THE YALE LAW JOURNAL

MICHELE GOODWIN & ERWIN CHEMERINSKY

Pregnancy, Poverty, and the State

The Poverty of Privacy Rights

BY KHIARA M. BRIDGES

STANFORD UNIVERSITY PRESS, 2017

AUTHORS. Michele Goodwin is Chancellor's Professor of Law and Director, Center for Biotechnology and Global Health Policy, University of California, Irvine School of Law. Erwin Chemerinsky is Dean and Jesse H. Choper Distinguished Professor of Law, University of California, Berkeley School of Law. The authors are grateful for the research assistance of Mariah Lindsay and Julia Jones. This work was presented at Chicago-Kent College of Law, the University of California, Berkeley, the University of California, Irvine, Boston University, and Southern Cross University in conjunction with the Byron Writers Festival. The authors would like to thank the faculties and participants at those workshops and events for their insightful comments.

BOOK REVIEW CONTENTS

INTRODUCTION

This Review of Khiara Bridges's compelling book, *The Poverty of Privacy Rights*, is published on the fiftieth anniversary of Dr. Martin Luther King Jr.'s death.[1] In reading his pivotal speeches, sermons, and commentary, we are struck by his profound wisdom on matters related to race, class, reproductive autonomy, health, and women's equality. In 1966, King wrote a landmark speech on reproductive health and rights for his acceptance of Planned Parenthood's inaugural Margaret Sanger Award.[2] In accepting his award, King argued that Black Americans "have no mere academic nor ordinary interest in family planning."[3] He explained that while "[t]here is scarcely anything more tragic in human life than a child who is not wanted," poverty is often at the root of this condition.[4] Despite the many "mountainous obstacles" facing the Black community, King insisted that "one element in stabilizing [the Negro's] life would be an understanding of and easy access to the means to develop a family related in size to his community environment and to the income potential he can command."[5] Partially due to this reason, King saw the Civil Rights movement and advocacy for family planning as "natural allies" seeking to "guarantee[] the right to exist in freedom and dignity."[6]

1. KHIARA M. BRIDGES, THE POVERTY OF PRIVACY RIGHTS 2-4 (2017).

2. Rev. Dr. Martin Luther King Jr., Family Planning—A Special and Urgent Concern (May 5, 1966), http://www.plannedparenthood.org/planned-parenthood-gulf-coast/mlk-acceptance-speech [http://perma.cc/7TV2-22L5] (delivered by Coretta Scott King). Of Margaret Sanger, King noted that there is a "striking kinship" between the fight for reproductive rights and civil rights, particularly because "[Sanger], like we, saw the horrifying conditions of ghetto life." *Id.* He explained, "[l]ike we, she knew that all of society is poisoned by cancerous slums." *Id.* King noted that Sanger sought, like he, to expose truth "to the millions." *Id.* Recent scholarship provides a nuanced and complicated view of Sanger, who founded what is now the Planned Parenthood Federation of America. On one hand, she was a courageous advocate of women's rights and family planning, having been arrested numerous times in her advocacy to provide poor women access to birth control. Conversely, she is also described as a sympathizer of U.S. eugenics efforts of the early twentieth century. *See, e.g.*, ADAM COHEN, IMBECILES: THE SUPREME COURT, AMERICAN EUGENICS, AND THE STERILIZATION OF CARRIE BUCK 56-57 (2016); IRIS LOPEZ, MATTERS OF CHOICE: PUERTO RICAN WOMEN'S STRUGGLE FOR REPRODUCTIVE FREEDOM 16-18 (2008). This Review does not unpack that literature.

3. King, *supra* note 2.

4. *Id.*

5. *Id.*

6. *Id.*

King's Planned Parenthood acceptance speech came at a time when some researchers and doctors estimated that as many as one million illegal or "back-alley" abortions took place each year in the United States.[7] Hospitals were overwhelmed by the deaths and infections caused by coat-hanger abortions.[8] Deaths were most striking among poor women of color: "[m]aternal mortality rates of black women were three to four times higher than those of white women,"[9] and abortion-related deaths accounted for nearly half of the total maternal mortality in New York City.[10] Hospitals in major cities hosted an alarming number of survivors: teenagers and women who nearly bled to death or were severely burned while trying to end unwanted pregnancies.[11] Far less fortunate pregnant women died on kitchen tables, in bathtubs, and in unsanitary makeshift abortion facilities: closets, bedrooms, and living rooms. During this period, it remained illegal in a number of states for physicians or anyone else to provide birth control to unmarried women.[12]

Family planning then, as well as now, is what King called "a special and urgent concern"[13] because reproductive autonomy is directly linked to women's freedom, liberty, dignity, and health.[14] We are struck by the dramatic contrasts between the conversations taking place in the public sphere then and now, and we are particularly concerned with the continuing threats to poor women's reproductive health and rights.

For example, decades ago, Prescott Bush, father of former President George H. W. Bush, served as an early treasurer and fundraiser for Planned

---

7. Rachel Benson Gold, *Lessons from Before* Roe*: Will Past Be Prologue?*, 6 GUTTMACHER POL'Y REV. 8, 8 (2003) ("One analysis, extrapolating from data from North Carolina, concluded that an estimated 829,000 illegal or self-induced abortions occurred in 1967."); *see also* LAWRENCE LADER, ABORTION 2 (1966) ("In 1957 a conference of experts sponsored by the Planned Parenthood Federation estimated that U.S. abortions could run from 200,000 to 1,200,000 annually.").

8. *See* LESLIE J. REAGAN, WHEN ABORTION WAS A CRIME: WOMEN, MEDICINE, AND LAW IN THE UNITED STATES, 1867-1973, at 214 (1997).

9. *Id.* at 213 ("The racial differences in abortion-related deaths and access to safe therapeutic abortions mirrored the racial inequities in health services in general and in overall health."). High maternal mortality rates remain a problem in this country, especially for women of color. *See infra* Part III.

10. REAGAN, *supra* note 8, at 214.

11. *Id.* at 210-11.

12. In Massachusetts, for example, the law provided for a maximum five-year prison term for those giving away "any drug, medicine, instrument or article" relating to contraception, except for married individuals. Eisenstadt v. Baird, 405 U.S. 438, 440-41 (1972).

13. King, *supra* note 2.

14. Roe v. Wade, 410 U.S. 113 (1973).

Parenthood.[15] Later, then-Congressman George H. W. Bush played a crucial role in the enactment of Title X, which provides family planning services, including contraceptives for the poor.[16] In 1969, when access to family planning for poor women was being debated in Congress, George H. W. Bush exclaimed, "We need to take sensationalism out of this topic so that it can no longer be used by militants who have no real knowledge of the voluntary nature of the program but, rather, are using it as a political stepping stone."[17] According to the former President, "If family planning is anything, it is a public health matter."[18] Bush prevailed, and President Nixon signed Title X legislation into law.

By contrast, in early 2017, a partisan, Republican-led effort in Congress gutted Title X provisions, leaving states free to ban abortion providers from reimbursement for basic family planning services, including cervical and breast cancer screenings, testing for sexually transmitted diseases, and provisions of contraception provided to the poor.[19] Republican leadership proclaimed it a victory, and President Trump immediately signed the legislation into law.[20] Shortly thereafter, the House Committee on Appropriations approved the Make America Secure and Prosperous Appropriations Act of 2018, which eliminates nearly three

15. Pema Levy, *How the Bush Family Aided Planned Parenthood's Rise*, MOTHER JONES (Aug. 11, 2015, 10:00 AM), http://www.motherjones.com/politics/2015/08/planned-parenthood-jeb-bush-wants-roll-back-his-fathers-legacy [http://perma.cc/268E-X8FU].

16. *Id.*; *see also* Meredith Shiner, *Primer on Title X: The Fund Behind the Planned Parenthood Rider*, POLITICO: ON CONGRESS BLOG (Apr. 8, 2011, 2:17 PM), http://www.politico.com/blogs/on-congress/2011/04/primer-on-title-x-the-fund-behind-the-planned-parenthood-rider-034864 [http://perma.cc/BVP7-WBT7].

17. Ann Gerhart, *Birth Control as Election Issue? Why?* (Feb. 20, 2012), https://www.washingtonpost.com/national/health-science/birth-control-as-election-issue-why/2012/02/17/gIQASW6kPR_story.html [http://perma.cc/JJ4G-DLLV].

18. *Id.*

19. *See* Colin Dwyer, *Trump Signs Law Giving States Option To Deny Funding for Planned Parenthood*, NPR (Apr. 13, 2017, 5:07 PM), http://www.npr.org/sections/thetwo-way/2017/04/13/523795052/trump-signs-law-giving-states-option-to-deny-funding-for-planned-parenthood [http://perma.cc/93SL-CWXJ]; Julie Hirschfeld Davis, *Trump Signs Law Taking Aim at Planned Parenthood Funding*, N.Y. TIMES (Apr. 13, 2017), http://www.nytimes.com/2017/04/13/us/politics/planned-parenthood-trump.html [http://perma.cc/3JZ7-Q8XJ] ("Regardless of his misgivings about the effort, Mr. Trump appeared ready to accept congressional Republicans' idea of using a broad health care overhaul to strip all federal money from Planned Parenthood."); Lisa Lambert, *Trump Signs Resolution Allowing U.S. States To Block Family Planning Funds*, REUTERS (Apr. 13, 2017, 3:28 PM), http://www.reuters.com/article/us-usa-trump-abortion/trump-signs-resolution-allowing-u-s-states-to-block-family-planning-funds-idUSKBN17F2IH [http://perma.cc/KZV2-VW4T].

20. Lambert, *supra* note 19.

hundred million dollars in Title X funding for family planning services, essentially defunding the program.[21] Consequently, if enacted, this legislation will directly harm millions of poor Americans, including those who are underinsured and the low-income insured who access Title X services each year.[22]

Whether or not the Make America Secure and Prosperous Appropriations Act of 2018 becomes law, we are deeply concerned about lawmakers' evident disregard for the lives of poor women and the inhumanity that such legislation seeks to bake into law. Gutting funding for programs that provide essential health services does not contribute to the prosperity of poor women and girls, nor does it advance their security.[23] Instead, stripping funding from this program evinces disdain for the poorest American women because in the worst cases, the results include mass-scale preventable deaths.[24]

---

21. ANGELA NAPILI, CONG. RESEARCH SERV., RL33644, TITLE X (PUBLIC HEALTH SERVICE ACT) FAMILY PLANNING PROGRAM 4-7 (2017), https://fas.org/sgp/crs/misc/RL33644.pdf [http://perma.cc/6M9K-KRZ2] (writing that the bill "would provide no funding for the Title X program").

22. Casey Quinlan, *House Republicans Want To Kill Funding for Family Planning Services*, THINK PROGRESS (July 25, 2017, 2:52 PM), http://thinkprogress.org/title-x-funding-c0b54e2d9a2b [http://perma.cc/MD7A-7L7P]; *see also* NAPILI, *supra* note 21, at 5 ("The House-reported FY2018 Labor-HHS-Education Appropriations bill, H.R. 3358, would provide no funding for the Title X program in FY2018.").

23. To the contrary, empirical research shows that when facilities that provide Title X health services close, the rates of unintended pregnancies and Medicaid-funded births increase. This evidence also dispels the notion that policies to eliminate or reduce Title X funding promote or enhance the government's fiscal security. *See, e.g.*, *State Facts About Unintended Pregnancy: Texas*, GUTTMACHER INST. (Aug. 2017), http://www.guttmacher.org/fact-sheet/state-facts-about-unintended-pregnancy-texas [http://perma.cc/5DS3-EDN8] ("Unintended pregnancies are also costly to the federal and state governments, resulting in $21.0 billion in public expenditures in 2010. Yet, these costs could have been considerably higher: By helping women avoid unintended pregnancies, publicly funded family planning services saved taxpayers $13.6 billion in 2010, or $7.09 for every $1 spent." (footnote omitted)); *see also* Amanda J. Stevenson et al., *Effect of Removal of Planned Parenthood from the Texas Women's Health Program*, 374 NEW ENG. J. MED. 853, 853 (2016) (noting that during the period in which researchers studied the closure of facilities providing Title X services in Texas, "the rate of childbirth covered by Medicaid increased by 1.9 percentage points (a relative increase of 27.1% from baseline) within 18 months after the claim"); Deborah Netburn, *After Texas Stopped Funding Planned Parenthood, Low-Income Women Had More Babies*, L.A. TIMES (Feb. 3, 2016, 4:01 PM), http://www.latimes.com/science/sciencenow/la-sci-sn-planned-parenthood-texas-births-20160203-story.html [http://perma.cc/FHU5-98BP].

24. Marian F. MacDorman et al., *Recent Increases in the U.S. Maternal Mortality Rate: Disentangling Trends from Measurement Issues*, 128 OBSTETRICS & GYNECOLOGY 447 (2016); Sophie Novack, *Texas' Maternal Mortality Rate: Worst in Developed World, Shrugged Off By Lawmakers*, TEX. OBSERVER (June 5, 2017, 6:04 PM), http://www.texasobserver.org/texas-worst-maternal-mortality-rate-developed-world-lawmakers-priorities [http://perma.cc/T2ZB-99YN].

Consider the case of Texas, where lawmakers gutted Title X funding and caused reproductive health clinics to close. Three serious problems emerged. First, there was a reduction in access to, prescribing of, and use of long-acting contraception.[25] Second, more Medicaid-eligible pregnancies occurred.[26] And, third, the rate of maternal mortality skyrocketed.[27] The state's efforts to repeal and curtail reproductive rights and to close the clinics that provided reproductive health services seem likely to correlate to the problems identified above. The dramatic rise in maternal mortality in Texas now earns it the reputation as "one of the most dangerous places in the developed world to have a baby."[28]

In our view, efforts to gut Title X fit a broader pattern of hostility toward the interests and autonomy of poor women.[29] In 2015, Title X served over four million clients.[30] Of these clients, 66% had "incomes at or below the federal poverty guidelines."[31] According to a 2015 study, 86% of Title X clients had "incomes at or below 200% of the federal poverty guidelines."[32] For the majority of Title X patients, the Title X clinics that service them are their "usual" or only healthcare provider.[33] The question is not: if Congress eliminates Title X funding, where will poor women be served? Rather, we must ask whether they will have any healthcare access at all, given that Title X barely serves the millions of poor women and girls in dire need of reproductive health services. Eliminating what little remains of the program further lowers the benchmark of cruel and unjust treatment toward poor women.

The scale and scope of contemporary efforts to hollow out privacy rights and render them meaningless for poor women extend well beyond Title X.[34] In this

---

25. Stevenson et al., *supra* note 23.

26. *Id.*; *see also* Netburn, *supra* note 23 (summarizing the findings of Stevenson's study).

27. MacDorman et al., *supra* note 24.

28. Nina Martin, *Texas Is One of the Most Dangerous Places in The Developed World To Have a Baby*, PAC. STANDARD (Sept. 1, 2016), http://psmag.com/news/texas-is-one-of-the-most-dangerous-places-in-the-developed-world-to-have-a-baby [http://perma.cc/MCP7-Y7YW].

29. The number of clients served by Title X has steadily declined. In 2015, 23% fewer people were served by the program than in 2010. Reduced revenues for family planning services, staffing shortages, and increasing costs for providing services all account for some of the decrease in services available to the poor through Title X. *See* NAPILI, *supra* note 21, at 3.

