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"Every Shut Eye, Ain't Sleep": Exploring the Impact of Crack Cocaine Sentencing and the Illusion of Reproductive Rights for Black Women from a Critical Race Feminist Perspective

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“EVERY SHUT EYE, AIN’T SLEEP”:

**EXPLORING THE IMPACT OF CRACK
COCAINE SENTENCING AND THE
ILLUSION OF REPRODUCTIVE RIGHTS
FOR BLACK WOMEN FROM A
CRITICAL RACE FEMINIST
PERSPECTIVE**

DELESO ALFORD WASHINGTON*

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* J.D., *Southern University Law Center*, Baton Rouge, LA; LL.M., *Georgetown University Law Center*, Washington, D.C. This article is dedicated to: my grandmother, Gertrude Sims Alford, for always talking to me as if “I had been here before;” my parents, Mr. Floyd M. Alford and Ms. Carrie Terry Alford, for believing in me; my husband, Dr. Kevin Washington, for sharing his profound insight; and our daughters, Kalifa and Ayanna, for their unconditional love. Many thanks to Professor Anthony E. Cook for providing a venue for African American Critical Thought; Professors Emma Coleman Jordan, Pamela Bridgewater and Adrien K. Wing for their positive energy and encouragement to ‘add to the literature;’ and Dean Alfreda Robinson and Professor Russell Jones for their support.

*Her-Story*¹

Her-story used to be unspoken and buried deeply in his-story
 But today we give voice to her experiences
 So as to claim her Human-ness, her Spirited-ness, and her Womb-
 manness

Yes, Womb-man . . . Woman with a B
 And the B stands for Black
 Because the Black Wom(b)man's Womb
 Has been historically defined as a Cash Crop, Discovery Zone,
 Unworthy Crack Infested Momma and more, however the definer
 could not contain her,
 Because those who could see, shut their eyes so as not to see
 Her-story.

Her-story has just begun to unfold
 Because today we see her Human-ness, her Spirited-ness, and her
 Womb-manness
 Standing at the intersection of Race, Class and Gender
 With our herstorical lens in place.
 We see that for the Black wombian, it is impossible to choose
 between
 Race or Gender or Class
 For she is born in a race expressing gender and society puts the
 issue of class in her face.
 So every shut eye ain't sleep
 Because her-story is yet to be told.

INTRODUCTION

The proverb "Every Shut Eye, Ain't Sleep" is one I grew up hearing while growing up in Shreveport, Louisiana. As a product of two working parents, I spent a lot of time with my paternal grandmother, Gertrude Sims Alford. She was the caretaker for her own grandchildren as well as her sisters' grandchildren and great grandchildren. As I look back on my life, I sincerely believe that it was the time that I spent with her during my youth that helped me to

1. An original unpublished poem written by the author.

presently “see” because of the benefit of her wisdom. I remember sitting on the porch with her as she napped. When I moved, she looked out of one eye and said, “Every shut eye, ain’t sleep.” When I was a child, I heard the words but really didn’t know what she meant; today with much reflection I am able to see what she was saying.

The impetus for using this particular proverb and relating it to the subject of crack cocaine sentencing and the reproductive rights of Black women lies in the call to “search the feminist soul” from a Critical Race Feminist (“CRF”) perspective.² My personal search begins with a reminder that the “[B]lack wombmans sphere is self-defining, in that she is ‘bone black’ with a womb, having the ability to create and protect life, both biologically and figuratively.”³ For purposes of this paper, I will address societal regulations imposed upon the Black wombmans ability to control her reproductive rights.

As we – Critical Race Feminist theorists who are becoming more empowered Critical Race Feminist activists – engage in necessary dialogue, there must be an appropriate point of departure. Imagine if you will, sitting on the porch called “Life” being lulled to sleep with lethal dosages of negative news about “bad Black boys and their bad Black mothers” on crack, “crackheads,” crack mothers, and crack babies — all at the expense of hard earned taxpayer dollars. It is enough to make anyone keep their eyes shut. But once CRF theorists open our eyes, we will see what I refer to as “her-story.”⁴ We will also see that it is time to move into action mode in order to address the illusion of reproductive rights for Black women.

I. BLACK WOMEN STANDING AT THE INTERSECTION OF RACE, CLASS, AND GENDER

Professor Kimberle Crenshaw posits that “the intersectional experience is greater than the sum of racism and sexism, any analysis

2. See Deleso Alford Washington, “The Feminist and Legal Theory Project: Celebrating Twenty Years of Feminist Pedagogy, Praxis, and Prisms,” A Washington College of Law Founders’ Day Event (March 18-19, 2004) (describing the panel topic as presented by the author during the March symposium).

