THE POVERTY OF PRIVACY RIGHTS

Introduction

A cursory glance at the California Code of Regulations hardly excites. Indeed, due to the fact that it just appears to be composed of chapters upon chapters of rules upon rules concerning bureaucratic banalities, one might be tempted to describe the code as "boring." Sure, there are moments of titillation: Title 17 regulates the "Office of Problem and Pathological Gambling." (It includes a provision that requires casinos to make payments to the "Gambling Addition Program Fund.") And then there is Title 26, which concerns "Toxics." (It contains a subtitle that governs the "Board of Barbering and Cosmetology" and includes a provision that, in no uncertain terms, prohibits an establishment or school from "knowingly permit[ing] a person afflicted with an infection or parasitic infestation capable of being transmitted to a patron to serve patrons or train in the establishment or school.") But, besides these brief flashes of the unfortunate and the foul, the California Code of Regulations seems utterly mundane and quite dull.

Yet, nestled within it is Title 22, which itemizes rules and regulations for the provision of social services in California. And nestled within that title is section 51179.10, which delineates the services that pregnant women will receive when they, lacking private health insurance and the means to pay for prenatal care out-of-pocket, look to the state's Medicaid program for assistance in acquiring medical care. The provision requires that prenatal care services administered in line with it must, alongside the expected examinations and laboratory tests designed to access and manage a pregnant woman's physical health, include:

> (c)…
>
> (1) Written assessments of each patient's nutritional status.
>
> (A) A complete initial nutrition assessment shall be performed at the initial visit or within four weeks thereafter….
>
> (B) A nutrition reassessment using updated information shall be offered to each client at least once every trimester and the individualized care plan revised accordingly.
>
> ….
>
> (5) Postpartum reassessment, development of a care plan, and interventions.
>
> (d) …
>
> (2) Written assessment of each patient's health education status.
>
> (A) A complete initial education assessment shall be performed at the initial visit or within four weeks thereafter and shall include an evaluation of: …formal education and reading level; learning methods most effective for the client; educational needs related to diagnostic impressions, problems, and/or risk factors identified by staff; … mobility/residency; religious/cultural influences that impact upon perinatal health; and client and family or support person's motivation to

> participate in the educational plan.
>
> (B) An education reassessment using updated information shall be offered to each client every trimester and the individualized care plan revised accordingly.
>
> (4) Postpartum assessment, development of care plan, and interventions.
>
> (e) …
>
> (1) Written assessments of each patient's psychosocial status.
>
> (A) A complete initial assessment of psychosocial functioning shall be performed at the initial visit or within four weeks thereafter and shall include review of: current status including social support system; personal adjustment to pregnancy; history of previous pregnancies; patient's goals for herself in this pregnancy; general emotional status and history; wanted or unwanted pregnancy, acceptance of the pregnancy; substance use and abuse; housing/household; education/employment; and financial/material resources.
>
> …
>
> (2) Preparation of the individualized care plan psychosocial component that addresses:
>
> (A) The prevention and/or resolution of psychosocial problems.
>
> (B) The support and maintenance of strengths in psychosocial functioning, and:
>
> (C) The goals to be achieved via psychosocial interventions.
>
> (3) Treatment and intervention directed toward helping the patient understand and deal effectively with the biological, emotional, and social stresses of pregnancy with referrals, as appropriate.
>
> (4) Postpartum reassessment, development of a care plan, and interventions.
>
> (f) Review and revision of the care plan shall occur during the antenatal, intrapartum, and postpartum periods on a regular basis and will be based on repeated and ongoing assessments and evaluation of the client's status.

During eighteen months of ethnographic fieldwork in the obstetrics clinic of New York City's "Alpha Hospital," a large public hospital that serves the city's poor, I had the chance to observe a "psychosocial assessment" that a social worker, "Tina," administered to an African American woman, "Erica." New York's Medicaid prenatal care program mirrors California's insofar as it requires various assessments of pregnant women that exceed assessments of their physical health. I had asked Tina to ask Erica, who was pregnant with her fourth child, if I could sit in during her consultation. Erica consented and allowed me to tape record her session:

> Tina ("T"): Are you working?
> Erica ("E"): No—I'm in college still.
> T: How are you supporting yourself?
> E: [long pause] How could I forget what it's called . . . . Welfare! [laughs]

T: You receive public assistance?
E: Yes.
T: How much?
E: Um, 354 . . . .
T: And does that include what they give you for your rent?
E: Yes. Well, I don't pay rent.
T: You don't pay rent?
E: I live in a shelter.
T: What shelter do you live in?
E: Beta Houses.
T: Who's your caseworker?
E: Ms. C.
T: Do you have the number?
E: Yeah—I have the number: 1-212-555-1212. She has an extension: 1212.
T: And how long have you been there?
E: Almost four months.
T: And can you tell me what the circumstances were that put you in shelter?
E: Domestic violence.
T: And how long did the domestic violence last?
E: Two months.
T: So, you were in a domestic violence relationship for about two months, and then you moved to a shelter.
E: Uh-huh.
T: And how long was your relationship?
E: It wasn't really a relationship. It was, like, I would say—three months.
T: I'm sorry?
E: Three months—it was, like, a three-month relationship.
T: It was a three-month relationship. And do you have a police report and an order of protection?
E: The police report, yes. Not the order of protection—still didn't get it.
T: Would you like to talk to someone about the domestic violence?
E: No . . . .
T: Who's the father of the baby?
E: Nathanial Thompson.
T: Is the father of the baby living with you?
E: No.
T: How long have you been in a relationship with the father?
E: 10 years.
T: The father of the baby?
E: Uh-huh. Same father as all the rest of them.
T: How old is he?
E: How old? 34.
T: Can you identify the father?
E: Yes . . . .
T: What's his name?
E: Nathanial Thompson.

T: And how would you describe your relationship with the father?
E: Fine—now.
T: "Fine now"?
E: Uh-huh.
T: Does he intend to help when the baby comes?
E: Yes—he's my fiancé. I just didn't get my ring yet. He better hurry up.
T: Is he working?
E: Yes. No, he doesn't work. Sorry. He's in college.
T: How does he support himself?
E: I know that he's on public assistance, but I don't know what he gets or anything like that.
T: But, he's going to able to support you and your child?
E: Yes, he's going to get a job by the time—he's about to be done with college.
T: You feel that when he's done with school, he's going to be financially able to support the child?
E: He's going to be making 43,000 [dollars] a year.
T: You know that already?
E: Yes. His job is already set up.
T: What does he do?
E: He's a computer technician. I don't know how he does it. I hate computers.
T: You are in a better situation than a lot of our patients.
E: I just have to get up out this dag-gone shelter. Then, I'll be fine.

What is remarkable about this exchange is that Erica was led into a conversation about a romantic relationship that tragically involved severe, homelessness-inducing violence, the healthiness of her relationship with the father of her children, her earnings capacity, the earnings capacity of the father of her children, and any previous contact that she had had with the welfare state (in addition to answering questions seeking to gather information about any history that she may have had with tobacco and alcohol products, controlled substances, mental illness, and a host of other issues) because she was pregnant and had presented herself to a public hospital with the hope of receiving state-assisted prenatal care. It is important to observe at the outset that this is an intensely personal, painfully intimate conversation that privately-insured pregnant women can avoid enduring.

It is not hyperbole to describe the inquiries made by California's and New York's Medicaid programs as extremely extensive and unnervingly exhaustive. And it is not unreasonable to wonder how pregnant women asked to live these programs experience them. The woman who, lacking private health insurance, turns to Medicaid assistance will find that her need and desire to have the health of her physical body monitored throughout her pregnancy will result in the monitoring of areas of her life that she may not have expected to open up for scrutiny. A vast quantity of information, ranging from her eating habits to her employment history, will be gathered. And she will be counseled about a whole array of matters—counseling that no law requires that privately-insured women receive.

Consider as well that Illinois—which operates a prenatal care program that parallels the programs in California and New York insofar as it requires pregnant women to undergo consultations with social workers, nutritionists, health educators, and the like—also operates a program called "Family Case Management." This program is designed to address "a wide range

of needs, including health care, mental health, educational, vocational, child care, transportation, psychosocial, nutritional, environmental, [and] developmental." Importantly, Family Case Management is not a program for which pregnant women sign up; it is a program into which they are inducted: "All women known to [the Department of Healthcare and Family Services or 'HFS'] as being pregnant … are referred to [the Illinois Department of Human Services or 'IDHS'] for family case management services. HFS transmits the names of participants to Cornerstone, IDHS' tracking system designed to track maternal and child health services provided by or through its provider networks." Of great interest is one particular feature of the service: home visits. "Contacts with clients include home and office visits at a frequency necessary to meet the client's needs." With this in mind, one should note a policy that Alpha Hospital had in place during the period of my ethnographic research: a patient mentioned to me me that a social worker, Carmen, informed her that a woman will "get into trouble" if she gives birth to a baby at Alpha and lacks a record demonstrating that she has received more than four prenatal care appointments. When I asked Carmen about this policy, she responded:

> If somebody comes . . . to deliver and it seems like they haven't been getting prenatal care here or elsewhere, what happens is that they will hold the baby until they can get a nurse to go to the home and see if everything is taken care of there. And once they get clearance, then the lady can take the baby home. It's not like they get in trouble. It's just that we have to clear the air because if she wasn't prepared enough to come to prenatal care, who says that she's prepared enough to take care of a baby? That's neglect. Why haven't you been getting your prenatal care? That's neglect. It can cause birth defects and all sorts of things like that. It's not that they lose the baby. It's just that we hold the baby long enough so that the nurse can check to see if there is a crib and things like that. . . . We want to clear the air. After that, we let them go.

The reality is that many pregnant women, namely those who have recently immigrated without documentation to the United States, will not be able to be seen by a provider four times before delivering their babies. As such, many pregnant women in New York endure home visits in order to "clear the air" and take their babies home with them.

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Many persons may find disquieting the bureaucratic apparatus into which pregnant women without private health insurance are inserted. And many of those persons will describe their disquietude in the language of *privacy*. That is, the programs of public healthcare in California, New York, and Illinois do not leave the women that it serves with much privacy. Now, they may feel a bit heartened by the knowledge that not only do these states cover the costs of an uninsured woman's prenatal care, but they also cover the costs of her abortion should she elect not to carry her pregnancy to term. In this way, they respect women's privacy when privacy is understood as the space wherein women can decide, without undue government influence or coercion, whether or not to bear a child. (Importantly, these states are in the minority with regard to respecting the privacy of uninsured pregnant women in this regard.)

