


## Misconceiving Mothers: Legislators, Prosecutors, and the Politics of Drug Exposure, by Laura E. Gomez

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# Book Review

## LAURA E. GÓMEZ, *MISCONCEIVING MOTHERS: LEGISLATORS, PROSECUTORS, AND THE POLITICS OF PRENATAL DRUG EXPOSURE*<sup>1</sup>

JOSEPH R. HENRY

The story begins with the imagery of a billboard. A newborn baby lies in an incubator covered with tubes going into and out of his body. The caption reads: "He couldn't take the hit. If you're pregnant, don't take drugs."<sup>2</sup> While such an image is universally recognized and understood today, little more than a decade earlier few would have made any connection.<sup>3</sup> Within a span of just a few years in the mid-1980s, the issue of prenatal drug exposure went from being nonexistent to omnipresent.<sup>4</sup> And once this new social problem was discovered, armies of private and public bureaucrats emerged from their cubicles with a call "to do something" about it.<sup>5</sup>

Laura E. Gómez's *Misconceiving Mothers* is about that step—how prenatal drug exposure went from its discovery as an issue to its ultimate institutionalization within the state apparatus.<sup>6</sup> Gómez sees the remarkable success of the issue as the result of the confluence of two political trends dating from that period: the beginning of the war on drugs and the renewed assault on abortion rights.<sup>7</sup> Her overview is not politicized and does not attempt to advocate any particular solution for the problem. In fact, the "problem," such as it is, exists only as a backdrop for her sociological analysis of the process itself. Gómez contends that this process from discovery to institutionalization was fundamentally political in nature.<sup>8</sup> Various actors competed to define the issue according to their terms and to leave their stamp on the problem's solution.<sup>9</sup> What is of particular interest to Gómez is how the treatment of prenatal drug exposure as an issue underwent a dra-

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1. LAURA E. GÓMEZ, *MISCONCEIVING MOTHERS: LEGISLATORS, PROSECUTORS, AND THE POLITICS OF PRENATAL DRUG EXPOSURE* (1997).

2. *Id.* at 1.

3. *See id.*

4. *See id.*

5. *See id.* at 4.

6. *See id.*

7. *See id.*

8. *See id.*

9. *See id.*

matic transformation as it went through this process.<sup>10</sup> The issue first came to the public's attention by virtue of media hysteria over the crack epidemic; initial reports were harsh and censorious of women who used drugs while pregnant,<sup>11</sup> yet attempts by the government to treat prenatal drug exposure as a criminal issue utterly failed. Instead, the government expanded social services to offer treatment for pregnant drug users.<sup>12</sup>

In this review, I will critique Gómez's attempt to explain this tricky phenomenon. In Part I, I will summarize her analysis. Gómez sets out to demonstrate how the dynamic nature of social problems affected the government's response to prenatal drug exposure.<sup>13</sup> In particular, she argues that a coalition of women's rights organizations and medical professionals managed to shape the eventual "solution" by redefining the "problem."<sup>14</sup> In Part II, I will assess her arguments and explain what I think we can learn from them. Gómez's analytical framework offers much to those who are interested in how various political actors interact in attempting to address emerging social problems. Her treatment of the legislative process in particular reaffirms the old adage that, in politics, perception is reality. Her subsequent analysis of how prosecutors dealt with prenatal drug exposure, however, is curiously inconsistent and fails to account fully for the institutional differences between prosecutors and legislators.

### I. GÓMEZ'S ANALYSIS

Social problems, says Gómez, have predictable life cycles that consist of two main stages.<sup>15</sup> First, there is the *discovery phase*, in which the problem is first identified and brought to the people's attention.<sup>16</sup> Second, there is the *institutionalization phase*, in which the problem is officially catalogued and handled, chiefly by the government.<sup>17</sup> Gómez focuses on institutionalization in part because it "highlights the constructed nature of social problems."<sup>18</sup>

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10. See *id.* at 119.

11. See *id.* at 15-16.

12. See *id.* at 119.

13. See *id.* at 8.

14. See *id.* at 62.

15. See *id.* at 7. Gómez adopts theories developed over the past half century in the literature on social problems. See, e.g., Richard C. Fuller & Richard R. Myers, *The Natural History of a Social Problem*, 6 AM. SOC. REV. 320 (1941); see also, Joseph W. Schneider, *Social Problems Theory: The Constructionist View*, 11 ANN. REV. SOC. 209 (1985) (providing a brief history of the sociological study of social problems).

16. See GÓMEZ, *supra* note 1, at 7.

17. See *id.*

18. *Id.* at 8.

Gómez examines two areas where this institutionalization has taken place: the state legislature (where the law is made) and local district attorney's offices (where the criminal law is implemented).<sup>19</sup> She focuses on California because of its reputation as a bellwether state and because of its size.<sup>20</sup> Gómez sees the institutionalization process as inherently political, involving competing "claims-makers" who seek to define and "own" an issue.<sup>21</sup> "Claims-makers" are parties who attempt to bring attention to particular issues to encourage action dealing with those issues.<sup>22</sup> They "own" an issue by first controlling the public discourse surrounding the issue and then controlling the collective response to it.<sup>23</sup>

A. *The Discovery of the "Crack Baby" Problem and the Legislative Response*

Gómez firsts recounts how the whole "crack epidemic" began. In 1986, papers across the country began running stories about a new drug hitting the streets of America: crack.<sup>24</sup> Initial reports were sensationalist, suggesting that crack cocaine was somehow special, that it was more addictive than powder cocaine.<sup>25</sup> Following soon after these initial reports came stories about premature babies born with serious health problems.<sup>26</sup> The two phenomena were inevitably linked in the media, and the term "crack baby" was born.<sup>27</sup> Papers ran stories pro-

19. *See id.*

20. *See id.* at 4-5.

21. *See id.* at 6.