3. Deleso Alford Washington, *Exploring the Black Wombman’s Sphere and the Anti-lynching Crusade of the Early Twentieth Century*, 3 GEO. J. GENDER & L. 895, 895 (2002) (identifying a “Black wombmans sphere” in stark contrast to the “woman’s sphere” during the nineteenth century, and examining the rarely discussed phenomenon of Black women who were lynched during this period, as well as Black women who led the anti-lynching crusade).

4. The author defines “her-story” as the Black woman’s story that centers around her particularized experiences as she stands at the intersection of race, class and gender. It should be noted that “her-story” includes abusive historical experiences as focused on in this paper as well as celebratory ones. The author is grateful to the SisterSong Women of Color Reproductive Health and Sexual Rights National Conference held in Atlanta, Georgia, on November 13-16, 2003, for providing a sacred space for many “her-stories.”

that does not take intersectionality into account cannot sufficiently address the particular manner in which Black women are subordinated.”⁵ The particularized and unique experiences of Black women cannot adequately be independently addressed as race, class or gender issues.⁶ The multi-dimensionality of the Black woman born into a race, expressing gender in a class-oriented patriarchal society mandates awareness of the “intersection.”⁷ As the Black woman stands at the intersection, she needs to be able to see before she gets hit with societal rhetoric that purports to define but ultimately confines her by either/or propositions (i.e. either discrimination based upon race or class or gender). The intersection of race, class and gender provide an approach to “seeing” the Black woman. As Professor Pamela Bridgewater correctly points out,

Those of us interested in creating a feminist theory that speaks to all women will find that once we see these women, their lives and the lives of their children as feminist concerns, we will be better prepared to develop appropriate feminist theories and legal strategies.⁸

In my opinion, one such feminist legal theory worthy of review and deep introspection as to Black women is the Critical Race Feminist Perspective.

A. Critical Race Feminist Perspective

The Critical Race Feminist Perspective is definitive, yet expansive. It is definitive in that its genesis is rooted in critical legal studies and critical race theory.⁹ According to Professor Adrien Wing:

Critical legal studies attempts to expose the differential power

5. Kimberle Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Anti-Discrimination Doctrine, Feminist Theory and Anti-Discrimination Politics*, 1989 U. CHI. LEGAL F. 139, 140 (arguing that Black women’s unique experiences warrant a separate analysis, apart from the single-axis analysis, which acknowledges discrimination based upon the intersection of race and gender).

6. *See id.* at 149-50 (explaining that Black women’s needs are often not met because they are too broad to fit into the categories that discrimination discourse provides).

7. *See id.* at 152 (describing how the single-issue framework of discrimination discourse marginalizes other issues and hinders development of adequate theory to address the problems of intersectionality).

8. Pamela Bridgewater, *Connectedness and Closeted Questions: The Use of History in Developing Feminist Legal Theory*, 11 WIS. WOMEN’S L.J. 351, 361 (1998) (exploring why feminists seeking honest answers to complex questions regarding women of color should examine the historical experiences of women of color).

9. *See* Adrien K. Wing & Christine A. Willis, *From Theory to Praxis: Black Women, Gangs and Critical Race Feminism*, 11 LA RAZA L.J. 1, 2-3 (1999) (detailing the development of Critical Race Feminism from both critical legal studies and critical race theory to then utilize the CRF approach to center Black women in the discussion of gangs).

relationships that exist throughout society in supposedly neutral or objective concepts. Deconstructing such concepts aids in analyzing and understanding the relationship between law, racism and white privilege. Critical race feminism draws from critical legal studies the idea of deconstruction along with the critical analysis of the traditional legal canon.¹⁰

It should be noted that critical race theory embraces the critical legal studies' "deconstruction methodology to challenge racial orthodoxy."¹¹ It is critical race theory's challenge to interpret the law while placing emphasis on the unspoken issue of race.

The expansiveness of CRF is evidenced by the utilization of critical race theorists' "technique of storytelling and narrative analysis to construct alternative social realities."¹² As Wing surmises, "[t]hese narratives aid in exposing the reality of racism and validate the experiences of people of color."¹³ The CRF Perspective is integral to the survival of the Black woman's unique experiences and her interaction with the law; otherwise, "her-story" would not be valued as worthy of being told.

The CRF approach to interpreting law shapes the legal discourse on Black women and crack cocaine sentencing with the benefit of "diurnal reasoning."¹⁴ Examining the Black woman in her totality - her Humanness, her Spiritedness, and her Wombmaness - must be done both from a past and a present perspective. The information that is not "neatly categorized or compartmentalized"¹⁵ lies deep in the genetic memory of the Black woman's womb. It is information that is not only present in our current lives but also that is suppressed and maintained in her-stories from past lives.