However, if we conceptualize the family as a private entity into which the government ought not to intervene absent evidence of the abuse or neglect of any one of its members, then these programs violate uninsured women's privacy to the extent that they allow the government to monitor the family unit for the duration of the pregnancy, and possibly after. If we understand certain information about ourselves as private—like the details about our marriages or romantic

relationships, our eating habits, the frequency with which we exercise (or not), and our success at remaining gainfully employed (or not)—then these programs violate uninsured women's privacy to the extent that they require women to divulge that information. And if we think that compiling such information into databases and tracking individuals through centralized systems implicates our privacy interests, as many legal scholars do, then we may feel even more affirmed in believing that pregnant women are not left with much privacy when they attempt to receive prenatal healthcare with the assistance of the state. Finally, and most simply, if we understand our homes as private spaces, then these programs violate uninsured women's privacy to the extent that they require women to open their homes to agents of the state during home visits.

While states' Medicaid programs vary greatly, most provide assistance to poor pregnant women in the form of health insurance that covers prenatal care expenses. And the Medicaid programs for pregnant women seeking prenatal care in California, Illinois, and New York—which are typical of other states' Medicaid programs in their demands—demonstrate a simple reality: to be poor and in need of assistance from the state is to be subject to invasions of privacy that the economically self-sufficient would perceive as gross demonstrations of the danger of governmental power without limits. Indeed, one would expect that if the Constitution is a protector of individual rights and liberties that place boundaries on state power, it would prevent precisely what poor mothers endure with respect to governmental intrusions into their private lives. It is not unreasonable to believe that if the state treated wealthier persons who receive government benefits the same way that the state treats poor mothers who receive government benefits, there would be a general sense of outrage at the thought of the government violating citizens' privacy. For example, if the state required home visits before a person received the benefit of a tax deduction or a broadcasting license, or if states required farmers to divulge information about their sexual, occupational, and social histories when they apply to receive farm subsidies, these requirements would be struck down as violations of the right to privacy. Indeed, if a state or the federal government required that *all* pregnant women—poor and non-poor alike—be counseled about smoking and drinking alcohol, be subject to "treatment and intervention directed toward helping the patient understand the importance of [] and maintain good nutrition during pregnancy," and be required to discuss her "goals for herself in this pregnancy" and her "general emotional status," one would expect outcry about the privacy invasions visited upon pregnant women by a paternalistic and regulatory state. Nevertheless, courts have routinely upheld the constitutionality of the privacy invasions that state Medicaid programs force poor mothers to endure.

When scholars have addressed the lack of privacy that poor mothers suffer when they receive state assistance, they usually speak about it in the language of the violation of privacy rights. That is, they describe these programs as violating poor mothers' rights to privacy. This book seeks to alter the terms of the current conversation. This conversation assumes that poor mothers actually have privacy rights that welfare programs like TANF and Medicaid violate. Some scholars formulate the claim more forcefully and contend that poor women have meaningless rights. However, this book suggests that scholars have misconceptualized the issue when they claim that welfare programs violate poor mothers' privacy rights or that poor mothers have meaningless privacy rights. That is: perhaps privacy rights are always already a function of class, such that poor mothers do not have any privacy rights about which to speak. Accordingly, Medicaid and TANF do not violate the privacy rights of poor mothers because their socioeconomic status precludes their possession of any privacy rights that the state is obliged to respect.

Essentially, this book argues that wealth is precondition for privacy rights. And it argues that the reason why wealth is a precondition for privacy rights is because poverty has been constructed as indexing the poor person's bad moral character. Because poor mothers are thought to have a bad moral character, and because their bad moral character necessarily implicates children insofar as they are pregnant or are parenting, they are not given any rights that could limit the power that the government uses with and against them. Essentially, an examination of our society and culture demonstrates that privacy rights are given to those whose moral character reveals them as worthy of being rights-bearers.

It is important to describe with precision the argument that this book makes and to distinguish it from an alternative formulation:

1) The first formulation is a rhetorical argument. It claims that poor mothers have privacy rights; however, for all practical purposes, they have no rights. Under this formulation, describing poor women as having "no rights" is a rhetorical flourish – meant to underscore the impotence of the rights that they do possess.
2) A second formulation is an analytical argument. It claims that poor women actually do not possess rights. It claims that being presumed to be of good moral character is, analytically, a condition on having rights; moreover, poor women who are on Medicaid are not presumed to be of good moral character. As a consequence of this presumption, they have no rights.

This book makes the second, analytical argument.

It is imperative to note why this book has chosen to make the claim that poor mothers have no privacy rights as opposed to the less controversial, less provocative claim that poor mothers have privacy rights, but their rights are meaningless and/or are routinely violated.[1] First, other scholars have competently made the less controversial, less provocative, rhetorical argument. The importance of this book is that it builds on this rhetorical argument and shifts the terms of the existing conversation by introducing the analytical argument. This is a crucial, generative shift because the analytical argument may explain why *positive rights are only an illusory solution to poor mothers' predicament*. While the distinction between positive rights and negatives rights is often an chimerical one, as Chapter *** discusses, one could roughly schematize it as follows: positive privacy rights oblige the government to ensure that individuals are able to engage in the behaviors and make the decisions that are deemed private. Meanwhile, negative privacy rights prohibit the government from acting in ways that amount to governmental intervention into areas of life deemed private. When faced with Court decisions that insisted that the right to privacy contained in the Constitution was a negative one, and when faced with the fact that the negative right to privacy oftentimes did not protect poor women's interests, many scholars argued that positive rights would fix the problem. For example, they argued that the negative right to an abortion, which proscribed government from interfering with a woman's ability to access an abortion, was inconsequential for poor women who did not have the means with which to purchase abortion services; what was needed, they argued, was a positive right to abortion, which would obligate the government to pay the cost of abortion services for poor women. However, this book argues that positive rights may not solve the problem. If being presumed to bear a good moral character is a prerequisite for negative privacy rights, then we may have little hope that a similar presumption would not be a prerequisite for positive privacy rights. If it is, poor mothers would likely be denied positive rights to privacy as well.

Second, making the analytical argument allows us to draw parallels between poor women and other groups who have been disqualified from having rights. The following three examples are illustrative: in *Dred Scott*, Chief Justice Taney wrote that the "negro … had no rights which the white man was bound to respect"; the law that prompted the litigation that led to the Court's decision in *Romer v. Evans* had disqualified LGBT persons from having a set of rights (i.e., the right to access the court system and pursue sexual orientation discrimination claims); and, at present, undocumented non-citizens do not have a set of rights (i.e., the right to vote, the right to access Medicaid and SCHIP). Speaking about poor women as analogously not having a set of rights, privacy rights, allows us to see continuities between these other groups that have been formally disqualified from certain legal protections and poor women who have been informally disqualified from a set of legal protections. It allows us to think about the issue in new ways. And it allows us, perhaps, to imagine different solutions.

There is, of course, a distinction between violated rights and the absence of rights. This book is not interested in identifying with precision where the line that distinguishes the two circumstances can be drawn. However, it does posit that where a right "violation" is systematic, expected, and invariably sanctioned by the Court, then the line that distinguishes a right violation from the absence of the right has long been crossed, and it is fair to say that the right does not exist. We are well on the other side of the line with respect to poor mothers' ostensible privacy rights. We have entered a regime where violations of poor mothers' purported privacy rights are not one-off occurrences—rarities. Far from it, they are banalities that the jurisprudence authorizes. Practically, experientially, and analytically, poor mothers do not have privacy rights.

Departing from Traditional Rights Discourse

To argue that poor women do not have privacy rights is inconsistent with how lawyers (as well as members of the lay public) are trained to conceptualize rights, especially constitutional rights. We are taught that once a constitutional right is recognized, then everyone possesses that right equally. We understand that there were moments in our history when groups of persons were denied rights altogether—during the days of chattel slavery, for example. And we understand that the passage of the Reconstruction Amendments after the Civil War formally corrected this exclusion. We also understand that, throughout our history, groups of individual have agitated for inclusion in the population of persons to whom rights would be given—during the Women's Rights Movement in the mid- to late-nineteenth century and early twentieth century, for example. And we also understand that groups of individuals have continued to agitate for the recognition of additional constitutional and non-constitutional rights that will make their citizenship, their opportunities, or the rights that they already possess equal to those of other persons in the United States. The Civil Rights Movement in the 1960s and the Women's Liberation Movement in the 1960s and 1970s immediately come to mind.

We are also trained to understand that there are some classes of persons that do not possess the same rights as others—incompetent persons and minors, for example. However, we are trained to believe that these groups are rare exceptions to the general rule that once a constitutional right is recognized, everyone possesses the right equally. As such, the narrative that we are trained to accept tells us that once the Supreme Court in *McDonald v. Chicago* interpreted the Second Amendment to provide individuals with the right to possess handguns in the home, the interpretation gave everyone a right to possess handguns in the home. According to this narrative, once the Supreme Court in *Roe v. Wade* interpreted the Constitution to contain a right to an abortion, the interpretation gave everyone the right to an abortion. Now, we are instructed to understand that there may be enduring questions about the right that the Court has

found or recognized. (Does the right that the Court recognized in *McDonald* prohibit states from banning semi-automatic weapons? Does the right that the Court recognized in *Roe v. Wade* require a state to fund the costs of terminating a pregnancy when it funds the costs of carrying a pregnancy to term?) However, we understand those questions as going to the content and shape of the right that everyone possesses. How the Court answers those questions affects everyone equally insofar as everyone possesses the same right. At least, this is what we are trained to believe.

We are also trained to understand that rights may be infringed when the government has good reasons for doing so. When the Court has found the right to be a fundamental one, the government's reasons for infringing it must be compelling. When the right is not fundamental, of course, the government's reasons for infringing it need not be as persuasive. As lawyers and members of the lay public, we come to be comfortable with that result because we are instructed to understand that rights are not absolute—that the government can override them if it demonstrates that the circumstances call for it.[2] Our legal education tells us that what distinguishes a legitimate infringement of the right from an illegitimate violation of the right is whether the government's reasons for overriding it meet the burden of justification that the right demands.[3]

And this is how most scholars and jurists have approached the question of the privacy rights of poor mothers. Consistent with the narrative that presupposes that everyone (who is not incompetent or a minor) possesses the same right once the right is recognized, they assume that poor mothers have privacy rights. But then, in the face of laws like California's section 51179.10 and similar state laws, these scholars argue that poor pregnant women's rights are violated. For example, when the Ninth Circuit upheld a provision requiring that all beneficiaries of California's cash assistance program living in San Diego County submit to home visits by an investigator from the District Attorney's Office, the dissenters observed that no court would ever uphold the constitutionality of a similar provision applied against the wealthy. The dissenters argued that although the poor do not receive most government benefits, "this is the group that we require to sacrifice their dignity and their right to privacy." (Sanchez v. San Diego County). Similarly, legal scholar Dorothy Roberts, who has dedicated a substantial portion of her oeuvre to exposing the injustices that poor mothers are forced to endure, has written that many government programs that aid this group require "individuals to barter away their rights in exchange for benefits." (Roberts, "The Only Good Poor Woman," 939).

