

THE KNOWLEDGE/POWER DILEMMA AND THE MYTH OF THE SUPERMOTHER*: A CRITIQUE OF THE INNOCENT OWNER DEFENSE IN NARCOTICS FORFEITURE OF THE FAMILY HOME

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In the projects, somebody can call your mother a one-legged whore who does nasty tricks for men for five dollars and she will be the most important influential person in your childhood. She is the only one a child can depend upon for survival...But aren't all mothers everywhere the control figure in the eyes of a child? Mostly the answer is yes. But for the children in the projects the answer is even more so.

Sister Souljah¹

Knowing that there was such a thing as outdoors bred in us a hunger for property, for ownership. The firm possession of a yard, a porch, grape arbor. Properties. Black people spent all their energy, all their love on their nests...Renting blacks cast furtive glances at those owned yards...In the renter they saved, and scratched and piled away what they could from living in rented hovels, looking forward to the day of property. Outdoors was the end of something, an irrevocable, physical fact, defining and implementing our metaphysical condition.

Toni Morrison²

*Respectful subversion of the title of Michelle Wallace's Black Macho and the Myth of the Superwoman (Doubleday 1975).

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¹Sister Souljah, No Disrespect at 3 (Times Books 1994).

²Toni Morrison, The Bluest Eye at 17 (1970).

MS. DARBY'S FORFEITURE DEFENSE: THE PARADIGMATIC CLAIMANT

This article arises out of a "narcotics forfeiture"³ defense I handled while a student attorney at the University of Baltimore Housing Law Clinic. Our forfeiture claimant,⁴ Celia Darby,⁵ was a 55-year-old black woman who had spent most of her life at 1508 North Eden Street, a tiny rowhouse in East Baltimore. She had grown up there, and raised five male children there (burying her oldest the month before we met). When she came to us, she was raising the next generation of the extended family of which she was the center.

Had the forfeiture been successful, Ms. Darby's house would have been the first in Baltimore to be taken under Maryland's Asset Forfeiture Act, legislation which had recently been amended in emulation of the Federal Civil Forfeiture Statute to allow the forfeiture of real property, including the family home.⁶ The federal statute provided for the forfeiture of property "used to

³I use the term "narcotics forfeiture" rather than the broader, but less precise term "civil forfeiture" to describe cases in which the government is statutorily enabled to take citizen's property on the basis of alleged narcotics activity by its owners and/or inhabitants. I make this choice both because there are many civil forfeiture statutes unrelated to narcotics use and because I do not wish to contribute to the reification of the legal fiction that such forfeiture is not a criminal punishment of a human homeowner but rather an *in rem* civil action in which the "wrongdoing" piece of property is the object of a remedial action.

⁴For clarity, I will use the term "claimant" in referring to the personal defendant in the narcotics forfeiture action in spite of the fact that it also furthers reification of this legal fiction.

⁵Ms. Darby was referred to us by the Housing Unit of Baltimore City Legal Aid, which lacked the resources to handle a potentially impact-making case. Since narcotics forfeiture is classified as a civil matter there is no right to counsel and therefore no involvement by a Public Defender.

⁶Md. Code Ann. Art §297, (a)(7) (1970 as amended 1989). In pertinent part:

R]eal property may be forfeited where the State can show it was obtained with the proceeds of an enumerated drug violation...or when the property, [including a principal family residence], is used in connection with a violation of Article 27, §286, 286B, 286C or 290 (emphasis added).

In addition, Section 297 (n) requires that: "In case of forfeitures of the principal family residence the owner must be convicted of one of the enumerated offenses" (emphasis added).

The Maryland statute is emblematic of the many state statutes which were either passed or amended to include residences in the 1980s. All fifty states now have narcotics forfeiture statutes. Most of these state statutes track 21 U.S.C. §881 (which was in turn modeled on the Uniform Controlled Substances Act), although they differ in detail according to the legal history of the statute in each particular state.

facilitate" the commission of a narcotics felony. Prosecution under Maryland's Asset Forfeiture Act required that the home be "used in connection" with a violation of one of five enumerated narcotics offenses, including a crime called "Maintaining a Common Nuisance,"⁷ which is a felony in Maryland.

Ms. Darby told us the "bad facts" right away. Yes, she had pled guilty to the nuisance charge. The prosecutor had explained to her, that as owner of the house in which people were involved with drugs, she was maintaining a nuisance house. When they explained it that way, she could see their point. No, she had not known before the raid that Charlie, her youngest son, was dealing drugs or involved at all with them. Yes, she was at the house at the time of the drug raid, and the police had told her they found drugs in her purse. No, she didn't know how the drugs got there.

The prosecutor in her criminal case had told Ms. Darby that her sons and grandson would only be allowed to enter into a plea bargain if she pled guilty to Nuisance—"everyone had to plead, she said, or it will not work."

As a member of the Baltimore City Forfeiture Committee,⁸ the prosecutor well knew that a criminal conviction of the house's owner was a necessary precursor to bringing state forfeiture proceedings. Ms. Darby told us, as her attorney told the court during plea colloquy,⁹ that she pled guilty because she wanted to get it over with.

Her life was her home and family. Her world did not go much beyond the blocks which surrounded the little house on North Eden Street where she had first moved with her parents in the 1940s. At first they rented but eventually her father, a longtime Sears employee, was able to buy the house. Ms. Darby's family became one of the first black families in the neighborhood to own their

⁷This common law crime is codified at Article 27, §287 (1)(5) of the Md. Ann. Code, which provides in pertinent part:

[It is unlawful] to keep or maintain a common nuisance, which means dwelling house, apartment building...which is resorted to by drug abusers for purposes of illegality, administering controlled substances, or controlled paraphernalia as described in 287(b)...

⁸The Committee consisted of members of the State's Attorney's Office (including the prosecutors in both Ms. Darby's criminal and civil case), the City Solicitor's Office, and the Police Department (including two police officers who had been members of the raiding party on Ms. Darby's house).

⁹See State v. Darby, No. 09313060, transcript at pg. 16, line 1013 (on file with author) ("My client has asked me to bring matters to a conclusion today, whether she was satisfied with the results or not, because it is taking a toll on her health").

own home. Ms. Darby remembers it as always "the place to be"—neighbors and friends were constantly in and out. Although she had siblings, the house was left to her because she had stayed on Eden Street and cared for her parents while raising her own boys.

The house consists of a small front room and a kitchen in the back, a second floor with two bedrooms (one for the boys and one for the girls), a bathroom, and a basement. There is no air conditioning. Ms. Darby shared the front bedroom with her two nieces, Donique, 19, whom she had raised from age five, and Jimica, 12. Her sons, Duane, 27; Charles, 21; and Chave, 15, slept either in the back bedroom or in the basement. Ms. Darby also frequently cared for other members of her extended family.¹⁰

Ms. Darby's neighborhood seemed nice, "almost middle class."¹¹ Her block contained only one house with boarded up windows and only a few that looked less than well kept. The drive to the house, though, from East Baltimore, or moving up one block towards North Baltimore, was a different story. The area seemed bleak and vanquished, full of the "crack houses," or "drug havens," of forfeiture/eviction imagery.

On Ms. Darby's block, in Ms. Darby's house, the middle class feeling comes back. Like most poor people, her life was harder than that of someone with money—poverty consumes energy—and it was a life characterized mostly by its ordinariness. She rose early before everyone else in the house to make sure everyone got to work or school. She spent most of the day cleaning, shopping, or doing errands. If she was feeling particularly ill she took a rest before Jimica came home from school. By all accounts she had very little time to observe any changes in the behavior of her son, Charles, since he graduated from the high school where he had earned good grades and basketball fame.

We saw Ms. Darby as "a good client." The realities of her life seemed to make her sympathetic, and her demeanor—dignified and warm—promised a credible witness. Both points were key to the successful maintenance of the innocent owner defense. The burden of proof lay on Ms. Darby, as a forfeiture "claimant," not a criminally "accused"—to prove that she had no knowledge of the drug activity.

¹⁰She frequently made room for Candace Matthews, 8 (daughter of her son James); Kenny and Kenneth Hurt, 9 and 15 (children of her son Kenneth); Jewel Hurt, 11 (daughter of her deceased son Steven); and Taylor Hurt, 11 months (daughter of her youngest son Charles).

