problems in current law.

**A-8215, Scopetta and Mayersohn:**

New York State Assembly Bill A-8215 opens stating “that infants who are born drug-exposed and drug-addicted must be a priority of our state's public health and child welfare systems,” and that the problem has expanded in “virtually geometric proportion since the 1980's with the advent of cheap, smokeable free base crack cocaine.”

The bill reads: “the intervention of the state into the integrity of the family unit should be exercised cautiously.” This bill is justified, however, because “the very life and safety of the most vulnerable segment of society is in question, [and] the intervention of the state must be aggressive and consistent.” After recapping current policy— which requires an investigation proving additional evidence of neglect following a positive toxicology screening, the bill’s authors conclude: “This policy creates an unacceptable risk to New York’s most vulnerable citizens: newborn infants.” The argument for a *prima facie* finding of neglect is framed as follows:

At present, infants born with such a positive toxicology must, without additional evidence of neglect, be discharged home without mandating support, supervision or intervention - only to await the occurrence of other neglect, injury or even death before protective action can be taken. While intending to protect children, laws that essentially require the child to be injured or harmed before help is offered are fatally flawed. The tragic consequences of such defective laws are needless and avoidable particularly when at the time of birth authorities are aware of an immediate problem.

The language of the bill supports the assumption that the presence of a positive toxicology screening implies future abuse. The bill doesn’t make any recommendations or provisions for “support” or “supervision”, focusing only on intervention. Framing the current statute as one that “essentially require[s] a child to be injured or harmed” does not account for the wide variety of pre-emptive evidence already used to prove neglect under family court act section 1046. The author’s propose several changes to address this issue. The bill amends both social services law

and the family court act to expand the definition of “neglected child” to include “newborn infants testing positive for a controlled substance.” It also amends the Family Court Act to establish a “rebuttable presumption that the release of a newborn infant testing positive for a controlled substance to the parent(s) presents an imminent danger to the child’s life health as the court reviews an application to return a child temporarily removed from its parents,” and also “as the court reviews the facts to determine if a petition of neglect is dismissed or sustained.” Finally, the bill amends section 1046 of the family court act by adding a paragraph that notes a positive toxicology screen for a controlled substance is “prima facie proof of neglect in a dispositional hearing.” The bill does not alter hospital procedure surrounding how women or infants are selected for drug testing, establish guidelines for testing accuracy.

Essentially, the bill lays out a procedure wherein any child testing positive for a controlled substance would be removed immediately from parental custody, awaiting trial. Mothers would be offered the opportunity to rebut a finding of neglect, but could do so only on the basis of a false-positive or, possibly, proof of independent enrollment in rehabilitation services as an accurate positive toxicology screen would now *necessarily* constitute neglect. Children testing positive for controlled substances are remanded to hospital care while their mother’s are discharged; those choosing to rebut findings of neglect are automatically engaged in a custodial battle.

Though these measures are civil, not criminal, they engage with prenatal drug users through a criminal-justice apparatus: women appear in court, are appointed counsel, and must present formal evidence of parental fitness. Women are not allowed to see or bond with their children after giving birth— their relationship is defined firstly as adversarial. This policy consistent with the tone of the bill regarding policies favoring family integrity. The author’s state

that current protocols are a “sad commentary indeed,” concluding that “this legislation seeks to remedy this horrendous injustice which often sends society’s most vulnerable and innocent individuals to face further neglect, maltreatment, and abuse at the hands of their own parent.”<sup>101</sup>

### **A-8271, Green:**

The second bill, proposed by Brooklyn state Assemblyman Green approaches the issue of prenatal drug use and testing from a different angle. The Act proposed three major interventions: to change public health law in order to allow for the mandatory testing of all newborns for alcohol and drugs; to amend social services law to provide comprehensive rehabilitative services to parents of newborns testing positive; and to modify the family court act to allow lab tests into evidence when referring alcohol and substance abusers into drug treatment court.

If a positive toxicology is found, the bill lays out the following procedure concerning neglect:

the local district shall conduct an investigation of the subject of the report and shall investigate the home in which the newborn is to reside with the custodial parent in order to assess whether such living arrangements will impair the child or place the child at imminent risk of impairment

In addition to this investigation, the bill provides that:

The local social services commissioner shall in writing inform the subject of a report to the central register pursuant to this subdivision of the availability of drug and/or alcohol substance abuse treatment programs, including intensive caregiver rehabilitation services, in which the subject of the report may participate. The local social services district or the hospital shall, if appropriate, make arrangements for the admission of the caretaker parent and child or children into a residential treatment program or into an out-patient treatment program (...) The subject of a report pursuant to this section shall be informed in writing by the local commissioner of social services of the possible civil consequences of failing to participate and comply with the requirements of a substance-abuse treatment program.