In stating that government programs violate poor mothers' rights or demand that they be sacrificed or bartered, scholars and jurists are claiming that the government has overridden their rights without meeting its justificatory burden. Accordingly, they describe poor mothers' rights as "weak" or "meaningless." They are "weak" because they invariably fail to stop the government from overriding them. They are "meaningless" because, in invariably failing to stop the government from overriding them, the government acts as it would act if the rights did not exist at all.

This book departs from this traditional account of poor mothers' privacy rights. It refuses to describe poor mothers as possessing "weak," "sacrificed," "meaningless," or "violated" privacy rights because these descriptions presuppose that poor mothers actually have privacy rights. This book suggests that the traditional narrative that presupposes that everyone who is competent and is not a minor possesses a right once it is recognized is actually wrong. Perhaps the reason why the government can act as it would act if poor mothers' privacy rights did not

exist at all is because *poor mothers' privacy rights do not exist at all.* Poor mothers do not have privacy rights.

This is a provocative claim. When most scholars have contemplated the fact that poor people's purported rights function dramatically differently from the rights that their counterparts with class privilege possess, they have resisted the conclusion that poor people actually do not have rights. For example, when contemplating the fact that poverty makes it quite difficult, and frequently impossible, for poor persons to exercise the rights that the conventional rights discourse asserts that they possess, political theorist John Rawls declined to conclude that the practical inefficacy and irrelevance of poor persons' theoretical rights demonstrate that they actually do not possess those rights. He writes:

> The inability to take advantage of one's rights and opportunities as a result of poverty and ignorance, and a lack of means generally, is sometimes counted among the constraints definitive of liberty. I shall not, however, say this, but rather I shall think of these things as affecting the worth of liberty, the value to individuals of the rights that the first principle defines….: liberty is represented by the complete system of the liberties of equal citizenship, while the worth of liberty to persons and groups is proportional to their capacity to advance their ends within the framework the system defines. Freedom as equal liberty is the same for all; the question of compensating for a lesser than equal liberty does not arise. But the worth of liberty is not the same for everyone. (John Rawls, *Theory of Justice*: 204).

Here Rawls distinguishes between having rights and the worth of the rights that one has. While poverty may make rights less valuable insofar as poverty precludes the indigent rights-bearers from taking advantage of them, Rawls maintains here that they possess the rights in the first place. Here, he does not arrive at the conclusion at which this book arrives: the utter inefficacy of ostensible rights demonstrates the nonexistence of those rights.

Rawls is not alone. Legal philosopher Jeremy Waldron writes that political theorist Isaiah Berlin arrived at a conclusion similar to Rawls'. Waldron quotes Berlin as asking, "For what are rights without the power to implement them?" (Waldron, *Liberal Rights: Collected Papers*: 6). However, he also notes that Berlin, like Rawls was willing to distinguish the possession of rights from their worth: he was willing to allow that indigent persons could be in possession of meaningless rights. Writes Waldron of Berlin, "And *still*, he said, from the analytical point of view, 'liberty is one thing, and the conditions for it are another.'" (Ibid.).

Waldron, who has been a proponent of positive economic and other subsistence rights throughout his career, disagrees with Rawls and Berlin, however. And in disagreeing with Rawls and Berlin, Waldron proposes a theory of rights that is consistent with the one that this book proposes. Waldron quotes a fellow proponent of positive economic and subsistence rights, Henry Shue, as saying, "No one can fully, if at all, enjoy any right that is supposedly protected by society if he or she lacks the essentials for a reasonably healthy and active life." (Waldron, *Liberal Rights: Collected Papers*: 9). Waldron goes on:

> What enjoyment means is actually *having* the right, in the substantive sense in which the right is thought to be worth having. A person does not have the right to vote unless there is some reasonable prospect that he can cast his vote on election day and have it counted. He cannot be said to have or enjoy the right in this sense if, for example, there are no polling places nearby or if there is no transportation available to get him to the polls.

Here, Waldron articulates a conception of rights wherein some people have the right to vote while others do not. Wealthy Person, who lives near polling places or who has the ability to drive to polling places, possesses the right to vote; simultaneously, Poor Person, who does not live near a polling place nor has a car or other means of transportation, does not have the right to vote. In Waldron's conception of rights, a constitution or a piece of legislation may have given the right to vote to all persons of a certain age. Accordingly, in a theoretical sense, both Wealthy Person and Poor Person, who are persons under the constitution or the legislation and who satisfy the age requirement, have voting rights. Rawls and Berlin would conclude as much. However, Waldron disagrees, contending that the impossibility of exercising the right renders the right nonexistent.

Waldron's formulation of rights is important because it suggests the possibility, and likelihood, of a legal landscape wherein some classes of persons have a right and other classes of persons do not have that right *although a constitution or law might have bestowed the right universally on all persons*. This is the United State's current legal landscape. Now, as it relates to the current project, the reason why poor mothers do not have privacy rights is not because it is impossible for them to exercise the privacy right. Surely, it is possible for them to exercise it: it simply requires government deference to it. Instead, the reason why poor mothers do not have the privacy right is because the government invariably refuses to defer to it, and the Court routinely upholds the government's refusal of deference.

The Government Interest in Protecting Children

Those who are committed to conventional rights discourse might argue that poor mothers have privacy rights; however, the government's interest in protecting their children and children-to-be from abuse and neglect overrides their rights. Accordingly, they suggest that the reason why it appears that the government can act as it would act if poor mothers' privacy rights did not exist at all is because the government interest in protecting children invariably justifies infringing these mothers' rights. It is important to take this claim seriously.

Some will argue insist that whatever privacy rights a poor mother has may be justifiably overridden in order for the state to do what it needs to do in order to ensure that a woman's child will be born into a healthful environment and that the woman will properly parent the child once born. Proponents of this view assert that it is pursuant to this state interest that the state gathers intimate, private data about the woman, monitors her and whatever extant family unit she may have, constrains her reproductive decisions, and makes her home available for surveillance. For example, consider California's Medicaid program and its requirement that, during the obligatory assessment of a woman's "psychosocial status," a social worker inquires into a woman's "housing/household" situation. The idea is that, if the woman reveals that she is cohabiting with a man to whom she is not married, the state may have an interest in continuing to monitor the woman and her family due to the fact that statistics reveal that children living in unmarried-couple households are at higher risk for physical and sexual abuse. (***CITATION) The same is true of inquiries that, for example, confirm that a woman smokes cigarettes, drinks alcohol, or does not regularly receive prenatal care although she is aware that she is pregnant. The information is thought to index a woman's neglect of her fetus. If the encyclopedic inquisitive net cast by the state indicates that a woman is likely to be a poor parent, the state will use the information gathered to maintain her within its regulatory apparatus in order to protect the child once it is born. The exhaustiveness of the inquest—and that it touches on information and areas of life that the woman may consider private—is necessary, it may be argued, because the end in mind is the protection of the child. The means to this end, the infringement of poor women's

right to privacy, is argued to be an unfortunate, yet inevitable, happenstance.

Thus, one might be tempted to conclude that not only do poor, pregnant women have privacy rights, but also the infringement of their privacy rights by state Medicaid programs is legitimate because the infringement is motivated by the state's interest in protecting children from abuse and neglect.

But, one must ask: why is the state convinced—so much so that it has erected an elaborate, cumbersome, bureaucratic apparatus—that the children born (or to be born) to poor women are in need of protection such that the meticulous and methodical audit of all of the pregnant poor is imperative? One must ask: why does the state presume that poor, pregnant women are at risk of abusing or neglecting their children?

The most salient characteristic that is shared by all women receiving Medicaid benefits during their pregnancy is their poverty. And one might conclude that it is this characteristic that casts suspicion over poor women's ability to not fail their children such that state override of these women's ostensible privacy rights is rational, expected, and appropriate. The most benign interpretation of this fact states, simply, that a mother's poverty yields the possibility that she will be unable to meet the material needs of her child. The benign interpretation posits that the state impinges a woman's privacy rights because in her poverty, the state assumes a likelihood of parental neglect in the form of the inability to meet an infant's basic subsistence needs. However, were this benign interpretation true, the questions asked of women throughout their prenatal care would concern, more specifically, their ability to provide food, clothing, and shelter for their children. If this interpretation were true, the ambit of the state's inquisition would focus on the question of the woman's economic viability and whether her financial condition could support an expanded family. Instead, inquiries about women's sexual histories, experiences with substance use and abuse, histories of sexual and domestic violence, and strategies for preventing the conception and birth of more children far exceed the purview of a concern about the material conditions in which newborn children can expect to be placed. Indeed, a less benign interpretation is required: the state's presumption of the abusive potentials of the poor, pregnant women who ask for Medicaid assistance is a consequence of the discursive construction of poverty as an index of the moral integrity of the person so impoverished.

It is worth noting, early and often, that wealthier women engage in the same behaviors in which poor women engage. Wealthier women cohabit with men to whom they are not married. Wealthier women have colorful sexual histories. Wealthier women smoke cigarettes and drink alcohol while pregnant. They, too, miss prenatal care appointments. They, too, have histories of sexual and domestic violence. They, too, have unplanned pregnancies. They, too, ought to contemplate strategies for preventing the conception and birth of more children if such a result is desired. They, too, find themselves pregnant after being in relatively short relationships with the fathers of their babies. Yet, no state has erected an extravagant bureaucratic tool with which it can take an accounting of every non-poor pregnant woman. This is telling. It suggests that the state is not really interested in protecting children from abuse and neglect. Instead, it is only interested in protecting *some* children from abuse and neglect. That is, the state assumes that only some children need to be protected from their mothers. And those children are the ones that are born to poor women. Why does the state make this assumption about poor women? It cannot be because poor women engage in problematic behaviors and have problematic histories; wealthier women do, too. It has to be because of something else. That something else is poor women's poverty and the explanation for poverty that the architects of these laws, and the judges that interpret these laws as consistent with the Constitution, have accepted.

Justice Marshall articulated this argument in his dissent in *Wyman v. James*, in which the Court upheld suspicionless searches of the homes of poor women receiving welfare assistance:

> It is argued that the home visit is justified to protect dependent children from "abuse" and "exploitation." These are heinous crimes, but they are not confined to indigent households. Would the majority sanction, in the absence of probable cause, compulsory visits to all American homes for the purpose of discovering child abuse? Or is this Court prepared to hold as a matter of constitutional law that a mother, merely because she is poor, is substantially more likely to injure or exploit her children? Such a categorical approach to an entire class of citizens would be dangerously at odds with the tenets of our democracy." (Wyman v. James, 341 – 42).

Justice Marshall is correct: such an approach *is* dangerously at odds with the tenets of our democracy. Nevertheless, it is an approach that the Court has sanctioned time and time again.