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.*

34. *See generally* LAURA E. GÓMEZ, MISCONCEIVING MOTHERS: LEGISLATORS, PROSECUTORS, AND THE POLITICS OF PRENATAL DRUG EXPOSURE (1997) (analyzing the state's intrusion into the

Review, we argue that state legislatures, as well as the federal government and courts, express moral disregard and even outright contempt for poor women in multitudinous ways that include, but extend beyond, Bridges's daring new book.[35] *The Poverty of Privacy Rights* argues that states' moral constructions of poverty, which frame indigent women as lazy, irresponsible, and ultimately immoral, help justify unwelcome state interventions in these women's lives, as well as the deprivation of their privacy rights. However, we emphasize the point that it is the state that bears the mark of immorality and illegitimacy when it deprives women of civil liberties and constitutional rights. For example, in Alabama, where King famously penned *Letter from a Birmingham Jail*,[36] nearly five hundred poor women have been prosecuted in recent years for endangering their fetuses.[37] In most of those cases, medical providers also played a key role in dis-

lives of mothers who gave birth to drug-addicted babies in the 1980s and 90s); April L. Cherry, *The Detention, Confinement, and Incarceration of Pregnant Women for the Benefit of Fetal Health*, 16 COLUM. J. GENDER & L. 147, 148 (2007) (describing how states justified interventions in women's pregnancies based on the notion that women harbored "maternal environments" that threatened fetal health); Michelle Goldberg, *Policing Pregnancy*, NATION (Apr. 21, 2011), http://www.thenation.com/article/160092/policing-pregnancy [http://perma.cc/28A3-DJBX] (describing the erosion of abortion rights and consequent rise in feticide laws). Twenty-five years ago, Dorothy Roberts exposed how racial animus toward poor Black mothers resulted in criminal and civil punishments. Her chilling descriptions of government interventions and harassment of poor Black mothers exposed how race was and continues to be an intrinsic factor in the hierarchy of reproductive rights. *See, e.g.*, Dorothy E. Roberts, *Punishing Drug Addicts Who Have Babies: Women of Color, Equality, and the Right of Privacy*, 104 HARV. L. REV. 1419 (1991).

35. One key vehicle for this disregard for poor women is fetal protection laws, which on their face apply equally to all women (and men), but in practice almost exclusively target poor women for threatening the health of their fetuses. *See, e.g.*, Michele Goodwin, *Fetal Protection Laws: Moral Panic and the New Constitutional Battlefront*, 102 CALIF. L. REV. 781 (2014) (analyzing the myriad ways in which states problematically and unconstitutionally intervene in vulnerable women's pregnancies, ranging from pregnancy exclusion laws that override pregnant women's medical directives, to laws that punish women for endangering their fetuses); Lynn M. Paltrow & Jeanne Flavin, *Arrests of and Forced Interventions on Pregnant Women in the United States, 1973-2005: Implications for Women's Legal Status and Public Health*, 38 J. HEALTH POL., POL'Y & L. 299, 300 (2013) (empirically cataloguing the hundreds of instances in which poor pregnant women were targeted for criminal punishment).

36. Martin Luther King, Jr., *Letter from a Birmingham Jail [King, Jr.]*, U. PA. (Apr. 16, 1963), http://www.africa.upenn.edu/Articles_Gen/Letter_Birmingham.html [http://perma.cc/AR7A-5U3Z].

37. Nina Martin, *The State that Turns Pregnant Women into Felons*, ALTERNET (Sept. 23, 2015, 9:24 AM GMT), http://www.alternet.org/drugs/when-womb-crime-scene [http://perma.cc/8S8N-W2DG]; *see also Ex parte* Ankrom, 152 So. 3d 397, 429 (Ala. 2013) (Parker, J., concurring) (upholding the conviction of a poor mother for "endangering" her fetus, opining, "The

closing confidential patient information and reporting the women to law enforcement.[38] Such actions, combined with recent federal and state efforts to undermine women's reproductive healthcare rights through the enactment of targeted regulations of abortion providers[39] (known as "TRAP" laws), the exclusion of Planned Parenthood and other abortion providers from Title X programs,[40] and efforts to repeal the Patient Protection and Affordable Care Act's reproductive health safeguards,[41] demonstrate remarkable disdain for the lives and dignity of poor women.

We think King would be horrified by the state's oversized role in determining how and when women can control their reproductive health. Both King and Bridges explicate the urgency and necessity of paying close attention to the dignity of poor women, especially poor women of color. They agree that profound cruelty and indignity define the stigmatization of poor mothers. Indeed, one of the key contributions of Bridges's book is its careful analysis of how such stigmatization not only affects how society treats poor mothers, but also how it structures the law's treatment of these women.[42] Bridges provides a number of analytical frameworks that illuminate the social and legal ways in which poor women's reproductive rights are rendered ineffective or nugatory.

This Review problematizes the intersection of privacy and morality. We argue not only that the state is a fallible and problematic arbiter of women's morality, but also that it acts immorally when it deprives poor women of privacy, compromises their bodily autonomy, and threatens to rob them of life itself. Bounded in the state's immoral actions toward poor women of color are its historical struggles and campaigns against their personhood and citizenship,[43] as

decision of this Court today is in keeping with the widespread legal recognition that unborn children are persons with rights that should be protected by law").

38. Martin, *supra* note 37.

39. *Targeted Regulation of Abortion Providers*, GUTTMACHER INST. (Feb. 1, 2018), http://www.guttmacher.org/state-policy/explore/targeted-regulation-abortion-providers [http://perma.cc/EVF2-METV].

40. Jennifer Steinhauer, *Senate Lets States Defund Clinics That Perform Abortions*, N.Y. TIMES (Mar. 30, 2017), http://www.nytimes.com/2017/03/30/us/politics/pence-congress-family-planning-money.html [http://perma.cc/CL4F-ZRXD].

41. Alanna Vagianos, *Kirsten Gillibrand: If You Love Women, Do Not Unwind the Affordable Care Act*, HUFFINGTON POST (Jan. 12, 2017, 5:02 PM), http://www.huffingtonpost.com/entry/kirsten-gillibrand-if-you-love-women-do-not-unwind-the-affordable-care-act_us_5877e6a9e4b0b3c7a7b0544d [http://perma.cc/V38Y-2CPD].

42. BRIDGES, *supra* note 1, at 2-4.

43. The case of American antebellum slavery illustrates our point. In the context of slavery, the moral construction of poverty rendered Black women's bodies as property, which could be bartered, rented, leased, and sold. Later, during Jim Crow, this construction morphed into a

well as conscription of their bodies in service to malevolent state agendas such as eugenics and forced sterilization.[44] This is more than mere indifference, but an historic pattern. In this Review, we illustrate how the continued effects of more than a century of negative state interventions in the reproductive lives of poor women of color are actually deadly.

In addition, we predict that the continued interference in the reproductive lives of poor women creates cultural norms and precedents in medicine, society, law enforcement, legislatures, and courts that will spill over and constrain the rights of all classes of women, regardless of race. That is, historical disregard for the lives and rights of Black women inscribed by judicial doctrine and court opinions, as well as state and federal legislation, enable ongoing and future disparagement of all women.

In this Review, we argue that the core bundle of rights contained in reproductive privacy has been hollowed out through new legislation and court decisions, affecting the actual practice of reproductive privacy.[45] We show how increasingly, even judicial opinions affirming reproductive rights fail to constrain

strong eugenics discourse to eliminate the possibility of Black women giving birth to future citizens. *See, e.g.*, Dred Scott v. Sandford, 60 U.S. 393, 404 (1857) ("We think . . . that they are not included, and were not intended to be included, under the word 'citizens' in the Constitution, and can therefore claim none of the rights and privileges which that instrument provides for and secures to citizens of the United States."). In the immigration context, the moral construction of poverty rendered and stereotyped Chinese women as prostitutes unworthy of citizenship, an attitude enacted into law. *See, e.g.*, Page Act of 1875, ch. 141, § 3, 18 Stat. 477 (repealed 1974) (prohibiting "the importation into the United States of women for the purposes of prostitution," contemplating women from Asia); *see also* Kerry Abrams, *Polygamy, Prostitution, and the Federalization of Immigration Law*, 105 COLUM. L. REV. 641, 643, 698-99 (2005) (arguing that the Page Act was part of a broader effort to ban all Chinese women from the United States and noting that "[i]f a woman answered 'single' or if her aspired occupation seemed improbable, the consul could conclude that she was a likely prostitute").

44. *See* Buck v. Bell, 274 U.S. 200 (1927) (upholding the forced sterilization of the so-called mentally unfit under the Fourteenth Amendment's Due Process Clause).

45. For example, *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), was a significant retreat from *Roe v. Wade*, 410 U.S. 113 (1973), stripping the abortion right of its fundamental contours and imposing paternalistic standards that actually do not advance women's health. *See also* Rust v. Sullivan, 500 U.S. 173 (1991) (upholding restrictions and conditions on Title X funding); Harris v. McRae, 448 U.S. 297, 316 (1980) ("[I]t simply does not follow that a woman's freedom of choice carries with it a constitutional entitlement to the financial resources to avail herself of the full range of protected choices."); Beal v. Doe, 432 U.S. 438, 445 (1977) ("[W]e do not agree that the exclusion of nontherapeutic abortions from Medicaid coverage is unreasonable under Title XIX."); Maher v. Roe, 432 U.S. 464, 474 (1977) (ruling that *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. . . . An indigent woman who desires an abortion suffers no disadvantage as a consequence of Connecticut's decision to fund childbirth").

state governments seeking to eviscerate those rights through new legislation.[46] Though court rulings recognize these rights, they ultimately render them meaningless for poor women, particularly poor women of color. Since these groups are largely unseen and unheard by those who make the law and policy, they are the first victims. As the policies that substantially burden women's reproductive rights become normalized, these norms will affect broader segments of the population, placing greater numbers of women at risk.

We view these issues as not simply matters of law, but of human rights, morality, and dignity. The moral hypocrisy of the state is clear in the reproductive health context. When the state coerces women and girls into pregnancies they do not want and to bear children they do not desire to have, it not only creates unconstitutional conditions, as Bridges argues, but it also acts immorally. Even though legal scholars typically refer to lawmaking that unduly burdens the poor as unjust, we suggest that legislative efforts to eviscerate reproductive rights are far worse than that.

Part I of this Review provides a descriptive account of Bridges's work by highlighting the key analytical tools used to build her argument. We further show how the interceding forces of racism, classism, and sexism result in the legal construction of privacy rights that are too weak to stop government infringement. Part II expands beyond Bridges's historical arguments to demonstrate the ongoing and essential role played by the moral construct of poverty in the state's intervention in poor women's reproductive lives. This Part also explores the broader implications of reproductive privacy in the abortion context, arguing that TRAP laws wield the potential to spread the erosion of reproductive privacy. Finally, Part III issues a warning call, highlighting how the trampling of reproductive privacy rights not only disenfranchises the poor of these rights, but also may potentially render all women's reproductive privacy rights ineffective. The moral and legal arguments adopted by courts and legislatures to disenfranchise poor women of their privacy rights are quickly being used to limit *all*

46. In the wake of *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016), which many celebrate as a reproductive rights victory, state legislatures began vetting laws nearly identical to the Texas laws struck down by the Court. In Minnesota, legislators proposed bills — ultimately vetoed by the Governor — shortly after *Whole Woman's Health* that closely resemble the ambulatory surgical center requirements ruled unconstitutional by the Court. *See, e.g.*, S.F. 704, 2017 Leg., 90th Sess. (Minn. 2017) (prohibiting establishment of abortion facilities without a license); S.F. 702, 2017 Leg., 90th Sess. (Minn. 2017) (prohibiting use of state-sponsored health programs for funding abortions).

women's reproductive rights. Once again, those who are most vulnerable are the canaries in the coal mine for us all.[47]

I. RACE, CLASS, AND THE LOSS OF FAMILY AND REPRODUCTIVE PRIVACY

Bridges articulates an alarming thesis in *The Poverty of Privacy Rights*: simply put, poor women have no privacy rights. She theorizes that these women are deprived of privacy rights because society presumes that they do not "possess the character that justifies recognizing the[se] rights in the first instance."[48] The book emphasizes reproductive, family, and informational privacy rights—areas that are thought to protect the privacy of poor mothers but which instead fall victim to heavy state regulation.[49] Her work helps us to understand how poor women are burdened even in states like New York, which have otherwise favorable laws on the books.[50] For example, one New York woman, Erika Christensen, could not get a medically necessary abortion at around week thirty, which was past the legal cutoff in the state. As she recounted to the New York Civil Liberties Union (NYCLU), "We live in New York, after all and my baby is not viable. Yet, I still can't have this done in a supposedly progressive state."[51] Getting this late-term abortion cost Christensen $25,000, not including travel and

47. Julie D. Cantor, *Court-Ordered Care: A Complication of Pregnancy To Avoid*, 366 NEW ENG. J. MED. 2237, 2240 (2012) (arguing that judicial interventions in pregnancies "betray foundational legal principles of our free society" and "endanger the liberty of us all").

48. BRIDGES, *supra* note 1, at 34.

49. *Id.*

50. For example, despite the fact that New York was one of the first states to legalize abortion, some "New York women . . . were unable to receive constitutionally protected care because of the state's outmoded abortion law." KATHARINE BODDE & SEBASTIAN KRUEGER, N.Y. CIVIL LIBERTIES UNION, CRITICAL CONDITIONS: HOW NEW YORK'S UNCONSTITUTIONAL ABORTION LAW JEOPARDIZES WOMEN'S HEALTH 6 (2017), http://www.nyclu.org/sites/default/files/field_documents/nyclu_criticalconditions_20170126.pdf [http://perma.cc/Z8KJ-SGDJ]. New York "criminalizes abortion after 24 weeks unless it is needed to save a woman's life." *Id.* at 5. The law, which was enacted three years before *Roe v. Wade*, remains unchanged since that time. *Id.*; *see also* JORDAN GOLDBERG ET AL., NAT'L INST. FOR REPROD. HEALTH, WHEN SELF-ABORTION IS A CRIME: LAWS THAT PUT WOMEN AT RISK 1 (2017), http://www.nirhealth.org/wp-content/uploads/2017/06/Self-Abortion-White-Paper-Final.pdf [http://perma.cc 3Q62-QAN9] ("Now, even as women may be able to self-induce an abortion without attendant hazards to their health, they may face another serious complication: prosecution and incarceration. In a few states, including New York, inducing an abortion on oneself remains a crime.").

51. BODDE & KRUEGER, *supra* note 50, at 17.

hotel.[52] As she pointed out, "That would be impossible for most people. They would have to carry to term because they can't afford it."[53]

Sadly, very often poor women are not lucky enough to be able to spend thousands of dollars and fly to another state to obtain an abortion.[54] The NYCLU report chronicled other such stories of girls and women in New York forced to carry pregnancies to term even while suffering from cancer or other serious medical illnesses, or after sexual assault.[55]

The story above conveys two important messages. First, the deprivations of reproductive rights extend beyond poor women, even in New York. Second, and perhaps more disturbing, women risk their reproductive rights being denied, even in matters of life and death, including in states described as "liberal." If this can happen to wealthier women in liberal states, what are the "on the ground" realities for poor women's reproductive healthcare rights in any state? Bridges elegantly answers this question.

The Poverty of Privacy Rights was born out of eighteen months of embedded field research at a New York City medical center that provides care to women living in poverty. Bridges's impressive fieldwork involved conducting more than 120 hours of qualitative interviews with indigent pregnant women, observing their visits with medical providers, and interviewing staff.[56] She thoughtfully expands feminist legal discourse about law, reproductive health, and poverty in discussing glaring breaches of patient privacy in the civil setting.

---

52. *Id.*

53. *Id.*

54. *See id.* at 18, 20 (describing one woman who decided to terminate a pregnancy before getting final results regarding the fetus's abnormalities because she could not afford to travel to another state after New York's twenty-four-week deadline, and another woman in New York who was forced to carry a fetus that would not survive to term because she could not afford to travel to obtain an abortion).

55. *See, e.g.*, *id.* at 5, 16.