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<sup>101</sup> New York State Assembly Bill A-2515. 1997-1998 Regular Session. Heard June 6, 1997. Sponsor: Mayersohn, Netti.

This combination of investigation and mandated rehabilitation modifies existing family court policy. Combined with the proposal to mandate drug-testing for all newborns, it could be argued that mandated rehabilitation services could function in a way that also infringes on the privacy rights of mothers. However, an examination of other concerns addressed in the bill makes clear the ways in which the ideological stance of its authors diverge from those of the Scopetta and Mayerson.

Firstly, bill extensively discusses testing protocol: it designates that gas chromatography tests must be employed to lower false positives, further notes that “hospital protocol shall require a newborn to be tested [...]based upon medical symptoms, and prohibits socio-economic factors such as the expectant mother’s race, ethnicity, age, educational level, or profession to be considered,”<sup>102</sup> and discusses, in detail, the types of rehabilitation services it aims to fund and foster— namely, community-based programs resembling New York City’s FRP’s. The bill mandates that social services shall give priority to women who receive a report due to a positive toxicology screen; that children may be permitted to be placed with parents in residential programs; caseworker to client ratios must not exceed one to eight; and that funding priority will be given to:

projects which develop and implement a performance plan with specific verifiable goals which shall include, but not be limited to: reduction or elimination of drug dependency at program's completion, foster care prevention, prevention of subsequent involvement of caregiver with the local child protective services agency, appropriate parent/caregiver child interaction, maintenance of a healthy home environment and participation of child and family in counseling and/or support services.

Foster care prevention and family unity remain at the core of the bill. While required drug testing and mandated rehabilitative services raise constitutional questions of privacy and possible abuse,

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<sup>102</sup>Green, Roger. Public Hearing, the Positive Toxicology in Newborns: Strengthening Testing Protocols and Providing Rehabilitative Services. New York, NY. December 17, 1997. New York State Library, 1997.

the bill attempts to address these by outlining several checks and balances (including monitoring the demographics of women altered to testing.) The bill's justification, as articulated by Green, notes that :

the intent of this legislation is to provide for a more comprehensive program for the testing of newborns and upon confirmation of a positive toxicology, investigate and provide appropriate services to their parents in order to ensure that these children have the chance to thrive.

The children in question are not placed in an adversarial relationship with their parents: both are represented as possible beneficiaries from the program. Moreover, the logic of the bill relies on a dramatic increase in funding for rehabilitative services (similar to the services eliminated from New York City's budget in 1995.)

The political ideologies behind each of these bills differ in subtle but significant ways. While it is impossible to prove that public sentiment influenced the specific policies proposed, it is interesting to note that Green's bill mentions drug abuse *and* alcoholism as problems (identifying Fetal Alcohol Syndrome as a possible consequence of addiction during pregnancy) while Mayersohn's bill specifically targets the use of "cheap, smokeable, free-base cocaine" by mothers as the catalyst of the problem. Mayersohn's bill attempts to address the issue of prenatal drug use through aggressive action to remove children from addicted mothers and a rapid expansion of the role of the court. Green's, conversely, attempts to address the issue by mandating invasive urine testing but also reversing the trend towards service-reduction put forth by the Giuliani administration.

The role of Elisa Isquredo's murder as a political tool and moral touchstone for groups and individuals aiming to curtail the rights of pregnant drug users is evident in testimony from a Public Hearing held in December 1997 about bill A-8271. Only four individuals offering testimony expressed support for mandatory urine testing and an

automatic presumption of neglect based on a positive toxicology test— all four evoked Isquierdo’s death within their testimony.<sup>103</sup>

The testimony of one of the four, Dennis Saffran— the director of the Center for Community Involvement, shows the ideological rift between those in support of Scopetta’s push to redefine neglect and those opposed to these measures. Saffran begins by stating that “We’ve been particularly concerned with issues in which the weakest and most vulnerable members of our society are left voiceless when decent liberal policies are carried to politically correct extremes,”<sup>104</sup> continuing that drugs are “at the heart of the worst abuse cases, as in the tragic 1995 murder of Elisa Isquierdo.” The “decent liberal policies” and “politically correct extremes” of rehabilitation and family unification, Saffran seems to imply, actively put children in danger. He concludes: “There has to come a point where our concern for a parent’s drug addiction is outweighed by the moral imperative to rescue a child from this kind of horror”<sup>105</sup>