Thus, the inability to thrive within a capitalist economy, the failure to attach oneself to a man who has, and the consequent reliance upon the state for financial survival is thought to index a moral laxity that results in the production of unplanned children and their likely subsequent mistreatment and exploitation. Moreover, the mistreatment and exploitation of children is sufficiently probable that the prevention thereof justifies the dispossession of all poor, pregnant women of any right to be free from state intervention in private matters. Questions are asked of a poor woman not because the child to whom she will give birth might be wounded or wronged in some way by her mother's imperfect diet, cigarette smoked years ago, or inability to read beyond a tenth grade level. Instead, this information is gathered because the patient's poverty is presumed to indicate a moral character that might manifest in harm to her child. That there is a professed relationship between an individual's ostensible failure as a purveyor of her labor and that same individual's commitment to love, nurture, and care for her own children speaks to the power of society's commitment to capitalism.

Legal scholar Jordan Budd has reached a similar conclusion. He notes that while Fourth Amendment's privacy protections have not enabled indigent mothers receiving government assistance to shield their homes from suspicionless searches, wealthier persons enjoy Fourth Amendment rights that allow them to be free of such intrusions. He writes, "The judicial bias giving rise to this divided doctrine reflects a deeply rooted and enduring conception of the poor as morally bereft. By imputing to impoverished parents an innate risk of misconduct, in keeping with the abiding stereotype of the immoral poor,… indigency [acts] as a surrogate for the individualized suspicion that otherwise would be required to justify the intrusions at issue." (Budd, "A Fourth Amendment for the Poor Alone," PAGE). This is precisely this book's argument: because poor mothers are thought to possess a bad moral character, they are divested of any capacity to shield themselves from government intervention. However, while Budd describes poor mothers as retaining ineffective, futile Fourth Amendment privacy rights, this book suggests that poor mothers' presumptive moral character has been used as a justification for disenfranchising them of privacy protections altogether. That is, they do not enjoy ineffective, futile privacy rights. Instead, they do not enjoy privacy rights.

A Legal Landscape Dotted with Conditional Rights

Simply, this book argues that poor mothers do not have privacy rights because these rights are conditioned on the rights-bearer being presumed to possess a good moral character. Because poor pregnant women are assumed to have compromised morals—because society constructs it as good evidence of bad moral character when a woman allows her pregnancy to intersect with

her poverty—poor mothers are not given privacy rights.

Some may balk at the suggestion that privacy rights—a constitutional right with respect to reproductive, family, and spatial privacy—may be conditional. Their instinct may be that constitutional rights can not be conditional. The idea is that the Constitution bestows rights on "persons"; accordingly, all persons will bear any right that the Constitution bestows. There is no room within this understanding of constitutional rights for there to be *conditional* constitutional rights. However, this instinct is incorrect. The case of Puerto Rico demonstrates this. While the residents of Puerto Rico are United States citizens, those who reside on the island do not enjoy all of the constitutional rights that United States citizens on the mainland enjoy. Namely, in *Balzac v. Puerto Rico*, the Court held that Puerto Ricans on the island do not possess a Sixth Amendment right to trial by jury. In this way, the Sixth Amendment right to a jury trial is a conditional right; it is conditioned on the rights-bearer being within the borders of the continental United States (or in Hawaii and Alaska). The lesson of Puerto Rico is quite clear: constitutional rights can be conditional.[4]

Some may admit that the case of Puerto Rico demonstrates that there are conditional constitutional rights. However, these persons may balk at the suggestion that constitutional rights may be conditioned on *moral character*. It may fly in the face of their instincts about the particular brand of constitutionalism embraced and practiced in the United States to think that we would allow an appraisal of the moral character of the would-be rights-bearer to determine whether or not she will be given a right.

Nevertheless, the Immigration and Nationality Act, which sets forth the requirements that persons must fulfill if they would like to naturalize and become a United States citizen, explicitly requires an appraisal of the moral character of the applicant. The act requires that an applicant for naturalization:

1) be a legal permanent resident,
2) be 18 or more years old,
3) meet both a continuous residence and physical presence requirements, and
4) *be of good moral character during the required residence period and up to the time of admission*. (8 U.S.C. s1427(a)).

Thus, in order to become a citizen, a person must demonstrate that he possesses a good moral character.[5]

Citizenship might be understood as a status that grants special rights. Indeed, Chief Justice Warren once described citizenship as "the right to have rights." (*Perez v. Brownell*, 356 U.S. 44, 64 (1958)).[6] Further, some of the rights that citizenship bestows are *constitutional* rights—like Fourth Amendment rights against unreasonable search and seizure of property that one owns outside of the United States. (United States v. Vergudo-Urquidez, 494 U.S. 259 (1990)). Accordingly, if citizenship means that a person is given certain constitutional rights, and if possession of good moral character is a condition to citizenship, then possession of good moral character is a condition to being given certain constitutional rights. This is the precise argument that the book makes about privacy rights: possession of good moral character is a condition to being given the privacy right. Because poor mothers are presumed not to have a good moral character, they are not given the privacy right.

One should also keep in mind that the right to informational privacy, which is one of the privacy rights that this book argues poor mothers are denied, has not yet been recognized as a constitutional right. Just recently, the Court in *NASA v. Nelson* refused to hold explicitly that the Constitution protects a right to informational privacy. Accordingly, we might describe the right

to informational privacy as one that does not rise to constitutional significance, or is constitutionally insignificant. If, as this book suggests, the right to informational privacy is conditional, then it is in good company: there is a host of other constitutionally insignificant rights that are conditional.

Perhaps the most salient condition imposed on constitutionally insignificant rights is having not been previously convicted of a felony. And the number of rights that bear this condition is substantial. All but two states and the District of Columbia restrict felons' voting rights; these restrictions range from denying voting rights only during the period of incarceration to disenfranchising felons permanently—even after the sentence has been served and probation has been successfully completed. (James Forman, "Beyond the New Jim Crow"). Further, convicted felons are prohibited from serving on federal grand and petit juries unless their civil rights have been restored. (ibid.) Most states follow suit, permanently prohibiting felons from serving on juries absent the restoration of their civil rights—a restoration that is subject to "discretionary clemency rules." (Brian C. Kalt, "The Exclusion of Felons from Jury Service," 53 Am. U. L. Rev. 65, 157 (2003).

Eleven states currently prohibit all persons convicted of drug-related felonies from receiving any assistance under Temporary Aid for Needy Families (TANF) or the Supplemental Nutrition Assistance Program (SNAP, formally know as food stamps). Other states allow some persons convicted of drug-related felonies to be eligible for these programs if they meet certain conditions. For example, Kentucky allows these persons to be eligible if they participate in an alcohol or drug treatment program, while Minnesota allows for eligibility if they submit to random drug screens. Other states only make ineligible persons convicted of distributing or manufacturing drugs; those convicted of possession remain eligible. Finally, federal law requires that local housing agencies permanently make ineligible for public housing benefits persons who have been convicted of manufacturing methamphetamine on public housing property.

The disenfranchisement of felons demonstrates that many civil and political rights are conditional. This raises the question: is it fair to describe these civil and political rights as being conditioned on the rights-bearer possessing a good moral character? That is, can one understand the disenfranchisement of felons as analogous to the disenfranchisement of poor mothers: are felons denied civil and political rights because they are thought to have a bad moral character? Now, the rationale for dispossessing felons of the vast array of rights that they are denied is not explicitly related to some presumption that their status as a felon demonstrates that they have a bad moral character. However, it also seems clear that there is a tinge of moralizing—a specter of the belief that felons have done something bad, something *immoral*, and they ought to be treated accordingly—involved in some of the disenfranchisements to which felons are subjected. For example, one might understand the denial of voting rights and jury service entirely amorally. One could argue that voting and serving on juries require the exercise of good judgment; felons might be denied these rights because their felony conviction arguably evidences that they lack (or have lacked) this type of judgment. One could understand the ban relating to public housing amorally as well: a felon who has been convicted of manufacturing methamphetamine on public housing premises may pose a serious safety risk to residents, as she just may manufacture methamphetamine again and expose her neighbors to the risks that come along with the production of this drug. Justification for these disenfranchisements need not make reference to felons' presumed moral character at all.

But, the bans relating to TANF and SNAP just *look* significantly different from the ban relating to public housing and the denial of rights to vote and serve on juries. One can not

convincingly argue that the TANF and SNAP bans are a product of concerns about health and safety, as one could argue about the ban regarding public housing. Neither could one convincingly argue that they are a product of concerns about the judgment of felons, as one could argue about the denial of voting and jury service rights: the ability to meet the subsistence needs of one's family (which TANF makes possible) and the ability to feed oneself (which SNAP makes possible) do not require good judgment, which felons arguably have demonstrated that they lack (or lacked at one time in their lives). Accordingly, there seems to be some moralizing in the states' decisions to deny felons TANF and SNAP benefits. It seems that states have decided that felons can be treated differently from other needy persons—that they can be denied life's essentials—because they have done something bad; they are bad people. In denying food and basic necessities to felons, it seems that states are judging felons' moral character and deciding they are willing to let *these people* starve and be incapable of providing for their children and families.

It may be important to note that the claim that rights can be conditioned on the moral character of the rights bearer is not an entirely novel one. Several political theorists have written in support of such conditions. Indeed, the exceptionally influential John Stuart Mill can be read to make this argument. In "Thoughts on Parliamentary Reform," Mill considered the question of whether voting rights should be conditioned on some demonstration that the rights-bearer is intelligent enough *and moral* enough to competently exercise the right. He wrote in favor of conditioning the voting right in this way. In the essay, he makes it clear that he was not a proponent of equal rights, as he did not believe that people were of equal moral worth: "If it is asserted that all persons ought to be equal in every description of right recognized by society, I answer, not until all are equal in worth as human beings. It is the fact, that one person is *not* as good as another; and it is reversing all the rules of rational conduct, to attempt to raise a political fabric on a supposition which is at variance with this fact." (323—24). Thus, Mill reveals that the narrative that we tell about our Constitution in the United States—one in which every right that is recognized is bestowed to each person equally—describes a governance structure that he would not support. For Mill, it is simply irrational.

Mill goes on to explain that his claim that "one person is *not* as good as another" should be understood to describe individuals' differing intellects *as well as their differing moral worths:* "Putting aside for the present the consideration of moral worth, of which, though more important even than intellectual, it is not so easy to find an available test." (ibid.). For Mill, voting rights ought to be conditioned both on the rights-bearer's intellectual capacities as well as her moral worth. However, because there was not readily available any instrument that could competently assess moral worth, he thought it necessary to put aside the question for another day. For present purposes, what one ought to take away from Mill is his willingness to condition voting rights on the morality of the rights-bearer.

Although Mill limits his discussion to intellectual conditions on the voting right, it is obvious that there is also a moral element in these intellectual conditions. It is clear that Mill believes that a person who could not pass an intelligence test had only himself (and his moral shortcomings) to blame: "But reading, writing, and the simple rules of arithmetic, can now be acquired, it may be fairly said, by any person who desires them; and there is surely no reason why every one who applies to be registered as an elector, should not be required to copy a sentence of English in the presence of the registering officer, and to perform a common sum in the rule of three." Certainly, one can hear shades of an argument about the bad moral character of the uneducated in this statement. Mill claims that the uneducated man could have gotten a

basic education; it was available to him. However, he chose not to do so. For Mill, that choice reveals much about the moral character of the uneducated man.