In my search for the feminist soul, I must address a CRF notion called "group spirit injuries."¹⁶ I add to the notion of Group Spirit

10. *Id.*

11. Adrien K. Wing, *A Critical Race Feminist Conceptualization of Violence: South African and Palestinian Women*, 60 ALB. L. REV. 943, 947 (1997) (tracing the genesis of CRF and advocating the use of the CRF approach to examine violence against women, under both international and foreign domestic law).

12. Wing & Willis, *supra* note 9, at 3.

13. *Id.*

14. See Kenneth B. Nunn, *Law as Eurocentric Enterprise*, 15 LAW & INEQ. 323, 334-35 (1997) (explaining that "diurnal reasoning" generates "both/and" conclusions, thus facilitating consideration of information that cannot be strictly categorized). In contrast, eurocentric culture favors reasoning that is dichotomous, describing the world in rigid pairs of opposites. *Id.* at 334.

15. *Id.* at 333-35 (concluding that a eurocentric society's propensity to compartmentalize information produces cultural factors that shape all social products within its culture).

16. Adrien Katerine Wing & Sylke Merchan, *Rape, Ethnicity, and Culture: Spirit Injury from Bosnia to Black America*, 25 COLUM. HUM. RTS. L. REV. 1, 1 (1993) (discussing the physical and psychological effects of rape in the context of spirit

Injury by expounding on what I refer to as the intergenerational factor ("I-factor"). The I-factor of Group Spirit Injury affects the psycho-spiritual health of living persons. In addition, the I-factor includes the effect that the psycho-spiritual condition of past living persons has on the physical health of their progeny.

B. "Her-storical" Lens

I urge the use of the "her-storical" lens to critically examine the often overlooked issue of Black women's lives, which traces particularized historical events to present day manifestations as they relate to the reproductive health and crack cocaine sentencing of Black women. The "her-storical" lens enhances one's ability to see a continuum of race, class and gender abuse from the past to the present. More specifically, it empowers the "seer," a CRF theorist, to critically examine "her-story" which includes the particularized experiences of Black women. In turn, the "seer" can become a "doer," a CRF activist. It is my desire that using the "her-storical" lens will allow us to view the I-factor's impact on Group Spirit Injury in the realm of Black women's reproductive health and the crack cocaine sentencing process.¹⁷

"Her-story," the Black woman's story, cannot be maintained in the background of history. The Black woman's body has known reproductive regulations¹⁸ and reproductive restraints.¹⁹ Her womb has been used as a reproductive resource center²⁰ and as a receptacle

injury). According to Wing and Merchan, "[s]pirit injury on a group level is the cumulative effect of individual spirit injuries, which leads to the devaluation and destruction of a way of life or of an entire culture." *Id.*

17. See *id.* at 26-30 (asserting that the untreated spirit injury inflicted on American Black women by denigrating their reproductive capacity is partially responsible for breaking down Black America's social fabric).

18. See DOROTHY ROBERTS, *KILLING THE BLACK BODY: RACE, REPRODUCTION, AND THE MEANING OF LIBERTY* 4-5 (1997) (arguing that "[t]he systematic, institutionalized denial of reproductive freedom has uniquely marked [B]lack women's reproductive lives"). The long history of dehumanizing attempts to control Black women's reproductive lives can be traced from the slave masters' economic stake in their female slaves' fertility to the campaign in the late 1990s to restrict welfare mothers' fertility by requiring insertion of the Norplant birth control device as a precondition to receiving welfare aid. *Id.* at 3-5.

19. *Cf. Loving v. Virginia*, 388 U.S. 1, 11-12 (1967) (holding that because the only justification for marriage and anti-miscegenation laws was to promote and reinforce White supremacy, prohibiting interracial marriage has no valid legislative purpose and violates the central meaning of the Equal Protection Clause); see also Emily Field Van Tassel, *Only the Law Would Rule Between Us: Antimiscegenation, the Moral Economy of Dependency, and the Debate Over Rights After the Civil War*, 70 *CHI-KENT L. REV.* 873, 876-77 (1995) (arguing that post slavery anti-miscegenation laws, which created implicit reproductive restraints on Black women, revealed the socio-psychological sentiment that interracial marriage between White men and Black women challenged manhood's definition).

20. See Wing & Merchan, *supra* note 16, at 27 (explaining that the offspring of

or dumping ground for the sexual pleasure of those in power.²¹ The Black woman's womb has been viewed as a contagion subjected to sterilization laws and abuses. Her womb has served and continues to serve as a discovery zone for the experimentation of contraceptives under the auspice of welfare reform or for the sake of advancing scientific knowledge.