56. For a broader reading of Bridges's scholarship related to her field research, see Khiara M. Bridges, *Pregnancy, Medicaid, State Regulation, and the Production of Unruly Bodies*, 3 NW. J.L. & SOC. POL'Y 62 (2008), which examines the patient enrollment process in the New York State Prenatal Care Assistance Program, a Medicaid program that underwrites prenatal care for poor women; Khiara M. Bridges, *Quasi-Colonial Bodies: An Analysis of the Reproductive Lives of Poor Black and Racially Subjugated Women*, 18 COLUM. J. GENDER & L. 609 (2009), which analyzes and compares the experiences of poor pregnant women of color at Alpha Hospital to the experience of the colonized; and Khiara M. Bridges, *Wily Patients, Welfare Queens, and the Reiteration of Race in the U.S.*, 17 TEX. J. WOMEN & L. 1 (2007), which examines the racialized constructions and stereotypes that attend receiving state benefits.

In her first book, *Reproducing Race*,[57] Bridges's firsthand observations brought greater clarity and empirical support to prior research showing that poor patients of color receive "less" quality care or fewer referrals for diagnostic care services.[58] Her empirical work buttressed long-held suspicions and anecdotal reports that poor Black women are often subjected to hostile treatment in medical settings, with a focus on public hospitals, such as lengthy delays as well as constraints on their privacy. Bridges contrasted the experiences of the poor women of color she observed with her studies of patient care received by wealthier women at a nearby private hospital.[59] These findings were original, insightful, and disturbing, and led to Bridges's conclusion that if privacy were mapped on a spectrum, those with "no privacy rights" at all were poor mothers.[60]

This Part provides an overview of Bridges's arguments in her new book, highlighting her analytical moves in order to show how many of the privacy rights that we assume women legally possess have little effect in poor women's lives. Bridges believes that law is first and foremost shaped by cultural beliefs and that it is a mistake to simply rely on the judicial branch to fix how these beliefs influence law.[61] Of particular concern is society's belief in the moral failure of the poor. In Section I.A, we briefly compare Bridges's "moderate claim" that poor women have ineffective privacy rights with her "strong claim" that poor women are completely disenfranchised of privacy rights. In Section I.B, we outline the value of privacy rights and how they have been denied to poor women. In Section I.C, we demonstrate how the state has adopted a moral construction of motherhood to ultimately blame poor women for their poverty, and thus justify invasions of their privacy rights.

---

57. KHIARA M. BRIDGES, REPRODUCING RACE: AN ETHNOGRAPHY OF PREGNANCY AS A SITE OF RACIALIZATION (2011).

58. *See, e.g.*, UNEQUAL TREATMENT: CONFRONTING RACIAL AND ETHNIC DISPARITIES IN HEALTH CARE (Brian D. Smedley et al eds., 2003); Council on Ethical & Judicial Affairs, *Black-White Disparities in Health Care*, 263 JAMA 2344 (1990); Carmen R. Green et al., *The Unequal Burden of Pain: Confronting Racial and Ethnic Disparities in Pain*, 4 PAIN MED. 277 (2003); Vickie L. Shavers et al., *Race, Ethnicity, and Pain Among the U.S. Adult Population*, 21 J. HEALTH CARE POOR & UNDERSERVED 177 (2010); Michelle van Ryn & Steven S. Fu, *Paved with Good Intentions: Do Public Health and Human Service Providers Contribute to Racial/Ethnic Disparities in Health?*, 93 AM. J. PUB. HEALTH 248 (2003).

59. BRIDGES, *supra* note 57, at 15.

60. BRIDGES, *supra* note 1, at 11.

61. Khiara Bridges, Concluding Remarks at the Boston University School of Law's Symposium on *The Poverty of Privacy Rights* (Nov. 20, 2017) (transcript on file with authors).

A. Depriving Poor Mothers of Privacy Rights

Bridges's book frames a nuanced argument about privacy that encapsulates dignity and takes seriously the experiences of vulnerable women across the domains of family, reproduction, and informational privacy. Bridges encourages a deeper scrutiny of law in action — that is, one that probes beyond whether textual rights exist.[62] The key question is whether the promised rights of freedom, equality, voting, or reproductive health care are tangibly existent for the most vulnerable in society.

Bridges dissects and then parses her thesis into a "moderate" claim and a "strong" claim. Bridges's strong claim is that poor women have been informally disenfranchised of their privacy rights.[63] That is, they do not bear these rights at all. Bridges believes that wealth is a legal prerequisite for privacy rights, relegating poor women to a similar status as other groups that have been deprived rights by courts and legislatures.[64] Her moderate claim is rooted in a law and society framework: "for all practical purposes," she writes, poor women have no privacy rights, in other words, "no *effective* privacy rights."[65] To this end, Bridges argues that the idea of privacy rings hollow for women who encounter the reproductive health setting as a threatening, hostile, and, ironically, unsafe environment.

An example that fits her moderate claim may be instructive. On September 3, 2015, Blanca Borrego, a forty-four-year-old mother of three, was arrested in front of her eight-year-old daughter, other patients, and medical staff during a routine medical checkup at her gynecologist's office. For nearly eighteen months, she had been treated by the same doctor for an excruciatingly painful, chronic abdominal cyst. Unlike her usual visits, this time Borrego was scheduled to see

---

62. Similarly, Dr. Martin Luther King, Jr., in writings subsequent to the passage of the 1964 Civil Rights Act and the 1965 Voting Rights Act, spoke to the impasse of enforcement and full actualization of "Negro" rights. King observed, "The short era of widespread goodwill evaporated rapidly. As elation and expectations died, Negroes became more sharply aware that the goal of freedom was still distant and our immediate plight was substantially still an agony of deprivation." MARTIN LUTHER KING, JR., THE TRUMPET OF CONSCIENCE 6 (1967).

63. BRIDGES, *supra* note 1, at 11.

64. *Id.* at 12-13. Bridges compares poor mothers disenfranchised of privacy rights to Blacks living under *Dred Scott v. Sanford*, 60 U.S. (19 How.) 393 (1857), and the LGBT community prior to *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

65. BRIDGES, supra note 1, at 11.

her doctor at a different location, the Memorial Hermann Medical Group Northeast Women's Healthcare Clinic outside of Houston, Texas.[66] There, after presenting her private medical insurance card (provided through her husband's employer),[67] she was asked to complete new paperwork.

Unbeknownst to Borrego, her doctor's appointment was transformed into an immigration dragnet, created by her medical providers who prioritized criminal law goals that target undocumented immigrants over medical objectives. That is, medical staff at the clinic reported Borrego's fake license to law enforcement and secretly admitted the officers into the clinic through a backdoor. In terrible pain, Borrego waited two hours while staff deceived her that a doctor would be available. Sadly, the doctor never arrived to care for her. Instead, when finally taken to the examination room, Borrego was confronted by sheriff's deputies, arrested, taken to jail, and "held in lieu of $35,000 bond."[68]

The attorney for Borrego told reporters that clinic staff violated her client's privacy and trust, stating "[t]hey took her into that examination room solely for the purpose of being arrested."[69] Borrego was not receiving public aid and had a well-established physician-patient relationship with her doctor.[70] However, it seems that none of that mattered.

Borrego's story exemplifies how rights can lose all meaning and value if they are not enforced in practice. Cases like this demonstrate what Bridges refers to as the "impotence of the privacy rights that they do indeed possess."[71] Although doctor-patient privacy and medical privacy laws should have protected Borrego, her rights were so weak that they were easily rendered ineffective.

Other recent examples of this phenomenon exist, especially in immigrants' rights contexts. The Office of Refugee Resettlement has taken aggressive steps to interfere in the unintended and unwanted pregnancies of migrant girls who have taken perilous steps to migrate to the United States. In one instance, the

---

66. Molly Hennessy-Fiske, *Advocates Protest Latina Immigrant's Arrest at Texas Doctor's Office*, L.A. TIMES (Sept. 15, 2015, 5:39 PM), http://www.latimes.com/nation/nationnow/la-na-houston-immigrant-clinic-arrest-20150914-story.html [http://perma.cc/6V7N-G447].

67. Unlike millions of women, Ms. Borrego had the luxury of private medical insurance, which medical offices prefer, because the payments are direct from the provider and incur less bureaucracy than state-funded health plans like Medicaid and Medicare.

68. Hennessy-Fiske, *supra* note 66. Prosecutors charged her with "tampering with a government record" by producing fake identification, which is a felony. *Id.*

69. Michael Barajas, *Woman Arrested at Gynecologist Appointment Could Face Deportation*, HOUS. PRESS (Sept. 11, 2015, 8:00 AM), http://www.houstonpress.com/news/woman-arrested-at-gynecologist-appointment-could-face-deportation-7754827 [http://perma.cc/4JZT-47EK].

70. Hennessy-Fiske, *supra* note 66.

71. BRIDGES, *supra* note 1, at 11.

former head of the agency, Ken Tota, contacted a shelter and ordered officials to take a girl against her will to a hospital to reverse her medical abortion—and if that did not work, to deny her the second pill to complete the uterus evacuation,[72] which can be dangerous "because a woman can become septic from leftover tissue in her uterus."[73] In a memorandum sent to the shelter, Tota instructed the shelter to essentially force the girl to have a gynecological examination—and the shelter complied.[74]

Our illustration of Bridges's moderate claim with respect to the plight of Borrego and that of detained girls emphasizes the ways in which medical professionals and others conspire with the state in its agenda to suppress the autonomy and privacy of poor women of color. In other words, these cases do not happen in a vacuum, but are facilitated through third parties. Prior work examines how this form of complicit bias—third parties conspiring to reframe, deny or suppress rights—stultifies reproductive rights.[75]

Bridges might distinguish her strong claim (described further below) from Borrego's story by pointing out that the disenfranchisement of poor mothers of their rights does not always happen through noncompliance with the law.[76] Rather, the denial of privacy can occur through the legislative process, where lawmakers deny rights and disparately impose conditions on vulnerable groups, and

---

72. Michelle Goldberg, *The Trump Administration's Power Over a Pregnant Girl*, N.Y. TIMES (Oct. 20, 2017), http://www.nytimes.com/2017/10/20/opinion/trump-pregnancy-abortion-.html [http://perma.cc/3XTP-UKU8].

73. *See* Ashley Lopez, *What Stood Between an Undocumented Minor and an Abortion? One Trump Appointee*, HOUS. PUB. MEDIA (Oct. 25, 2017, 11:22 AM) (quoting Susan Hays) http://www.houstonpublicmedia.org/articles/news/2017/10/25/244582/what-stood-between-an-undocumented-minor-and-an-abortion-one-trump-appointee [http://perma.cc/48Z4-CDVZ].

74. *See id.* In a memorandum written by Tota, he directed:

> This memorandum directs [the Office of Refugee Resettlement] to bring the UAC [Unaccompanied Alien Child] to the emergency room of a local hospital in order to determine the health status of the UAC and her unborn child. If steps can be taken to preserve the life of the UAC and her unborn child, those steps should be taken. If it is confirmed that the unborn child has already expired due to the beginning of the abortion procedure, steps can be taken to safely remove the body of the unborn child.

Id.

75. Goodwin, *supra* note 35, at 789-90, 792-812 (providing multiple examples from recent criminal law cases of medical providers revealing private, confidential pregnant patients' medical information to law enforcement).

76. BRIDGES, *supra* note 1, at 13-14; *see also infra* Section I.C.

through legal cases, where the Supreme Court fails to uphold the rights of vulnerable individuals and groups. In these cases, mothers have no privacy rights at all.

Bridges identifies the Supreme Court as one of the chief forces in denying poor women privacy rights.[77] She suggests that the Court has pulled the wool over our eyes. For example, people may believe all women possess privacy rights and even point to cases where that seems apparent, such as *Roe v. Wade*.[78] But in reality, she argues, that case does not apply to poor women. For example, in *Harris v. McRae*, the Court held that "although government may not place obstacles in the path of a woman's exercise of her freedom of choice, it need not remove those not of its own creation" by permitting women to use Medicaid to fund abortions.[79] Her strong claim, she argues, is necessary to combat the legal "sophistry" that restrictions on federal funding do not burden the woman's right and therefore leave *Roe v. Wade* and the Constitution "not at all disturbed."[80]

Bridges believes that when poor women have no reasonable means of actualizing their privacy rights, that itself demonstrates that they have no privacy rights. Abortion cases, as discussed later in this Review, bear this out. However, Bridges does not limit her discussion to abortion. For example, if the state conditions a poor woman's privacy rights on being surveilled at home (whether she consents or not), surrendering First Amendment protections, or disclosure of intimate personal and sexual histories, the state demonstrates that she has no privacy by its very imposition and enforcement of such norms.[81]

So, what distinguishes Bridges's moderate claim from her strong claim? *Garza v. Hargan*[82] may be instructive. This case demonstrates the way in which both the state and federal government may impose policies and practices that render reproductive rights nonexistent. In October 2017, Jane Doe, a seventeen-year-old immigrant girl, who traveled hundreds, if not thousands, of miles to flee physical abuse in her home and country, arrived in the United States where she was placed in federal detention. This journey alone exposed her to an inordinate risk of sexual abuse, rape, physical abuse, and sexual exploitation "at the

77. BRIDGES, *supra* note 1, at 25-27.

78. *Id.* at 15.

79. 448 U.S. 297, 316 (1980) (citing Maher v. Roe, 432 U.S. 464 (1977)).

80. BRIDGES, *supra* note 1, at 182-84.

81. *See id.* at 75-79.

82. Garza v. Hargan, 874 F.3d 735 (D.C. Cir. 2017) (en banc).

hands of other migrants, smugglers, and government officials in every country whose territory she crossed."[83]

After entering the United States, Doe discovered that she was pregnant and sought an abortion to terminate the pregnancy.[84] Even though she was penniless, living without her parents, and residing in a government-funded shelter in Texas, Doe too possessed constitutional rights. The Fifth Amendment protected her right to "decide whether to continue or terminate her pregnancy."[85] However, Texas law requires that minors either obtain parental approval to terminate a pregnancy or obtain a judicial waiver.[86] In this case, Doe obtained the necessary waiver, which established that she was sufficiently mature to determine whether or not she wished to end the unwanted pregnancy.

Texas also imposes other conditions on a woman or minor who seeks to end a pregnancy, namely mandating that she visit a crisis pregnancy center (CPC). Doe was taken to a religiously affiliated CPC in Texas where she was counseled to continue her pregnancy.[87] After counseling, Doe reconfirmed the desire to end

---

83. Order Attaching Statement of Circuit Judge Millett Dissenting from the Disposition of the Case at 2, *Garza*, 874 F.3d 735 (No. 17-5236), http://www.acludc.org/sites/default/files/field_documents/garza_v_hargan_appeals_ct_millett_dissent_10-20-2017.pdf [http://perma.cc/6DXA-YNQG]. According to Amnesty International, "It is a widely held view—shared by local and international NGOs and health professionals working with migrant women—that as many as six in 10 migrant women and girls are raped." INVISIBLE VICTIMS: MIGRANTS ON THE MOVE IN MEXICO 15, AMNESTY INT'L (2010), http://www.amnestyusa.org/wp-content/uploads/2017/04/amr410142010eng.pdf [http://perma.cc/D6WF-DWAG]; *see also id.* (noting that rapes are so common that some smugglers require that women "have a contraceptive injection prior to the journey as a precaution against pregnancy resulting from rape").

84. Plaintiff's Memorandum in Support of Her Application for a Temporary Restraining Order and Motion for a Preliminary Injunction at 4-5, Garza v. Hargan, No. 1:17-cv-02122 (D.D.C. Oct. 13, 2017).

85. *Garza*, 874 F.3d at 737 (Millett, J., concurring).

86. *Id.* at 739-40.