Lest anyone still be unpersuaded that Mill though that the uneducated were morally inferior to the educated, he writes of the former, "None are so illiberal, none so bigoted in their hostility to improvement, none so superstitiously attached to the stupidest and worst of old forms and usages, as the uneducated. None are so unscrupulous, none so eager to clutch at whatever they have not and others have, as the uneducated in possession of power. An uneducated mind is almost incapable of conceiving the rights of others." (327). In Mill's rendering, the uneducated are morally compromised people. To condition the voting right on the education of the rights-bearer is to condition the voting right on the morality of the rights-bearer.

Finally, one ought not to ignore that, for Mill, there is a relationship between morality and poverty. Indeed, for Mill, the poor in England were a class of people with degraded morals—a moral condition that, presumably, the wealthier classes did not share: "The opinions and wishes of the poorest and rudest class of labourers may be very useful as one influence among others on the minds of the voters, as well as on those of the Legislature; and yet it might be highly mischievous to give them the preponderant influence, by admitting them, *in their present state of morals and intelligence*, to the full exercise of the suffrage. (334). Mill's sense that the poor have bad morals and they ought to be denied voting rights on that basis echoes the description of privacy rights that this book offers: poor mothers are assumed to possess bad moral character and are denied privacy rights on that basis.

Arguments that the Book Will *Not* Make

Thus, this book argues that poor pregnant women do not have privacy rights because possessing a good moral character is a condition for the privacy right and poor mothers and mothers-to-be are not assumed to possess this requisite character. That said, it is important to articulate what this book is *not* arguing.

1. *This book is not about moral rights, but rather legal rights*.

This book does not argue that poor mothers do not have a *moral right* to privacy because they are thought to have a bad moral character. As David Lyons explains, moral rights "include the rights that are sometimes called 'natural' or 'human,' but are not limited to them. Natural or human rights are rights we are all said to have (by those who believe we have them) just by virtue of our status as human beings. They are independent of particular circumstances and do not depend on any special conditions." (David Lyons, "Utility and Rights," in Waldron, *Theories of Rights*: 111). Thus, to argue that this country has made a "natural" or "human" right to privacy conditional is to make a losing argument, as "natural" and "human' rights are unconditional. Instead, this book makes an argument about *legal rights,* which Lyons defines as those that "presuppose some sort of social recognition or enforcement, the clearest case being rights conferred by law, including constitutional rights" (ibid). Legal rights can be conditioned on whatever the institution that recognizes or enforces them prescribes.

2. *This book primarily makes an interpretational argument about privacy rights – not a* normative *argument*.

This book does not argue that poor pregnant women *should not* have privacy rights, nor does it suggest that the privacy right *should be conditioned* on the rights-bearer's presumed moral character. Instead, it makes an interpretation about how the privacy right—with respect to reproductive, family, informational, and spatial privacy—operates in the United States today. Further, describing poor mothers as having been disenfranchised of privacy rights is offered as an interpretation of our existing legal landscape that is as plausible as the widely accepted

alternative that describes poor mothers as in possession of privacy rights that are weak, meaningless, surrendered, or violated. In offering an interpretation of privacy rights that is as plausible as the one that is consonant with traditional rights discourse, it simultaneously offers a challenge. It challenges us to think about why we have been seduced by a narrative about equal rights when everyday, lived reality suggests that nothing could be farther from the truth. Moreover, as explained earlier, it challenges us to begin to think differently, more creatively, about the solution. If it is not about giving rights teeth, but rather about giving rights in the first instance, then we might be well-advised to look to other historical moments for instruction: what did it take for other disenfranchised groups to win rights? That is, if poor mothers are as disenfranchised of privacy rights as black men and women living in the antebellum United States were disenfranchised of rights altogether and LGBT persons living in Colorado at the time of Amendment 2 were disenfranchised of the right to access the courts and the political system, we should look into what it took for the state to be convinced to enfranchise black people and LGBT people when we are searching for the solution to the state's occupation of poor mothers' private lives. If history is a teacher, then the answer lies not in changing the law, but rather in changing culture.

The implicit normative claim of the book, or course, is that poor pregnant women *should* be given privacy rights. First, privacy rights can be effective. If negative, they can constrain the government from acting in ways that offend our sensibilities. If positive, they can oblige the government to act in ways that ensure our dignity. Moreover, even if privacy rights reveal themselves to be frustratingly ineffective at times, insofar as they may be indeterminate and unable to produce any given result in any given case, critical race theorists have instructed that they can be meaningful nonetheless. (Patricia Williams, "Alchemical Notes," 22 Harvard Civil Rights-Civil Liberties Review). It is meaningful to a poor mother to be able to describe the privacy invasions that she experiences as a matter of course as *rights* violations. It is meaningful for a poor mother to imagine herself as equal to even the wealthiest in society with respect to the rights that they both possess.

Second, to deny poor mothers privacy rights due to the assumption that they have a bad moral character is to accept a problematic understanding of the causes of poverty. It is to believe that individual shortcomings and failures, as opposed to macro, structural forces, explain why people are poor. It is to deny that the reason why a woman may find herself pregnant and in need of help from the state in order to secure prenatal care may not be function of bad decisions that are products of a bad moral character. It is to deny that the reason why a woman's pregnancy may intersect with her poverty may be a function of contracting economies, evaporating industries, the criminalization of property crimes, mass incarceration, racial discourses, the devaluation of women's labor, the financing structure of public schools, and constrained immigration policies that make undocumented populations deportable and, therefore, easily exploitable. In essence, it is simply wrong to presume that if a woman is poor and pregnant, then she has a bad moral character. If privacy rights, or any rights at all, are to be conditioned on moral character, then the appraisal of the potential rights-bearer's moral standing ought not to turn on her socioeconomic status, but rather on an individualized assessment of her character. If this were to happen, we would likely find that the non-poor would occupy the ranks of those with compromised character as frequently as the poor. This is a happenstance that our current "test" of moral character precludes.

Further, when society presupposes that poor pregnant mothers have bad morals, and when the law denies them privacy rights for that reason, it creates a disturbing equality problem.

The legal landscape that it produces is one in which wealthier women enjoy a right that, in its reproductive, family, and spatial dimensions, has been recognized as fundamental. Wealthier women bear this fundamental right as a matter of course; meanwhile, their poor counterparts bear nothing. It is important to note that nothing justifies this result. As discussed above, the reason that is invariably given, by governments and legal scholars alike, for the governmental occupation of poor mothers' private lives is the state's interest in protecting children. States make exhaustive inquests into mothers' lives in order to divine whether they may pose a danger to their children once born. Poor pregnant women are asked whether they smoke cigarettes, drink alcohol, use controlled substances, have a history of domestic or sexual violence, eat healthy foods, and exercise. They are asked to think, early and often, about the method of contraception they will use postpartum in order to avoid a repetition of the implicitly problematized current pregnancy. (Of course, poor mothers' pregnancies are problematized *explicitly* in other channels—like political and popular discourses that portray poor mothers as guileful drains on the national economy and the children that they birth and raise as eventual second generation social problems. (Bridges 2011)). State actors are told that they need to search all pregnant women who turn to government programs for assistance in acquiring medical care for signs that they are at risk of child abuse or neglect. It may be stating the obvious to note that wealthier women with private health insurance smoke cigarettes, drink alcohol, use controlled substances, have histories of domestic and sexual violence, eat unhealthy foods, and do not exercise as often as they should. Wealthier women with private health insurance may also need to think about the method of contraception that they will use postpartum. And, certainly, wealthier women with private insurance are at risk of child abuse and neglect; women of all walks of life abuse and neglect their children. Nevertheless, wealthier pregnant women are not asked the sorts of questions and subjected to the sorts of monitoring to which poor pregnant women are subjected. No one transmits their names to a centralized tracking system in order to maintain a database of their information and whereabouts. No state agent visits their homes. Wealthier women bear a privacy right that shields them from such intrusions even though they may share the same histories and engage in the same behaviors as poor women. Those of us interested in equality—in the simple truism that similar people ought to be treated similarly—will find such a result immensely disquieting.

Moreover, those of us interested in racial justice will also find deeply disturbing the legal landscape wherein wealthier women have privacy rights while poorer women do not. The lamentable truth is that race follows class closely in this country: there is a undeniable relationship between race privilege and class privilege. Racial minorities are disproportionately represented among the poor. It follows, then, that racial minorities are disproportionately represented among those who have been dispossessed of their privacy rights. This is entirely unacceptable.

Critical thinkers about race will also pay attention to the way that racial discourses have functioned to produce a legal landscape wherein poor mothers are disenfranchised of privacy rights. As noted above, and as more expansively explored in Chapter ***, one can only construct all poor mothers as morally suspect if one rejects explanations of poverty that locate its causes in macro structures in favor of explanations of poverty that locate its causes in individuals' personal shortcomings. If an individual's personal moral failings are to blame for her poverty, only then can one assume that any that any and every poor person one encounters—any and every pregnant women who asks the government for assistance in acquiring prenatal care—has a bad moral character. Now, explanations of poverty that locate its causes in individuals, and not the

structures in which they exist, have consistently enjoyed a certain degree of traction in the United States. When one puts this fact in conversation with the fact that racial minorities have always been disproportionately represented among the poor, one can begin to see a possible explanation for why large numbers of people in the United states have believed that most poverty is caused by individual moral deficiencies: it is easy to moralize poverty when those who are disproportionately impoverished are racial Others. It is especially easy to moralize poverty when Black people are the racial group that is most disproportionately represented among the poor, and the racial discourses that attach to that particular racial Other render them as a lazy, sexually immoral, labor averse people. Which is to say: race plays an important role in explaining how we have arrived at a present where substantial numbers of people explain poverty in terms of individual moral shortcomings. And race plays an important role in explaining why the country has been comfortable with denying privacy rights on the basis of the presumed bad moral character of the rights-bearer.

This is a species of an argument that Dorothy Roberts has made quite cogently in her scholarship. She has argued that the Court's decision in *Rust v. Sullivan*, in which the Court upheld a law that prohibited doctors serving an indigent clientele from giving medically relevant information about abortion, was "politically acceptable" because of the race of the women affected: they were disproportionately minorities. She writes, "Race may help to explain the government's willingness to exclude [the affected patients] from the privileges that other women enjoy. It may help to explain the Court's refusal to require that the government provide equal access to medical care." (Roberts, "*Rust v. Sullivan* and the Control of Knowledge," 61 Geo. Wash. L. Rev. 587, 597 (1993)). Essentially, Roberts argues that race may help to explain why the Court was comfortable denying some women reproductive privacy rights (as well as First Amendment rights to information and ideas).