Employing a critical race feminist perspective is necessary to contextualize the illusion of reproductive rights for Black women.²² Historically, Black women were encouraged and often forced to have babies in order to create and maintain a cash crop of human labor during enslavement.²³ The enslaved Black woman was a so-called "breeder" woman under the regime of slavery.²⁴ The duties of a breeder woman predisposed her to a disorder called vesico-vaginal fistula, a medical condition involving internal tears in the vaginal wall leading to urinary and sometimes fetal incontinence,²⁵ most often caused during traumatic childbirth.²⁶ It was the enslaved Black woman, including a woman named Anarcha and many other African women, who were used as reproductive resource centers to advance medical knowledge and discover a cure for this gynecological

interracial unions between a White slave owner and his Black slave usually became slaves and served to expand the slave owner's property without cost to the slave owner).

21. See, e.g., *id.* (noting that a White slave "master" could legally rape his slaves because it was not a crime to rape one's property and that rape was "part and parcel of [W]hite man's subjugation of a people for economic and psychological gain").

22. See Terry Andrea Kapsalis, *The Pelvic Exam as Performance: Power, Spectacle, and Gynecology* (1994) (unpublished Ph.D. dissertation, Northwestern University) (on file with the Northwestern University Library) (explaining the history of reproductive rights suppression faced by Black women).

23. See Barbara L. Bernier, *Class, Race, and Poverty: Medical Technologies and Sociopolitical Choices*, 11 HARV. BLACKLETTER L.J. 115, 128 (1994) ("[T]he female was in essence a breeder whose slave children were seen as 'valuable units of property.')" (footnotes omitted); ROBERTS, *supra* note 18, at 4 (emphasizing the slave master's economic stake in the bonded slave woman's fertility).

24. See Bernier, *supra* note 23, at 128 (elaborating that slavery's legal construct contributed to the "breeder" status of the female slave by establishing legal status through one's slave mother in place of English law's identification through one's father).

25. See generally DEBORAH KUHN MCGREGOR, FROM MIDWIVES TO MEDICINE: THE BIRTH OF AMERICAN GYNECOLOGY 33 (1998) (defining vesico-vaginal fistula and noting that in the mid-nineteenth century there was no cure for this painful ailment). The vaginal tears of one suffering from vesico-vaginal fistula caused her to suffer with continual dribble of urine into the vagina. See *id.* at 45 (illustrating typical symptoms of vesico-vaginal fistula, such as lack of bowel movement control, through the story of a Black enslaved woman named Anarcha).

26. See *id.* at 33-34 (elaborating that vesico-vaginal fistula occurred when a woman was in childbirth for a period of many hours or days such that the infant's head pressed on the bony pelvic floor, cutting off circulation to the soft vaginal tissues covering the area and eventually cutting off necessary oxygen).

problem.²⁷

The “her-story” of Anarcha lays the foundation for the development of gynecology as a medical specialty in Montgomery, Alabama.²⁸ It also places these Black women at the intersection of race, gender and class in the middle of the nineteenth century. J. Marion Sims, M.D. was a physician who purchased his patients under the institution of slavery to repair the so-called property, the enslaved Black woman, back to its working condition as a breeder woman.²⁹ From 1845-1849, Dr. Sims conducted cruel surgical exploitation³⁰ on Black enslaved women in his backyard hospital in Montgomery, Alabama.³¹

Although history praises Dr. Sims as the “Father of Modern Gynecology” and the “Architect of the Vagina,” the use of a “her-story” lens allows us to examine the power differential between the enslaver and the enslaved and the doctor and his enslaved patient.³² During Anarcha’s delivery of her first child, she suffered a recto-vaginal fistula. Sims described her condition:

[Anarcha] had not only an enormous fistula in the base of the bladder, but there was an extensive destruction of the posterior wall of the vagina, opening to the rectum. . . . The urine was running day and night, saturating the bedding and clothing, and producing

27. See MICHAEL BYRD & LINDA A. CLAYTON, AN AMERICAN HEALTH DILEMMA: A MEDICAL HISTORY OF AFRICAN AMERICANS AND THE PROBLEM OF RACE: BEGINNINGS TO 1900, at 273 (2000) (describing the plight of Anarcha and other Black enslaved women, whom the “Father of Gynecology,” Dr. J. Marion Sims, exploited to find a cure for vesico-vaginal fistula and advance his surgical career).

28. See *id.* at 273-74 (stating that Dr. Sims operated on enslaved women like Anarcha twenty or thirty times without anesthesia, sometimes exposing their genitalia to the public during these operations); see also *id.* at 273 fig.5.4 (depicting a Robert Thom painting that captures Dr. Sims’ subjugation of the Black slave women upon whom he performed repeated exploratory operations).