22. *See id.*; see also MALCOLM SPECTOR & JOHN KITSUSE, *CONSTRUCTING SOCIAL PROBLEMS* 73, 78-81 (2d ed. 1987).

23. *See GÓMEZ, supra* note 1, at 6; see also JOSEPH GUSFIELD, *THE CULTURE OF PUBLIC PROBLEMS: DRINKING-DRIVING AND THE SYMBOLIC ORDER* 10 (1981). Gusfield sees his concept of "ownership" as analogous to Spector and Kitsuse's "claims-making." *See id.* at 197 n.5. But while Spector and Kitsuse consider a "claim" to be something the claims-maker thinks he or she is entitled to, see SPECTOR & KITSUSE, *supra* note 22, at 78, the concept of a "claim" does not address the *power* required to shape the issue. The concept of "ownership," on the other hand, does not address the possibility of competition among social activists. It therefore seems appropriate for Gómez to treat the two concepts as distinct.

24. *See GÓMEZ, supra* note 1, at 11. The very first use of the word "crack" appeared in the *New York Times* on November 17, 1985. See Donna Boundy, *Program for Cocaine-Abuse Under Way*, N.Y. TIMES, NOV. 17, 1985, 11WC12.

25. *See GÓMEZ, supra* note 1, at 11. More recent studies have concluded that there are no differences in pharmacological effects. *See id.* Early reports also suggested that crack was 90% pure cocaine. See STEVEN R. BELENKO, *CRACK AND THE EVOLUTION OF ANTI-DRUG POLICY* 5 (1993). Estimates by the Drug Enforcement Agency, however, put the figure at anywhere between 5 and 40%, depending on the sample. *See id.* at 6.

26. *See GÓMEZ, supra* note 1, at 12.

27. *See id.* The health risks of cocaine to unborn fetuses have been largely overstated. *See id.* at 22-25. See also Claire D. Coles et al., *Effects of Cocaine and Alcohol Use in Pregnancy on Neonatal Growth and Neurobehavioral Status*, 14 *NEUROTOXICOLOGY & TERATOLOGY* 23, 31-32

filing some of the most serious drug users, treating them as if they were representative.<sup>28</sup> Gómez points out that the portrayal of crack and its users often reflected traditional stereotypes about racial minorities.<sup>29</sup> These stories had a tremendous impact on public opinion. A 1989 poll showed that eighty-two percent of the people polled felt that pregnant women who used crack should be jailed for child abuse.<sup>30</sup> In another survey, however, when the question was asked without specifically referring to crack, the number was only about half.<sup>31</sup>

No sooner had stories of an epidemic of crack-addicted babies appeared when legislators began proposing solutions to the problem. Gómez outlines the various legislative efforts to deal with prenatal

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(1992) (finding prenatal cocaine exposure affects fetal growth but does not otherwise impair a child physically or behaviorally); Bertis B. Little et al., *Is There a Cocaine Syndrome? Dysmorphic and Anthropometric Assessment of Infants Exposed to Cocaine*, 54 *TERATOLOGY* 145, 146 (1996) (finding no combination of dysmorphic features to distinguish cocaine-exposed infants from non-exposed infants); Albert J. Tuboku-Metzger et al., *Cardiovascular Effects of Cocaine in Neonates Exposed Prenatally*, 13 *AM. J. PERINATOLOGY* 1, 4 (1996) (finding no direct effects of chronic cocaine use among pregnant women on cardiac health of newborns); Nanci Stewart Woods et al., *Cocaine Use During Pregnancy: Maternal Depressive Symptoms and Infant Neurobehavior Over the First Month*, 16 *INFANT BEHAV. & DEV.* 83, 92 (1993) (finding no differences in neurobehavioral performance of cocaine-exposed infants as compared to non-exposed infants). One of the most egregious examples of media hysteria is found in the media's enthusiasm for statistics. Dr. Ira Chasnoff, an early leader in prenatal drug exposure research, found in 1989 that 11% of newborn infants had been exposed to alcohol or illicit drugs. See GÓMEZ, *supra* note 1, at 22 (citing Ira J. Chasnoff, *Drug Use and Women: Establishing a Standard of Care*, 562 *ANNALS N.Y. ACAD. SCI.* 208 (1989)). A simple extrapolation from this figure yielded some 375,000 children nationwide. See GÓMEZ, *supra* note 1, at 22. The day after Chasnoff announced this at a press conference, newspapers across the country were carrying stories claiming that 375,000 "crack babies" were born each year. See *id.*

28. See GÓMEZ, *supra* note 1, at 16.

29. See *id.* at 15.

30. See *PUB. OPINION ONLINE*, October 12, 1989, available in *LEXIS*, News Group File, Beyond Two Years.

31. See GÓMEZ, *supra* note 1, at 26. There are a number of problems with Gómez's use of poll data here. First, she cites different surveys conducted at different times. See *id.* The "other" surveys, in fact, were taken up to two or three years after the first. See, e.g., Rorie Sherman, *Bioethics Debate: Americans Polled on Bioethics*, *NAT'L L.J.*, May 13, 1991, at 1; George Skelton & Daniel M. Weintraub, *The Times Poll: Most Support Norplant for Teens, Drug Addicts*, *L.A. TIMES*, May 27, 1991, at A1. Second, not all of the poll questions are close enough in form and substance to warrant a valid comparison. For example, the *Los Angeles Times* survey asked respondents whether Norplant should be mandatory for drug-using women of childbearing age. See Skelton & Weintraub, *supra*, at A1. Nevertheless, Gómez's central assertion that the media frenzy had a rousing effect on public opinion seems secure. A more telling figure comes from tracking the results of periodic surveys questioning respondents as to what they consider to be the most important issue facing the country. A January 1985 *New York Times* survey revealed that fewer than 1% of Americans identified drugs as the most important issue. See *War: 1 Percent. Drugs: 54 Percent*, *N.Y. TIMES*, Sept. 28, 1989, at A26. By September 1989, however, that figure had reached 54%. See *id.*