¹¹These were the surprised words of the prosecutor who had driven past the house with a Baltimore City Police Officer at our suggestion.

However, we were shocked to discover that the picture painted by our prosecuto, was that of a veritable "Ma Barker."¹² Our talks seemed to revolve around not only the issue of knowledge, but also the issue of control. His intention, it seemed, was to try to force us to choose between two unpalatable images: the "prisoner in her own home,"—knowing but lacking agency, or the matriarchal "brains" of the operation.

To portray her as a victim of social forces, against which she was powerless to protect her family, was to give substance to the argument that laws like forfeiture are necessary to protect the community against her children and those of other parents who lack control over their children's criminal deeds. On the other hand, to portray her as the strong black matriarch, an image which had become commonplace in media representations of black urban life, was to risk vesting her with too much power to make a denial of knowledge convincing to the prosecutor or to a judge.

After over a year, we settled Ms. Darby's case. At first the prosecutor pushed hard, seeming to prefer testing the statute and making an example of Ms. Darby to the usual procedure of a "buy-back," essentially settling for a monetary fine.¹³ At times we felt the right thing to do was to force the case to litigation, but the climate was not right and our client needed her life back. So we made, and took, the opportunity to settle. The settlement was a combination of a monetary fine of \$2,000 and an agreement under which Ms. Darby's two sons and grandson would not live in the house or visit except at specified times, such as certain major holidays or picking up their children. The arrangement was made possible by the involvement, at our request, of a local community group. Ironically, Ms. Darby was only able to pay the

¹²This image was fueled by the unfortunate fact that we were trying our case against the backdrop of the much-publicized trial in Washington, D.C., of drug kingpin Rayfel Edmonds, in which the role of his mother in his ring and in seducing him into the dealing life had been much ballyhooed by the press.

As it turns out, this fascination with the perceived relationship between black matriarchy and the criminality of black children extends across U.S. boundary lines into other parts of the black diaspora. See Paul Gilroy, *There Ain't No Black in the Union Jack* 242-44 (Routledge 1987). Gilroy discusses the vilifying coverage by the English media of council housing community activist Dolly Kiffin who, according to one article, was known by her deviant followers as "Mamma Queen." The press had created a black matriarch who ruled a mini-empire where crime and race hate are the dreadful exports.

¹³ Pejoratively termed "buy-back settlements," most forfeiture cases are settled for a monetary fine. While the privilege of buying back one's house may be unlikely to avail most poor people, no such option, however illusory, is unavailable to those evicted from public housing or apartment leaseholds.

settlement price through an insurance payout on her oldest son's death by handgun—the prosecutors claim it was drug related. Without this “windfall” she would not have been able to afford even a \$200.00 payment, much less \$2,000.

Although we settled the case with the knowledge that it was the best result for our client, I am haunted by the fact that the law has not changed materially since that time. While we were selling Ms. Darby's civil liberties to ensure her continued property rights, I was as sure as I am now that a middle class person would not likely have been subjected to the same indignities. I also doubt that a single father, even a poor, black, single father, would have been required to prove his parenting skills in order to keep his house.

The issues of knowledge and power which came up repeatedly in both our strategy sessions and settlement talks were, I believe, directly related to our beliefs about the role and nature of motherhood. This knowledge/power dilemma proved to be a bigger obstacle than any substantive weaknesses in our case or even the practical difficulty of proving a negative—lack of actual knowledge. This article attempts to answer the questions that haunted me: Why was Ms. Darby's lack of knowledge so important to all of those involved in the case? Why was her denial of such knowledge so unbelievable to some of us? Why was a woman, who didn't have bus fare to come to our clinic, seen as such a powerful agent of evil?

On a personal level, I believed that our endless discussions about lack of knowledge and the power of a mother revealed much about ourselves. The confusion surfacing in our conversations was caused, I now think, by our growing awareness of the unconscious racism and sexism which clouded the case.

INTRODUCTION

There is no doubt that stereotypes, both consciously and unconsciously held,¹⁴ have enormous power to influence the widely discretionary decisions

¹⁴Charles Lawrence, *The Id, the Ego, and Equal Protection: Reckoning With Unconscious Racism*, 39 Stan. L. Rev 316 (1987).

of prosecutors.¹⁵ Unconscious racism or sexism¹⁶ is often in play in criminal law,¹⁷ to which narcotics forfeiture is intimately connected. These unarticulated but deeply held views are often more dangerous than their more obvious, cruder versions.¹⁸ The ugliest of our socially ingrained beliefs are often not merely unspoken but thoroughly unacknowledged by the holder at any conscious level.¹⁹ The myth of the strong black mother who knows and controls all her children's actions is in opposition to the myth that the white mother knows but passively nurtures with no power to mold identity. The fact that such biases are unconscious makes them dangerous and difficult to debunk.

Poverty attorneys, of course, are not immune to internalization of myths. During the course of Ms. Darby's case, it became clear that many of our conversations regarding the difficulties of proving lack of knowledge at trial revolved around a lethal cocktail of our own prejudices and the fears associated with representing a powerless person.²⁰

House forfeiture itself, and the structure of its largely illusory innocent owner's defense, is an example of the many laws which, though facially neutral, essentially make it a crime to be a "bad mother" or a "bad woman," particularly one of the wrong race or class.²¹ House forfeiture mirrors the

¹⁵The power of prosecutors to coerce and threaten is discussed in Joseph A. Eustance Jr., The Purist View Prevails: Butterworth v. Caggino Prohibits Homestead Forfeiture, 22 Stetson L. Rev. 1111, 1131 (1993); Dwight L. Green, Abusive Prosecutions, Gender, Race and Class Discretion and the Prosecution of Drug Addicted Mothers, 39 Buff. L. Rev. 737 (1991).

¹⁶The Id, the Ego 322, n.22 (noting that while the role of unconscious gender discrimination is outside the scope of his article much of his analysis should be applicable to unconscious sexism).

¹⁷Sheri Lynn Johnson, Unconscious Racism and the Criminal Law, 78 Cornell L. Rev. 1016 (1988).

¹⁸Lawrence at 322.

¹⁹*Id.*

²⁰Milner Ball, Jurisprudence from Below: First Notes, 61 Tenn. L. Rev. 747 (1994) (description of a poverty lawyer's experience of disempowerment while representing poor people and presenting strategies to combat the feeling).

²¹See generally Dorothy Roberts, Motherhood and Crime, 79 Iowa L. Rev. 109 (1993) (exploring the historical relationship between motherhood and crime); Racism and Patriarchy in the Meaning of Motherhood, 1 Am. U. J. of Gender and the Law 1 (1993); Punishing Drug Addicts Who Have Babies: Women of Color, Equality, and the Right of Privacy, 104 Harv. L. Rev. 1419 (1991).

See also Paula Johnson, At the Intersection of Injustice: Experiences of African-American Women in Crime and Sentencing, 4 Am. U. J. of Gender and the Law (1995); Sheri Lynn

punitive operation of selective prosecutions of drug-addicted pregnant women²² and of criminal fines for failure to ensure a child's compliance with truancy or curfew laws²³—and produces the familiar disparate impact on poor black mothers. House forfeiture reproduces the futility of differential sentencing guidelines for cocaine and crack use²⁴ and of the concentration of prosecutions on low-level street dealers rather than on large-scale profiteers.²⁵

The identity of the strong black matriarch seemed to be the least of the evils available to us as we developed our case theory. It certainly seemed to be a more desirable image than “lazy welfare queen,” “Jezebel,” or “Sapphire.”²⁶ But it was a positive countermyth with a price. In representing Ms. Darby, the Housing Clinic had begun what Angela Harris terms “education work”²⁷ of the powers that be. We had to replace the stereotypical vision of who Ms. Darby was and what she was likely to know with the reality of her life, before the flawed vision could hamper reasoned consideration by

Johnson Cross Racial Identification Errors in Criminal Cases, 69 Cornell L. Rev. 934 (1984); Race and the Decision to Detain a Suspect, 93 Yale L. J. 214 (1983); Black Innocence and the White Jury, 83 Mich. L. Rev. 1611 (1985).

²²As Professor Roberts argues in Punishing Drug Addicts Who Have Babies, 1419, 1424, and 1432, poor black women are singled out for punitive prosecutions under statutes criminalizing delivery of drugs to minors in part because of the historical devaluation of black motherhood.