87. Research shows that such centers are notorious for pressuring women to continue their pregnancies. *See* Jenny Kutner, *How Crisis Pregnancy Centers Are Using Taxpayer Dollars To Lie to Women*, SALON (July 14, 2015, 1:41 PM), http://www.salon.com/2015/07/14/how_crisis_pregnancy_centers_are_using_taxpayer_dollars_to_lie_to_women [http://perma.cc/CAM3-LF7P] ("More often than not, CPCs—which now outnumber abortion clinics by an estimated 3 to 1—can be misleading, manipulative or downright coercive, pushing a distinctly antiabortion agenda that relies heavily on lying to clients."); *see also As Texas Cuts Family-Planning Funding, More Goes to Crisis-Pregnancy Services*, AM. INDEP. INST., http://www.americanindependent.com/193545/as-texas-cuts-family-planning-funding-more-goes-to-crisis-pregnancy-services [http://perma.cc/8JJ8-VU78] ("Ever since Texas CPCs began receiving public money, reproductive-rights advocates in the state have been noticing a pattern: When family planning funding is cut in the state budget, money that goes to this anti-abortion-rights program increases.").

her pregnancy.[88] Texas law also required that Doe undergo a sonogram, where the doctor is forced to describe the sonogram results, display images, and make the fetal heartbeat audible to the patient.[89] Again, after this procedure Doe reconfirmed her decision to end the pregnancy.[90]

Even after enduring such state-mandated hurdles, Doe was subject to federal government intrusions on her autonomy rights. To its credit, the government never maintained that Doe lacked a constitutional right to terminate a pregnancy. Rather, it interposed barriers that defied controlling Supreme Court precedent in *Planned Parenthood v. Casey*[91] and *Whole Woman's Health v. Hellerstedt*.[92] For example, the federal government informed Doe that if she left the shelter to obtain an abortion, she risked being expelled from the United States and relinquishing any legal rights to stay in the United States.[93] To avoid this outcome, she could find herself a "sponsor," essentially foster parents who would agree to take custody of her; this alone delayed the abortion by many weeks.[94] The federal

88. Jackie Wang, *Unauthorized Immigrant Minor "Jane Doe" Has Abortion After Back-and-Forth Court Battle,* DALLAS NEWS (Oct. 25, 2017, 2 :17 PM), http://www.dallasnews.com/business/health-care/2017/10/25/undocumented-teen-texas-abortion [http://perma.cc/QKM4-3TC5].

89. TEX. HEALTH & SAFETY CODE ANN. §§ 171.011 (West 2018). In a lower court challenge to the 2012 law, District Court Judge Sparks wrote, "The concept that the government may make puppets out of doctors, provided it does not step on their patients' rights, is not one this Court believes is consistent with the Constitution, in the abortion context or otherwise." Tex. Med. Providers Performing Abortion Servs. v. Lakey, No. A-11-CA-486-SS, 2012 WL 373132, at *3 (W.D. Tex. Feb. 6, 2012). Despite drafting an opinion sympathetic to the plaintiffs, however, Judge Sparks ultimately upheld the law, as the Fifth Circuit had tied the lower court's hands and "left little room for meaningful discussion." *Id.* at *1; *see also* Jordan Smith, *Ultrasound Suit Loses Ground*, AUSTIN CHRON. (Feb. 17, 2012), http://www.austinchronicle.com/news/2012-02-17/ultrasound-suit-loses-ground [http://perma.cc/TE85-RAVQ] ("The law, passed this spring after Gov. Rick Perry deemed it an 'emergency' to do so, requires women seeking abortion to first undergo an ultrasound a day before the termination. It also requires that women view an image of the fetus and listen to the fetal heartbeat, and that doctors describe the fetal development."); *"We Have No Choice": A Story of the Texas Sonogram Law*, NPR (Jan. 22, 2013, 2:02 PM), http://www.npr.org/*2013*/01/22/169059701/we-have-no-choice-a-story-of-the-texas-sonogram-law [http://perma.cc/84YA-PPY5].

90. Goldberg, *supra* note 72.

91. 505 U.S. 833 (1992).

92. 136 S. Ct. 2292 (2016).

93. Garza v. Hargan, 874 F.3d 735, 737, 740, 740 n.3 (D.C. Cir. 2017) (en banc) (Millett, J., concurring).

94. Order Attaching Statement of Circuit Judge Millett Dissenting from the Disposition of the Case, *supra* note 83, at 2 ("Forcing her to continue an unwanted pregnancy just in the hopes of finding a sponsor that has not been found in the past six weeks sacrifices J.D.'s constitutional liberty, autonomy, and personal dignity for no justifiable governmental reason.").

government claimed that it was not an undue burden on Doe—an impoverished, pregnant, immigrant minor residing in a shelter in a foreign land—to search for weeks for a sponsor as a condition for having an abortion without risking deportation. A seven-week waiting period for an abortion is clearly unconstitutional.

Tellingly, the government appointed a guardian *ad litem* for Doe but refused to release her to the custody of the guardian in order to obtain the abortion. The Trump Administration blocked the minor's transportation to a clinic, claiming that even allowing a government contractor to facilitate the necessary paperwork for Doe's release would place a burden on the government.[95] Essentially, then, the federal government determined the only option for Doe was to continue the pregnancy. The teenager finally prevailed when her petition reached the D.C. Circuit Court of Appeals and the court issued an en banc order securing her right to terminate the pregnancy.[96]

In a stinging concurring opinion, Judge Millett wrote, "Where the government bulldozed over constitutional lines was its position that—accepting J.D.'s constitutional right and accepting her full compliance with Texas law—J.D., an unaccompanied child, *has the burden of extracting herself from custody* if she wants to exercise the right to an abortion that the government does not dispute she has."[97]

---

95. *Garza,* 874 F.3d at 740-41 (Millett, J., concurring) ("The government argues that it need not 'facilitate' J.D.'s decision to terminate her pregnancy. . . . Government officials themselves do not even have to do any paperwork or undertake any other administrative measures. . . . So on the record of this case, the government does not have to facilitate—make easier—J.D.'s termination of her pregnancy. It just has to not interfere or make things *harder*."). Many in the public confused the case, believing that taxpayers were being asked to bear the financial cost of the abortion—and that the government refused to pay. *See* Linda Greenhouse, *The Worrisome Future of Abortion Rights,* N.Y. TIMES (Nov. 9, 2017), http://www.nytimes.com/2017/11/09/opinion/the-worrisome-future-of-abortion-rights.html [http://perma.cc/2CWS-NUK7] ("Among the precedents cited for the 'need not facilitate' rule are those holding that the government need not pay for abortions for women who can't afford one. But that is a far cry from Jane Doe's situation. There was never a question of the government paying; the cost of the abortion was borne by a private fund."); *see also Garza,* 874 F.3d at 753 (Kavanaugh, J., dissenting) ("For minors such as Jane Doe who are in U.S. Government custody, the Government has stated that it will not provide, pay for, or otherwise facilitate the abortion but will transfer custody of the minor to a sponsor pursuant to the regular immigration sponsor program."). To the contrary, the government was not asked to fund the abortion (the procedure was being paid for by a third party). *See Garza,* 874 F.3d at 740 (Millett, J., concurring). In our view, that should not matter either, as an immigrant does not surrender autonomy over her body simply by entering the United States. The state cannot force a girl to become a mother simply because she is an immigrant.

96. *Garza*, 874 F.3d at 737 (Millett, J., concurring).

97. *Id.*

In this case, the government imposed a "categorical[] blockade" of Doe's constitutional right when it conditioned her leaving the shelter to obtain an abortion on a return "to the abuse from which she fled" in her home county, where she became pregnant.[98] This placed Doe in "constitutionally untenable" position.[99]

Judge Millett suggested that only a "legal Houdini" could overcome the various obstacles and impositions ordered by the federal government.[100] A different analogy, that of a legal Olympic hurdler practiced in the ways of navigating the various TRAPs specifically targeting pregnant women, comes to mind. Even for the best-trained athlete, overcoming the seemingly endless bevy of hurdles — only to find a moat interposed before the finish line — is seriously doubtful. That none of the various and substantial hurdles placed in Doe's path related to her health and well-being (or if so, only tangentially), demonstrates an even larger systemic problem that extends well beyond Doe's specific case.[101] Namely, a broader failure exists in the rule of law such that the constitutional rights of poor pregnant women and minors are held hostage by the state. This, we argue, is not only unconstitutional, but frankly immoral. For, even after Doe rounded the final hurdle, attaining what should have been within her constitutional reach, the Trump Administration threatened to seek disciplinary actions against her attorneys who prevailed on her behalf, which further illustrates our point.[102]

We present Doe's case to offer additional context and texture to Bridges's strong claim, even though her strong and moderate claims often blur. Does Bridges's strong claim make room for when women actually obtain abortions even if they endure enormous hardships along the path to exercising their reproductive right(s)? Possibly. But, Bridges is not clear on that point. In the instance above, a teenager in a foreign land was expected to strategically navigate both

98. *Id.*

99. *Id.*

100. *Id.*

101. *See* Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292, 2316 (2016) (striking down two Texas laws imposing undue burdens on pregnant women who seek abortions in that state, stating that the "upshot is that this record evidence, along with the absence of any evidence to the contrary, provides ample support for the District Court's conclusion that '[m]any of the building standards mandated by the act and its implementing rules have such a tangential relationship to patient safety in the context of abortion as to be nearly arbitrary'" (internal citation omitted)).

102. Brief in Opposition of Rochelle Garza, as Guardian Ad Litem to Unaccompanied Minor J.D., Hargan v. Garza, 874 F.3d 735 (D.C. Cir. 2017), *petition for cert. filed* (U.S. Dec. 4, 2017) (No. 17-654), http://www.supremecourt.gov/DocketPDF/17/17-654/22502/20171204174233978_17-654%20Hargan%20BIO.pdf [http://perma.cc/Y8HU-5KYR].

state and federal legal strictures in order to actualize a fundamental constitutional right. This process lasted more than seven weeks even while, in the end, Doe was able to terminate her pregnancy.

In reality, the very potent example that we provide in *Garza v. Hargan* may equally suit Bridges's moderate claim framework. Or, the fact that Borrego never received the healthcare she sought, but instead was sent to jail, could fit Bridges's strong claim framework. Even though Doe did receive the abortion she sought, many poor women are unable to exercise their reproductive rights. Their cases do not stir national attention; their plights are invisible and unanswered.

Predictably, some scholars will not accept the "strong claim" that economically vulnerable women possess *no privacy rights*. To them, Doe's abortion is evidence that privacy rights do exist and can be accessed by any woman or minor who avails herself to informed consent requirements. Yet, cases of women like Borrego,[103] Regina McKnight,[104] Bei Bei Shuai,[105] Rennie Gibbs,[106] and so many others illustrate the violence of the state's power if left unconstrained by strong privacy rights. The abrogation of privacy rights can result in formal punishment, the deprivation of liberty, the removal of children from the home, and financial punishment.

Thus, one soft critique of Bridges's book may be that its strong and moderate claims are not sufficiently distinguished. That is, at the root of state and federal obstruction of reproductive rights are blurred rather than fixed lines. Bridges seems to acknowledge this fact, as she argues that in both cases, poor women are "completely exposed to state power."[107] In the end, whether one accepts the

---

103. Hennessy-Fiske, *supra* note 66 (describing Borrego's arrest during her gynecological appointment for fake documentation of legal status).

104. McKnight v. State, 661 S.E.2d 354 (S.C. 2008) (overturning McKnight's conviction for homicide by child abuse after she gave birth to a stillborn fetus and admitted to using cocaine during pregnancy).

105. Ed Pilkington, *Indiana Prosecuting Chinese Woman for Suicide Attempt that Killed Her Foetus*, GUARDIAN (May 30, 2012, 1:36 PM), http://www.guardian.co.uk/world/2012/may/30/indiana-prosecuting-chinese-woman-suicide-foetus [http://perma.cc/57R2-WSX5] (detailing the criminal charges against Shuai following an attempted suicide that may have caused the death of her fetus).

106. *Court To Hear Case of Woman Accused in Stillbirth*, JACKSON FREE PRESS (Apr. 1, 2013, 10:39 AM), http://www.jacksonfreepress.com/news/2013/apr/01/court-hear-case-woman-accused-stillbirth [http://perma.cc/NC38-RKP4] (discussing the pending prosecutions of Rennie Gibbs and Nina Buckwalter for the deaths of their stillborn babies); *see* Brief of the Appellant at 36, Gibbs v. State, No. 2010-M-819-SCT (Miss. Nov. 12, 2010) ("Under the statutory interpretation advanced by the prosecution, Ms. Gibbs faces life in prison because of her combined status as a pregnant woman and drug user."); *see also* MISS. CODE ANN. § 97-3-19(1)(B) (West 2017).

107. BRIDGES, *supra* note 1, at 12-13.

strong or moderate claim may be immaterial, because in either instance, the state has compromised its legitimacy by imposing insurmountably severe and burdensome constraints on reproductive health and rights such that it would require the artistry of a magician or pertinacity of an elite athlete to overcome.

In addition, because "privacy rights are imagined to generate value," and not simply for the individual, but also to the communities to which they belong,[108] denial of rights exposes vulnerable people (and communities) to dignitary harms. The next Section discusses why privacy rights are necessary to assure widespread human dignity and how they have been denied to poor women, particularly poor women of color.

B. The Value of Privacy Rights

Initially, readers of Bridges's book may be doubtful about the strength of her thesis that poor mothers have been deprived of privacy rights, as it may seem indefensible to them. After all, despite their poverty, constitutional protections rooted in the Fourth,[109] Fifth,[110] and Fourteenth Amendments[111] still apply to indigent women. Although the word "privacy" is not found in the text of the Constitution, Justice Blackmun explained in *Roe v. Wade* that "the Court has recognized that a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution."[112] The Court has opined that privacy is a woman's fundamental right, specifically referencing the medical harms, distress to their lives, psychological stress, economic instability, and stigma states would impose on women by infringing upon their privacy right to make

---

108. *Id.* at 11 (citing DANIEL SOLOVE, UNDERSTANDING PRIVACY (2008)).

109. *See, e.g.*, Ferguson v. City of Charleston, 532 U.S. 67, 76 (2001) (finding that state hospital staff were government actors subject to the strictures of the Fourth Amendment in a case where indigent pregnant women were unconstitutionally searched at a medical university for law enforcement purposes).

110. Garza v. Hargan, 874 F.3d 735, 737 (D.C. Cir. 2017) (en banc) (Millett, J., concurring).

111. *See* Whalen v. Roe, 429 U.S. 589, 599-600 (1977) (establishing that privacy rights encompass two distinct spheres: an individual's interest in independent decision-making and an interest in avoiding or refusing disclosure of intimate information, including medical records); Roe v. Wade, 410 U.S. 113 (1973); Eisenstadt v. Baird, 405 U.S. 438, 453 (1972) ("If the right of privacy means anything, it is the right of the individual . . . to be free from unwanted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.").

112. *Roe*, 410 U.S. at 152. Justice Blackmun traced the right in a line of cases going back to the nineteenth-century case *Union Pacific Railroad Co. v. Botsford*. *Id.* (citing Union Pac. R.R. Co. v. Botsford, 141 U.S. 250 (1891)).

reproductive health decisions.[113] Furthermore, federal laws such as the Health Insurance Portability and Accountability Act of 1996[114]—not mentioned in Bridges's book—explicitly guarantee patient privacy. And while the state may assert "important interests in safeguarding health,"[115] as Bridges acknowledges,[116] the threshold for infringing on a right to privacy is high—at least in theory.

Bridges's emphasis on the fragility of poor mothers' privacy rights is particularly striking considering the strong presumption regarding the family right to privacy, which is rooted in instrumental,[117] pragmatic,[118] and noninstrumental justifications.[119] Bridges describes each of these justifications in turn, buttressing her argument with landmark Supreme Court opinions striking down state laws that banned the use of contraceptives,[120] required children to attend public school,[121] and proscribed schools from teaching foreign languages.[122] Yet, from our perspective, family privacy could also be extended to cases like *Loving v. Virginia*,[123] where the Supreme Court struck down antimiscegenation laws limiting who people could marry and include in their family.