drug exposure and how they came to be implemented.<sup>32</sup> The first two bills dealing with the issue were introduced into the California Legislature in 1986.<sup>33</sup> Over the next ten years, the number would reach 57.<sup>34</sup> Gómez concludes that the flurry of media reports fueled legislative interest.<sup>35</sup> In support of this conclusion, she points out that 26 of the 57 bills—nearly half—were introduced during the 1989-90 legislative session.<sup>36</sup> She then takes a look at the incidence of stories related to the issue in California's two largest newspapers.<sup>37</sup> Of a total of 148 such stories published from 1985 to 1992, some 40% of them came in 1989-90, coinciding with the peak of legislative activity.<sup>38</sup>

Gómez states that legislators relate to claims-makers in two ways. First, they are the primary audience for the first-round claims-makers among academia and in the media who first discover the issue.<sup>39</sup> Second, they serve as claims-makers in their own right.<sup>40</sup> Politicians, she notes, often seize upon hot issues in an effort to make names for themselves or to carve out ideological niches.<sup>41</sup> Gómez finds an example of this in the first two bills proposed in the California legislature.<sup>42</sup> One, sponsored by Senator Gary K. Hart, would have made available more money for "high-risk infants," including those born with illicit drugs in their system.<sup>43</sup> The other, sponsored by Senator Edward Royce, would have amended the child abuse laws to protect fetuses.<sup>44</sup> What these two very different bills were both trying to do, asserts Gómez, was define the issue according to each senator's political views.<sup>45</sup> Hart, a liberal Democrat, was seeking to define the issue as one implicating public health.<sup>46</sup> Royce, a conservative Republican, was seeking to define the issue as one implicating public morality.<sup>47</sup>

32. See GÓMEZ, *supra* note 1, at 27-40.

33. See *id.* at 27. Neither bill was enacted into law. See *id.*

34. See *id.* at 28. This would be out of a total of some 7500 bills, but given the specificity of the issue, Gómez considers the number to be rather high. See *id.*

35. See *id.* at 32.

36. See *id.* at 36. The year 1989 was also when the United States invaded Panama to arrest Manuel Noriega for drug trafficking. See BELENKO, *supra* note 25, at 7.

37. See GÓMEZ, *supra* note 1, at 29. The two papers examined are the *Los Angeles Times* and the *San Jose Mercury News*.

38. See *id.* at 30. Few of these stories had anything to do with reporting on the progress of the legislation. See *id.*

39. See *id.* at 33.

40. See *id.*

41. See *id.*

42. See *id.*

43. See *id.* (citing S.B. 987, 1985-86 Leg., Reg. Sess. (Cal. 1986)).

44. See *id.* (citing S.B. 1070, 1987-88 Leg., Reg. Sess. (Cal. 1987)).

45. See *id.* at 28.

46. See *id.*

47. See *id.*

Gómez further stresses the importance of political symbolism. Prenatal drug exposure was a perfect candidate for the “politics of substitution,” where a narrow issue is subliminally connected with another, more potent issue.<sup>48</sup> The biggest such connection that was made was with abortion.<sup>49</sup> Abortion rights advocates in particular saw this connection and fought hard against any attempts to punish mothers who used illicit drugs while pregnant.<sup>50</sup> To them, such a move could have proved to be the first step towards outlawing abortion.<sup>51</sup>

Gómez notes that about one-third of all the bills addressing prenatal drug exposure introduced in the California State Legislature were eventually signed into law.<sup>52</sup> No punitive measures, however, even made it out of committee.<sup>53</sup> Despite the harsh tone of many of the original reports in the news media,<sup>54</sup> the bills the legislature tended to pass were those that provided additional funds for education, health care, and other social services.<sup>55</sup> Gómez sees this seemingly contradictory result as the product of a political struggle between rival parties attempting to define prenatal drug exposure in a fashion palatable to their respective world views.<sup>56</sup> She explains how, early on, feminists and civil libertarians were galvanized by the 1987 prosecution of Pamela Rae Stewart for child abuse after her newborn infant died of complications of her drug use.<sup>57</sup> The feminist attack was two-fold. First, they portrayed this and any other prosecution as an attack against women in general, forcing district attorneys to reconsider the use of existing laws to punish drug-addicted mothers.<sup>58</sup> Second, they went to the legislature and lobbied against any new criminal

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48. *See id.* at 35.

49. *See GÓMEZ, supra* note 1, at 37.

50. *See id.* at 38.

51. *See id.*

52. *See id.* at 41. This would be during the period between 1983 and 1996. *See id.* Gómez points out that this rate is slightly lower than average for bills introduced into the California State Legislature. *See id.* at 142 n.1 (citing Alan Rosenthal, *The Third House: Lobbyists and Lobbying in the States*, CONG. Q., 1993).

53. *See id.* at 41.

54. *See GÓMEZ, supra* note 1, at 15-16.

55. *See id.* at 41. The most important of these bills was the “Alcohol and Drug-Affected Mothers and Infants Act” sponsored by Assemblywoman Jackie Speier. *See id.* at 58. First introduced in 1989, it would create a state agency to fund medical and drug treatment for impoverished pregnant drug-users. *See id.* It was passed by both houses of the legislature before it was vetoed by Governor George Deukmejian. *See id.* at 59. The following year, Speier reintroduced the bill, and it was ultimately signed into law by newly-elected Governor Pete Wilson. *See id.*

56. *See id.* at 41-42.

57. *See id.* at 42-43.