²³For an excellent overview of the trend towards parental responsibility laws imposing either criminal fines or community service as a repercussion of their children's misdeeds, see Barbara Gillaran Johnson and Daniel Rossman, Recent Developments in Non-traditional Alternatives in Juvenile Justice, 28 Loyola U. Chi. L. J. 719 (1997).

²⁴Nkechi Taifa, Beyond Institutionalized Racism: The Genocidal Impact of Executive, Legislative and Judicial Decision Making in the Crack Cocaine Fiasco, 10 October Natl. B. J. Mag. 13 (1996); Jason A. Giller, United States v. Clary: Equal Protection and the Crack Statute, 45 Am. U. L. Rev. 497 (1995).

²⁵See e.g., Coramae Richey Mann, We Don't Need More Wars, 31 Val. U. L. Rev. 565 (1997).

²⁶For an elucidation of the Sapphire myth see Regina Austin, Sapphire Bound!, 1989 Wisc. L. Rev. 539. For other excellent discussions of the web of black mythology see Lisa Crooms, Don't Believe the Hype: Black Women, Patriarchy and the New Welfarism, 38 How. L.J. 611 (1995) (detailing how the various stereotypes of black women have been used in the context of welfare rhetoric); bell hooks, Ain't I a Woman (1981); Michelle Wallace, Black Macho and the Myth of the Superwoman (1975); David Zucchino, Myth of the Welfare Queen (Scribner 1997).

²⁷Angela Harris, On Doing the Right Thing: Education Work in the Academy, 14 Vt. L. Rev. 125 (1991) (advocating the need for consciousness-raising on diversity issues in legal education particularly).

the prosecutor who was charged with deciding whether to settle, or by a judge considering whether she had prevailed on the issue of lack of knowledge. At the time, our unfamiliarity with the unspoken beliefs that others (or perhaps even we) might hold impeded us. In our "enlightenment" we were ignorant and had difficulty determining how to proceed.

Celia Darby is my paradigmatic client. I have chosen her for the obvious reason that I represented her and know her story well. Also, as a poor, black mother, she falls at the intersection²⁸ of multiple oppressed categories and thereby provides an entryway into an examination of how the stereotypes attached to each category interrelate with one another. I wish to stress, however, that the risks of detrimental stereotyping extend as well to poor white single mothers, and to a lesser extent single mothers in more privileged economic positions.

The prosecution was brought under Maryland's Asset Forfeiture Act, and therefore, I use the Act's innocent owner defense to demonstrate the biases attached to proof of lack of knowledge. The Maryland Asset Forfeiture Act, like the federal statute, places the burden of proof on the claimant to prove innocent ownership. The Maryland Asset Forfeiture requires the claimant to prove that the underlying drug offense was done "without the owner's actual knowledge." This defense is different from that of the federal statute which has two prongs: "lack of knowledge" and "lack of consent."

This article, however, is meant neither as a comprehensive analysis of one Maryland statute nor as a comment solely on cases brought under the Maryland Asset Forfeiture Act. Its implications extend to Federal Narcotics Forfeitures and public housing "drug evictions"²⁹ as well because they both

²⁸Kimberlé Crenshaw, Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Anti-Discrimination Doctrine, Feminist Theory and Anti-Racist Policies, 109 U. Chi. Legal F. 139 (1989); Patricia J. Williams, The Rooster's Egg: On the Persistence of Prejudice (Harvard University Press 1996) ([t]he black single mother, "who is beyond hope of ever being within the protective grove of 'wife,' 'good,' 'bad' or otherwise").

²⁹"Drug eviction" is the popular term for forfeitures of public housing leaseholds and rental property as distinguished from that of owned homes. In 1988, 21 U.S.C. 881 was amended to include public housing among forfeitable interests. This was a codification of HUD regulations which authorized public housing administrators to evict on the basis of drug use or sales. On the state level, nuisance abatement was touted as the route to go. Landlords were encouraged to place non-drug use provisions in leases for low-cost housing and to pursue breach of lease litigation, and both state and community groups were encouraged to pursue actions under newly passed "nuisance abatement" laws. A critique of these laws in operation can be found in Lisa Weil, Drug Related Eviction in Public Housing: Congress Addiction to a Quick Fix, 9 Yale L. & Pol'y Rev. 161 (1991).

require proof of lack of knowledge and operate to put poor black mothers on trial. The analysis is also connected to critiques of the other laws directed at controlling mothers set out in the above paragraph.

Ms. Darby's story and the stories of women like her very rarely appear in the press or in judicial opinions because access to both venues requires money.³⁰ Silence is often used to suggest that no problem exists, but scenarios similar to Ms. Darby's are actually disturbingly frequent.³¹

She, and others like her—specifically single black mothers living in poverty—are vulnerable to attack on two levels. First, she is much more likely to be singled out for prosecution under the facially neutral statute than a man or a middle class woman. Second, it is harder for her to mount a successful innocent owner defense due to the stereotypes lurking in the shadows of her case.

Although statistics on the number of actual prosecutions and demographic information on their targets are hard to come by, the vulnerability of this group is clear. Many poor black mothers are single heads of household.³² Indeed, families headed by single mothers of any race are more likely to live in poverty than those headed by a married couple.³³ Poverty translates into ease of government intervention.³⁴ Certain kinds of drug use and most low-

³⁰The lack of such voices in case law means that forfeiture opinions are curiously bloodless compared with criminal law opinions which, though focusing on specific legal issues, usually reveal some of the human drama behind the litigation. For two exceptions see U.S. v. Nostrand, 760 F. Supp. 1015 (1991) and U.S. v. 908 T. Street, N.W., 770 F. Supp. 697 (D.D.C. 1991)(victorious claimant in this case was black male parent).

³¹See e.g., Nkechi Taifai, Civil Forfeiture v. Civil Liberties, 39 New York Law School Rev. 95, 97-98 (1994)(citing statement of James Hoyle submitted to the House Committee on Government Operations, Legislation and National Security Subcommittee, re: The Federal Asset Forfeiture Program).

³²Dorothy Roberts, Unshackling Black Motherhood, 95 Mich. L. Rev. 938 (1997).

³³G. Goldberg & E. Kremen, The Feminization of Poverty: Only in America at 37 (1990)(as cited in U.S. v. Nostrand at 1023).

³⁴Dorothy Roberts explains in Drug Addicts Who Have Babies 1432 that "poor women, who are disproportionately Black, are in closer contact with government agencies, and their drug use is more likely to be detected" (footnote omitted), citing at note 62, Faller & Ziefert, Causes of Child Abuse and Neglect, in Social Work with Abused and Neglected Children, at 46-47 (K. Faller, ed. 1981) ("providing a similar explanation of why poor parents are more likely to be reported for child neglect").

level drug dealing are concentrated in poor areas.³⁵ In addition, many grown children in the poor and/or black communities may live in the family home for either economic or cultural reasons. As a result, the odds that there will be some family contact with drug use are higher. Therefore the risk that a woman who falls into one or more of the oppressed categories will be a forfeiture target is correspondingly higher than in other communities.

Numerous articles have addressed the various constitutional flaws in forfeiture law,³⁶ and particularly the problems with the innocent owner defense.³⁷ Surprisingly, there has been little attention paid by critical race scholars to this issue, given the disproportionately devastating effect the legislative scheme is having on the black community.³⁸ There has also been no explicitly feminist treatment of the forfeiture scheme. This article aims to fill this gap, rather than to repeat previous comprehensive research efforts.

In Part I of this article, I briefly explain how narcotics forfeiture evolved as one of the chief weapons in the "war on drugs." In Part II, I discuss the myths and stereotypes of both mothers in general, and especially black single mothers, which will necessarily beset their innocent owner defenses to narcotics forfeiture. In Part III, I address how some of these stereotypes presented themselves as we attempted to construct an innocent owner defense for Ms. Darby. In Part IV, I show how common sense and social science data

³⁵ See U.S. v. Nostrand at 1023:

We take judicial notice, based on other cases in this courtroom as well as information generally available in the N.Y. community, that the incidence of drug dealing among poor members of society living in ghetto conditions, is greater than that of the population at large. The cheap, potent, and highly addictive drug, crack, has exacerbated this problem in recent years.