As Bridges observes, there is strong justification to limit the state from constraining individual freedom within families. A state that would standardize children or families "is absolutely terrifying."[124] She explains:

---

113. As Justice Blackmun explained, "[t]his right of privacy . . . founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action . . . is broad enough to encompass a woman's decision whether or not to terminate her pregnancy." *Id.* at 153.

114. Health Insurance Portability and Accountability Act of 1996, 29 U.S.C. § 1181 *et seq.* (2012).

115. *Roe*, 410 U.S. at 154.

116. BRIDGES, *supra* note 1, at 118-22. But Bridges also explains that poor families "are simply more visible to the state." She writes, "[T]he difference between wealthier and poor parents is that, as a direct consequence of their poverty, the lives of the poor are subject to more observation by third parties—parties who may have a legal duty to report possible child maltreatment to authorities. Because of dependence on public aid and public resources . . . poor families are more likely to come to the attention of child welfare agencies." *Id.* at 122.

117. *Id.* at 102-103.

118. *Id.* at 105.

119. *Id.* at 105-107.

120. Griswold v. Connecticut, 381 U.S. 479 (1965) (overturning a Connecticut statute criminalizing the dispensation of contraception to married couples).

121. Pierce v. Soc'y of Sisters, 268 U.S. 510 (1925) (striking down an Oregon law mandating that children attend public schools).

122. Meyer v. Nebraska, 262 U.S. 390 (1923) (ruling a Nebraska law that banned foreign language instruction unconstitutional).

123. 388 U.S. 1 (1967).

124. BRIDGES, *supra* note 1, at 104.

> In essence, the state would become omnipresent: It would be *in* its subjects' values, beliefs, opinions, worldviews, politics, and so forth. If the state is present in its subjects' minds and hearts—indeed, if the state *forms* its subjects' minds and hearts—the state, in very important ways, would form the institutions in civil society that individuals create: family, school, religion, the press, the market, and so on. And if the state forms the institutions in civil society, it would approximate absolute power. This is totalitarianism.[125]

Thus, one concern expressed by Bridges is the need to ward off a dystopic future wherein an authoritarian government "standardizes" its citizenry, including children, mothers, and fathers.

While most privacy scholarship concentrates on what a government must not prohibit because of the "fundamentality" of the right or conduct the law proscribes, some scholars take a different view. Jed Rubenfeld argues:

> The question, for example, of whether the state should be permitted to compel an individual to have a child—with all the pervasive, far-reaching, lifelong consequences that child-bearing ordinarily entails—need not be the same as the question of whether abortion or even child-bearing itself is a "fundamental" act within some normative framework.[126]

Rubenfeld explains that ultimately the "distinguishing feature of the laws struck down by the privacy cases has been their profound capacity to direct and to occupy individuals' lives through their affirmative consequences," and that it is "[t]his affirmative power in the law, lying just below its interdictive surface" that "must be privacy's focal point."[127] Another way of understanding the point made by Rubenfeld is to imagine the state visiting the families of each newborn to declare what future it will *or will not* have; some may be removed to different cities, states, and climates to better acclimate to the state's choices—winter athletes sent to cold climates; future doctors and scientists carted off to boarding schools heralded for intellectual rigor; soon-to-be maids, sanitation workers, and low-income earners relegated to blighted communities with underachieving schools. This nightmarish notion is as offensive as the state determining a pregnant woman or minor's future.

Yet, this scholarly disagreement shows that what is at stake is not simply a matter of what an overly intrusive state may prohibit, but what this type of state

---

125. *Id.*

126. Jed Rubenfeld, *The Right of Privacy*, 102 HARV. L. REV. 737, 739-40 (1989).

127. *Id.* at 740.

may obligate its citizens to do.[128] Viewed through this lens, in the case of abortion, the state forces women into the future it prefers by absolutely or effectively stripping their privacy. As we have argued elsewhere, "When the state makes this decision for a woman, against her will, it inscribes her to a fate of its choosing, which for all purposes is to serve as its designated womb or incubator."[129] Forcing anyone into labor or condition against his or her will for the benefit of others is by definition understood as slavery. Coercing women into subsequent state reliance on welfare and social service programs does not mitigate this fact or make it any less problematic.

As noted, Bridges suggests that a strong family privacy right "is a bulwark against this type of totalitarianism."[130] According to Bridges, however, the problem is that reproductive and family privacy rights often yield little value in the lives of poor women. Bridges stresses that the "family is not beyond regulation,"[131] "parental liberty is not absolute,"[132] and family privacy rights "[y]ield [n]o [v]alue" in the lives of poor women.[133] If it is true that all mothers suffer infringements on privacy, what makes the matter worse for poor women? The difference may be that for poor women, *it is not an infringement*, but rather two distinct privations in operation: dispossession—as in the sense that these are rights never had (or intended to be had) by poor women (Margaret Garner's

128. *Id.* at 739 ("But the fundament of the right to privacy is not to be found in the supposed fundamentality of what the law proscribes. It is to be found in what the law imposes.").

129. Erwin Chemerinsky & Michele Goodwin, *Abortion: A Woman's Private Choice*, 95 TEX. L. REV. 1189, 1232 (2017).

130. BRIDGES, *supra* note 1, at 104.

131. *Id.* at 114 (quoting Moore v. City of East Cleveland, 431 U.S. 499 (1977)).

132. *Id.* at 114.

133. *Id.* at 107.

tragic life and Black women's plights during chattel slavery more generally exemplify this)[134] and perdition—as in the sense of punishing women simply because they are poor (eugenic sterilizations offer a stunning illustration).[135]

Bridges rightfully acknowledges "the struggle to reconcile" the narrative of equal rights and presumptive privacy rights against a backdrop of "poor mothers . . . not enjoy[ing] privacy rights in any real sense of the word."[136] She cleverly shows that although we may think the Constitution protects privacy rights, the courts and legislatures' unwillingness to acknowledge the lived experiences of poor women further disenfranchises them of these rights. This matters because the state intervenes in the very areas of poor women's lives that the Supreme Court has held should be safe from intrusion.

Bridges evokes the scholarship of the school of legal realism, including Karl Llewellyn,[137] Jeremy Waldron,[138] and Anita Allen.[139] In particular, Bridges relies on Llewellyn's notion of "paper rights," that is, rights without substantive expression in people's lived lives. Building on Llewelyn, Bridges explains, "[o]ne knows that the[] [rights] exist not by looking to whether a constitution, statute, or court opinion has formally provided it, but rather by looking to whether the purported rightsbearer enjoys a remedy when the ostensible right is violated."[140] Llewellyn was skeptical about formal rules, noting that they are often unequally

---

134. The case of the pregnant runaway slave, Garner, further illustrates not only what it means to be deprived of reproductive privacy, such as to be rendered a breeder and supply mechanism for the production of others' property, but also to be legally and politically silenced in the process. Garner escaped slavery in Kentucky, fleeing to Cincinnati, Ohio over the frozen Ohio River. In a desperate attempt to resist her return and that of her children, she began killing them, including the ones presumed to be the biological offspring of her owner. At trial, Garner was indicted not for the killing of her daughter, but for the destruction of her owner's property. Not even her daughter could be legally said to belong to her in any real sense of the word. Garner's life is fictionalized in the Pulitzer-Prize-winning novel *Beloved* by Toni Morrison. *See, e.g.*, STEVEN WEISENBURGER, MODERN MEDEA: A FAMILY STORY OF SLAVERY AND CHILD-MURDER FROM THE OLD SOUTH (1998); Julius Yanuck, *The Garner Fugitive Slave Case*, 40 MISS. VALLEY HIST. REV. 47 (1953); *see also* Prigg v. Pennsylvania, 41 U.S. (16 Pet.) 539, 613 (1842) (invalidating a Pennsylvania law that prohibited Blacks from being removed from the state into slavery).

135. *See, e.g.*, Buck v. Bell, 274 U.S. 200 (1927).

136. BRIDGES, *supra* note 1, at 65.

137. *E.g.*, Karl N. Llewellyn, *Some Realism About Realism—Responding to Dean Pound*, 44 HARV. L. REV. 1222 (1931).

138. JEREMY WALDRON, LIBERAL RIGHTS: COLLECTED PAPERS 1981-1991, at 6 (1993).

139. Anita L. Allen, *Legal Rights for Poor Blacks*, *in* THE UNDERCLASS QUESTION 117, 117-39 (Bill E. Lawson ed., 1992); Anita L. Allen, *Privacy Law: Positive Theory and Normative Practice*, 126 HARV. L. REV. F. 241 (2013).

140. BRIDGES, *supra* note 1, at 19.

applied, and thus lack coherence. The ultimate strength of the rights depends on the subjective leanings of judges.[141] Bridges explains that we are "trained to understand that rights may be infringed when the government has good reason for doing so . . . . When the right is not fundamental, the government's reason for infringing it need not be as urgent."[142]

Bridges highlights how courts repeatedly find poor women's reproductive rights to "not be so urgent," using the vocabulary of morality in their justification.[143] Bridges points to how the moral constructions of indigent motherhood and race have allowed the state to convince courts to let it override poor women's privacy rights. She explains that "[r]ace—that social force that both obviously and obliquely shapes the nation—must be considered in any analysis of how the working mother became moral and the nonworking mother became immoral."[144]

Despite the formal constitutional and statutory protection of privacy, Bridges convincingly shows how these rights ultimately fail to protect poor women. Thus, the test for existence of privacy rights is not the existence of formal rules, but rather whether the rights may be utilized and exercised without arbitrary encumbrances imposed by the state. In the next Section, we explore further why this might be, focusing on how moral norms have penetrated and shaped the law. As Bridges articulates, there is no way to understand how courts and legislatures have stripped poor mothers of their rights without understanding these underlying morality debates.[145]

C. The State as a Negative Messenger Against the Poor

Society crystallizes the image of the morally corrupted, libidinous poor woman of color in the so-called *welfare queen*. The figure of the welfare queen, which Ronald Reagan birthed into popular imagination, remains "the apotheosis of immorality" in the American ethos.[146] We have all seen versions of her,

---

141. *See* Llewellyn, *supra* note 137, at 1238-39, 1242-43.

142. BRIDGES, *supra* note 1, at 15.

143. *Id.*

144. *Id.* at 51; *see also id.* ("When cultural discourses attached a badge of immorality to mothers who worked outside of the home, the fact that many of those mothers were black—indeed, the fact that *most* black mothers worked outside the home—validated this judgment.").

145. *Id.* at 37-39.

146. As a candidate, Reagan described the trope of the "welfare queen" as a cheat and fraud from Chicago:

popularized by news media in the image of a Black woman, surrounded by multiple unkempt children, in homes ravaged by despair. Headlines from the 1980s, for example, suggested that taxpayers' hard-earned wages and savings rendered profits for these women.[147] And, with her endless bounty of children, state resources continuously funneled in to provide for their care. Photographers capture the image of a seemingly hopeless woman, and society is to measure whether spending their resources on situations such as hers is also a hopeless affair. Nothing about this situation resembles an aristocracy.

Reagan's "welfare queen" became a convenient stereotype to scapegoat and stereotype all poor Black women.[148] As Kaaryn Gustafson explains, "This image of the lazy African-American woman who refuses to get a job and keeps having

---

> She has 80 names, 30 addresses, 12 Social Security cards and is collecting veterans' benefits on four nonexisting deceased husbands . . . . And she's collecting Social Security on her cards. She's got Medicaid, getting food stamps and she is collecting welfare under each of her names. Her tax-free cash income alone is over $150,000.

'*Welfare Queen*' *Becomes Issue in Reagan Campaign*, N.Y. TIMES (Feb. 15, 1976), http://www.nytimes.com/1976/02/15/archives/welfare-queen-becomes-issue-in-reagan-campaign-hitting-a-nerve-now.html [http://perma.cc/RLZ3-8NNJ]. To place in context President Reagan's erroneous claim, and the anger it inspired against Black women receiving welfare benefits, $150,000 in 1976 was worth $660,849.82 in June 2017, according to the government's consumer price index as of August 6, 2017—an unfathomable sum to earn from government benefits. *Consumer Price Index Inflation Calculator*, BUREAU LAB. STAT., http://data.bls.gov/cgi-bin/cpicalc.pl?cost1=150000&year1=197601&year2=201706 [http://perma.cc/4KKW-GTNU]. Nor is it lost on us that President Reagan launched his campaign with a first stop at the local fair in Neshoba County, Mississippi—an event attended by possibly ten thousand people. Of all the places to launch his campaign and float the welfare queen myth, then-candidate Reagan chose a county most known for the brutal killings of three young civil rights activists in 1964: Andrew Goodman, Michael Schwerner, and James Chaney. *See, e.g.*, Bob Herbert, *Righting Reagan's Wrongs?*, N.Y. TIMES (Nov. 13, 2007), http://www.nytimes.com/2007/11/13/opinion/13herbert.html [http://perma.cc/CK2F-ZXVA] ("The murders were among the most notorious in American history. They constituted Neshoba County's primary claim to fame when Reagan won the Republican Party's nomination for president in 1980. The case was still a festering sore at that time. Some of the conspirators were still being protected by the local community.").

147. Josh Barbanel, *New York City's Economy Booms, and the Poor Begin To Profit*, N.Y. TIMES (May 16, 1988), http://www.nytimes.com/1988/05/16/nyregion/new-york-city-s-economy-booms-and-the-poor-begin-to-profit.html [http://perma.cc/64MC-4CUC] ("Some have looked to the decline in the welfare rolls, as well as a decline in the number of homeless people seeking emergency housing, as evidence that some poor people are benefiting.").

148. John Blake, *Return of the "Welfare Queen,"* CNN (Jan. 23, 2012, 10:32 PM), http://edition.cnn.com/2012/01/23/politics/weflare-queen/index.html [http://perma.cc/U7ZR-JDFT].

kids is pretty enduring. It's always been a good way to distract the public from any meaningful conversations about poverty and inequality."[149]

Bridges refers to the welfare queen trope and its many variations as the moral construction of poverty. And this moral construction of poverty directly and indirectly shapes the development of privacy norms for poor women of color. To Bridges, the trope of the welfare queen embodies many of the characteristics that help this country to imagine poor Black women as immoral citizens, subjected to a barrage of insults and demeaning characterizations that suggest laziness, ineptness, disregard for offspring, sexual promiscuity, incompetence with financial resources, and disrespect for self and society.[150] Author bell hooks speaks to this perception in *killing rage*, where she writes, "[W]ithin the sphere of white supremacist assault on black womanhood nothing was as hurtful quite as 'deeply and keenly as the taunt of immorality; the jest and sneer with which our women are spoken of, and the utter incapacity or refusal to believe there are among us mothers, wives, and [young women] who have attained a true, noble, and refining womanhood.'"[151]

Clearly, such vilification allows society to attribute poverty to the poor's own behavior in order to limit their citizenship.[152] Ignored, then, is how the devaluation of Black women's bodies and rights has historically been "central" to building American capital, reflected through the economic exploitation of slavery,[153]

---

149. Ally Boguhn, *Why Everything We're Led To Believe About People on Welfare Is Based on Lies*, EVERYDAY FEMINISM (Aug. 23, 2015), http://everydayfeminism.com/2015/08/welfare-is-not-living-large [http://perma.cc/U7GG-CVU6]; *see also* KAARYN S. GUSTAFSON, CHEATING WELFARE: PUBLIC ASSISTANCE AND THE CRIMINALIZATION OF POVERTY (2011).