29. See *id.* at 273 (emphasizing the inhumane way Dr. Sims treated the Black enslaved women “patients” by noting that he purchased a Black woman in order to perform painful operations on her).

30. See Kapsalis, *supra* note 22, at 39-40, 55 (describing the praise in medical history texts that Dr. Sims received for his contributions to contemporary gynecology despite his cruel use of enslaved women as experimental patients).

31. See *id.* at 55-56 (proffering the theory that society’s acceptance of Dr. Sims’ exploratory gynecological surgery on Black enslaved women at the turn of the century was due in large part to the view that Black women were triply pathological because of their stigmatized race, sex, and vesico-vaginal fistula disease). Black female sexuality in the nineteenth century was characterized as “heathen, lascivious, and excessive” and the Black woman’s skin color was viewed as a diseased version of “normal” white skin. *Id.* The theory that the Black person’s skin color and additional physiognomy resulted from congenital leprosy was frequently accepted in the nineteenth century. *Id.* at 56 & n.90 (demonstrating nineteenth century White America’s perception of the Black female body as diseased even prior to her affliction with vesico-vaginal fistula).

32. See *id.* at 39-40 & n.2 (expressing shock at the large extent to which Sims received worldwide fame and continues to receive acclaim today for his advances in gynecological medicine despite his unethical experiments on enslaved women).

an inflammation of the external parts wherever it came in contact with the person, almost similar to confluent smallpox, with constant pain and burning. The odor from this saturation permeated everything . . . and, of course, her life was one of suffering and disgust.³³

Sims' categorical definition of Anarcha's life as one of "suffering and disgust" indicates his sense of power over Anarcha. He disregarded the additional degree of suffering and disgust that his four years of surgical experimentation placed on her life. From Sims' perspective as a medical master, Anarcha's body and particularly her reproductive parts belonged to him. During the process of repair/experimental surgeries on Anarcha and other enslaved Black women, Sims perfected his surgical skills and found a cure for vesico-vaginal fistula, after Anarcha's thirtieth operation.³⁴ Moreover, Dr. Sims' belief that Blacks did not perceive pain as did Whites, demonstrated by his decision to withhold anesthesia from Black women in pain while administering anesthesia to White women in pain,³⁵ places the reproductive rights of Black women at the intersection of gender, race and class.

According to Michael Byrd and Linda Clayton, Dr. Sims also addicted the enslaved Black women to opiates³⁶ to manipulate the post-operative process and modulate their bowel and bladder function.³⁷ "Her-story," viewed with the benefit of a "her-storical" lens, would define this treatment as inhumane in light of the physical, mental, and spiritual suffering that the enslaved women endured. In contrast, "his-story" sheds light only on the result; that is, the medical advances in the study and practice of gynecology derived from Dr. Sims' experimental operations on Black enslaved women.³⁸ The I-factor of Group Spirit Injury manifested through the "her-story" of Anarcha and other enslaved Black women in the area of reproductive

33. See MCGREGOR, *supra* note 25, at 46 (quoting Dr. Sims' cold and objective description of Anarcha's suffering from recto-vaginal fistula).

34. See Kapsalis, *supra* note 22, at 55 (explaining that Sims' cure for the successful repair of the fistula was to use a specially made silver wire suture in the operation instead of the widely used silk thread).

35. See BYRD & CLAYTON, *supra* note 27, at 273 (relating Dr. Sims' belief that not only did Black people not experience pain as Whites did, but also that they did not have any morals).

36. See *id.* at 274 (explaining that the opiates Dr. Sims distributed to his enslaved patients in the post-operative stage were addictive equivalents to morphine or heroin).

37. Cf. *id.* at 273-74 (exhibiting Dr. Sims' belief that the Black slave's body was his experimental property not only in the operation stage, but also during the post-operative healing process).

38. See Kapsalis, *supra* note 22, at 39-40 (demonstrating the result-oriented praise that Dr. Sims received for his advances in the field of gynecology).

medical advancement is one of dehumanization. These Black enslaved women were treated, not as human beings, but as scientific objects. They were the “cultural others”³⁹ used solely to gain knowledge about the female reproductive anatomy.⁴⁰

Fast-forward 145 years later to the 1990s. The I-factor of Group Spirit Injury has neither been acknowledged nor discussed. Consequently, the 1990s marked a period of generational poverty, suppressed pain, crack cocaine, and the reality that it was no longer financially lucrative for poor Black mothers to have more Black babies. However, there remains a need for the Black woman’s body to be viewed as a “cultural other,” but not to reproduce more Black babies.⁴¹ Instead, in the 1990s, the Black woman’s womb was treated as a reproductive resource center for gathering medical knowledge about controlling birth through long-term hormonal contraceptives such as Norplant⁴² and Depo-Provera.⁴³