³⁶ See generally Mary Cheh, Can Something This Easy, Quick, or Profitable Also Be Fair?: Runaway Civil Forfeiture Stumbles on the Constitution, 39 New York Law School L. Rev. 1 (1991); Tamara Piety, Scorched Earth: How the Expansion of Civil Forfeiture Has Laid Waste to Due Process, 45 U. Miami L. Rev. 911 (1991); Steven Wisotsky, Crackdown: The Emerging Drug Exception to the Bill of Rights, 38 Hastings L. J. 889 (1987); Leonard Levy, A License to Steal: The Forfeiture of Property (1996).

³⁷ Levy at 161-76; Sandra Guerra, Family Values?: The Family as an Innocent Victim of Civil Drug Asset Forfeiture, 81 Cornell L. Rev. 343 (1996); Richard Strager, Civil Forfeiture: Protecting the Innocent Owner, 37 U. Fla. L. Rev. 841-61 (1996).

³⁸ But see John A. Powell and Eileen B. Hershonov, Hostage to the Drug War: The National Purse, the Constitution and the Black Community, 24 U.C. Davis L. Rev. 557, 559 (1991) (in context of drug legalization argument); Carol M. Bast, The Plight of the Minority Motorist, 39 N.Y. L. Sch. L. Rev. 49 (1994) (discussion of race in the context of probable cause for vehicle seizure).

can be used to debunk some of the myths most likely to surface, and in Part V, I present the U.S. District Court's opinion in U.S. v. Nostrand³⁹ as a model of a successful forfeiture defense for a poor black client whose situation was very much like that of Ms. Darby.

PART I: BACKGROUND ON NARCOTICS FORFEITURE AND DRUG EVICTION

The legal fiction that narcotics forfeiture is an *in rem* civil action targeting the property as the wrongdoer, has been maintained by the U.S. Supreme Court despite its own recognition on several occasions of the obvious fact that it is a criminal punishment.⁴⁰ The advantage of *in rem* civil forfeiture as opposed to *in personam* criminal forfeiture lies not only in its lowered burden of proof and relaxed due process protections but also in the high profits it has afforded the government.

Although forfeiture has been recognized by a variety of statutes and by both the United States and the English common law,⁴¹ house narcotics forfeitures of the kind addressed in this article were authorized in 1984 when the U.S. Congress amended 21 U.S.C. §881 to provide for the forfeiture of real property "which is used, or intended to be used, in any manner or part to commit or to facilitate the commission of 'drug related offenses,' as part of the Reagan Department of Justice's 'Zero Tolerance,'"⁴² policy on drugs. The federal government used 21 U.S.C. §881 heavily from the time it was passed, and continues to do so. Legislatures of all fifty states either amended or passed narcotics forfeiture laws in emulation of federal financial success.

At the same time, public concern was growing over the governmental abuses of narcotics forfeiture. The government's glaring failure to stem the tide of drugs and crime was a contributing factor. In addition, the government's untempered use of forfeiture began to touch the lives of middle and upper class white people. On a few occasions, middle class white families with children who had been involved in drugs found themselves the target of

³⁹760 F.Supp 1015 (E.D.N.Y. 1991).

⁴⁰Cheh, Runaway Forfeiture at 14 (arguing that house forfeiture is to the civil fine as the death penalty is to criminal incarceration).

⁴¹For a description of the history of civil forfeitures see generally David B. Smith, Prosecution and Defense of Forfeiture Cases (Matthew Bender 1994—updated periodically with looseleaves).

⁴²This policy was zealously re-announced by successor President George Bush and has not been repudiated by President Bill Clinton.

what was publicized as Kafkaesque persecution.⁴³ The judicial response to this mild backlash in the early 1990s was a spate of U.S. Supreme Court⁴⁴ and lower federal court cases,⁴⁵ and even a few state cases,⁴⁶ signaling a possible trend towards limiting the narcotics forfeiture power (at least regarding owned property.) However, this trend, if it ever existed, seems to have lost steam now that narcotics forfeiture is concentrated almost exclusively on people not in a position to fight back.⁴⁷

The innocent owner defense ostensibly protects against wrongful forfeiture of a family home based on behavior of family members, renters or visitors.⁴⁸ Most likely the defense is included to ensure the constitutionality of the statute although its very name throws into relief the fact that the guilt of the owner is at issue. Narcotics forfeiture deprives owners who are guilty of bad mothering of their family home. It exemplifies the irrational expansion of criminal omission liability, which seems to be growing apace and now requires that a mother know all.

⁴³See, e.g., 20-20 Killing in Paradise (ABC, April 2, 1993); Street Stories (CBS, July 9, 1992); 60 Minutes (CBS, April 5, 1992).

⁴⁴Austin v. United States, 509 U.S. 602, 113 S.Ct. 2801 (1993) (holding that the Excessive Fines Clause of the Eighth Amendment of the U.S. Constitution applies to forfeitures involving residences); United States v. Halper, 488 U.S. 906, 109 S.Ct. 256 (1988); (holding that the label of civil fine does not preclude a monetary penalty from being categorized as a criminal punishment thereby implicating the Eighth Amendment); United States v. James Daniel Good Real Property, 510 U.S. 431, 114 S.Ct. 490 (1993) (ruling that procedural due process protections apply to forfeiture proceedings).

⁴⁵Richmond Tenants v. Department of Housing and Urban Development, 956 F.2d 1300 (4th Cir. 1992) (holding that pre-hearing seizure of public housing leasehold violates due process protections under U.S. Constitution).

⁴⁶Ohio v. Cassalichio, 569 N.E.2d 916 (Ohio 1991) (holding that the Ohio vehicle forfeiture statute is a criminal punishment and thereby prosecution of one already criminally prosecuted violates Double Jeopardy clauses of the U.S. and State Constitution).

⁴⁷See, e.g., Bennis v. Michigan, 516 U.S. 442, 116 S.Ct. 994 (1996) (this case, which upheld the constitutionality of lack of innocent owner defense to forfeiture of automobiles of prostitution clients, may chill argument regarding lack of nexus in public housing forfeiture regulations).

⁴⁸In breach of lease actions an owner may lose his or her leasehold even for the conduct of visitors outside of their apartment.

PART II: THE MYTH OF THE SUPERMOTHER

The prevailing myth of the ideal "good mother" constrains women of every color and at every level of society. It infiltrates many areas of the law.⁴⁹ Like a virus, insidious and constantly mutating, rendering powerless potential antidotes as they are devised, the ideal mother conception is constantly changing. It is necessary to understand the source of the present incarnation of the myth in order to counter it. The current permutation of the myth probably owes as much to the pervasive influence in western culture of Freudian psychoanalytic theory⁵⁰—as it does to the "cult of true womanhood." The good mother who is happy in her private sphere of home and hearth describes the reality of few women's lives and of fewer black women still.⁵¹ However, the all-knowing yet passive nurturer remains the unstated norm against which all women are measured.⁵² In order to understand how black women like Ms. Darby may fall short of that standard we need to examine both how the patriarchally imposed myths described above imprison all mothers and how racially infused myths force black women into the role of "other" to the white woman.

It is necessary to understand that a group effort is behind the construction of the particular myth of the strong black woman who turns into the strong black matriarch when she bears or cares for children. It is not simply the product—unwitting or purposeful—of white feminists (who have been justly criticized for failing to include women of color and working class women in their analysis, but have worked hard to correct this), or of conservatives.⁵³ Black men in the black power movement and even to some extent black

⁴⁹See Odeana Neal, Myths & Moms: Images of Women & Termination of Parental Rights, 5 Kan. J. L. & Pub. Pol'y 61(1995); Shari L. Thurer, Myths of Motherhood: How Culture Reinvents the Good Mother (1994); Adrienne Rich, Of Woman Born: Motherhood as Experience and Institution (1976).

⁵⁰Nancy Chodorow, The Reproduction of Mothering: Psychoanalysis and the Sociology of Gender (Univ. of Cal. Press 1978).

⁵¹Tracey Higgins, Democracy and Feminism, 110 Harv. L. Rev. 1657, 1672 (1997)(one of two meanings of "private sphere," as referring to "the sphere of home and family" (to which white, educated upper-middle class women have often been confined).

⁵² See generally Gilda Lerner, ed. Black Women in White America: A Documentary History (1972).