58. *See id.* at 43-44.

provisions dealing with the issue.<sup>59</sup> Instead, they insisted that the problem was medical in nature and that what these mothers needed from the government was assistance, not incarceration.<sup>60</sup> In this they were helped by a much-needed alliance with the public health sector, which gave them added nonpartisan clout.<sup>61</sup> Gómez considers this coalition key to understanding how prenatal drug exposure came in the end to be treated as a public health issue.<sup>62</sup>

### B. *The Prosecutorial Response*

Gómez next turns to the California district attorney's offices to see how local prosecutors dealt with the issue of prenatal drug exposure.<sup>63</sup> She considers examining the thoughts and actions of prosecutors an interesting counterpoint to her look at the legislature for a number of reasons.<sup>64</sup> For one, because of the lack of extensive public scrutiny or contested elections, prosecutors are generally viewed as apolitical.<sup>65</sup> Moreover, prosecutors are in the position to implement criminal policies as enacted by the legislature; this enables one to see how the "law on the books" differs from the "law in action."<sup>66</sup> Finally, prosecutors differ from legislators in that each county has an independent district attorney's office as compared to the one legislative body. This difference allows one to study the variation within the statewide system of prosecutors.<sup>67</sup>

Gómez finds that most prosecutors consider prenatal drug exposure an important issue, though not all have worked directly with it.<sup>68</sup> Their rhetoric is often consistent with the themes and tone of the initial media reports, expressing a belief that crack is somehow "different" from other drugs<sup>69</sup> and connecting the prenatal drug exposure primarily with inner-city blacks.<sup>70</sup> The prosecutors with whom she

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59. *See id.* at 44.

60. *See id.* at 50.

61. *See id.* at 44.

62. *See id.* at 62.

63. *See id.* at 63. Gómez interviewed a total of 18 prosecutors representing 16 counties. *See id.* at 64-65. Her selection was designed to be "both random and representative." *Id.* at 64.

64. *See GÓMEZ, supra* note 1, at 63.

65. *See id.*

66. *See id.* at 63-64.

67. *See id.* at 64.

68. *See id.* at 65-66.

69. The San Diego district attorney's office, for example, distributed anti-drug pamphlets touting the difference in pharmacological effects between crack and powder cocaine without any scientific support. *See id.* at 67.

70. "[I]n the lower incomes, meth is the drug for white people, crack is the drug for Black people, heroin is the drug for Hispanics." *Id.* at 69 (quoting San Diego County



spoke were actually quite open about their reliance on these stories.<sup>71</sup> Unlike their counterparts in the legislature, however, the prosecutors do not typically associate the issue with abortion.<sup>72</sup> Gómez suggests this may be because prosecutors are less politicized.<sup>73</sup>

Gómez then shifts from the prosecutors' words to their deeds. She divides prosecutors into four distinct categories based on different prosecutorial strategies that have been publicized nationwide.<sup>74</sup> Offices are labeled either very punitive (policy to prosecute fully), moderately punitive (policy to use prosecution to push mothers into drug treatment<sup>75</sup>), least punitive (policy to threaten prosecution to push mothers into drug treatment<sup>76</sup>), or inactive (policy against prosecution<sup>77</sup>). Only one-third of the offices had ever prosecuted a woman for prenatal drug exposure, and Gómez places them in the "very punitive" category.<sup>78</sup> A quarter of the offices had an express policy against prosecution or had never considered prosecution ("inactive").<sup>79</sup> The remainder had considered prosecution at one time or another but had not acted; these counties she does not count at all.<sup>80</sup> Gómez notes the absence of any action in the middle categories and concludes that, due to their tendency to collect at the extremes, prosecutors' policies on prenatal drug exposure are influenced by symbolic politics.<sup>81</sup>

Despite many prosecutors' interest in pursuing the issue, few had actually brought forward cases against drug-using mothers.<sup>82</sup> To explain this phenomenon, Gómez theorizes about what institutional fac-

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District Attorney Ed Miller). Half of the prosecutors with whom Gómez spoke associated particular drugs with specific racial groups, though many were uncomfortable with doing so. *See id.*

71. *See id.* at 71.

72. *See id.* at 70.

73. *See id.*

74. *See id.* at 78.

75. Such a policy was widely practiced in Charleston County, South Carolina from 1989 to 1993. *See id.* at 79. Prosecutors would work with local hospitals to reach out to pregnant drug users. *See id.* at 80. Women who tested positive for drugs would be charged with drug possession and informed by the district attorney's office that they would have to undergo drug treatment or be charged with child neglect as well. *See id.*

76. Such a policy is followed in the Second Judicial District of New Mexico in a program called "Addicted, Pregnant, and Busted." *See id.* at 81. Pregnant women arrested for nonviolent crimes, such as prostitution or drug possession, are given the option of undergoing drug treatment in order to avoid prosecution altogether. *See id.*

77. *See id.* Inaction is not always the result of policy, however. *See id.* at 82-83.

78. *See id.* at 83.

79. *See id.*

80. *See id.*

81. *See id.* at 91.

82. *See id.* at 93.

tors might cause prosecutors to balk at prosecuting. She comes up with a number of possible reasons. For one, there is a general rule against bringing weak cases.<sup>83</sup> Cases of this kind usually involve tricky questions of causation and intent that are difficult to prove.<sup>84</sup> Moreover, prosecutors have not had any support from other powerful societal institutions.<sup>85</sup> First, the California State Legislature has chosen specifically not to criminalize prenatal drug exposure, forcing prosecutors to stretch existing law in order to seek conviction.<sup>86</sup> Second, the courts have not accepted any of the theories prosecutors have used in their cases.<sup>87</sup> Third, many local agencies, on whose assistance

83. *See id.* at 102.

84. *See id.* at 105. Under the California Penal Code, proving intent for child endangerment would not be much of an issue. Although in prenatal drug cases, the mother does not likely *intend* to harm the fetus, California law requires only that the harmful act—in this case, the drug use—be willful. *See California v. Pointer*, 151 Cal. App. 3d 1128, 1134 (1984). With any other crimes requiring specific intent, however, intent may indeed become an issue. Proving causation, however, might require extensive medical testimony. *See GÓMEZ, supra* note 1, at 105.