150. BRIDGES, *supra* note 1, at 107.

151. BELL HOOKS, KILLING RAGE: ENDING RACISM 77 (1995) (quoting an 1887 editorial by Ida B. Wells).

152. BRIDGES, *supra* note 1, at 55; *see also* HOOKS, *supra* note 151, at 77 ("As early as 1887 black woman activist Ida B. Wells wrote an article titled 'Our Women' which appeared in the newspaper *New York Freeman*, in which she emphasized the way white supremacist degradation of black womanhood served to undermine anti-racist struggle. . . . Wells declared: 'Among the many things that have transpired to dishearten the Negroes in their effort to attain a level in the status of civilized races, has been the wholesale contemptuous defamation of [Black] women.'").

153. SVEN BECKERT & SETH ROCKMAN, SLAVERY'S CAPITALISM: A NEW HISTORY OF AMERICAN ECONOMIC DEVELOPMENT 11 (2016) ("Scholars of slavery have gone further to recognize the technologies of capitalism as indispensable to transforming human beings into commodities. . . . Scholars of Atlantic slavery . . . have recognized women's reproductive labor as the fundamental mechanism of wealth creation for American slaveholders, who appropriated generations of black children for the perpetuation of generations of white wealth.").

Jim Crow,[154] and more contemporaneously, persistent wage disparities.[155] As a more recent matter, Bridges explains that the state shows its disregard for poor mothers' citizenship, and the rights such citizenship condones, by imposing itself in their homes as a condition of receiving government aid.[156] Claims that poor women's lives are rendered public by their need for state assistance and thus are subject to some level of state surveillance and control are not new.[157] Neither is the notion that an individual sheds or surrenders some level of privacy after she enters a governmental system—be it the criminal justice system or systems of social services.[158]

In other words, when poor women demand freedom and equality, society hands them back an improvement on their condition, like welfare, but not the freedom, equality, or privacy they seek. King famously wrote that desegregated housing and education brought Blacks a sense of achievement, "but it brought

---

154. HERBERT HILL, BLACK LABOR AND THE AMERICAN LEGAL SYSTEM 99-100 (1977) (reflecting on the low wages Black women received and the blowback and retaliation they experienced when complaining to the National Recovery Administration during the 1930s and noting that "[d]uring NRA's short life hundreds of complaints charging racial discrimination were filed with the agency. Retaliation against those who complained was widespread. A typical case was that of 200 women factory workers in Arkansas who were summarily dismissed for 'inefficiency' after one of them complained to Washington that their wage was $6.16 per week compared to the $12.00 minimum set by the code").

155. PATRICIA HILL COLLINS, BLACK FEMINIST THOUGHT: KNOWLEDGE, CONSCIOUSNESS, AND THE POLITICS OF EMPOWERMENT 110 (2d ed. 2000) ("Since the 1970s, U.S. Black women have been unevenly incorporated into schools, jobs, neighborhoods, and other U.S. social institutions that historically have excluded [them]. As a result, African-American women have become more class stratified than at any period in the past."); Editorial, *Even College Doesn't Bridge the Racial Income Gap*, N.Y. TIMES (Sept. 20, 2017), http://www.nytimes.com/2017/09/20/opinion/college-racial-income-gap.html [http://perma.cc/AE45-JK9Q] (focusing on women and noting that "[p]ay gaps between white and black workers have grown since 1979, even after controlling for education, experience and location, according to research by the Economic Policy Institute. In fact, racial pay gaps have expanded the most for college graduates, which makes it seem clear that discrimination is a leading cause").

156. BRIDGES, *supra* note 1, at 80.

157. *See, e.g.*, NANCY F. COTT, PUBLIC VOWS: A HISTORY OF MARRIAGE AND THE NATION (2002); MARTHA ALBERTSON FINEMAN, THE NEUTERED MOTHER, THE SEXUAL FAMILY, AND OTHER TWENTIETH CENTURY TRAGEDIES 177-78 (1995); DOROTHY ROBERTS, KILLING THE BLACK BODY: RACE, REPRODUCTION, AND THE MEANING OF LIBERTY 3-4 (1997) [hereinafter ROBERTS, KILLING THE BLACK BODY]; Martha L.A. Fineman, *Masking Dependency: The Political Role of Family Rhetoric*, 81 VA. L. REV. 2181, 2196-97 (1995); Dorothy E. Roberts, *The Only Good Poor Woman: Unconstitutional Conditions and Welfare*, 72 DENV. U. L. REV. 931, 931-32 (1995); Austin Sarat, *". . . The Law Is All Over": Power, Resistance, and the Legal Consciousness of the Welfare Poor*, 2 YALE J. L. & HUMAN. 343, 344-45 (1990).

158. *See* Roberts, *supra* note 34.

to the whites a sense of completion."[159] Textual privacy and equality rights, like welfare, seem to offer legislatures and courts this sense of completion, which may keep them from further protecting the rights of poor women of color. Indeed, the Court problematically declares these women to be the arbiters of their own fates, rather than the subjects of laws and social mores that traditionally disenfranchised them.[160]

Yet, according to Bridges, the state is complicit in—if not a chief messenger of—instigating, shaping, wielding, and propagating the negative messages described above about poor women. States adopt the moral construction of motherhood to render poor women of color blameworthy for their poverty, and, consequently, in need of intervention. For example, Senator Patrick Moynihan, in the infamous Moynihan Report delivered to President Johnson, used moral arguments about the impoverished to "notoriously theorize[] problematic black motherhood"[161] as a "tangle of pathology."[162] This consistent trope—the root of poor Black mothers' pathology is their immoral reproduction in absence of marriage and parenting outside of marriage, if they ever were married—offers a wholly reductive framing of race and the family structure in the United States.[163] It ignores inconvenient historical truths, including that Black women were legally denied the right to marry and possession of their own bodies, let alone a legal claim to be connected to any others.[164] To the extent that Black women

159. KING, *supra* note 62, at 6.

160. *See, e.g.*, Harris v. McRae, 448 U.S. 297, 316 (1980) ("[R]egardless of whether the freedom of a woman to choose to terminate her pregnancy for health reasons lies at the core or the periphery of the due process liberty recognized in *Wade*, it simply does not follow that a woman's freedom of choice carries with it a constitutional entitlement to the financial resources to avail herself of the full range of protected choices.").

161. BRIDGES, *supra* note 1, at 52.

162. *Id.* (quoting Daniel Patrick Moynihan, *The Negro Family: The Case for National Action*, U.S. DEP'T LAB. *passim* (1965), http://liberalarts.utexas.edu/coretexts/_files/resources/texts/1965%20Moynihan%20Report.pdf [http://perma.cc/FT2A-PPRN]).

163. *See, e.g.*, COLLINS, *supra* note 155, at 53 (explaining that the definitions of family "advanced by elite groups in the United States uniformly work to the detriment of African-American women" because "[s]ituated in the center of family values debates is an imagined traditional family ideal," and noting that this "family ideal" is formed through "a combination of marital and blood ties," which is heterosexual and racially homogenous, and where the children are all biological offspring).

164. The architectures of slavery and Jim Crow both created stratified family structures, *see, e.g.*, *id.* at 49 (discussing the informal kin networks that enslaved Blacks were forced to create due to being separated at various points for the economic benefit of others, and explaining that "[Blacks] had great difficulty maintaining families and family privacy in public spheres that granted them no citizenship rights"), and dispossessed slaves of their bodies, *see, e.g.*, State v. Mann, 13 N.C. (2 Dev.) 263, 264 (1829) (explaining that while a slave's general owner

could and did marry, those important relationships were persistently vulnerable to the auction block.[165]

The state's moral construction of poverty is perhaps best exemplified by the evolution of social welfare programs over the course of the twentieth century. For example, Black women were actually excluded from social welfare programs years ago. These were programs designed to benefit white women who were considered innocent of their poverty.[166] However, marriage still mattered (it conveyed a message of being morally upstanding), and thus unmarried or divorced poor white women were often excluded from such programs, despite their destitution.[167] Even so, as Bridges points out, when these circumstances befell white women, it could be described as a problem of patriarchy—white women's "failure to abide by the sex-gender system's conventions governing marriage and the traditional two-parent family."[168] Bridges quotes Lisa Crooms for the claim that white women's "anti-patriarchal conduct rendered them morally responsible for their poverty and justified the government's refusal to provide them with assistance."[169]

According to Bridges, single parenting and divorce in the Black community are "understood as something bigger than a problem of patriarchy."[170] It is a problem of immorality. In other words, Black mothers are not only morally responsible for their destitution, but their lives were also "generative" of most of the "social ills that plagued black people in the United States."[171]

Finally, there is the case to be made against the Supreme Court. The Court has perpetuated inequality in privacy rights through its willingness to validate the government's rationale for violating poor women's privacy rights. For example, in *Wyman v. James*, the Court held that New York's home visitation program, a condition of receiving Aid for Families with Dependent Children (AFDC), did

---

is not liable for battery against the slave, a stranger who has hired the slave temporarily may be liable for "cruel and unreasonable battery" that devalues the slave).

165. *See, e.g.*, TERA W. HUNTER, TO 'JOY MY FREEDOM: SOUTHERN BLACK WOMEN'S LIVES AND LABORS AFTER THE CIVIL WAR (1997).

166. BRIDGES, *supra* note 1, at 52.

167. *Id.* ("Prior to Black women's agitation in the 1960s for access to welfare programs that benefited poor mothers, being divorced, deserted, or an unwed mother served as a moral disqualification from these programs.").

168. *Id.* (quoting Lisa A. Crooms, *Don't Believe the Hype: Black Women, Patriarchy and the New Welfarism*, 38 HOW. L.J. 611, 620 (1995)).

169. *Id.*

170. *Id.*

171. *Id.*

not violate any right guaranteed by the Fourth or Fourteenth Amendments, because it was a "reasonable administrative tool."[172] In that case, the Court noted that "the visitation in itself is not forced or compelled, and that the beneficiary's denial of permission is not a criminal act. If consent to the visitation is withheld, no visitation takes place."[173] However, as Justice Marshall expressed in his dissent, mandatory home visits are not related to "probable cause . . . to suspect [poor women] of welfare fraud or child abuse," and when poor women refuse to permit home visits, state benefits may be arbitrarily denied—just as the Court ultimately affirmed in *Wyman*.[174]

According to Bridges, another way in which the Court endorses the negative messaging curated by states about poor women is by permitting caps on AFDC grants, such as in *Dandridge v. Williams*.[175] In that case, the Court upheld a Maryland regulation that imposed a limitation on the amount single families receiving AFDC could claim (at the time, $250 per month was an upper limit in Baltimore).[176] Poor families contended that the state's cap unconstitutionally imposed hardship on their younger children by denying them benefits that the Social Security Act entitled them to receive. To the contrary, the Court ruled, "[i]t cannot be gainsaid that the effect of the Maryland maximum grant provision is to reduce the per capita benefits to the children in the largest families."[177] Notwithstanding the fact that the case involved "the most basic economic needs of impoverished human beings,"[178] the Court upheld Maryland's regulation, and, in doing so, "reveal[ed] an underlying faith in the belief that people are impoverished because of their own character flaws."[179]

Critics may charge that Bridges's arguments are absolutist and overstated; obviously, poor women do possess some privacy rights. Critics also may claim that if poor women suffer breaches to their privacy, those actions can be remedied administratively or judicially, and thus, their dignitary harms may be rectified. However, Bridges shows how legal decisions have foreclosed many paths for poor women to vindicate their privacy rights, by either rendering them ineffective or legally limiting them to the point of disenfranchisement. In this regard, the example of abortion is particularly instructive.

---

172. 400 U.S. 309, 326 (1971).

173. *Id.* at 317-18.

174. *Id.* at 338 (Marshall, J., dissenting).

175. 397 U.S. 471 (1970); *see also* BRIDGES, *supra* note 1, at 187-88 (discussing *Dandridge*).

176. *Dandridge*, 397 U.S. at 474.

177. *Id.* at 477.

178. *Id.* at 485.

179. BRIDGES, *supra* note 1, at 46.

Some might well argue that poor women's privacy rights are not paramount when they are pregnant, because two lives matter—that of the fetus and that of the woman—and the state's interest in protecting the former is a compelling interest. Yet as the next Part will show, the state and federal government have designed access to abortion in order to provide wealthy women with options while depriving poor women of their constitutionally mandated choice. This type of state involvement contradicts the very premises of privacy by influencing the ability of poor women to make their own reproductive decisions. The abortion context also reveals the state's continuing use of moral arguments to strip portions of the population of privacy rights today. The moralistic thinking that Bridges brings to our attention is slowly disenfranchising more and more women of their rights to reproductive and family privacy.

II. THE LEGALIZATION OF THE MORAL DISREGARD FOR WOMEN'S REPRODUCTIVE HEALTH AND RIGHTS

The balance of our Review turns to privacy and reproductive rights. In this Part, we add further context to our reading of Bridges's insightful contemporary narrative. The force of her important argument, we believe, centers on the state's moral disregard for the lives of poor women of color, especially Black mothers. That is, when Bridges articulates that poor women of color have no privacy rights, we read and respond to this as a condemnation of the state's moral transgressions and omissions. While she examines how the state constructs poor women of color as morally problematic, we turn to examining how the state exploits such arguments.

In this regard, we point to the state's enduring disregard for Black women's endemic poverty, unequal educational opportunities, economic immobility, persistent wage gaps, and unequal treatment. The state further cemented these conditions by denying them political participation, which now continues through voter suppression and gerrymandering the districts where they live.[180] The state's omissions would certainly include a failure to remedy these conditions. Perhaps even worse are the horrific actions the government has historically sanctioned against vulnerable women.

---

180. *See* BRIDGES, *supra* note 1, at 13, 211-22; David A. Graham, *North Carolina's Deliberate Disenfranchisement of Black Voters*, ATLANTIC (July 29, 2016, 9:30 PM), http://www.theatlantic.com/politics/archive/2016/07/north-carolina-voting-rights-law/493649 [http://perma.cc/7FMY-T35J]; Alex Lubben, *North Carolina Gerrymandered Districts Suppressed Black Votes, Supreme Court Rules*, VICE NEWS (May 22, 2017), http://news.vice.com/story/north-carolina-gerrymandered-districts-suppressed-black-votes-supreme-court-rules [http://perma.cc/GP3A-5QY8].

In her chapter on reproductive privacy, Bridges shows how the Court hollowed poor women's right to reproductive privacy through a number of decisions in the 1970s and 80s.[181] In Section II.A, we build on Bridges's analysis to show how the Court legally constrains poor women's rights, while preserving and protecting the rights of wealthy women. Such concerns are not new, but sadly enduring. Decisions like *Buck v. Bell*, in which Justice Oliver Wendell Holmes tragically upheld a Virginia eugenics law that permitted the involuntary sterilization of men, women, boys, and girls, epitomize our concern. That is, analytical arguments based on morality remain widespread and continue to constrain the rights of the most vulnerable. In Section II.B, we connect the Court's decisions to historical practices, like eugenics and labor exploitation, to illustrate that infringements on the privacy rights of poor women of color are not novel, but rather are rooted in illegitimate state action.

Finally, in Section II.C, we show how the proliferation of TRAP laws represents a resurgence of the type of moral thinking that has historically left poor women without adequate means to exercise their right to reproductive privacy and freedom. We show how the state uses morality to dispossess women of their constitutional rights and acts immorally in the process. We demonstrate how a majority of states are systematically engaged in such work across the country today.

A. Moral Corruption Against Women's Bodies

The present circumstances and conditions that Bridges copiously documents were not born of thin air, but rather forged with complicity and often the direct involvement of the state. Articulating this truth matters for many reasons, including acknowledging where government has failed and even harmed vulnerable women. This work seeks to give visibility to the experiences of poor women and correct assumptions and misimpressions baked into law and reified in society.[182]

181. BRIDGES, *supra* note 1, at 179-205.

182. Patricia Hill Collins recounts Fannie Barrier Williams remarking, "The colored girl . . . is not known and hence not believed in; she belongs to a race that is best designated by the term 'problem,' and she lives beneath the shadow of that problem which envelops and obscures her." COLLINS, *supra* note 155, at 5 (citation omitted).