⁵³Although conservatives have often used the Moynihan Report described below, Senator Moynihan is neither a reactionary nor is his report the racist diatribe often described. See, The Moynihan Report and the Politics of Controversy (Lee Rainwater and William L. Yancy, ed. 1967) (*hereinafter* The Politics of Controversy).

women scholars themselves, along with the particular strand of feminism that insists upon the re-valorization of motherhood,⁵⁴ have all collaborated in creating a countermyth of the strong black mother which is of equal strength and as unreal as that of the classic myth of the feminine (white) mother.

Undoubtedly, black mothers have been scapegoated for the problems of the black community through, as Dorothy Roberts puts it, "the myth of the Black matriarch, the domineering head of the Black family."⁵⁵ The idea of the "too-strong" black mother may be seen as the mirror image of and root cause of the "absent black father." Those who have searched for a scapegoat on which to place the blame for the poor black community's failure to thrive have seized upon this notion. The so-called Moynihan Report⁵⁶ injected the concept of mother-blaming into the national consciousness in 1965. The Report is often maligned as providing conservatives with a weapon against the black community in the arenas of crime, welfare and education. The Moynihan Report stood at the center of a firestorm of controversy at the time it was first leaked to the media and its concerns have recently been resurrected again for a second media driven life to similar reaction. It predicted that the problems in Negro society would not be disposed of by Civil Rights laws alone because its family structure was a "tangle of pathology" which was the "fundamental source of the weakness of the Negro community."⁵⁷ The report argued that slavery had forced the community into a matriarchal structure which, because it was so "out of line with the rest of American society...seriously retards the progress of the group as a whole."⁵⁸

Readers might well wonder how easy the black civil rights leaders had made it for Senator Moynihan's Committee to blame black mothers. During

⁵⁴See, e.g., Martha Albertson Fineman, The Neutered Mother, the Sexual Family, and Other Twentieth Century Tragedies (1995) (asserting that motherhood is the one "totalizing" concept cutting across race and class lines); Barbara K. Rothman, Motherhood: Beyond Patriarchy, 13 Nova L. Rev. 483 (1989) (arguing that, in disputes, surrogate mothers should always be granted custody of the children they bear in recognition of the natural supremacy of pregnancy as the only route to true motherhood).

⁵⁵Punishing Drug Addicts Who Have Babies at 1467.

⁵⁶The Negro Family: The Case for National Action (Report of the Office of Policy Planning and Research, United States Department of Labor 1965) (*hereinafter* The Moynihan Report). A comprehensive collection of the controversy as it was enacted in the print media is collected in The Politics of Controversy, *supra* note 53 (this compilation of press reports and opinion pieces written around the time of the leak demonstrates the thesis that media coverage of the Moynihan Report was often inaccurate and more problematic than the actual report).

⁵⁷ The Moynihan Report, *supra* note 56, at 5.

⁵⁸*Id.* at 29.

the civil rights movement, the black power leaders were largely men. According to black feminist writer Michelle Wallace, not only did these men largely exclude women from the struggle, but also in their zeal to partake of the riches of the white world, they shifted the lion's share of the burden of negative stereotypes about the black community to black females.⁵⁹

In her book Black Macho and the Myth of the Superwoman, Wallace describes a sense of betrayal by black men's inaccurate portrayal of black women as domineering matriarchs in this way: "It made me want to cringe to hear [black] men refer to me as 'strong' because I knew they were referring to the historical me, the monolithic me...who reminded them they had no power to control their own destinies...Never realizing how imaginary my 'strength' was, I swore never to use it."⁶⁰

Because society devalues black women as women, and as mothers specifically, black women have sometimes chosen to identify with this stereotype as a survival strategy. As Wallace writes "[I]t continues to be difficult to let the myth go. Naturally black women want very much to believe it, in a way it is all we have."⁶¹ In avoiding other stereotypes, many black women have chosen to play the role of the hypercompetent woman. When they have children they embrace the persona of matriarch living out what they hope is a positive counter-myth to worse ones which might be created.

Society at large often learns of the myth of the matriarch through black women themselves. After going too long without a voice, many black women writers are prolific in telling moving stories of overcoming oppression. The tale has been passed down from black women writers like Zora Neale Hurston to Angela Harris to Dorothy Roberts that, "[r]ejected from the dominant society's norms of womanhood, Black women have been forced to resort to their own internal resources,"⁶² and that "relying on the concept of self-definition celebrates the legacy of Black women who have survived and transcended conditions of oppression...they have found their way into the consciousness of modern Americans, for better or worse."⁶³

⁵⁹Wallace, *supra* note 1, at 94.

⁶⁰*Id.* at 95.

⁶¹*Id.* at 107.

⁶²Punishing Drug Addicts Who Have Babies, *supra* note 21, at 1469 (citing Angela Harris, *Race and Essentialism in Feminist Legal Theory*, 42 Stan. L. Rev 581 (1990) (quoting Zora Neale Hurston, *How It Feels to be Colored Me*, in *I Love Myself When I Am Laughing...And Then Again When I am Looking Mean and Impressive* 140, 152 (Alice Walker ed. 1979).

⁶³Punishing Drug Addicts Who Have Babies at 1469.

Another way the consciousness of modern America is reached is through entertainment. Today, a black male power broker is more likely to be found making movies than in the world of electoral politics, and director Spike Lee has been a major force in representing the players in the black community for white America. Lee has often been taken to task for perpetuating stereotypes of black women through his movies. The powerful image of the black matriarch appears in many of his movies.⁶⁴ The image becomes dangerous for “real life” imperfect black women when situated in what is meant to be a hyper-realistic portrayal of ghetto drug culture in his 1995 movie *Clockers*. The movie represents black male criminals, not so much as autonomous actors, but as agents of not one, but two black matriarchs. We see the anti-hero, Strike’s mother, Gloria (40-ish, overweight), who has presumably failed either by not controlling well enough or by controlling in the wrong direction. We also see a young single mother whose young son, Tyrone, is in danger of falling under Strike’s influence. Her attractive, alluring appearance is juxtaposed with a fearless upbraiding of both Strike and several of his partners in crime for influencing her son. Her lecture is eloquent. Her lack of fear is shown by not only harsh words but by slapping the face and body of the imposing Strike. While this makes for good drama, it hardly seems wise. The viewer is left wondering, why, if black women are really so feared, and criminals so easily cowed, more black mothers just don’t “Say no to drugs” in their community. Real life single mothers who wish to guard their children from drug influence should be expected neither to beat up criminals nor to report their own children to the police.

PART III: DEFUSING THE MYTHS THAT MAKE UP THE KNOWLEDGE/POWER DILEMMA

The question, “How could she not know?” echoed in both our clinic strategy sessions and our negotiations. The incredulity with which this statement hung in the air plagued us. Our only possible legal position under Maryland’s Asset Forfeiture Act was that Ms. Darby did not know anything about drug use or involvement of any of her children. An alternative position, which seemed more palatable to the prosecutor, was that even if she did know she would not have had the power to control it—the prisoner in her own home

⁶⁴See, e.g., bell hooks, *Reel to Real: Race Sex and Class at the Movies*, at 35-46 (1996) (hooks, in chapter 5, entitled “Crooklyn: the denial of death,” criticizes Lee and the process by which he creates a monstrous matriarch out of both Alfre Woodard’s character of the dying mother and a mini-matriarch out of her little daughter Troy upon the mother’s death in the movie *Crooklyn*).

scenario. The latter position was dangerous for us because the Asset Forfeiture Act contained only a knowledge prong and facts showing lack of consent might be used to undermine a no knowledge defense.⁶⁵

Proving lack of knowledge was clouded largely by gender based myths of the mother as unselfishly nurturing—all-knowing but passive. Since she is a slave to the child's identity, his development her constant focus, she must know all his habits. Lack of action in the face of such knowledge could be forgiven in a white middle class woman, but never in a black poor single mother. We had to keep facts supporting lack of consent to ourselves, lest knowledge be inferred.

"Us against them," is the prevailing motto in the rhetoric of the drug war and also of welfare reform. Knowing this, we knew it was necessary to represent a forfeiture client as one of the members of the community in need of protection—to distinguish her from the "evil within." Identifying the root of the drug problem in the black community as the black mother defies common sense. Investing such power in someone caught in the constraints of poverty, gender oppression and racism, is odd to say the least.