In the 1990s, U.S. legislators and policymakers focused attention on Norplant as a potential method of domestic population control.⁴⁴ The notion of domestic population control is intricately tied to interests in eugenics traditionally defining Black people and other people of color as unworthy and less suitable than Europeans.⁴⁵

39. See MARIMBA ANI, YURUGA: AN AFRICAN-CENTERED CRITIQUE OF EUROPEAN CULTURAL THOUGHT AND BEHAVIOR 402-04 (1994) (defining the “cultural other” as a creation of imperialistic European culture whereby peoples with non-European cultural histories and traditions are categorized as nonhuman, and therefore, undefined).

40. See *id.* at 403 (explaining that the “cultural other” is a conceptual construct that becomes the proper receptacle for what would otherwise be considered unsupportable, unsanctioned behavior). Because the “cultural other” is not fully human “the person (object) . . . can be treated in any manner – with an unlimited degree of hostility and brutality.” *Id.*

41. See ROBERTS, *supra* note 18, at 3 (purporting that present day political rhetoric and policies continue to degrade Black women’s reproductive decisions by proposing aggressive promotion and use of contraceptives as a solution to the problem of the growing Black underclass).

42. See COMMITTEE ON WOMEN, POPULATION, AND THE ENVIRONMENT, DANGEROUS CONTRACEPTIVES: NORPLANT AND DEPO-PROVERA (describing Norplant as a hormonal contraceptive consisting of six capsules that are inserted into the upper arm, where they slowly release small amounts of progestin), at <http://www.cwpe.org/sex%20lies%20&%20contraception%20pack/dangerous%20contraceptives%20norplan%20Depo.pdf> (last visited Feb. 21, 2005).

43. See *id.* (defining Depo-Provera as a hormonal contraceptive injected into a woman’s bloodstream every three months, thereby suppressing ovulation by making the cervical mucus uninhabitable for sperm survival).

44. See ROBERTS, *supra* note 18, at 104 (noting that “policymakers in the United States seized upon Norplant,” thus demonstrating a will to control women’s reproductive capacity).

45. See Robert J. Cynkar, *Buck v. Bell: “Felt Necessities” v. Fundamental Values?*, 81 COLUM. L. REV. 1418, 1427 (1981) (explaining that the study of eugenics and its use of the Binet-Simon tests confirmed what many people at the time had guessed for years: Blacks were inferior). “All of the practical recommendations of eugenics

Here, the I-factor of the Group Spirit Injury is the degradation of Black women. Once we identify this factor, society's refusal to recognize the Black woman's status as "Mother" is highly apparent. This inevitable denial is most apparent when viewing the facts surrounding a Black mother's crack cocaine sentencing process through a "her-storical" lens.

II. CRACK COCAINE SENTENCING OF BLACK MOTHERS AND ITS INTERGENERATIONAL IMPACT

In the Critical Race Feminist tradition of storytelling, visualize a southern Grandmother talking to her Granddaughter before she goes to college up north.

Grandmother says "Be Careful when you go out, You know Elsie had a daughter that went college . . . fell in love, so she thought . . . with a drug dealer. He bought her nice things. Drove a fast car. I heard they call it crack, say you cook it, course I don't know what it taste like, but it must be powerful. Elsie's daughter carried it, so he could sell it to folk . . . while she was full of baby - eight months- they tell me - well anyway, a drop off here and there, until she dropped off some to the FBI. And they took her down to the jail. They questioned Elsie's daughter till she got sick and fell out - exhausted with the baby and all. Tell me, Elsie's daughter got to do some real time in jail. Elsie will have to raise her grandchild. If you ask me, the real crime was that Elsie's daughter couldn't tell what she didn't know.

Grandmother says, "You go, but be careful. Don't get blinded by the light and lose your sight." The granddaughter returns home on Spring Break.

Grandmother says, "You know Elsie's other daughter was on that stuff, they call crack and the judge ordered her to get birth control, one shot and probation or prison time. They call it 'Nor —plants' or something like that, I hear it's a shot in the arm that will stop you from having babies. Well, Elsie's daughter got sick as a dog, and bled like a hog for nine months straight. That Judge didn't care nothing about her, just a quick fix, so he thought. But believe me, anything that man can give you to stop your Ms. Mary (menstrual cycle) - you need to run the other way . . . cause it will do more harm than what they want to tell you.