85. *See GÓMEZ, supra* note 1, at 108-14.

86. *See id.* at 108. Prosecutors in the seminal case of Margaret Velasquez Reyes, for example, used the child endangerment statute:

Any person who, under circumstances or conditions likely to produce great bodily harm or death, willfully causes or permits any child to suffer, or inflicts thereon unjustifiable physical pain or mental suffering, or having the care or custody of any child, willfully causes or permits the person or health of that child to be injured, or willfully causes or permits that child to be placed in a situation where his or her person or health is endangered, shall be punished by imprisonment in a county jail not exceeding one year, or in the state prison for two, four, or six years.

CAL. PENAL CODE § 273a(a) (West Supp. 1998).

Although the prosecution secured a conviction against Reyes, the California Court of Appeal reversed on appeal. *See Reyes v. Superior Court of San Bernardino County*, 75 Cal. App. 3d 214, 216 (1977).

87. *See GÓMEZ, supra* note 1, at 110. In *Reyes*, the California Court of Appeal rejected the contention that drug use by a pregnant woman could constitute child abuse. *See Reyes*, 75 Cal. App. 3d at 216. Prosecutors had indicted Reyes for child endangerment under § 273a of the California Penal Code. *See id.* The court reversed her subsequent conviction, holding that a fetus did not constitute a "child" as used in the statute. *See id.* at 216-17. Prosecutors have lost every subsequent case at the trial court level. *See GÓMEZ, supra* note 1, at 110. Prosecutors in the Pamela Rae Stewart case argued that Stewart had failed to provide proper medical care for a child under § 270 of the California Penal Code. *See Jennifer Warren, Woman is Acquitted in Test of Obligation to an Unborn Child*, L.A. TIMES, Feb. 27, 1987, at B1. Despite the fact that the statute included a provision saying that "[a] child conceived but not yet born is to be deemed an existing person insofar as this section is concerned," CAL. PENAL CODE § 270 (West 1988), the court ruled that the intent of the statute was only to make it more difficult for noncustodial parents to avoid paying child support and dismissed the case. *See Mitch Himaka, Judge Drops Prenatal Case Against Mother*, SAN DIEGO UNION-TRIB., Feb. 27, 1987, at A1.

prosecutors rely to make their cases, have often come out against prosecution.<sup>88</sup>

In spite of these obstacles, however, prosecutors in five counties did bring cases against drug-using mothers.<sup>89</sup> Gómez seeks to account for why these counties broke the mold. She finds that these five counties share certain demographic and economic features. All five counties are roughly medium-sized, have had heavy population growth in recent years, and have an increasing percentage of racial minorities.<sup>90</sup> Gómez points out how uneasy the prosecutors with whom she spoke are about the increased urbanization in their communities and how they are afraid that they are becoming more like Los Angeles.<sup>91</sup> Moreover, each of these counties was hit hard by an economic downturn in the late 1980s and early 1990s.<sup>92</sup>

## II. CRITIQUE OF GÓMEZ'S ANALYSIS

*Misconceiving Mothers* begins, appropriately enough, with an image; symbolism is at the heart of Gómez's analysis. Her approach is "constructionist" in nature.<sup>93</sup> She sees social problems largely as social constructs, and the response to those problems comes after a change in perception of the problems engineered by the interactions of different social actors.<sup>94</sup> This differs from what Gómez calls an "objectiv-

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88. Prosecutors rely on other local agencies in order to carry out their duties. See GÓMEZ, *supra* note 1, at 111. For instance, they frequently interact with the coroner's office, child protection services, and medical personnel at public and private hospitals. See *id.* Gómez points out two ways these bodies might affect prosecutorial action. First, other local officials, particularly social workers, might convince the prosecutor that prosecution might not be a wise strategy. See *id.* at 112-13. Second, such officials may actively compete with the prosecutor for jurisdiction in a given case. See *id.* at 113. Because child protective services and public health organizations handle prenatal drug exposure more directly than do prosecutors, they serve as "gatekeepers" for many marginal cases and can block prosecutorial action. See *id.*

89. See *id.* at 93. These would be the District Attorneys of Contra Costa, Kern, Riverside, San Bernadino, and San Diego Counties. See *id.* at 94.

90. See *id.*

91. See *id.* at 94-96.

92. See *id.* at 96.

93. "Constructionism" is a school of thought in the sociology of social problems. The term derives from Spector and Kitsuse's 1977 book, *Constructing Social Problems*. See SPECTOR & KITSUSE, *supra* note 22, at 65.

94. See *id.* at 5. The classical constructionist definition of a "social problem" is "the activities of individuals or groups making assertions of grievances and claims with respect to some putative conditions." SPECTOR & KITSUSE, *supra* note 22, at 75. In another context, Fuller and Myers put it more succinctly: "Social problems are what people think they are . . ." Fuller & Myers, *supra* note 15, at 320. For the purposes of this Article, I have been using the word "problem" in its traditional sense referring to a negative social condition.

ist" approach,<sup>95</sup> whereby social problems are seen as things in themselves, and the response to those problems comes after they become too serious to be ignored.<sup>96</sup> As a constructionist, she demonstrates some skepticism about the nature of the problem itself.<sup>97</sup> Many readers may be uncomfortable with Gómez's detached analysis, which can be perceived as bordering on reductionism. From a purely sociological perspective, however, she provides much insight into the evolving treatment of prenatal drug exposure in the public policy arena.