The job of alerting the prosecutor to the stereotypically informed double standard is a big one.⁶⁶ Certainly it is wrong to hold the poor black mother to a higher degree of knowledge than her white middle class counterpart. The societal ideal of a mother's firm belief in her child may not only be justified, but in fact necessary to raising a healthy child. The words of sociologist Sarah Ruddick would resonate with many prosecutors considering proceeding against mothers reminiscent of their own: "[M]others take risks, accepting their children's words and claims, trusting in their futures when no objective observer would, hoping when despair seems the saner council [*sic*], displaying their belief in the permanent possibility of reconciliation."⁶⁷ Probably a lot of fathers feel the same way. As Judge Weinstein wisely notes in his progressive

⁶⁵At first glance, Ms. Darby might have fared better under the federal statute although it does not require conviction of the owner. The plain language of this statutory scheme seems to require either lack of knowledge or lack of consent. For a client like Ms. Darby, who would be in no position to tell her grown sons what to do, such a scheme would seem to present a desirable alternative to one possibility of the Maryland's Asset Forfeiture Act.

⁶⁶See Jody Armour, Stereotypes and Prejudice: Helping Legal Decisionmakers Break the Prejudice Habit, 83 Cal. L. Rev. 723 (1995).

⁶⁷Sarah Ruddick, Preservative Love and Military Destruction: Some Reflections on Mothering and Peace, in *Mothering: Essays in Feminist Theory*, at 247 (Joyce Trebilcock, ed., Rowman & Allanheld 1984).

opinion in U.S. v. Nostrand,⁶⁸ having faith in one's children cannot be a luxury reserved for the middle class and rich.

PART IV: SUPERMOTHERS AND THE KNOWLEDGE/POWER DILEMMA

The Asset Forfeiture Act's Innocent Owner Defense requires that the owner prove lack of "actual knowledge" rather than lack of constructive knowledge. The inquiry, therefore, is whether the claimant had the knowledge of the drug offense leading to forfeiture "in her brain," not whether a reasonable person in her position "should have known."⁶⁹ However, the standard is not purely subjective and it is likely that a determination that the claimant was "willfully blind," will defeat a lack of knowledge case.

We knew that the testimony of our claimant on this point would be a key feature in a narcotics forfeiture defense. Indeed, such testimony is absolutely necessary given that courts have thus far accepted the legal fiction that narcotics forfeiture is a civil action, and refused to recognize a claimant's Fifth Amendment right against self incrimination. In rape and sexual harassment cases, where the primary witness is normally female, cases are often structured so as to put that witness on trial. The horror stories that have emerged from rape and sexual harassment trials illustrate that a jury member's or judge's own background, race, gender, and class will often color his or her view of what a reasonable person will know.

We also knew that women are traditionally found less credible as witnesses, even as to their own state of mind, and that black women are particularly suspect.⁷⁰ At first this was due to the historical vestiges of a time when women were seen as chattel. For white women the crime of rape was viewed as a crime against the husband or father. Black women slaves lacked even the protection of that patriarchal fiction and therefore could not be legally raped.⁷¹ Even after these legal disabilities were removed vestiges of

⁶⁸760 F.Supp 1015 (E.D.N.Y. 1991).

⁶⁹For a discussion on how courts have actually interpreted the lack of knowledge requirement in the context of spousal innocent owner claimants under 21 U.S.C. §881 see Derrick Wilson, Drug Asset Forfeiture: In the War on Drugs, Is the Innocent Spouse the Loser?, 30 J. Fam. L. 135 (1992).

⁷⁰See Kimberlé Crenshaw, Whose Story Is It Anyway?: Feminist and Anti-Racist Appropriations of Anita Hill, in Race-ing Justice, Engendering Power: Essays on Anita Hill, Clarence Thomas and the Construction of Social Reality (Toni Morrison, ed. 1992); Sheri Lynn Johnson, The Color of Truth: Race and the Assessment of Credibility (1992).

⁷¹See generally Jennifer Wriggins, Rape, Racism, and the Law, 6 Harv. Women's Law

the old attitudes coupled with stereotypes of black women as sexually promiscuous, and the belief that only chaste women could be raped continued to affect reactions to the testimony of black women.

One danger for us was that the facts which support a client's claim to lack of actual knowledge can also be interpreted as "willful blindness." We believed that this interpretation would be likely to occur in the case of a client like ours. We prepared three arguments to support this point. The first was the policy argument that the importance of keeping families together militated in favor of an exception to the general rule that lack of knowledge equates with willful blindness. Sandra Guerra has since presented a similar argument in detail in her article on forfeiture's effects on the family.⁷² The second was that our client was being held to a higher standard of knowledge than a middle class white woman, who would be afforded the right to denial of her children's misdeeds, as recognized by Judge Weinstein in the Nostrand opinion.⁷³ The third was one of statutory construction. The federal narcotics forfeiture statute distinguishes between the proof required for innocent ownership of vehicle forfeiture claimants—which explicitly excludes willful blindness as a defense—from that required for house forfeiture, which is silent on the point.⁷⁴

During our strategy sessions, however, our worries were more diffuse. To me, certain facts showed lack of consent and also reflected a lack of knowledge. To others these same facts seemed to support knowledge. One such scenario illustrates how locked in we all were to hidden assumptions about the nature of mothering. I analogize this story of an altercation Ms. Darby had with her sons with one that happened between my mother and myself. The facts showing Ms. Darby's lack of consent were these: Ms. Darby had told us that she had tried to stop drug activity in her home, twice calling 911 to report her son Duane, an occasional user, and Steven, the oldest son, now dead. Interviews with other family members revealed that the oldest son was quite a problem. Ms. Darby had locked him out of the house several times, but he and his friends had been able to get back in through the window.

First, I argued that even though her attempts to stop drug activity in the house were ultimately unsuccessful, Ms. Darby, as a mother, had every reason

Journal 103, 105-06 (1983) ("during the slavery period the rape of black women by white or black men, on the other hand, was legal; indictments were sometimes dismissed for failing to allege that the victim was white") citing Susan Brownmiller, Against Our Will, at 176 (1975).

⁷²Guerra, Family Values at 375-389.

⁷³See U.S. v. Nostrand, *supra* note 70.

⁷⁴See 21 U.S.C. § 881.

to believe that they had succeeded. Second, her knowledge of drug-related activities by her boys Steven and Duane, should not pierce the shield of her belief in her youngest son, Charles. By all accounts he had seemed to be a "good son." He had been a basketball star and, despite low SAT scores which kept him from accepting a college basketball scholarship, had started at a community college. She believed he had made it through.

In the end, our defense team decided that this evidence of Ms. Darby's attempt to exert control over her family members drug use would undercut a no-knowledge defense. It was apparent to me that Ms. Darby was suffering from the inherent presumptions against the poor black mother in comparison to the white middle class mother.

In the face of my companions' disbelief, I offered a hypothetical from own youth as a middle class, white, teenager growing up in suburban Maryland. Not long after I received my drivers license, my friends and I made plans to go to a Billy Joel concert at the Capitol Center, a large venue outside of Washington D.C. This required me to drive on the National Capitol Beltway. My mother's question as to who was driving, was immediately followed with what I perceived as an unfair "new" rule that I could not drive on the beltway until I was 18. After it became clear that my mother would not change her mind, my obvious rage subsided. I contrived a plan, unusual for me, (being a very "good girl") to drive anyway. I told my mother that I was driving to a friend's house, who would drive from that point. I am quite certain my mother never suspected that I had driven that night to the Capitol Center. More importantly, I think her belief was reasonable, and that few would question her on it.

A narcotics forfeiture lawyer should be prepared to point out the inconsistency in applying a sliding standard of knowledge: one for middle and upper class white families, who may be expected to deny to themselves some awareness of their children's drug activity, and of poor and/or black families who are expected to know all about this activity. An expert witness could be employed to testify that parents from any class or race are often ignorant of children's involvement with drugs.

A. Debunking Matriarchal Myths

Ms. Darby and others like her should certainly be allowed the same luxury of having faith in her children. Arguably, she and other poor black single mothers, faced with special difficulties in raising sons to adulthood should be given more support, not less. Psychoanalytic theory tells us that in order to develop into a healthy adult, the male child must separate from his mother,

rejecting her and her femaleness.⁷⁵ The "good" mother must, with the male child, but not with the female child,⁷⁶ contribute to this separation. She must, in present day parlance, "give the boy space."