[including sterilization] were based on the fundamental premise that 'much social inadequacy is of a deep-seated biological nature, and can be remedied only by cutting off the human strains that produce it.'" *Id.* at 1428 (exploring the process of those proposing the forced use of sterilization and birth control amongst society's feeble members, such as the mentally ill).

Before you left for school, I told you that Elsie's oldest daughter was in love, so she thought, but with the time she got in jail – no babies will be coming from her and now Elsie's baby daughter been ordered to take that shot to stop her from having babies.

Since a woman is born with all the eggs she'll ever have; when Elsie carried her daughters in her womb, she carried her granddaughters yet to be born. But it seems to me, that somebody don't want Elsie's eggs to hatch.

"You go, but be careful. Don't get blinded by the light and lose your sight."

Despite Grandmother's warning to not get blinded by the light and eventually lose one's sight, when the facts converge (through storytelling and actual cases),⁴⁶ crack cocaine and the illusion of reproductive rights combine to create what I refer to as the Prison Industrial Complex ("PIC") shot. The PIC shot has the effect of a long-term contraceptive because it controls the woman's reproductive freedom or her illusion of freedom. While the public outcry to "do something about these women who have baby after baby while on drugs or on welfare"⁴⁷ facially appears to cry out against the potential harm to the unborn baby, the benefit of the "her-storical" lens proves that the unspoken issue is really about the fitness of the Black mother. As Martha Fineman explains, the "deviant" mother is constructed out of poverty discourses.⁴⁸ Adrienne Wing expounds on an expansion of the definition of "mothering" as Critical Race Feminist praxis in the Black community by exploring notions of survival, nurturing, and transcendence.⁴⁹ Unfortunately, without the benefit of a Critical Race Feminist Perspective, the idea of fitness is relegated to the actions of the Black mother, rather than the fitness of the sentence

46. See Phyllis Goldfarb, *Counting the Drug War's Female Casualties*, 6 J. GENDER RACE & JUST. 277, 281-91 (2002) (providing a dozen federal cases detailing a pattern in which women were sentenced to long mandatory sentences for drug offenses due to a lack of valuable information about a plea bargain, despite their minimal involvement in the crime).

47. Risa E. Kaufman, *State Eras in the New Era: Securing Poor Women's Equality by Eliminating Reproductive-Based Discrimination*, 24 HARV. WOMEN'S L.J. 191 (2001) (explaining that those who support reproduction related welfare provisions justify restrictions "to prevent women receiving welfare from 'irresponsible procreation'").

48. See MARTHA ALBERTSON FINEMAN & ISABEL KARPIN, *MOTHERS IN LAW: FEMINIST THEORY AND THE LEGAL REGULATION OF MOTHERHOOD* 218 (1995) (discussing how poor, single mothers deviate from the traditional paradigm of marriage and family, which often brings social sanctions).

49. See Adrienne K. Wing & Laura Weselmann, *Transcending Traditional Notions of Mothering: The Need for Critical Race Feminist Praxis*, 3 J. GENDER RACE & JUST. 257, 275-81 (1999) (exploring the concept of mothering from a Critical Race Feminist Perspective, and defining "praxis" as "encouraging change through putting theory into practice").

for the drug crime, which overlooks the intersectionality of race/gender disparities in sentencing for possession of crack cocaine and powder cocaine.

A study reported in the *Journal of the American Medical Association* found that the physiological and psychoactive effects of cocaine are similar regardless of its form (powder or crack).⁵⁰ However, the study also showed a greater abuse liability, greater potential for dependence, and more severe consequences when cocaine is smoked or injected as powder.⁵¹ The study concluded that the federal sentencing guidelines for crack were excessive and that those addicted would be better served with treatment.⁵² Despite the findings of the above-mentioned study, the federal criminal penalties maintain a 100-to-1 quantity ratio. The penalty for possession and distribution of crack cocaine is one hundred times more severe than the penalty for the exact same amount of powder cocaine.⁵³ The devastating aspect of the 100-to-1 quantity ratio is the disproportionate impact on Blacks and people of color who become incidental collateral in the so-called "war on drugs."

As Goldfarb notes:

The vast majority of women incarcerated for drug offenses are women of color. The latest figures are that ninety-one percent of women sentenced to prison for drug offenses in New York State are women of color. From 1986-1991, the number of black female drug offenders in state prison rose 828%, New York prisons reported incomes of less than \$10,000 prior to their incarceration. Of course, the sentencing guidelines and mandatory minimum sentencing statutes are, on their face, gender-neutral and many men are serving sentences for peripheral roles in drug activity.