Supreme Court decisions, including *Maher v. Roe*,[183] *Beal v. Doe*,[184] and *Harris v. McRae*,[185] misguidedly suggest that indigent women forged their social and socioeconomic conditions completely on their own—denying that states share at least some responsibility or complicity in their indigence.[186] As our prior scholarship articulates, the Court consistently strikes a "blow against not only poor women, an unprotected class, but also against poor Black and Latina women" by reasoning that "although government may not place obstacles in the path of a woman's exercise of her freedom of choice, it need not remove those not of its own creation."[187] We pointed out the absurdity of the Court's claim in *Maher* "that the state law denying use of Medicaid funds does not place obstacles, either 'absolute or otherwise—in the pregnant woman's path to an abortion.'"[188] Indeed, it is a ludicrous notion that "[a]n indigent woman who desires an abortion suffers no disadvantage as a consequence of [the state's] decision to fund childbirth [instead of abortion]."[189]

Each of these cases established that the government is not required to expend financial resources to facilitate a poor woman's termination of a pregnancy. We argue that these cases ultimately result in making abortion rights more illusory than real for poor women.[190] Denying a woman the available means to end a pregnancy, a medical procedure for which she has a constitutional right, does in fact contribute to her indigence by forcing her into parenthood, which she does

---

183. 432 U.S. 464, 474 (1977).

184. 432 U.S. 438, 445-46 (1977).

185. 448 U.S. 297, 316 (1980).

186. *See* Chemerinsky & Goodwin, *supra* note 129, at 1240 (critiquing the Court's opinion in *Maher* that the "denial of public funding places a woman in no different position than she would have been if there was no Medicaid program or no public hospital"); Michele Goodwin & Meigan Thompson, *In the Shadow of the Court: Strategic Federalism and Reproductive Rights*, 18 GEO. J. GENDER & L. 333, 353 (2017). *See also* BRIDGES, *supra* note 1, at 185-86.

187. Goodwin & Thompson, *supra* note 186, at 353 (citing *Harris*, 448 U.S. at 316).

188. Chemerinsky & Goodwin, *supra* note 129, at 1240 (quoting *Maher*, 432 U.S. at 474).

189. *Id.* (quoting *Maher*, 432 U.S. at 474).

190. Michael J. Perry, *The Abortion Funding Cases: A Comment on the Supreme Court's Role in American Government*, 66 GEO. L.J. 1191, 1244 (1978) (arguing that the Supreme Court's abortion jurisprudence "mean[s] that some indigent women, perhaps many, will be unable to have abortions. These are the very women *most* likely to have unwanted pregnancies and *least* able to accommodate additional children."). Furthermore, empirical studies relate a decrease in abortions as a result of slashes to funding. According to James Trussell and his coinvestigators, the Hyde Amendment's impacts in Ohio and Georgia were such that roughly 20% of the female Medicaid recipients who desired an abortion could not get one because of the absence of funds. James Trussell et al., *The Impact of Restricting Medicaid Financing for Abortion*, 12 FAM. PLAN. PERSP. 120, 129 (1980).

not want and cannot afford. More than fifty years ago, King referenced this point in his Planned Parenthood speech, referring to it as a "cruel" condition when children are born into homes where they are not wanted and ill afforded.[191]

Consider *Harris v. McRae*, where the Supreme Court found that "Title XIX does not obligate a participating State to pay for those medically necessary abortions for which Congress has withheld federal funding."[192] The Court stated that "[t]he financial constraints that restrict an indigent woman's ability to enjoy the full range of constitutionally protected freedom of choice are the product not of governmental restrictions on access to abortions, but rather of her indigency."[193] Justice Stewart claimed that, although Congress subsidized necessary medical services generally, but excluded abortions, indigent women still maintained "at least the same range of choice in deciding whether to obtain a medically necessary abortion as she would have had if Congress had chosen to subsidize no health costs at all."[194] But this makes no sense, because the state does subsidize other medically necessary services, while excluding the choice of abortion for indigent women.

We take the position that a state must not coerce a pregnant woman's decision whether or when to become a mother.[195] These are core tenets of reproductive justice.[196] That is, the state could decide not to fund pregnancy, labor and

---

191. King, *supra* note 2.

192. 448 U.S. 297, 311 (1980).

193. *Id.* at 316.

194. *Id.* at 317.

195. We believe the state may choose to avoid paying for any medical services related to pregnancy altogether, including childbirth and abortion. However, if the state, through its Medicaid program, extends itself to pay for *any medically necessary* services related to pregnancy, it cannot then deny services, such as abortion, based on its preference for pregnancies. In other words, the state cannot condition its Medicaid funding on a quid pro quo, coercing a woman into the life that it condemns her to have, especially a life that burdens her with hardship. *See* Roe v. Wade, 410 U.S. 113, 168-69 (laying out liberty arguments); King, *supra* note 2 ("For the Negro, therefore, intelligent guides of family planning are a profoundly important ingredient in his quest for security and a decent life. . . . There is scarcely anything more tragic in human life than a child who is not wanted. That which should be a blessing becomes a curse for parent and child.").

196. *See* Loretta J. Ross, *Understanding Reproductive Justice*, SISTERSONG WOMEN OF COLOR REPROD. HEALTH COLLECTIVE 6 (May 2006), http://d3n8a8pro7vhmx.cloudfront.net/rrfp/pages/33/attachments/original/1456425809/Understanding_RJ_Sistersong.pdf [http://perma.cc/BV28-87UV]. Ross explains:

> [Women of color] were also skeptical about the motivations of some forces in the pro-choice movement who seemed to be more interested in population restrictions rather than women's empowerment. They promoted dangerous contraceptives and coercive sterilizations, and were mostly silent about the economic inequalities and

delivery, as well as abortion. By doing so, the state would not force the hand of pregnant women to fall into the default of motherhood. However, when the state chooses to fund one treatment for pregnancy, namely, childbirth, and not others, it ultimately makes the decision for what a woman's reproductive future will be. In fact, that is the point. Anti-abortion legislation is a direct attempt to circumvent women from choosing (or having the option of) abortion versus pregnancy. In other words, the underlying legislation produces anticipated results in courts and society: unplanned pregnancies resulting in births. Surely, it cannot be understood as a choice—in any real sense of the word—when an indigent woman is denied the ability to end her pregnancy, but is economically coerced into months of labor that risks her physical health. If taken to its logical conclusion, a poor pregnant woman's choice thus only practically exists when it aligns with the state's choice regarding her pregnancy.

Thus, we find Justice Stewart's analysis anemic at best, and very likely dangerous, for the proposition(s) it holds. He wrote that the Court had already explained this reasoning in *Maher*,[197] which indeed it had ("Although government may not place obstacles in the path of a woman's exercise of her freedom of choice," he surmised, "it need not remove those not of its own creation."[198]). Such an explanation relies on a morally driven understanding of poverty as the result of individual choice. Bridges explains that the Court imagines poor women as "powerful agents excising dominion over their lives. If . . . they find themselves carrying to term an unwanted pregnancy and giving birth to a child, it is because they chose not to pull together the private resources to pay for an

power imbalances between the developed and the developing worlds that constrain women's choices.

197. 432 U.S. 464 (1977) (holding that a state's choice to pay for nontherapeutic abortion is a policy decision not mandated under the Equal Protection Clause).

198. *Harris*, 448 U.S. at 316 (holding that the Equal Protection Clause does not obligate a state participating in the Medicaid program to fund abortion services even while it pays expenses incident to childbirth). Justice Stewart and the Court generally ignored the multitudinous ways that the state contributed to women's second-class citizenship by denying them a range of economic and civic participation activities. *See, e.g.*, Rostker v. Goldberg, 453 U.S. 57, 78-79 (1981) ("Congress' decision to authorize the registration of only men . . . does not violate the Due Process Clause. The exemption of women from registration is not only sufficiently but also closely related to Congress' purpose in authorizing registration."); Hoyt v. Florida, 368 U.S. 57, 61-62 (1961) (finding that "woman is still regarded as the center of home and family life" for purposes of creating different tiers of civic participation on juries); Goesaert v. Cleary, 335 U.S. 464, 465 (1948) ("[N]o female may be . . . licensed [to bar tend] unless she be 'the wife or daughter of the male owner' of a licensed liquor establishment.").

abortion."[199] The Court's reasoning echoes ideas that poverty is tied to poor women's lack of sexual control and morality.[200]

Yet, Justice Stewart's opinion misses the point altogether. The state funds expenses related to maintaining a pregnancy, childbirthing, and postnatal care even though the government would not claim to play any role in impregnating poor women. The Court's articulation of poor women *bringing these problems onto themselves* reflects a punishing tone, where retribution and teaching women a lesson are the answer. If carried to its full logic, poor women should not become pregnant—and as Dorothy Roberts muses, *poor Black women should not have sex*.[201]

Both Congress and the Court agree that pregnancy is a condition that necessitates medical services and warrants funding for the poor through the Medicaid program under Title XIX. Yet, the statute ultimately defers the course of treatment to the healthcare provider and patient, leaving an opening for the Court to ruthlessly determine that abortions for poor women are not medically necessary, despite the fact that pregnancy may be medically harmful to a woman—physically and psychologically. Justice Stevens's dissent in *Harris* presents a strong contrast to the majority opinions. As Bridges explains, Justice Stevens "attempts to humanize the women who stand to be maimed by the federal government's refusal to fund even medically necessary abortions."[202]

For example, Justice Stevens points to the "record" being "replete with examples of serious physical harm" suffered by poor women denied abortions.[203] Stevens references the affidavit of a young, married mother in her twenties, who tells the story of having four children. However, following her third child in 1976, she developed a serious case of phlebitis, from which she continued to suffer. She wrote, "[c]arrying another pregnancy to term would greatly aggravate this condition and increase the risk of blood clots to the lung."[204] The mother

199. BRIDGES, *supra* note 1, at 185.

200. *See supra* Section I.C; *see also* COLLINS, *supra* note 155, at 81 ("A final controlling image—the jezebel, whore, or 'hoochie'—is central in this nexus of controlling images of Black womanhood. Because efforts to control Black women's sexuality lie at the heart of Black women's oppression, historical jezebels . . . represent a deviant Black female sexuality."); HOOKS, *supra* note 151, at 79 (speaking to the notion that "black women are somehow more inherently treacherous, devious, lacking in morality and ethics than male counterparts [and that] [t]hese negative stereotypes about black womanhood usually shape the way we are represented in mainstream mass media").

201. *See* ROBERTS, KILLING THE BLACK BODY, *supra* note 157.

202. BRIDGES, *supra* note 1, at 82.

203. *Harris*, 448 U.S. at 353 n.5 (1979) (Stevens, J., dissenting).

204. *Id.* (quoting Jane Doe in Appendix at 109-10, *Harris*, 448 U.S. 297 (No. 79-1268)).

explained that she could not "afford to pay for an abortion [herself], and without Medicaid reimbursement, [she could not] obtain a safe, legal abortion."[205] She concluded her affidavit by recounting her doctor's advice, "without an abortion [she] might suffer serious and permanent health problems."[206]

Clearly, this record, as well as the other affidavits, were available to Justices Stewart, Burger, White, Powell, and Rehnquist. Even the lower court took note of how

> [w]omen, particularly young women, suffering from diabetes are likely to experience high risks of health damage to themselves and their fetuses; the woman may become blind through the worsening during pregnancy of a diabetic retinopathy; in the case, particularly, of the juvenile diabetic, Dr. Eliot testified there is evidence that a series of pregnancies advances the diabetes faster; given an aggravated diabetic condition, other risks increased through pregnancy are kidney problems, and vascular problems of the extremities.[207]

Given that a woman is fourteen times more likely to die from childbirth and pregnancy than by ending that condition,[208] forcing a woman to endure a condition that she does not want and that could end her life is by definition cruel and immoral. The state's claim that it is not responsible for the economic hardship of poor women, and thus not answerable for their pregnancy terminations (but willing to be on the hook for their childbirth), is a particularly perplexing response to the plight of these women. These cases ultimately stand for the proposition that poor women's lives are of little value to the state. Rereading *Maher* in light of this record illumes the type of immoral and illegitimate state action we seek to dismantle across this and other works.

Just as the state's motives for eviscerating poor women's reproductive rights cannot be explained away by purported attempts to promote health, they cannot be said to encourage states' fiscal responsibility. The Court is well aware that the state cannot claim to promote or protect its financial interests by prohibiting the funding of abortions while paying for the medical services required over the

---

205. *Id.*

206. *Id*.

207. McRae v. Califano, 491 F. Supp. 630, 670 (E.D.N.Y. 1980), *rev'd sub nom.* Harris v. McRae, 448 U.S. 297 (1980). *See generally* Jill E. Adams & Jessica Arons, *A Travesty of Justice: Revisiting* Harris v. McRae, 21 WM. & MARY J. WOMEN & L. 5 (2014) (arguing that *Harris* should be revisited in light of developments in government-provided healthcare, due process rights, and international human rights).

208. Elizabeth G. Raymond & David A. Grimes, *The Comparative Safety of Legal Induced Abortion and Childbirth in the United States*, 119 OBSTETRICS & GYNECOLOGY 215, 215-16 (2012).

course of a pregnancy, which cost far more.[209] Moreover, these costs do not simply end with the birth of a child. The state continues to pay for medical services and child rearing associated with "Medicaid births" even after the child is born through its state welfare systems.[210]

Bridges believes that the Court has struck a compromise between those who support and those who oppose abortion: weakening poor women's right to reproductive choice, while strengthening the right for wealthy women.[211] Using her strong claim, she contends that such a legal decision has disenfranchised poor women of their abortion rights. She points out that this is not an example of poor women exchanging rights for state assistance, because with or without Medicaid, poor women have no access to abortion.[212]

Finally, the underlying premise of the Court's conclusion in these cases relies on moral understandings of poverty to hide historical facts about its causes. Justice Stewart explained, "[t]he financial constraints that restrict an indigent woman's ability to enjoy the full range of constitutionally protected freedom of choice are the product not of governmental restrictions on access to abortions, but rather of her indigency."[213] Yet, as other scholars have noted, states erected the very barriers that denied poor Black women's voting and economic rights, which in turn shackled their access to education, and hobbled their abilities and capacities for better futures.[214] Consider the hobbling effects of being excluded from the democratic process—it directly impacts representation and promotion of perspectives and values in political discourse.

Thus, the democratic process directly implicates citizenship and provides the means for shaping better economic, educational, housing, environmental, and healthcare opportunities. By directly orchestrating infringements on voting access, states played an essential role in undermining the futures women could imagine and construct for themselves (i.e. who they could elect to local and national

209. *See* Beal v. Doe, 432 U.S. 438, 453 (1977) (Brennan, J., dissenting) (arguing that "[t]he State cannot contend that it protects its fiscal interests in not funding elective abortions when it incurs far greater expense in paying for the more costly medical services performed in carrying pregnancies to term").

210. *Id.*

211. BRIDGES, *supra* note 1, at 186.

212. *Id.* at 186-87.

213. Harris v. McRae, 448 U.S. 297, 316 (1980).

214. *See, e.g.*, PAULI MURRAY, STATES' LAWS ON RACE AND COLOR (1951) (describing thousands of state laws that conscribed Blacks to second-class citizenship in the United States); Pauli Murray, *The Liberation of Black Women*, *in* WOMEN: A FEMINIST PERSPECTIVE 351-62 (Jo Freeman ed., 1975); Raj Chetty et al., *The Effects of Exposure to Better Neighborhoods on Children: New Evidence from the Moving to Opportunity Experiment*, 106 AM. ECON. REV. 855 (2016) (finding that growing up in a low-income neighborhood decreases a child's potential lifetime earnings, and negatively impacts college attendance rates).

political office, to law enforcement positions, school boards, and other government seats). Fannie Lou Hamer's testimonials at the 1964 Democratic National Convention (DNC) about her attempts to vote in Mississippi—a state that now has only one abortion clinic—and subsequent arrests should correct any misimpressions that states did not interfere with or help to manufacture the conditions that shaped Black women's lives.