### **Chapter Four: Community Pushback**

As with Giuliani’s 1994 budget cuts eliminating FRP services, this proposed legislation faced considerable push back and protest from activists and Child Welfare specialists in New York. In December of 1997, Assemblyman Greene held a public hearing regarding bill (A-8271) for Mandatory Urine Testing in Newborns at the New York City Bar Association. Testimony from the hearing highlights the deep gulf between the supporter’s of the ACS reform plan, and other established members of the Child Welfare community specializing in prenatal drug use. In addition, the hearing illustrated the level of organization, coherence, and variety of organizations

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<sup>103</sup> These four were Nicholas Scopetta, Ann Reigner, Dennis Saffran, and Jose D. Alfaro.

<sup>104</sup> Public Hearing, New York, NY. December 17, 1997. 229.

<sup>105</sup> Ibid., 232.



involved in opposing measures curtailing the rights of drug-using mothers. The testimony of these individuals and groups emphasizes the unique challenge faced by a conservative Executive Branch attempting to further such legislation in New York City.

The purpose of the hearing was to gather feedback from leaders within the field. Of the 22 individuals and organizations that testified, only four expressed support for the provisions of the bill involving mandatory urine testing or the idea of a *prima facie* finding of neglect based on a toxicology screen. The remaining eighteen individual organizations spoke in partial support only of the bill's provisions for increased FRP funding. Participants expressed a host of concerns to legislators, including issues like the capacity of ACS to handle increased case loads, false positives from drug tests, constitutional rights to privacy, the propensity for class and race-based discrimination.

It is clear from the testimony that New York's status as the "epicenter" of drug epidemic created a functioning institutional memory regarding issues of Child Welfare. In her testimony, Dr. Wendy Chavkin states:

In our eagerness to take action, let us pause to remember that we have been here before and it was a tragic failure, known as the boarder baby crisis (...) In response to the failure of these policies to improve the situation, the City's family preservation efforts were started, including special drug treatment programs for mothers of young children. The current City Administration closed these programs and has at various times suggested additional reductions in services for drug treatment, foster care, and for payments to grandparents who serve as foster caretakers. Of course, government should intervene to protect a child from someone who cannot parent, whether because of addiction or any other reason. But a single positive drug test should not be used as a surrogate for an evaluation of parenting ability (...) The moment of birth should not become a moment for state scrutiny, especially in the context where services are not offered. This not only has political implication soft the status of women but may have pragmatic health consequences as well. The public health is not served if women see health care providers as agents of the state and avoid seeking care.<sup>106</sup>

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<sup>106</sup> Ibid.

Chavkin’s testimony directly links the actions of the Giuliani administration to current problems within the Child Welfare System, and locates the solution as the restoration of services. Concern over the role of the Mayor’s office is also clear in the testimony of Marlene Halpern, who states:

“The Mayor’s latest proposal in how to combat drug use recommends once again that our child neglect laws be amended (...) It is crucial that media hype and political expediency does not result in a rush to the return of past failed policies. I and others(...) have advocated an investment of state dollars in preventative services that is less costly than the maintenance of children in foster care, and this committee has dedicated itself to that principle over the years. However, the executive branch has not. (...) again it falls on the Legislature to keep a watch on our executive branch”<sup>107</sup>

Halpern’s advocacy for preventative services is voiced by many— including directors for the Pathway and Odyssey Programs, recovering addicts, social workers, and many lawyers. Lauren Schapiro, director of Brooklyn Legal Services, notes that the lack of rehabilitation facilities designed specifically for mothers in Brooklyn is “incomprehensible” given the number of court cases filed, noting that “almost routinely children are removed from their parents when there is any evidence of drug use (...) because there are so few programs which make it possible for parents to remain with their children while they struggle with their addiction.”<sup>108</sup>

These sentiments are reflected not only by those offering expert testimony, but also articulated by Assemblywoman Deborah Glick, in response to the testimony of Nicholas Scopetta:

Glick: So, the concern I have is that we— if our goal is to protect children, which I think should be the goal, part of that is making it possible for their mothers to get clean.

Scopetta: I agree 100%

Glick: I don’t think that— and the studies seem to indicate— that the use of drugs automatically makes somebody a bad parent. They have other problems. They may need assistance, but that doesn’t automatically mean they should not have their children with them.