### A. Legislators and the Importance of Associations

Gómez's analysis of the legislative process reveals the importance of associations. Because the "problem" is malleable, it can be defined as individual claims-makers see fit. The real battle is therefore in establishing the right symbolic context with which to associate the issue. In the legislature, for example, various early bills dealing with prenatal drug exposure linked the issue with drug abuse<sup>98</sup>—reasonable enough—but also welfare reform<sup>99</sup> and HIV-infected infants.<sup>100</sup> Gómez somewhat ominously associates these issues with a tacitly racist stereotype of inner-city blacks.<sup>101</sup> Perhaps more importantly, however, this response was in line with the issue's portrayal in the media, which shaped the legislature's perception.<sup>102</sup> Because prenatal drug exposure was, in its early stages, associated primarily with crack, an illegal drug prominent in the inner cities, one can see how it took few logical steps for legislators, particularly conservative Republicans, to

95. See GÓMEZ, *supra* note 1, at 5. The term appears to be Gómez's own coinage. Schneider calls them "social factists." Joseph W. Schneider, *Introduction*, in *STUDIES IN THE SOCIOLOGY OF SOCIAL PROBLEMS* xii (Joseph W. Schneider & John I. Kitsuse, eds., 1984).

96. See GÓMEZ, *supra* note 1, at 5-6. Gómez compares how an objectivist and a constructivist might approach the study of a social problem, taking the example of child abuse. See *id.* The 1960s saw a dramatic rise in interest in the issue. See *id.* An objectivist would tend to look for evidence of an increase in the frequency or severity of physical abuse to explain this phenomenon. See *id.* A constructivist, on the other hand, would look to the social context in which the issue arose. See *id.* Gómez mentions a widely-cited 1962 article in the *Journal of the American Medical Association* as an example of the kind of outside influence. See *id.*; see also C. Henry Kempe et al., *The Battered-Child Syndrome*, 181 *JAMA* 17 (1962).

97. Indeed, Spector and Kitsuse are adamant in rejecting any attempt to define a social problem as an objective condition. See SPECTOR & KITSUSE, *supra* note 22, at 74.

98. See GÓMEZ, *supra* note 1, at 36 (citing S.B. 1661, 1989-90 Leg., Reg. Sess. (Cal. 1989)).

99. See *id.* (citing A.B. 2205, 1991-92 Leg., Reg. Sess. (Cal. 1991); A.B. 2772, 1991-92 Leg., Reg. Sess. (Cal. 1992)).

100. See, e.g., S.B. 1450, 1987-88 Leg., Reg. Sess. (Cal. 1987); S. Con. Res. 98, 1988-89 Leg., Reg. Sess. (Cal. 1990).

101. See GÓMEZ, *supra* note 1, at 37.

102. See *id.* at 14-15.

regard it as a criminal matter.<sup>103</sup> Liberal Democrats, on the other hand, were less prone to this association and tended to look for new social programs to accommodate the needs of the afflicted.<sup>104</sup>

The breadth of the differences in the proposed solutions to the problem would seem to support Gómez's assertion of symbolic politics. In her view, the battle over what to do about prenatal drug exposure served as a proxy for the more contentious abortion issue.<sup>105</sup> The one problem with this assertion is that the connection between criminalization of prenatal drug exposure and abortion was more overtly made by *opponents* of criminalization than by *proponents*. Women's rights organizations fought hard to block passage of Republican punitive measures.<sup>106</sup> But, as Gómez admits, many pro-life forces refused to participate in the battle.<sup>107</sup> Some thought the issue was too peripheral to their primary concern.<sup>108</sup> Others expressed concern that were prenatal drug exposure to be criminalized, pregnant drug-users might choose abortion rather than face the risk of prosecution, thus increasing the number of abortions.<sup>109</sup> It is odd to see the ambivalence that many pro-life organizations felt towards prenatal drug exposure given the spirited opposition to criminalization of their usual

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103. See S.B. 1070, 1987-88 Leg., Reg. Sess. (Cal. 1987) (expanding child abuse statutes to cover prenatal drug exposure) (sponsored by Republican Senator Ed Royce); S.B. 1465, 1989-90 Leg., Reg. Sess. (Cal. 1989) (declaring death of drug-addicted baby manslaughter) (sponsored by Republican Senator John Seymour); A.B. 2614, 1995-96 Leg., Reg. Sess. (Cal. 1996) (criminalizing "fetal child neglect") (sponsored by Republican Assemblyman Phil Hawkins).

104. See S.B. 987, 1985-86 Leg., Reg. Sess. (Cal. 1986) (targeting state funds toward treatment for infants exposed to drugs in the womb) (sponsored by Democratic Senator Gary K. Hart); A.B. 749, 1988-89 Leg., Reg. Sess. (Cal. 1989) (establishing state agency to provide funding for drug treatment for pregnant drug addicts) (sponsored by Democratic Assemblywoman Jackie Speier); A.B. 1824, 1989-90 Leg., Reg. Sess. (Cal. 1990) (expanding Medi-Cal and Medicaid coverage to include drug treatment for pregnant drug addicts).

105. See *id.* at 37.

106. See *id.* at 41-42.

107. See *id.* at 39. Some readers might question whether this was, in fact, the case. Pro-life forces did support the prosecution of Pamela Rae Stewart. See *id.* at 42. They also actively opposed bills sponsored by pro-choice Assemblywoman Jackie Speier. See *id.* at 39. They failed, however, to support any of the punitive bills. See *id.* Speier's bills were designed to provide funds to treat pregnant drug-users. See *id.* at 58. It is odd that pro-life organizations would actively oppose legislation that did not appear to relate to their larger political agenda, while failing to support legislation that did. Nevertheless, it does appear that pro-life forces across the country remained ambivalent towards criminalization. See also Dan Eggen, *The Dilemma of Drug-abusing Moms*, DES MOINES REG., Mar. 31, 1996, at 1 (noting opposition of anti-abortion forces to criminalization of prenatal drug exposure); Andrew Wolfson, *Help, Not Jail, Urged for Pregnant Addicts*, COURIER-J., June 10, 1990, at 1A (prosecution of drug-using mothers gives anti-abortion groups pause).