50. See Dorothy K. Hatsukami, Ph.D. & Marian W. Fischman, Ph.D., *Crack Cocaine and Cocaine Hydrochloride: Are the Differences Myth or Reality?*, 276 J. AM. MEDICAL ASS'N 1580, 1586 (1996) ("[T]he acute and chronic use of cocaine, regardless of the route of administration, results in similar psychological, social, and medical sequelae.").

51. See *id.* (explaining that fewer individuals use intravenous cocaine hydrochloride than crack cocaine because crack cocaine is cheaper and more readily and easily administered).

52. See *id.* at 1586-87 (arguing that if treatment decreases the likelihood that the individual would stop selling cocaine, it makes more sense to try treatment before extensive jail time); AMERICAN BAR ASSOCIATION, JUSTICE KENNEDY COMMISSION, REPORT TO THE HOUSE OF DELEGATES (recommending that states, territories, and the federal government should fund treatment alternatives to incarceration of offenders who may benefit from substance abuse treatment), at <http://www.abanet.org/media/kencomm/rep121a.pdf> (last visited Feb. 21, 2005).

53. See Nkechi Taifa, *Codification or Castration? The Applicability of the International Convention To Eliminate All Forms of Racial Discrimination to the U.S. Criminal Justice System*, 40 HOW. L.J. 641, 659-64 (1997) (noting that under federal law, the criminal penalty for possession of only five grams of crack cocaine and for possession of five hundred grams of powder cocaine is the same).

Nevertheless, given criminological findings that women as a group have limited roles in the drug economy, a sentencing structure which treats offenders as fully responsible for a quantity of drugs to which they have minimal connection can fairly be said to have pronounced effects on women as a group, even if its impact is not felt exclusively by women.⁵⁴

The Critical Race Feminists' notion of Group Spirit Injury contextualizes the degree of harm experienced by women of color, particularly Black women who have historically been devalued. A "her-storical" lens enhances one's ability to see the racial and gender disparities in the sentencing of crack and powder cocaine, especially as it relates to the traditional concept of motherhood. Black mothers who are poor crack addicts are punished because "the combination of their poverty, race, and drug addiction is seen to make them unworthy of procreating."⁵⁵

The "her-storical" illusion of reproductive rights for Black women is replete with examples of deliberate preoccupation with the womb of Black women. This preoccupation is exemplified in the plight of the enslaved breeder women, and conversely, by permanent sterilization, advanced by eugenical interests, or temporary sterilization efforts, caused by long-term hormonal contraceptives, such as Norplant and Depo-Provera. A "her-storical" critique of Black motherhood reveals an illusion of reproductive rights, which incidentally impacts the domestic population.

CONCLUSION

The Black woman's womb has "her-historically" been a reproductive resource center that laid the foundation for the medical specialty of gynecology and is presently used as a discovery zone for the effects of long-term hormonal contraceptives. The I-factor of Group Spirit Injury stemming from the opium sedated, enslaved Black women who were used as a human gynecological experiment should be critically examined through a "her-storical" lens as one considers crack cocaine sentencing and reproductive rights for Black women from a Critical Race Feminist Perspective.

Hence, the "shut eyes" of CRF theorists must be opened by advocacy, education, and policymaking in order to address the new,

54. Goldfarb, *supra* note 46, at 293 (noting that men's state and federal incarceration rates have risen 200-300 percent since 1980, while women's rates have risen an astounding 500-600 percent).

55. Dorothy E. Roberts, *Punishing Drug Addicts Who Have Babies: Women of Color, Equality, and the Right of Privacy*, 104 HARV. L. REV. 1419, 1472 (1991) (examining the punishment meted out upon Black women drug addicts who are pregnant and their right of privacy).

long-term contraceptive, the PIC shot, which is injected in the arms of Black women and women of color during the sentencing phase for using crack cocaine while pregnant, or transporting crack cocaine while in love. Irrespective of the present-day factual scenario, the results have a “her-storical” foundation: the illusion of reproductive rights.

On the one hand, the judicial system feigns concern for the welfare and love of Black babies and, on the other hand, the law attributes no redeeming value for the power of love in terms of bargaining for a lesser sentence on behalf of Black mothers or the desire to procreate. CRF activists must begin to engage in critical dialogue and set forth steps to address the impact of lengthy crack cocaine sentencing of women of color, particularly Black women, and address judge-ordered contraceptives as the obvious means of attaining and maintaining population control in the twenty-first century. Additionally, we must address the I-factor of Group Spirit Injury, which has the potential, once acknowledged to empower CRF activists because the injuries did not kill the Spirit of the group. On the contrary, the wounds represent a reminder of our collective obligation to utilize a “her-storical” lens when examining present day phenomena because “every shut eye, ain’t sleep.”