More generally, Roberts has argued that privacy is something that, historically, the decision makers in this country have deemed Black women unfit to possess. She has made this claim quite forcefully. "The state has always considered Black mothers, whether married or single, to need public supervision and not to be entitled to privacy." (Roberts, "Racism and Patriarchy in the Meaning of Motherhood," 248 n.6). Again: "Because of racism, it is more likely that the government will interfere with [women of color's] reproductive decisions." (Ibid., 243). And again: "[T]he state is more willing to intrude upon the autonomy of Black mothers." (Ibid., 231). While Roberts is correct insofar as poor mothers of color have been denied privacy and privacy rights throughout history, this book would add a slight gloss on her claim. Roberts appears to describe a racism that takes the form that racism took prior to the 1960s, before the law prohibited explicit demonstrations of racism: the government denies privacy and privacy rights to black women *because they are black women*. However, this book describes a racism that is more oblique. That is, cultural discourses that have existed since time immemorial construct individuals racialized as black as lacking in good moral character—as indolent, as sexually incontinent, etc. When those who comprise the poor are disproportionately black, then it is consistent with extant cultural discourses to suppose that the poor are poor because they lack good moral character. Moreover, when those who are denied privacy rights on the basis of an ostensibly race-neutral criterion, presumed moral character, are disproportionately black, race explains why the country finds this result "politically acceptable."

3. *This book does not argue that poor mothers and mothers-to-be have no rights whatsoever.*

Again, such an argument is destined to fail. Surely, poor mothers have First Amendment rights to free speech and Second Amendment rights to bear arms. They also possess many rights that do not rise to constitutional significance. Certainly, poor mothers have many rights. However, this book argues that they are not given rights to family privacy, reproductive privacy, spatial privacy, and informational privacy.

This book does not argue that we never *give rights to people who we believe have compromised moral codes.*

This book does not claim that people who society deems to possess questionable character are *never* given *any* rights. Such a claim could not be sustained. There are numerous examples of rights being bestowed on people who many in society would understand as compromised morally or as having engaged in immoral activity. The case of incarcerated persons is an easy example. The Court has established that, while the prison context is significantly different from non-prison contexts and, accordingly, courts should use a less rigorous standard of scrutiny when reviewing burdens on incarcerated persons' constitutional rights, prison inmates nevertheless possess constitutional rights. As the Court avowed in *Turner v. Safley*, "Prison walls do not form a barrier separating prison inmates from the protections of the Constitution." (85). The Court goes on to mention several precedents in which it held that incarcerated persons bear rights, including the First Amendment right to petition for the redress of grievances and due process rights afforded by the Fourteenth Amendment. Moreover, *Johnson v. Calvert* and its holding that lower courts should review with strict scrutiny race conscious laws and policies that correctional institutions implement suggest that prison inmates may possess an equal protection right that their residence in a correctional institution does not qualify. Indeed, one could argue that to the extent that there are many who would describe lawbreakers as morally compromised, and to the extent that the Eighth Amendment right to be free from cruel and unusual punishment is a right that restrains government as it goes about punishing lawbreakers, then one can say that the drafters of the Eighth Amendment and the Framers of the Constitution contemplated giving rights to the morally suspect among us. Similar arguments might be made about the Fourth, Fifth, and Sixth Amendments, as well.

In sum, incarcerated persons bear rights. And they bear rights without regard to whether the most powerful voices in society would dismiss these persons as morally compromised or would condemn them for having behaved in ways believed to be immoral. (Of course, we ought to be open to the argument that, like poor mothers and the privacy right, incarcerated persons have been disenfranchised *in practice* of various rights that they bear in theory. As one scholar contends, prison walls, in fact, have functioned to form a barrier between inmates and the Constitution. (Borchardt, "The Iron Curtain Redrawn Between Prisoners and the Constitution")). As such, the example of prison inmates, and the fact that there are other similar examples, precludes this book from arguing that we never give rights to people who we assume bear a bad moral character. Instead, the book makes a more limited, focused argument: we do not give a specific right, the privacy right in its reproductive, family, spatial, and informational dimensions to a particular group of persons – poor mothers.

4. *This book does not make any argument that speaks directly to whether the Constitution forbids governments from "legislating morality."*

At first blush, this book seems to be in conversation with recent Court decisions regarding whether the Constitution protects a right to consensual sexual activity between adults. Indeed, *Lawrence v. Texas*, which struck down a Texas law criminalizing same-sex anal and oral sex, seems to contradict the argument that this book makes. Many, including Justice Scalia, have read

the Court's statement in *Lawrence* that the Texas law at issue pursued no legitimate government interest as stating that all laws that attempt to regulate activities on the grounds that they are immoral will not pass rational basis scrutiny and will be struck down as violations of the Due Process Clause.[7] This expansive reading of *Lawrence* suggests that the privacy right prohibits governments from legislating morality.[8] The question, then, is: is this precedent at odds with this book's argument that poor mothers are denied the privacy right because society presumes that they have a bad moral character? The answer is no.

The right to privacy has manifold facets. Legal scholar Daniel Solove has described "privacy" as an "umbrella term, referring to a wide and disparate group of related things." (***) Legal scholar Lillian BeVier has written, that "[p]rivacy is a chameleon-like word, used denotatively to designate a wide range of wildly disparate interests—from confidentiality of personal information to reproductive autonomy—and connotatively to generate goodwill on behalf of whatever interest is being asserted in its name." (4 Wm. & Mary Bill Rts. J. 455, 458 (1995)). And philosopher Judith Jarvis Thomas has argued that "Perhaps the most striking thing about the right to privacy is that nobody seems to have any very clear idea what it is." (The Right to Privacy, in Philosophical Dimensions of Privacy: An Anthology 272, 272 (Ferdinand David Schoeman ed., 1984).) Because privacy is such an ambiguous concept, denoting a range of only barely related phenomena, it is understandable why the privacy right has multiple dimensions.

Lawrence concerns the privacy right insofar as it relates to the ability of adults to engage in consensual sexual activity. There is no indication that this particular privacy right—that the privacy right in this dimension—is conditioned on the rights-bearer's moral character. Indeed, it would be quite peculiar if it were conditioned in this way. If conditioned on the moral character of the rights bearer, the privacy right at issue in *Lawrence* would give individuals the right to be free of government regulation of activity that a political majority believes to be immoral; however, the individual would only be given this right when he is believed to be a moral person in possession of a good moral character. Conditioning the privacy right that *Lawrence* articulates in this way would render it into a nullity: only persons believed to be moral would possess the right to engage in activities that a majority believes to be immoral. It may be that the determination that a person is moral, and therefore worthy of bearing the privacy right, would turn on the belief that he would not engage in immoral activities. If so, only moral persons would be given the right to engage in activities in which they probably will not engage anyway. The privacy right that *Lawrence* recognizes would be a meaningless if so conditioned. Instead, what *Lawrence* contends is that, when sexuality and sexual activity is at issue, the government should not be in the business of determining *what* is and is not moral and *who* is and is not immoral. *Lawrence* clears a space wherein individuals can make those determinations for themselves—without the threat of punishment from the state should their determination differ from that of the majority. In essence, *Lawrence* demands the amorality of the government in order for individuals to be their own moral sovereigns, capable of answering questions of morality for themselves.

The privacy right in its reproductive, family, spatial, and informational dimensions is motivated by a different set of concerns. With respect to family, spatial, and informational privacy, privacy rights that preclude government regulation of these areas are not motivated by the desire to clear a space wherein individuals can determine questions of morality. They do not demand the amorality of the government. They are not concerned with insuring that individuals are their own moral sovereigns. Quite distinctly, they are concerned with consequentialist interests (in enabling the development of a pluralism of thought and values in a country that prides itself on its diversity and in preventing the development of a totalizing state) and non-

consequentialist interests in the dignity of persons. With respect to the consequentialist interests, the justification for denying the privacy right to persons believed to have bad moral character turns on the belief that the beneficial consequences of the right will not be realized if people with bad moral character bear it. With respect to the non-consequentialist interests, we have to ask ourselves why arguments that privacy rights protect the dignity of the rights-bearer are unpersuasive when they are applied to poor mothers. Why are we comfortable with a Constitution that requires a person to forfeit her dignity interests when her pregnancy intersects with her poverty? It may be that present and past interpreters of the Constitution believe that the decision to procreate while impoverished is a decidedly undignified one, calling into question whether a woman who makes such a choice has any dignity interests at all. We have to wonder why non-consequentialist interests in dignity, when possessed by certain people, diminishes the status of the right that would protect them into a non-right, a non-entity.

Now, one can argue that reproductive privacy is different from family, spatial, and informational privacy insofar as it *is* concerned with clearing a space wherein individuals can answer questions of morality for themselves. The Court in *Casey* justified upholding the abortion right found in *Roe* (albeit in a substantially narrowed, possibly non-fundamental form) with the statement that its job was "to define the liberty of all, not mandate its own moral code"—presumably also prohibiting states from mandating their own moral code and, in the process, overriding the codes of individual women. As such, one could describe reproductive privacy, like the right to sexual privacy articulated in *Lawrence*, as interested in the amorality of the government. One could say that reproductive privacy demands governmental amorality in order for individuals, women, to be able to decide whether abortion is or is not moral and, thus, to decide whether or not to undergo one.[9] If so, then like the *Lawrence* privacy right, there may be an incongruity in conditioning the reproductive privacy right on the morality of the rights-bearer. However, this claim does not stand up to analysis. First, there is a convincing argument that the abortion right does not demand (or, at least, no longer demands) the amorality of the government. In *Maher v. Roe*, the Court explicitly disputed this position, writing that the abortion right found in *Roe v. Wade* "implies no limitation on the authority of a State to make a value judgment favoring childbirth over abortion and to implement that judgment by the allocation of public funds." (*Maher v. Roe*, 474). Moreover, *Casey*'s sanctioning of states to give "truthful, nonmisleading" information to women during the informed consent process has been read to authorize states' attempts to convince women to carry their pregnancies to term by making arguments about the fetus's moral status. Certainly, the abortion right, in its current forms, does not demand agnosticism from the government on the question of the morality of abortion.

Second, even if we assume *arguendo* that the abortion right demands governmental amorality and, consequently, only paradoxically bears a moral condition, reproductive privacy is so much more than the abortion right. It is much more than the right to decide whether to terminate a pregnancy. It is also the right to decide that one will bear a child. It is the right to decide that one does not want to use contraception. And it is the right to make these decisions without government coercion. Poor women, whose reproductive decisions are constrained by the Hyde Amendment (which coerces them to bear children they do not want to have) and family cap laws (which coerces them not to bear children that they do want to have), do not have this privacy right. While the *abortion* right may not have a moral condition, the reproductive privacy right, in all of its multifaceted glory, certainly does.