108. See GÓMEZ, *supra* note 1, at 39.

109. See *id.*

political opponents.<sup>110</sup> To the extent that it was a proxy fight, therefore, it was one-sided. This may help to explain the complete failure of the California legislature to pass even one punitive measure.<sup>111</sup> So, what began as primarily an urban, lower-class issue coupled with the war on drugs became entangled with broader-based gender issues and a woman's right to choose.<sup>112</sup> The particular effort on the part of women's groups to define the issue as one potentially affecting all women broadened the scope of the problem and rendered it more difficult for the other side to prescribe harsh treatment for pregnant women using drugs.<sup>113</sup>

The importance of differing associations helps to explain the inevitable hypocrisy in some of the early criminal proposals. Gómez skillfully juxtaposes her discussion of the inflated claims made about the effects of crack cocaine on fetuses with important sidenotes on the effects of alcohol and tobacco, as well as other substances.<sup>114</sup> Yet the prosecutors with whom she spoke talked specifically about "crack babies" and expressed some level of ignorance to the role of other drugs.<sup>115</sup> Gómez recognizes that, especially in the political realm, perception is reality, and that those in power act on their perceptions of social problems, which may or may not coincide with the actual problem. And, because prenatal drug exposure arose within the media-driven context of the intensifying War on Drugs, legislators were unable to make a connection between the effects of cocaine and the effects of tobacco.

This brings us to another major point in *Misconceiving Mothers*—that it was the intense media attention to crack and "crack babies" that drove legislators to act in the first place.<sup>116</sup> The coincidence in timing is certainly suggestive.<sup>117</sup> It is particularly interesting for Gómez to note that the *peak* of media and legislative interest so neatly coincided.<sup>118</sup> That would indicate not only a simultaneous *rise* in interest but also a simultaneous *drop*. Had the media coverage merely brought

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110. See *id.* at 38. Women's rights organizations may have had more at stake in the fight. Valerie Green argues that criminalization of prenatal drug exposure could have even wider repercussions than its putative impact on the abortion debate. See VALERIE GREEN, *DOPED UP, KNOCKED UP, AND . . . LOCKED UP? THE CRIMINAL PROSECUTION OF WOMEN WHO USE DRUGS DURING PREGNANCY* 88-91 (1983).

111. See GÓMEZ, *supra* note 1, at 41.

112. See *id.* at 121-22.

113. See *id.*

114. See *id.* at 12, 23-25.

115. See *id.* at 66-67.

116. See GÓMEZ, *supra* note 1, at 29.

117. See *id.* at 30.

118. See *id.*

the legislature's attention to the issue, one would expect a plateau of legislative activity despite the media's turning to more current issues to explore.<sup>119</sup>

Gómez adds further weight to her assertion that legislative action with regard to prenatal drug use was largely media-driven by pointing out the breadth of legislative interest. Nearly a quarter of the legislature had at one time or another sponsored a bill on prenatal drug exposure.<sup>120</sup> Furthermore, many legislative insiders conceded the role of the media in influencing public policy on this issue. One went so far as to tell her, "You don't get a quarter of the legislature to introduce bills on a topic unless '60 Minutes' or *Time* or *Newsweek* or some major media event or analysis has been presented that leads them in that direction."<sup>121</sup>

Unfortunately, Gómez's treatment of the media's role in the controversy fails to examine effectively how press coverage changed over the years.<sup>122</sup> Initial reports, she says, were harsh in tone and were influenced by classic stereotypes.<sup>123</sup> But, given her reliance on the media as a major impetus for legislative action,<sup>124</sup> she neglects to demonstrate a shift in the tone corresponding to the shift in the ultimate legislative response. She instead relies on the alliance of women's groups and medical professionals to explain the shift in the

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119. Gómez is careful enough to point out that few of the media reports at the time were specifically about the progress of legislation. *See id.* at 30. She clearly recognizes the possible argument that her data may be incestuous. She does not adequately rebut the claim, however, as there still exists the possibility that legislative action may have influenced the media by providing an impetus to investigate the issues underlying the legislative proposals. Belenko, for one, notes the existence of significant upswings in stories about crack nationwide in conjunction with election years. *See* BELENKO, *supra* note 25, at 25. A more likely hypothesis would be that the relationship between the media and the legislature is symbiotic, each one feeding the other. Nevertheless, given that the first media reports preceded any legislative call to action, the initial mover was no doubt the media.

120. *See* GÓMEZ, *supra* note 1, at 31. Gómez's actual figure is 34 out of 120. *See id.* She warns, however, that the actual number of total legislators should be larger than 120 because of legislative turnover. In part to compensate, though, she counts only those lawmakers who were *primary* sponsors of legislation rather than mere co-sponsors. *See id.* at 141.

121. *Id.* at 31 (quoting former Assemblyman Burt Margolin).

122. Earlier in the book, Gómez observes that, by the mid-90s, some in the media had begun rethinking their overreaction. *See id.* at 18. *See also, e.g.*, Editorial, *False Alarm Over "Crack Babies,"* ST. LOUIS POST-DISPATCH, Nov. 1, 1995, at 6B; Ellen Goodman, *The Myth of the "Crack Babies,"* BOSTON GLOBE, Jan. 12, 1992, at 69; Barbara Kessler, *Drug-exposed Infants' Future not Without Hope,* DALLAS MORNING NEWS, Nov. 30, 1995, at 1A. She never follows up on this observation, however, in her subsequent analysis of the media's role in influencing public policy.

123. *See* GÓMEZ, *supra* note 1, at 14-16.

124. *See id.* at 29.

weight of “reform” on the side of socially progressive policies.<sup>125</sup> Many readers will be left wanting to know what role the media might have played in the dissemination of their views.