This necessity is presumably even greater for a single black mother raising boy children than for mothers with partners or mothers of girls. She bears the heavy burden of explaining to her sons the inappropriateness of using his mother, a female, as a role model. For the black single mother, the road is even more difficult. It is well settled that black children in America face many hazards on the road to adulthood and in the working world.⁷⁷ High numbers of single mothers and absent fathers in the black community combine to produce a perceived need for the black single mother to be "both mother and father." This need is particularly urgent in the area of mothering young black boys, as black mothers are accused of not knowing how to teach their sons to be "black men."⁷⁸

Here we see two layers of myth. The first is the false ideal of knowledge created for both white and black mothers who necessarily know or should know all of their child's activities and thoughts and can detect when he is diverging from the value system she has set. The second, is the myth of control imposed upon black mothers but not upon white. If the black mother knows all and does not act she is ultimately responsible for how her child "turns out." The effect of this myth in narcotics forfeiture cases can be very strong.

Negotiation for Ms. Darby's case—Prosecutor's question "if she is such a 'saint,' such a wonderful mother—then why is her youngest son a drug dealer?"

The prosecutor's comment above is based on a series of syllogisms stemming in part from the damage done by mainstream popular psychology.

⁷⁵ Chodorow, *supra* note 50.

⁷⁶ See Luce Irigaray, And the One Doesn't Stir Without the Other, as cited in Eleanor H. Kuykendall, Toward an Ethic of Nurture: Luce Irigaray on Mothering and Power, in *Mothering: Essays in Feminist Theory*, *supra* note 67 (essay by leading French feminist on the unbounded nature of the mother-daughter relationship in psychoanalytic theory).

⁷⁷ See, e.g., Stephen L. Carter, An Affirmative Action Baby (1993); bell hooks, Bred in the Bone (1997); Henry Louis Gates Jr., Thirteen Ways of Looking at a Black Man, *The New Yorker*, Oct 23, 1995 at 56.

⁷⁸ See, e.g., Dwight L. Greene, Naughty By Nurture, Black Male Joyriding—Is Everything Gonna Be Alright?, 4 Colum. J. Gender and L. 73 (1994). However, it is problematic that the troubles of black boys growing up have received more attention than those of black girls. Not only are teenage pregnancies as worthy of attention as the problems which beset young boys, but girls also face the same risks that boys do, and are entering jails in spiraling numbers.

According to popularized Freudianism, the mother is the primary tool of replication of sex roles and therefore determines the direction of our society. Therefore, the syllogism goes, if our society is flawed, our families must be flawed.⁷⁹ If that is so, the mother must be at fault. In the black family, unthinkingly trumpeted as a matriarchy, the syllogism has extra force. However, social science evidence does not support the supposition that the black family is a matriarchy. In a truly matriarchal society, political power is in the hands of its women. In fact, according to anthropologist Ulf Hannerz,⁸⁰ whose work was contemporary to the Moynihan Report, the ethnocentrism of the creators of the Report led them to mistake or at least overestimate the matrifocal nature of the black family.⁸¹ Hannerz notes both that the socialization role of peer groups in the ghetto was as powerful as if not more powerful than that of the home, and that the home was more likely than not to have male influences regardless of whether the single mother was actually married.⁸²

Hannerz points out that there is more likely than not, particularly among younger mothers, a male "significant other." "More or less steady boyfriends (sometimes including the separated father) go in and out. Even if these men do not assume a central household role, the boys obviously can use them as source material for the identification of male behavior."⁸³

Indeed, Hannerz conjures up a world in which women, even women who are mothers, are denigrated rather than worshipped. He describes ritual peer group joking which serves to alienate the small ghetto boys from dependence on mother figures and train them in the attitude, typical of "streetcorner men," to be exploitative and somewhat antagonistic towards women.⁸⁴

The practical argument to make to a prosecutor about a forfeiture claimant he has been persuaded to feel a kinship with is "So what if she did know?" "What could she do about it?". Prosecutorial discretion allows the prosecutor to settle, notwithstanding the fact that the law does not distinguish between knowledge and consent. However, the strong black matriarch myth sets up the specter that control is always present and that this mother must guide the

⁷⁹See generally Chodorow, *supra* note 50.

⁸⁰Ulf Hannerz, *Another Look at Lower-class Black Culture*, in Soul (Lee Rainwater, ed. 1967).

⁸¹*Id.* at 177.

⁸²*Id.* at 173.

⁸³*Id.*

⁸⁴*Id.*

behavior of all of her family members. Knowledge of and consent to their activities are assumed from the larger assumption that she is “in charge.”

B. “Poor People are Immoral and Carefree” and “Single Women are Sluts”

Demonization of the single mother affects all women, regardless of race or socio-economic class.⁸⁵ An additional layer is added when the woman is from a disadvantaged socio-economic group. The fantasy of the lazy welfare queen (embodied recently in the rhetoric of both welfare reform and the “get tough on crime” movement) is not particularly new. Nor is the idea that the unemployed are shiftless, or that poor people have lots of energy and free time.⁸⁶ In all likelihood a forfeiture prosecutor will on some level believe that a stay-at-home mother will have nothing to do but observe the actions of her younger household members. He will assume that she has the energy to control them.

The majority of prosecutors and judges have no experience with the energy-sapping effect of a living space that is small, poorly ventilated, and not air-conditioned, in a world that makes no allowances for those without the power to control their environment. In addition, these circumstances also drive most of the activity out of the house and into the streets, where the ostensibly all-knowing/powerful mother cannot supervise it.⁸⁷

The day to day activities of coordinating family life in poverty— getting food and paying bills with no bank account, cashing benefits checks, getting to a telephone—are enormously draining. If any drug money does make its way into such a household it is likely to be from one of the children chipping in a small amount towards such day-to-day obligations as rent or food, to help the family into a semblance of a middle class lifestyle. It is rarely present as a vast cash infusion leading to a life of luxury.⁸⁸

PART V: U.S. v. NOSTRAND—MODELING A FORFEITURE

⁸⁵See Sue Miller, The Good Mother (1986) (upper middle class divorced white mother loses custody of her child for daring to be a sexual being).

⁸⁶A particularly fine debunking of this myth was done by George Orwell, in Down and Out in Paris and London (1933).

⁸⁷See, e.g., John Alex Kotlowitz, There Are No Children Here: the Story of Two Boys Growing Up in the Other America (1991).

⁸⁸See Regina Austin, The Black Community, Its Lawbreakers & A Politics of Identification, 65 S. Cal. L. Rev. 1769 (1992).

REPRESENTATION

The introductory story in this article reflects my awe at the way my client kept house and home together under terribly trying conditions. Judge Weinstein in Nostrand similarly notes the following schedule of forfeiture claimant Clara Smith with ill-concealed awe:

The credible evidence showed that Mrs. Smith was almost overwhelmed with the problems of her household. Her day began early in the morning. She took care of the minor children, seeing that they were bathed, dressed and fed before being sent off to school, and trying to supervise them upon their return. She was responsible for all the cooking and cleaning. She rarely left the apartment...usually when the food stamps arrived to do the shopping for the entire family.⁸⁹

Ms. Smith,⁹⁰ a poor black single mother and grandmother, prevailed on her innocent owner defense because her attorneys succeeded in representing her as one of “us,” not “them.” The construction of Ms. Clara Smith as the “good black mother,” in the opinion is, though not unproblematic, sensitive and unusually progressive in the world of forfeiture opinions’ construction of claimants. It confronts and rejects some of the more troubling stereotypes, for example that of the lazy welfare queen, in embracing the glorification of the matriarch (which could leave room for demonization of other black matriarchs possessing a less stellar housekeeping record).

Still, Clara Smith’s victory is good legal precedent for Ms. Darby and people like her. Both are poor black single women, who raised large families including not only their own children, but also grandchildren, nieces, and nephews. Smith’s case is of particular interest to those handling “drug evictions” rather than narcotics forfeitures of owned homes, since unlike Celia Darby, Smith did not own her own house but rather was the “owner” of a public housing leasehold.⁹¹

Judge Weinstein’s narrow holding was that Ms. Smith had mounted a successful innocent owner defense and that she and “her children, grandchildren and other family members, who look to her for shelter as the

⁸⁹Nostrand at 1024.

⁹⁰I note that Judge Weinstein’s reference to an evidently unmarried Clara Smith by the honorary title “Mrs. Smith” may be seen as culturally significant in light of her matriarchal role.