In sum, the privacy right that *Lawrence* articulates, concerned as it is with facilitating individuals' moral sovereignty with respect to sexuality and sexual activity, has no moral conditions. Simultaneously, the privacy right with respect to reproductive, family, spatial, and informational privacy is so conditioned. There is no contradiction in different privacy rights having different conditions.

The Argument to Come

Chapter One will explain how the language of privacy is used to index several different notions of privacy—including family privacy, reproductive privacy, informational privacy, and spatial privacy—and it will explain that that the ensuing book chapters will describe how various Medicaid provisions systematically violate these four areas of privacy. This chapter will then set forth theories that justify protecting the various privacy rights. Briefly, family privacy rights, which protect a realm of parental authority, can be justified because they allow parents the ability to raise their children in a manner that reflects the parents' values and, in so doing, enable the production of a citizenry with a diversity of beliefs and values. Reproductive privacy rights, which protect an individual's capacity to determine when and whether she will engage her body in the process of reproduction, can be justified because such decisions about reproduction are thought to be foundational to the dignity of a person; that is, a person suffers a crushing indignity when she may not decide whether she will or will not bear a child. Informational privacy rights, which function to prevent the state from compiling exhaustive datasets about individuals, can be justified because they guard against a fear that when the state has a total knowledge about an individual, it compromises that individual's ability to remain independent of, and unstandardized by, the state. Spatial privacy rights, which protect individuals' physical homes from intrusion by the state, can be justified because individuals need a physical space, free from governmental intrusion, within which they can engage in the activities and make the decisions that are central to their ideas of personhood (and parenthood); moreover, the home is that paradigmatic physical space.

This chapter sets forth the argument that privacy rights are reserved for individuals with good moral character. This is because of the assumption that, if the individual enjoying privacy does not have this character, her enjoyment of that privacy will not produce the value that otherwise justifies the provision of privacy. Because poor mothers are presumed to possess bad moral character, they are not given privacy rights because it is presumed that there will be no value realized by their enjoyment of privacy. This description of why poor mothers are disenfranchised of their privacy rights differs from other scholars' accounts of why the government invades poor people's privacy. Most scholars have looked to the ends that privacy invasions serve: privacy invasions allow for the government to evaluate whether the indigent individual is "deserving" of aid; they make the conditions under which one can receive aid less desirable than the conditions under which one would labor in the marketplace; they enable the government to attempt to "fix" the personal shortcomings that explain the impoverished person's indigence; and they facilitate the government's suppression of the indigent masses. (Handler and Hasenfeld, *The Moral Construction of Poverty*; Virginia Eubanks, "Technologies of Citizenship," in *Surveillance and Security: Technological Politics and Power in Everyday Life* 89, 90 (T. Monahan ed., 2006). However, this book explains privacy deprivations visited upon poor mothers by looking neither to the intentions behind policies and laws that invade their privacy nor to the intended and unintended consequences of denying them privacy. Instead, it explains privacy deprivations as a consequence of the denial of the privacy right, and it explains why the privacy right has been denied in the first instance: because those who are empowered to

interpret the Constitution believe that the value that privacy generates will not be realized when a person without good character enjoys that privacy.

Chapter Two will look at the expansive literature that documents the voices throughout history that have rejected structural explanations of poverty and, instead, have argued that individual moral shortcomings cause poverty. This chapter will show that the discursive link between poverty and immorality continues to the present day, as one need not listen too closely in our current society to hear a narrative in political or popular discourse that links poverty with immorality. It will also describe studies showing that large numbers of people in the United States believe that individuals are poor because of their own character flaws. This chapter will also show that the Court's jurisprudence has come to reflect the moral construction of poverty. It will examine several seminal cases in which the Court's rationale for refusing to limit the power of the government vis-à-vis poor individuals reveals an assumption about the immorality of the poor person—usually a poor mother—subject to privacy invasions.

Chapter Three will explore the doctrine of unconstitutional conditions, a doctrine that provides that it is unconstitutional for a state to premise the conferral of a benefit on the beneficiary's surrender of a constitutional right. It will note that when poor mothers and their advocates have challenged welfare programs that seemingly require beneficiaries to exchange their privacy rights for the benefit, the Court have upheld the programs, denying that they impose unconstitutional conditions. As such, one could describe the jurisprudence as finding that poor mothers simply trade their privacy rights for state assistance. This chapter argues that this description ought to be rejected because it presupposes that poor women actually have privacy rights that they could barter. It shows that poor women lack privacy even when they do not receive a welfare benefit. It looks to literature documenting the poor's vulnerability to state involvement in their private lives due to their lack of resources, which leads them to have more frequent contact with state actors. Indeed, state intervention is often the result of poor women's necessary consumption of public goods. It looks also to literature exploring the excessive policing of the poor and poor communities—policing that is administered consistent with a narrow interpretation of the Fourth Amendment and the privacy protections that it could provide. It is imperative to contextualize the privacy invasions that poor mothers endure when receiving Medicaid in a broader experience of privacy invasions that poor women endure by virtue of their being in more frequent contact with state actors and by virtue of their living in heavily policed communities: this contextualization demonstrates that poor mothers do not have to receive a welfare benefit in order to be vulnerable to state intervention in their private lives. This contextualization demonstrates that their lack of privacy is not a function of their reliance on government assistance; instead, it is a function of their not bearing privacy rights in the first place.

This chapter goes on to make the argument that positive rights are not the solution to poor mothers' predicament. First, it observes that many of the examples of poor mothers' lack of privacy given in the book are actually *interventions* into their lives as a consequence of government action—not *deprivations* that are occasioned as a result of government inaction. Negative rights are designed to protect individuals from precisely such *interventions*. Second, it asks: is there any reason to believe that positive rights would not still remain a function of class? If poor pregnant women have not been given negative privacy rights because of the belief that when such rights are given to individuals with bad moral character, the benefits that are supposed to be produced from the rights would go unrealized, what hope do we have that the Court would find that the benefits that *positive* privacy rights are supposed to produce would be realized

should the Constitution be interpreted as imposing affirmative obligations on the government? Essentially, this chapter argues that even if we had a Constitution that contained positive rights, the pregnant poor would still be deemed unworthy of being (positive) rights-bearers, as perceptions of their bad moral character would remain unchanged.

Chapter Four begins the exploration of the various facets of the privacy right. It will argue that if family privacy rights, which protect a realm of parental authority, can be justified because they allow parents the ability to raise their children in a manner that reflects the parents' values, then poor women are not given these privacy rights because, as individuals with bad moral character, they cannot be trusted to inculcate respectable values in their children. Indeed, poor mothers have failed to demonstrate that they possess one of the values most respected within our nation—economic independence. Moreover, if family privacy is justified on the grounds that our liberal democratic order depends upon families producing future citizens who, having not been standardized by the state, can stand in opposition to state power, then poor families are thought not to be capable of producing competent citizens. This chapter goes on to document how Medicaid facilitates the violation of family privacy rights by ensuring that the state is omnipresent in poor pregnant women's lives and, as a result, ensuring that a space is never created within which a poor pregnant woman can make autonomous, unfettered decisions about how to raise her child.

Chapter Five will argue that if reproductive privacy rights protect an individual's capacity to determine when and whether she will engage her body in the process of reproduction, and if these rights are protected because such decisions about reproduction are thought to be foundational to the dignity of a person, then poor women are not given these rights because the state cannot trust her ability to make competent, moral decisions about reproduction without state oversight. This chapter goes on to document how Medicaid facilitates the violation of reproductive privacy rights by constraining the decisions that poor women make about whether or not to use contraception and whether or not to obtain an abortion. With respect to contraception, this chapter will explore various states' Medicaid requirements that attempt to persuade poor women to limit their family size (e.g., conditioning Medicaid benefits on the beneficiary's use of contraception or receipt of a "contraceptive education," etc.). With respect to abortion, this chapter will explore the Hyde Amendment, its prohibition on the use of federal Medicaid monies to fund even the "medically necessary" abortions of women, and the Court's finding of its constitutionality in *Harris v. McRae*. In essence, Medicaid's approach to contraception is to encourage poor women to avoid maternity; simultaneously, Medicaid's approach to abortion is to propel poor women into maternity. What this reveals is that the state is not interested in the precise decision that poor women make with respect to maternity, but rather is interested in overseeing that decision as it is made.

Chapter Six will argue that if informational privacy rights give individuals the right to control personal data about themselves by limiting others' access to it, then they can be justified because they guard against a fear that when the state has a total knowledge about an individual, it compromises that individual's ability to remain unstandardized by the state. This chapter suggests that if this is the justification for informational privacy rights, then poor mothers are not given these rights because the state believes that they *ought* to be standardized inasmuch as it wants to prevent them from inculcating their problematic values in the children that they are raising. This chapter goes on to describe how states' Medicaid laws violate poor pregnant women's informational privacy as a matter of course, insofar as they are compelled to divulge the most intimate of information about their private lives to state actors in order to receive

government assistance. This chapter then explores an alternative understanding of informational privacy. In this alternative conception, informational privacy rights prevent not so much the collection of personal information as it does the *sharing* of that information. This chapter will describe how constitutional law is currently wrestling with the tension between the fact that many government programs cannot function without the collection of personal data and the dangers that attend to the intentional or accidental release of that personal data once collected. While the Supreme Court has yet to find that a right to informational privacy in this alternative sense exists, it has explicitly declined to declare that it does *not* exist, most recently in *NASA v. Nelson*. The Court's sympathetic stance to the existence of a right to informational privacy in this alternative sense may be because the non-poor are *also* threatened by its absence. Indeed, the non-poor, in some respects, are arguably more threatened by the collection and dissemination of personal information. This chapter goes on to describe how surveillance programs like PRISM, the Verizon order, fusion centers, license plate monitoring, etc., together create a "surveillance state," so to speak. The surveillance state possibly ensnares the non-poor more readily than the poor, insofar as the poor continue to have less access to networked technologies. Yet, on the other hand, insurance companies, Internet companies, financial service providers, and others offer free or reduced-price services in exchange for diminished privacy in one's person and information – making the poor more vulnerable to the collection and release of their personal data. This chapter argues that in the absence of a constitutional right to informational privacy, it is *wealth* that gives people the ability to protect their informational privacy. That is, to the extent that wealthier persons enjoy informational privacy, it is not because they have a constitutional right to it. It is because their wealth allows them to purchase privacy.