*B. Prosecutors and the Importance of Political Roles*

Gómez’s examination of prosecutors in this regard may seem somewhat odd since they are not really in a position to make public policy. The results of her study would appear to bear this out: very little prosecutorial action was taken despite the heated opinions of some of the prosecutors regarding the issue.<sup>126</sup> Gómez is right to connect this, at least in part, with the failure of other state agencies, particularly the legislature, to act.<sup>127</sup> I do not think that she gives it the weight it deserves, however.<sup>128</sup> Her initial suggestion that examining the actions of prosecutors is important because they serve as the “implementers” of criminal policy as enacted by the legislature never quite pans out.<sup>129</sup> Nevertheless, its importance is clear. District attorney’s offices deal with criminal issues derived ultimately from statutes passed by the legislature. Prosecutors therefore operate downstream from legislative policy, and anything they do—at least in theory—is dependent on prior action by the legislature. Gómez earlier states how, once a social problem is discovered, the question becomes how to deal with it.<sup>130</sup> This is primarily a legislative function. As the legislature in this case had flatly decided *against* treating prenatal drug exposure as a criminal matter,<sup>131</sup> ideally the issue should never even have reached the prosecutor’s desk. In this light, it is not surprising that prosecutors made few attempts, typically muted attempts at that, to deal with it.

That still leaves us with the question of why some prosecutors attempted to deal with prenatal drug exposure at all. In fact, the question becomes even more prescient than Gómez claims.<sup>132</sup> Gómez believes that the two extremes in prosecutorial responses suggest symbolic politics are at work.<sup>133</sup> This would be at odds with the usual

125. *See id.* at 62.

126. *See id.* at 108.

127. *See id.* at 108-11.

128. Gómez only raises it after discussing the prosecutors’ avoidance of weak cases. *See GÓMEZ, supra* note 1, at 102-08.

129. *See id.* at 63-64. Gómez also mentions the importance of taking into account the less immediate political role of the prosecutor in her introduction. *See id.* at 4.

130. *See id.* at 4.

131. *See id.* at 41.

132. *See id.* at 93.

133. *See GÓMEZ, supra* note 1, at 91.



assumption that prosecutors are apolitical.<sup>134</sup> Interestingly, prosecutors did not make any connection between prenatal drug exposure and abortion in the interviews she conducted.<sup>135</sup> Gómez thinks this might be because prosecutors are less politicized than legislators,<sup>136</sup> but it seems inconsistent to suggest, on the one hand, that prosecutors are playing politics and, on the other, that they are not political. The explanation for this seeming contradiction, although never stated outright, is likely to be found in the prosecutor's function as an "implementer" of legislative policy.<sup>137</sup> Abortion being a legislative issue, it would be less likely to be considered by a prosecutor. As claims-makers in their own right, prosecutors would most likely connect a new social problem to something more directly within their jurisdiction. It is not that prosecutors are not playing politics; it is that they are playing politics of a different kind.

Indeed, Gómez's suggested political motivation for those prosecutors who did act does seem more appropriate for an institution that does not decide upon great "political" questions. She is close to the mark in arguing that matters such as demographic shifts (more racially diverse newcomers) and economic trends (downward) would be the kinds of factors decisive in influencing prosecutors in those five counties.<sup>138</sup> But, on a broader level, such factors could just as easily have influenced the legislators to act. Gómez does not sufficiently take into account the unique role that prosecutors play within the system and how that role relates to the actions they take. The influences she cites are enough to explain why action was taken but not what the specific action was. She does not fully explain the "symbolic politics" she attributes to the prosecutors.<sup>139</sup> The demographic and economic patterns to which she refers occurred in the five counties that actually prosecuted, but Gómez earlier had noted that more than half of the

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134. *See id.* at 63.

135. *See id.* at 70.

136. *See id.*

137. *See id.* at 63-64.

138. *See GÓMEZ, supra* note 1, at 94-97.

139. *See supra* note 64 and accompanying text. Presumably, Gómez is referring to the economic and demographic changes and the corresponding sense of a lack of "order" which she says "relate to the prosecutor's function in an interesting way." *Id.* at 148 n.1. The changing racial and ethnic make-up of the counties could easily have been connected with crime and—given the initial media coverage of the issue—could well have been an interesting factor to examine further as it could potentially fit neatly within her argument about how social problems are associated with other issues. It is strange that she does not go any further on this point, and goes this far only in an endnote, given how it relates to her thesis. The other factors, however, are much too broad; it is hard to see just how they relate to the prosecutor's *function*.

prosecutors to whom she spoke *had considered prosecution* only to discount them in her subsequent analysis.<sup>140</sup> She does not, however, distinguish the motivations of those prosecutors who had at least come close to prosecuting drug-using mothers from those who actually went through with it or, for that matter, with those who expressly rejected prosecution as a matter of policy. Some of those who balked may have done so only because of the failure of any other prosecutors to secure a conviction.<sup>141</sup> In the end, her analysis of prosecutorial action and inaction lacks the necessary hook to tie it in with the constructionist themes she sets out with.

#### CONCLUSION

Laura E. Gómez's *Misconceiving Mothers* is an insightful analysis of government action in response to the so-called "crack baby" epidemic. More than that, however, it operates as a case study on the generally malleable nature of social problems, illustrating how political power and the contest among public policy advocates shape perceptions by shaping the perceptions of the problem. My only caveat is that her treatment of the legislature and of prosecutors does not satisfactorily account for the fundamental differences in their character as institutions. Nevertheless, such a flaw does not go to the heart of her thesis and does not detract in any sizable way from what the reader might learn from it.

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140. See *supra* note 63 and accompanying text.

141. Even four of the five counties that did prosecute only did so once. See GÓMEZ, *supra* note 1, at 101.