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<sup>107</sup> Ibid., 157

<sup>108</sup> Ibid., 221

Politically, the Congresswoman's remarks directly contradict the underlying narrative of the Giuliani administration in their assertion that regardless of drug use, these mothers are multifaceted individuals with a reasonable claim to their parental rights.

The privacy rights of the women in question were also discussed extensively. Regarding the constitutionality of these measures, the Ms. Chu, a lawyer for the New York Civil Liberties Union argues that mandatory testing of a newborn constitutes as an unreasonable search and seizure under state law, as “a woman who has entered a hospital to give birth does not have a diminished expectation of privacy with regard to state inquiries into any potential substance use or abuse.” Either legislation veers towards unconstitutionality, Chu argues, because:

Virtually every act or admission on the part of a pregnant woman can affect the well being of the fetus she carries— nutrition, physical hardship due to an accident or disease, exercise or not exercising, ingesting caffeine, being overweight, residing at a high altitude... If the goal of protecting children from prenatal-inflicted harms is taken to its logical conclusion, then each or any of these activities without more can be the basis for the initiation of government activity.<sup>109</sup>

Privacy concerns are again addressed in the testimony of Dr. Daniel Neuspiel, who argues that the proposal contains a “disturbing compromise of civil liberties” as it interferes with professional-client privilege. He continues:

There are better ways to protect children from abuse and neglect when in the care of parents with addictions (...) These make more sense than increasing the stigmatization of drug-exposed children and the demonization of poor women of color who use drugs.

The racial undertones of the debate as a whole are also addressed by Marlene Halpern, who state: “It’s no coincidence that our attention is focused solely on women who use crack cocaine (...) as a drug primarily taken by poor women of color and not mothers who use alcohol during pregnancy, a far more damaging drug to the fetus.”<sup>110</sup> Dissatisfaction with the willingness of

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<sup>109</sup> Ibid., 187

<sup>110</sup> Ibid., 152

politicians to dismiss the needs of these populations is further explored by Zolio Torres, the director of the Child Welfare Action Center:

Being a family preservationist does not mean I do not hold the safety of children as a paramount concern. However, I also believe that given the nature of the majority of the child removals and the sheer numbers of those removals, much more is at play. Could it be that there is an unspoken presumption that certain segments of our population that are stricken by what are prevalent social evils do not have the capacity and thus the right to raise their children?

Instead of working to eliminate social ills that lead to positive toxicity in newborns, some political leaders have opted for immediate removal of children and an accelerated process of termination of parental rights. Society shouldn't be the purveyor of social ills and then through its government punish those who fall victim to them. It is like telling a slave that because of the social ill of slavery she has no right and no human rights her master is bound to respect, including the right to raise her own children.<sup>111</sup>

The perception that drug-using women had become increasingly criminalized resurfaces in the testimony of social worker Jaqueline Hall: "I used to be comfortable in my sphere of what I called street-level bureaucrat. I provide direct services to the clients that need it the most. But lately, it has become quite uncomfortable being in the middle of those who dispute the implications of criminalizing parental conduct."<sup>112</sup> Frank Brancato, Director of the Council of Family and Child-Caring Agencies also testifies that using a positive toxicology screening as prima facie evidence "puts the burden of proof on the mother and it feels like it's very punitive in its intent. It leads to an automatic placement, we believe, and can be a real source of discrimination, continued discrimination"<sup>113</sup>

The realities of a proposed system that would require women to go to court immediately after giving birth were also poignantly discussed by Yolanda, a graduate of the Pathway program:

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<sup>111</sup> Ibid., 204

<sup>112</sup> Ibid., 180

<sup>113</sup> Ibid., 193

The court? Oh, that would have devastated me. I would have felt like I'm a criminal. I had never been to court in my life for anything. I always did the best that I could do, so I felt like they didn't need to be taking me and putting me in front of no court and no judge and them telling me how my life should be, what I should do. Now, if you feel like I have a problem, if I don't feel like I have a problem, offer me some suggestions. I'm willing to accept them instead of dragging me through, because that would have been more devastating to me than for you to not have another alternative to offer me.<sup>114</sup>

The rights of drug-using mothers— as parents and individuals— factor prominently into these testimonies. In addition, the well-being of addicted mothers is represented as closely linked to the well-being of their children: family unity and rehabilitation are emphasized as important goals of an effective system. Additionally, the sudden push for reform itself is met with skepticism and critique from those actively engaged in questions of Child Welfare. Gesturing towards the much-evoked symbol of Elisa Isquierdo, Dr. Wendy Chavkin states:

Elisa Isquierdo died, as best as I could tell from the *New York Times*, because her mother was psychotic and received no psychiatric treatment and the child protective agency made many serious errors on many occasions. Her mother's drug use did not appear to be the principal problem. Certainly maternal drug use can indeed seriously impair parental behavior. On this occasion, however, a focus on maternal drug use is diversionary, diverting attention from both the lack of psychiatric treatment offered the seriously mentally, especially if they're poor and from the poor performance of the child protective agency.<sup>115</sup>

The testimony of these individuals is an excellent representation of the robust and vocal community opposed to measures aiming to criminalize prenatal drug use in New York City. Moreover, this testimony evidences the depth of discourse and critical engagement surrounding this conversation in the case of New York.

## Epilogue

Ultimately, neither bill moved beyond the New York State Assembly Committee on Children and Families. Thus, New York City's policies regarding prenatal drug users remained in a bureaucratic limbo: the Mayor's office lacked the ability to change the statutory definition

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<sup>114</sup> Ibid., 120.

<sup>115</sup> Ibid., 86

of neglect; holistic rehabilitation programs and activists lacked the funding to provide the kind of comprehensive services for which they advocated. Though legislation explicitly criminalizing prenatal drug abuse was never passed in New York, service reductions created significant hurdles for women seeking pre-emptive treatment and greatly increased the likelihood that they would eventually lose custody of their children or be incarcerated.

More broadly, questions about the rights of pregnant women to privacy and due process persist: as recently as 2013, Alicia Beltran was arrested in Wisconsin during her third trimester and told that her fetus had been appointed a separate legal guardian by the court after telling her ob-gyn she had abused prescription drugs in the early weeks of her pregnancy.<sup>116</sup> Beltran's case is one of many brought against prenatal drug users in the wake of new drug scares around methamphetamine and prescription painkiller abuse. Deeply problematic ideas about controlling poor, minority reproduction frequently and insidiously influence popular culture—often casually revealed in talk show host commentary or in veiled form within policy debates.

While it is clear that social justice groups and individual activists played a critical role in shaping the legal and social landscape as it applied to drug-using mothers in New York City, the question of why these groups were so successful remains: despite an overwhelmingly liberal reputation, New York was also home to notoriously punitive Rockefeller Drug Laws and would go on to re-elect Mayor Giuliani in 1997. It is possible, perhaps, that New York's role as a progressive exception to national trends in criminalizing prenatal drug use may not be despite its status as the so-called "epicenter" of the crack epidemic, but because of it.

After all, New York City is remarkable because of the proximity of poor, minority neighborhoods to wealthy, white enclaves. It could be argued that the interests of disenfranchised

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<sup>116</sup> Eckholm, Erik. "Case Explores Rights of Fetus Versus Mother." *The New York Times*, October 23, 2013, sec. U.S

minority populations are intimately tied to the well-being of New Yorkers as a whole in an exceptional way. However, this theory still doesn't fully account for the virulent sanctions against drug use, petty crime, and graffiti New Yorkers supported during the 1990s.

More than urban density, the inclusion of the voices of drug addicted women themselves within this debate seems to be the most significant impact of New York's status as the center of the "crack epidemic." The stories of these women are made visible on several fronts: *The New York Times* coverage of Family Rehabilitation Programs quotes individuals who speak in detail about the role of holistic rehabilitation as a redemptive forces in their lives; two recent graduates of the Pathway program speak about their experiences during Assemblyman Greene's 1997 hearing on urine testing; clients from FRP and other rehab programs presented themselves visibly when protesting service reductions. In the case of New York City, these women are to a degree, allowed to represent themselves, in opposition to the tropes of the "crack mother", as thinking, feeling, and struggling human beings. It is significantly harder to respond to the nuanced experiences of these women without evoking a compassionate response.

The debate over prenatal drug users in New York City underscores a broader schism within the City itself. When confronted with a crisis like the crack epidemic and rising crime, with so little space between communities "affected" and "unaffected", the City's responses seem to be of two minds. On one hand, motivated by fear and distrust of poor communities, citizens supported Welfare-to-Work programs, draconian sentencing laws, and crackdowns on petty crime. Alternatively, real people and voices affected by addiction confronted citizens—not just media-generated tropes of "crack mothers" and "welfare queens." The schismatic conclusion reached from these debates over prenatal drug-abuse legislation and rehabilitation funding is representative of this precise rift.





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