Chapter Seven will argue that if spatial privacy rights, which protect individuals' physical homes from intrusion by the state, can be justified because individuals need a physical space free from governmental intervention within which they can engage in the activities and make the decisions that are central to their ideas of personhood and parenthood, then poor mothers are not given these rights because the physical space in which they would be engaging in these activities and making these decisions is the physical space that their children inhabit. Because poor mothers are presumed to have bad moral character, there is an assumption that they will abuse and/or neglect their children in this physical space. Thus, they are not given spatial privacy rights because the state wants to maintain a presence in that space so as to prevent poor mothers' abusive and neglectful potentials from being realized. This chapter goes on to describe how states' Medicaid laws violate poor women's spatial privacy. It will discuss the close, almost symbiotic relationship that Medicaid has with states' child protective services departments. The result of this relationship is that poor pregnant women oftentimes find themselves within the regulatory ambit of child protective service—and the requisite home visits that come pursuant to investigations by child protective services—simply because they receive Medicaid-subsidized prenatal care, and not because they have given anyone any reason (beyond their poverty) that they will be abusive or neglectful mothers.

The Conclusion proposes that poor mothers will only enjoy rights—be they positive or negative—when an individual's economic failure is no longer thought to indicate a dissolute moral character. That is, when society rejects its present commitment to constructing poverty as an index of the poor person's bad moral character, it is possible that society will deem poor mothers worthy of being privacy rights bearers. With this in mind, the recent economic downturn, together with the passage of the Affordable Care Act [ACA], create a hopeful moment for the conversion of cultural discourses. With respect to the Great Recession, millions of

"regular" Americans experienced home foreclosures, joblessness, the evaporation of assets, the disappearance of private and privatized safety nets, and the consequent need to turn to public sources for assistance. That is, millions of "regular" Americans became poor persons. It is possible that the Great Recession revealed that, frequently, poverty is not caused by individual moral pathology, but rather is caused by structural forces well outside of the control of the individual. Additionally, the passage of the ACA, which is in part an expansion of Medicaid, may also affect how poverty and poor people are understood. The ACA makes more people eligible for Medicaid. As such, it is possible to understand the ACA's expansion of the Medicaid program as the government constructing more people as "poor." More people are eligible for what poor people receive: government assistance. While acknowledging counternarratives that have been generated about the passage of the ACA and the Great Recession, this chapter will suggest that these two events are hopeful insofar as they could convert discourse from one in which poor people are abnormal deviants and poverty is blamed on moral failure to one in which poor people are normalized and poverty is explained by structural forces. If it is accepted that poverty and being poor do not necessarily have their origins in individual moral failure, and if it is accepted that poor individuals frequently possess the same moral character as non-poor individuals, then perhaps it will be accepted that the poor mothers are as capable and worthy of being privacy rights bearers as are the non-poor. It is only then that poor women will be given the various rights to privacy and will enjoy privacy in any meaningful sense of the word.

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[1] It is possible to reformulate the claim to make it even less provocative and controversial: one could claim that poor mothers have privacy rights, however their rights are systematically narrowed to the point of impotence and meaningless. This formulation denies that the government ever violates rights—violations that are necessarily illegitimate. In describing poor mothers' rights as narrowed (and never violated), this formulation denies that the government ever acts illegitimately when it invades their privacy in the various dimensions that the privacy right would otherwise protect.

[2] Many legal scholars have offered this description of rights, wherein they are not absolute and do not categorically prevent the government from acting, but rather simply demand that the government meet its burden of justification when acting. For example, Schauer writes, "Suppose that the right to o is not a right *to o*, but rather a right not to have the ability to o infringed without the provision of a justification of special strength. This is a reformulation of the idea of a right that appears quite consistent with the operation of much of American constitutional law." Schauer, "A Comment on the Structure of Rights," 428. He continues:

> What this appears to indicate is that what I get when I move from nonright to right is not (necessarily) the ability to have o or to engage in o-ing to which a right to o pertains, but rather simply the right to put the state to a higher burden of justification. A right to o then just is the right to have the state not restrict the ability to o without showing a compelling interest or the like…. Removing the ability to o from the right to o is far from making the right hollow. Rather, this reconception now sees rights as *shields* against government interests. And

> thus rights, like shields, can be thought of as having genuine force even though they may not be absolute. (Ibid.)

There are other formulations of rights, of course. In an article that explores the ambiguity of the language of constitutional rights, legal scholar Peter Westen offers two additional possibilities. The first possibility is to understand rights as entitlements—a conclusion that there is no government interest that can override the individual interest that the right protects. He writes that rights are understood as entitlements "when we say that the existence of a constitutional 'right' on the part of A to do or receive Y depends upon an anterior 'balancing' or 'weighing' of his 'interests' against the public's 'interests.' For one cannot tell whether he has such a right until one has already gone through the process of determining whether the balance of interests entitles him to do or receive Y." (Westen, "The Rueful Rhetoric of Rights," 998 – 99). In this formulation of rights, poor mothers do not have privacy rights because the anterior balancing of her interests against the public's interests inevitably yields public interests that outweigh her privacy interests. She is not "entitled" to Y when Y is privacy as it relates to reproduction, family, information, and the physical home. Although this is not the formulation of rights that this book employs, it is an attractive formulation inasmuch as it pays attention to the efficacy of rights in practice—that is, whether the government is actually precluded from doing something in the face of a negative right or actually compelled to do something in the face of a positive right.

The second possibility that Westen offers is to understand rights as interests. This possibility differs from the first inasmuch as the first only encompasses interests that have already been found to outweigh countervailing state interests. In this second formulation, rights refer to the "interest of A as have yet to be determined to support an 'entitlement' in A to do or receive Y." (Westen ***). In this formulation, poor mothers would certainly have privacy rights to the extent that they have mere interests in precluding the government from regulating their private lives in the way that rights to reproductive privacy, informational privacy, family privacy, and spatial privacy are supposed to preclude. However, this formulation is inconsistent with the way that privacy rights jurisprudence and related commentary discuss rights.

[3] Here, I borrow the "conventional terminology" that Frederick Schauer uses, "pursuant to which rights are either satisfied or infringed, with only unjustified infringements being referred to as violations." (Schauer, "A Comment on the Structure of Rights").

[4] It is also worth mentioning that one ignores an important element in the story of how Puerto Rico came to occupy its current peculiar status as an unincorporated territory of the United States – and how the Sixth Amendment right to a jury trial came to be conditional – if one ignores race. Puerto Rico came to "belong" to the United States as spoils of the Spanish-American War. Soon after the United States acquired the island, it was necessary to pose the question: does the Constitution follow the flag? Did the United States' annexation of the island country mean that the island country's inhabitants were bestowed with all of the rights, privileges, and obligations that persons on the mainland possess? Or was it possible for the United States to govern the nation without giving the nation's people the full range of rights of citizens? The concept of an "unincorporated territory"—by which a territory was not a full member of "the American family," was "foreign … in the domestic sense," and could be governed without the government being constrained by all of the provisions designed to do just that in the Constitution—answered in the negative the question of whether the Constitution followed the flag. The United States could possess Puerto Rico without Puerto Ricans possessing the full range of rights that the

Constitution guarantees.

Race played an important role in explaining why the concept of the unincorporated territory was even conceived. Race plays an important role in explaining why the United States wanted to create a governance structure on the island within which the people could be governed without those people having all of the rights of citizens. ***HERE***

[5] It is worth noting that the requirement that an applicant possess a good moral character in order to naturalize is not merely symbolic—an empty condition that has no real bearing on whether or not a person successfully naturalizes. Far from it, the good moral character requirement has become a "powerful exclusionary device." (Kevin Lapp, "Reforming the Good Moral Character Requirement for U.S. Citizenship," 1573). As Lapp notes, "Since 1990, Congress has added hundreds of permanent, irrebuttable statutory bars to a good moral character finding triggered by criminal conduct. Where no statutory bar applies, naturalization examiners may still deny an applicant on character grounds in their description." (Ibid.). It is also worth noting that many of the acts that trigger a finding of no good moral character, and thereby preclude an applicant from naturalizing, do not involve the commission of crimes. The claim that one has a good moral character may be impeached on a showing that one has willfully failed or refused to support one's children or that one has had an extramarital affair "that tends to destroy an existing marriage." (ibid: 1593).

[6] The fuller quote is:

> Citizenship *is* man's basic right, for it is nothing less than the right to have rights. Remove this priceless possession and there remains a stateless person, disgraced and degraded in the eyes of his countrymen. He has no lawful claim to protection from any nation, and no nation may assert rights on his behalf. His very existence is at the sufferance of the state within whose borders he happens to be. In this country, the expatriate would presumably enjoy, at most, only the limited rights and privileges of aliens, and, like the alien, he might even be subject to deportation, and thereby deprived of the right to assert any rights. (Perez v. Brownell, 64—65).

[7] Statements in *U.S. v. Windsor* appear to buttress this reading. There, the Court wrote that the Defense of Marriage Act ran afoul of the Constitution because "no legitimate purpose overcomes the purpose and effect to disparage and to injure those whom the State, by its marriage laws, sought to protect in personhood and dignity." However, the Court also notes that the law was motivated by Congress' sense that "homosexuality" and same-sex marriage were immoral. The Court observes, "The House concluded that DOMA expresses 'both moral disapproval of homosexuality, and a moral conviction that heterosexuality better comports with traditional (especially Judeo- Christian) morality.' The stated purpose of the law was to promote an "interest in protecting the traditional moral teachings reflected in heterosexual-only marriage laws.'" Thus, in an important sense, the Court admits that the purpose of the law was to enforce traditional morality. Nevertheless, the Court concludes that "no legitimate purpose" motivated the law. It is easy to see why some have concluded that *Windsor* interpreted the Constitution to prohibit the government from regulating on the basis of morality.

[8] There are many other less expansive readings of *Lawrence* that are as viable as the reading that Justice Scalia would suggest. For example, the narrowest reading of the decision would prohibit legislatures from regulating morals only when that regulation involves private, consensual sexual activity between adults. Accordingly, if the state wanted to regulate gambling on the theory that

gambling is immoral, it may do so, as gambling does not involve private, consensual sexual activity between adults. Alternately, the decision may only prohibit morals regulation whenever there is no third-party harmed by the activity (as is the case when adults engage in private, consensual sexual activity). Accordingly, if the state wanted to regulate polygamy on the theory that it such marital arrangements are immoral, it may do so if it also shows that third parties, perhaps children, are harmed by these marriages. Another alternative is to read the decision as only prohibiting morals regulation when the regulation functions to make more vulnerable an already vulnerable population. Certainly, the Court in *Lawrence* was quite concerned about the effects that criminal "homosexual sodomy" laws had on LGBT persons, noting that the laws "demean[ed] their existence" and functioned as "an invitation to subject homosexual persons to discrimination both in the public and in the private spheres." (***)

[9] One could also describe reproductive privacy as demanding governmental amorality so that women can decide whether or not abortion is moral; moreover, even if a woman decides that abortion is immoral, reproductive privacy might demand governmental amorality so that a woman can decide to do what she believes is immoral—that is, to undergo an abortion. In order words, governmental amorality in the arena of reproductive privacy enables the making of both moral and immoral choices. Perhaps this is what full moral sovereignty entails: not just the ability to answer questions of morality for oneself, but also the ability to engage in what one has decided is immoral activity.