⁹¹Public housing leaseholds are covered in plain language of 21 U.S.C. §881 (a)(7)(as amended 1988).

family's matriarch,"⁹² were entitled to remain in their home in spite of the fact that her one granddaughter Chenelle⁹³ had sold drugs from the home, and two daughters, Juanita and Sylvia, had been drug users. While denying many of the claimant's substantive and constitutional claims and emphasizing his belief that drug sales did occur in the house and that it fell squarely within the forfeiture statute, Judge Weinstein cited the social cost of forfeiture:

This case reveals some of the limitations of apartment forfeiture as a means of eliminating drugs from public housing complexes. For the poor, the shortage of livable, low priced housing is especially acute. Tenants—and especially their minor children—who are evicted are likely to become homeless, with whatever stability their lives afforded seriously jeopardized.⁹⁴

The judge considered the size of the apartment itself and the number of people living in it, eighteen, as relevant facts. "Apartment 1-C is a small three bedroom, one bath, one kitchen and one living room unit at the Marcy public housing project in the Williamsburg section of Brooklyn. The leaseholder of record for 32 years has been Mrs. Clara Smith." He then went into quite a bit of detail about the composition of the Smith family, based on a chart offered by the claimants as Exhibit 1 illustrating the relationships of the family members.⁹⁵

The Nostrand court recognized an inverse correlation between poverty and the level of knowledge expected of a person claiming innocent ownership. In

⁹²*Id.* at 1018.

⁹³At the time of the opinion, Juanita Smith was a reformed heroin addict. Judge Weinstein left the Housing Authorities to determine whether she and her sister Sylvia and granddaughter Chenelle would be allowed to reside in the apartment after the order. He did note however, that Chenelle has forfeited her independent property right to live there by selling drugs.

⁹⁴*Id.* at 1018.

⁹⁵"Mrs. Clara Smith, age 51, is a great-grandmother. Most of the children, grandchildren and great- grandchildren bear the surname of Smith [and not of their fathers]. She has six children. Two of her daughters, Juanita Smith, age 36, and Sylvia Smith, age 32, reside in the apartment with her...Juanita Smith's four children reside with her in the apartment. They are Chenelle Smith, age 19, Jamele Smith, age 15; Nicole Smith, age 14, and Ramel Smith, age 11. Ramel was born drug addicted; as a result, Mrs. Clara Smith has legal custody of him. Chenelle Smith has two daughters who live in the apartment; they are Fatima Smith, age 4 and Jasmine Carr, 22 months...All of Sylvia Smith's children live with her in the apartment...They are Tara Smith, age 12; Anthony Smith, age 11; Marcus Smith, age 9; Kelima Smith, age 8; Kevin Smith, age 8; and Quentay Smith, age 4...Mrs. Clara Smith also has legal custody of another three grandchildren whose mother is Pearl Smith, another of her daughters who does not live in the apartment. They are Shawn Lindsay, age 13; Shonda Lindsay and Melissa Smith, age 23 months." *Id.* at 1020-21.

cataloguing the reasons why the court found that Mrs. Smith's testimony was "not incredible as the government claims."⁹⁶ Judge Weinstein wrote:

The apartment does not appear to be a "crack house" where widespread notorious drug activity occurred. The Government only established one drug sale and the presence of hidden drug paraphernalia. The crack vials though large in number were not strewn around the apartment but rather concealed from sight. Given Mrs. Smith's other burdens she could easily have been unaware of the illegal activities. In view of her expressed antipathy to drugs, it would be reasonable to assume that her children and grandchildren would try to keep Mrs. Smith in the dark about their proscribed activities. We take judicial notice of the widespread lack of knowledge of children's drug activities in all kinds of families.⁹⁷ (emphasis added).

Judge Weinstein concluded,

evidence revealed that, on the whole, the children were far better living with their own extended family, even in the difficult, overcrowded circumstances of Mrs. Smith's apartment, than they would be as atomized individuals in the streets, foster homes or shelters of New York. Exclusion from their apartment risks driving the eighteen Smith family residents far below a minimum standard for civilized living.⁹⁸

and stressed that "Congress does not appear to have intended such a draconian result."⁹⁹

Of course, Clara Smith's victory may have been a result of a happy coincidence of representation *pro bono* by the large New York law firm Sullivan & Cromwell and a trial court Judge appointed by Lyndon Johnson, known for both his iconoclasm and his commitment to social justice. However, the strategies of presentation can be inferred from the opinion and can be applied to the cases of almost any unempowered forfeiture claimant, by any attorney.

CONCLUSION

Ms. Darby was an easy target for prosecution. As Mari Matsuda wrote,

⁹⁶*Id.* at 1033.

⁹⁷*Id.*

⁹⁸*Id.* at 1023.

⁹⁹*Id.*

"the law rarely goes where women, children, people of color and poor people live," and "this absence of law redressing harm is itself another story with a message...about the relative value of human lives."¹⁰⁰ But if we hold a mirror to Professor Matsuda's concept, we reveal that the law goes to these same places easily when the goal is not to ameliorate but to punish or socially engineer.

More and more, scholars and activists are identifying ways to combat the material impact of facially neutral statutes such as the Maryland Asset Forfeiture Act. Clients can be helped through the development of legal theories like Dorothy Robert's equal protection challenge to punitive prosecutions of drug addicted mothers, which she argues may best be made to a legislature or under color of state constitution. While work goes on to change the substantive law, clients can also be helped by an attorney's awareness of how unconscious racism and sexism color the views of the players in the pre-trial and trial processes.

Since the mid 1980s, the power of the triple threat of narcotics forfeiture, drug eviction, and breach of lease have been employed to punish women and their children for the mothers' failure to live up to a false ideal and for their, in some way, "causing" their children to become involved in drugs. The result is thousands of single black mothers with families losing, or at risk of losing, their homes. The false public image of forfeiture as mostly affecting large scale drug dealers who might lose a car or boat masks the reality of its effect on poor single mothers struggling to hold extended families together. These women, already living on what Toni Morrison describes as the "hem of society,"¹⁰¹ are more likely to be at risk of losing their homes to narcotics forfeiture or drug eviction. They are also less likely to have access to the legal means to fight the action successfully.

Ms. Darby's case presented us with a choice of two stereotypical extremes: a place of victimhood or a place of complete power. There was danger in representing her either way. To present her as the woman of strength, dignity, and yes, wisdom, that we knew her to be, would be to risk having her veracity on the knowledge point called into question. The powerful positive image of the single black head of the family had been constructed for the empowerment of the community, but it could, and often was, appropriated to harm that same community. A third choice, hardly revolutionary, was to try to humanize her, learn of the realities of her life and

¹⁰⁰Mari J. Matsuda, Public Response to Racist Speech: Considering the Victim's Story, 87 Mich. L. Rev. 2320 (1989).

¹⁰¹ Morrison, *supra* note 3, at 17.

present those realities in a package that would enable the prosecutor to see her as one who should be protected from the drug war rather than its target. This, of course, takes time and resources, two things often in short supply for the poverty lawyer, but the effort is well worth it.¹⁰²

Much that is positive has arisen out of the feminist stripe that glorifies motherhood, and from the black community's empowerment movement which has presented strong images of black women overcoming oppression. However, by the time these pictures have reached the consciousness of prosecutors and judges, the complex human beings behind the constructions may have been irretrievably lost to the reductive nature of stereotypes. Myth makers—even positive myth makers—need to think about all of their possible audiences, or to put it more crassly, the end-users of their product.

To the extent that traditions of mothering in the black community differ from a white societal norm (however false), the black women will suffer in comparison. For example, if as is often done in black but not middle class white communities, a black woman allows a relative, daughter or neighbor to share caretaking of her child, will that be termed neglectful?¹⁰³ Having failed against the white standard, real black mothers cannot live up to the standard of supernatural strength that the black community itself has helped to construct.

¹⁰²Lynne Henderson, *Legality and Empathy*, 85 Mich L. Rev. 1574 (1987).

¹⁰³Carol B. Stack and Linda M. Burton, *Kinscripts: Reflections on Family, Generation and Culture* at 33-42, in *Mothering: Ideology, Experience, and Agency*, (Evelyn Nakomo Glenn *et al.*, ed. Routledge 1994).