Hamer was arrested a number of times while attempting to vote, as were many Black women across the South. Hamer describes how the state brutally responded to her exercise of this fundamental right by arresting and torturing her:

> I was carried out of that cell into another cell where they had two Negro prisoners. The State Highway Patrolmen ordered the first Negro to take the blackjack. . . .
>
> And I was beat by the first Negro until he was exhausted. I was holding my hands behind me at that time on my left side, because I suffered from polio when I was six years old.
>
> After the first Negro had beat until he was exhausted, the State Highway Patrolman ordered the second Negro to take the blackjack.
>
> The second Negro began to beat and I began to work my feet, and the State Highway Patrolman ordered the first Negro who had beat to sit on my feet—to keep me from working my feet. I began to scream and one white man got up and began to beat me in my head and tell me to hush.[215]

Hamer concluded, "All of this is on account of we want to register, to become first-class citizens."[216]

If anything, the Court's opinions in *Maher* and *Harris* expose glaring obliviousness and indifference to the obvious conditions of poor women's lives. At the time of those cases, the sweat of Jim Crow lingered and affected where a woman could work, the conditions of her work, and whether she would earn a dignified wage.[217] These concerns remain today.[218]

---

215. Fannie Lou Hamer, Testimony Before the Credentials Committee, Democratic National Convention, (Aug. 22, 1964), http://www.americanrhetoric.com/speeches/fannielouhamercredentialscommittee.htm [http://perma.cc/P924-46AP].

216. *Id*.

217. *See* COLLINS, *supra* note 155, at 45-46; Goodwin & Thompson, *supra* note 186, at 353.

218. COLLINS, *supra* note 155, at 61-62 ("Black women who work yet remain poor form an important segment of the Black working class. Labor market trends as well as changes in federal policies toward the poor have left this group economically marginalized.").

B. Why We Can't Forget Jim Crow and Eugenics: Poverty and Reproductive Rights

In *Maher*, *Beal*, and *Harris*, the Court refused to see the relationship between state-manufactured conditions that denied women political access, control over their reproductive health, protection from sexual assault in the home, economic opportunities, and the realization of their constitutional rights. These decisions illustrate how courts' inattention to the lived experiences of poor women can strip them of their formal rights. As Bridges explains, the Court chose to see these women as "powerful agents exercising dominion over their lives."[219] The Court repeatedly ignored its own history of failing to protect women, which directly impacted their safety, security, and livelihood.[220] Thus, we find neither comfort nor accuracy in the Court's rulings in these cases, because neither women's poverty nor their legal and social statuses were forged in a vacuum.

Such willful ignorance only reproduced a long tradition of courts employing "the moral construction of poverty"[221] and race to ensure state control over the bodies and lives of women of color and poor women. During the early twentieth century, the eugenics movement served as a primary method to exert state control over women, while Jim Crow, a legal foreclosure of economic opportunity for Black women,[222] perpetuated the cycle of state control. During Jim Crow, the state relegated Black girls to substandard segregated schools[223] and denied them

---

219. BRIDGES, *supra* note 1, at 185.

220. *See* Buck v. Bell, 274 U.S. 200 (1927) (upholding a Virginia law that imposed nonconsensual sterilization of indigent girls, women, and men); Radice v. New York, 264 U.S. 292 (1924) (upholding a New York law that barred female waitresses from working nightshifts); Bosley v. McLaughlin, 236 U.S. 385 (1915) (upholding a California statute limiting the hours of female pharmacists and nurses in hospitals, preventing them from earning higher evening wages); Miller v. Wilson, 236 U.S. 373 (1915) (upholding a California statute limiting women's employment hours in hospital jobs); Bradwell v. Illinois, 83 U.S. 130 (1872) (upholding Illinois law that denied female law school graduates the opportunity to become lawyers).

221. BRIDGES, *supra* note 1, at 12.

222. *See* PAULA GIDDINGS, WHEN AND WHERE I ENTER: THE IMPACT OF BLACK WOMEN ON RACE AND SEX IN AMERICA 256-58 (1984); Murray, *The Liberation of Black Women*, *in* WOMEN: A FEMINIST PERSPECTIVE, *supra* note 214, at 351-63; Kimberle Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. OF CHI. LEGAL F. 139, 166 (urging that "[i]f any real efforts are to be made to free Black people of the constraints and conditions that characterize racial subordination, then theories and strategies purporting to reflect the Black community's needs must include an analysis of sexism and patriarchy").

223. *See* Brown v. Bd. of Educ., 347 U.S. 483 (1954); COLLINS, *supra* note 155, at 4.

admission to state colleges and universities.[224] Black women occupied the least desirable and some of the most health-hazardous jobs during and after Jim Crow.[225] Today the state does little to break the cycle of poverty that haunts the children and grandchildren of Blacks who lived under decades of state-sponsored terror. In fact, the Court's decisions in *Beal*, *Maher*, and *Harris* work to perpetuate the cycle by forcing poor women into motherhood when they would otherwise reject it and setting them up for a lifetime of social stereotyping and stigma as a consequence of the choices the state and Court make for them.

By further highlighting the vicious campaigns and enduring effects of these legal choices, we add further context to Bridges's analysis of this deeply engrained phenomena that manifests in American jurisprudence and law more generally.

1. Eugenics

American eugenics is traditionally framed as a story about the deprivation of autonomy, privacy, and reproductive rights. It is also the story of debased values, cruelty, and torture. For poor women, the narrative of oppression has a profound and shameful historical arc rooted in reproductive privacy. Under the banner of American eugenics, an immoral but significantly overlooked government platform that dates back more than a century, dozens of states forcibly sterilized thousands of girls, women, and men.[226] The state rationalized the sterilization

---

224. *See, e.g.*, Douglas Martin, *Vivian Malone Jones, 63, Dies; First Black Graduate of University of Alabama*, N.Y. TIMES (Oct. 14, 2005), http://www.nytimes.com/2005/10/14/us/Vivian-malone-jones-63-dies-first-black-graduate-of-university-of.html [http://perma.cc/E6VF-USHC] ("[Vivian Malone Jones's] entrance to the university came as the civil rights struggle raged across the South. On June 12, the day after Ms. Jones and James Hood were escorted into the university by federalized National Guard troops, the civil rights leader Medgar Evers was shot to death in Jackson, Miss." She was the "first black to graduate from the University of Alabama in its 134 years of existence.").

225. *See, e.g.*, PETER M. BLAU & OTIS DUDLEY DUNCAN, THE AMERICAN OCCUPATIONAL STRUCTURE 241 (1967) (describing the "severe" entrenchment of racial discrimination in American employment, reporting that Blacks "suffer[] at every step in the process toward achieving occupational success"); Sally Hillsman Baker & Bernard Levenson, *Job Opportunity of Black and White Working-Class Women*, 22 SOC. PROBS. 510, 531-32 (1975).

226. *See, e.g.*, Buck v. Bell, 274 U.S. 200, 207 (1927) (holding that "it is better for all the world, if . . . society can prevent those who are manifestly unfit from continuing their kind"); ERWIN CHEMERINSKY, THE CASE AGAINST THE SUPREME COURT 15 (2014) (commenting on *Buck*); HARRY HAMILTON LAUGHLIN, EUGENICAL STERILIZATION IN THE UNITED STATES 446 (1922) (outlining a "Model Eugenical Sterilization Law"); PAUL A. LOMBARDO, THREE GENERATIONS, NO IMBECILES: EUGENICS, THE SUPREME COURT, AND *BUCK V. BELL* 236-79 (2008) (discussing

of indigent girls as young as nine and ten years old by using the language and metaphor of morality: it was "weeding" out individuals perceived to be unfit for reproduction. The state tilled women's and girls' bodies like a farmer clears the land, removing offending species in order to avoid their reoccurrence. In this case, snipping the fallopian tubes of little girls was taken as lightly as pruning weeds.

For example, the Supreme Court notoriously sanctioned these practices in its troubling 1927 decision, *Buck v. Bell*.[227] The landmark case permitted the nonconsensual sterilization of Carrie Buck, a poor white teenager who became pregnant because of a rape at sixteen years old. Justice Oliver Wendell Holmes used highly moralist language to validate his ruling, calling these poor women "mental[ly] defective[]," "feeble minded," and "socially inadequate."[228]

The Virginia law and similar legislation in dozens of states like it throughout the United States terrorized and demoralized the poor, homeless, and uneducated. The Court ruled, in some of the most offensive and insensitive language in the United States Reports, that "[i]t is better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind."[229] Holmes opined that the states' authority was broad enough to cover "cutting the Fallopian tubes,"[230] and famously declared that "[t]hree generations of imbeciles are enough."[231] Within a short period after the case, more than two dozen states had eugenics laws on the books.[232] It is not a stretch of imagination or definition to describe such state action as torture.

Class bias of the kind highlighted in *Buck v. Bell*, which upheld laws targeting poorer women, like Carrie Buck, shows how deeply ingrained the belief that poor women are less capable of caring for themselves and their children is in

Buck and its aftermath); HARRIET A. WASHINGTON, MEDICAL APARTHEID (2006) (documenting the numerous ways in which scientists, doctors, and government officials have historically colluded in exploiting African American women's bodies); Paul A. Lombardo, *"The American Breed": Nazi Eugenics and the Origins of the Pioneer Fund*, 65 ALB. L. REV. 743 (2002) (documenting the early economic, political, and social ties between Nazi eugenic policy and eugenics in the United States).

227. *Buck*, 274 U.S. at 207-08.

228. *Id.* at 205, 207.

229. *Id.* at 207.

230. *Id.*

231. *Id.* Subsequently, in *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (1942), the Court held a forced sterilization law unconstitutional.

232. COHEN, *supra* note 2, at 300. *See also id.* at 301 ("In the two-year period from 1928 to 1929, there were 2,362 [sterilizations] – more than triple the annual rate from before the court's ruling [in *Buck v. Bell*].").

American society and law. Over the last century, states waged two forms of eugenic sterilization plans. The first wave occurred at the turn of the twentieth century in order to reduce, if not altogether eliminate, the reproductive potential of poor white women considered socially and morally unfit and, in California, to stifle the reproduction of Asians and Mexicans.[233] The second wave of American eugenics materialized in the latter half of the twentieth century—under a platform to sterilize poor Black women who received state aid. In the South, these practices came to be known as "Mississippi appendectomies," which papered over the fact that invasive, unnecessary hysterectomies were cruelly performed on poor women of color, often at teaching hospitals as "practice for medical students."[234] According to Roberts, these programs intended to deny Black women procreative rights.[235] Most of these girls and women were not informed of their sterilizations and unaware of their doctors' complicit conduct with the states.

Nor did the state spare indigenous women. It is estimated that "as many as 25-50 percent of Native American women were sterilized between 1970 and 1976."[236] The sterilization of Native American women persisted into the 1980s, "with examples of young women receiving tubal ligations when they were getting appendectomies."[237] Repeatedly, the state demonstrated that poor women and especially poor women of color did not have the type of reproductive rights that it should respect. In fact, many states had so little respect for the reproductive rights of these women and girls that, more often than not, poor women and girls were also not informed about their sterilizations, leading them to misunderstand the nature of their inability to procreate.

Southern states are replete with examples that illustrate our concern. In North Carolina, 26% of forced sterilizations were forced on children "under age 18" and 60% of all sterilization victims were Black.[238] We highlight two examples. Elaine Riddick, raped as a little girl, did not know until many years later

---

233. Lisa Ko, *Unwanted Sterilization and Eugenics Programs in the United States*, PBS: INDEP. LENS (Jan. 29, 2016), http://www.pbs.org/independentlens/blog/unwanted-sterilization-and-eugenics-programs-in-the-united-states [http://perma.cc/WL4X-P4AL].

234. *Id.*

235. ROBERTS, *supra* note 157, at 304-08.

236. Ko, *supra* note 233.

237. *Id.*

238. Valerie Bauerlein, *North Carolina To Compensate Sterilization Victims: State Sets $10 Million Pool To Pay Subjects in Eugenics Program*, WALL ST. J. (July 26, 2013, 1:46 PM), http://www.wsj.com/articles/SB10001424127887323971204578629943220881914 [http://perma.cc/6BFM-HLHZ] ("[A]bout 2,000 of the 7,600 who were sterilized were under age 18.").

that the state of North Carolina sterilized her at age 14.[239] Similarly in 1974, sisters Mary Alice and Minnie Relf were sterilized at ages 14 and 12 in Alabama. Years later, a lawsuit filed by the Southern Poverty Law Center on behalf of the Relf sisters revealed that federally funded programs sterilized 100,000 to 150,000 people each year.[240] Clearly, some of those sterilizations may have been voluntary, but the majority were likely performed under coercive means. More recently, the state of California coercively sterilized dozens of women in its prisons — in violation of the law — and only ceased doing so after the governor issued a ban on such practices.[241]

Bridges describes reproductive privacy as a tool that was developed "to enforce government abstention and to enable individuals to enjoy procreative liberty."[242] Yet, she conjectures that "if we examine the experience of poor women," we will see that the tool is either broken or absent from the toolbox.[243] It is hard to argue against her view in light of this history.

The cases presented above illustrate immoral state action. They epitomize the very nature of illegitimate state rule of law by carving out and enforcing discriminatory treatment against a discrete class of people, namely poor women and girls. Importantly, *Buck v. Bell* and its enduring legacy show how the Court has failed vulnerable poor women when they needed it most. By doing so, the Court became complicit in the demeaning of poor women's reproductive rights. Sadly, it continues to do so. It is not surprising that judges, who earn their living applying precedent, continue to fail to see how their refusal to acknowledge the complex relationship between poor women and the state limits these women's reproductive rights and privacy. Furthermore, as we will show below, the state's refusal to see how its decisions disenfranchise poor women of reproductive rights perpetuates state-sanctioned second-class economic citizenship.

---

239. *Id.*; David Zucchino, *Sterilized by North Carolina, She Felt Raped Once More*, L.A. TIMES (Jan. 25, 2012), http://articles.latimes.com/2012/jan/25/nation/la-na-forced-sterilization-20120126 [http://perma.cc/7BPR-3UCM].

240. *Sterilization Abuse*, S. POVERTY L. CTR., http://www.splcenter.org/seeking-justice/case-docket/relf-v-weinberger [http://perma.cc/RL7M-WWP7].

241. Hunter Schwarz, *Following Reports of Forced Sterilization of Female Prison Inmates, California Passes Ban*, WASH. POST (Sept. 26, 2014), http://www.washingtonpost.com/blogs/govbeat/wp/2014/09/26/following-reports-of-forced-sterilization-of-female-prison-inmates-california-passes-ban [http://perma.cc/66R6-WU5M].

242. BRIDGES, *supra* note 1, at 179.

243. *Id.*

2. *The Relationship Between Economic and Work Exploitation and Reproductive Privacy*

If, as both King and Bridges recognize, women of color's lack of reproductive privacy is a byproduct of their poverty, then it is necessary to recognize state complicity in manufacturing that poverty. Throughout the twentieth century, poor women generally had few economic opportunities, driven in part by state policies limiting all women's job opportunities[244] and the state-sanctioned regime of Jim Crow, which allowed the machineries of slavery to persist long after Blacks in the south gained freedom.[245] Despite stereotypes that characterize poor Black mothers as lazy and unemployed ("welfare queens"), Black women labor across many spheres. However, for many, job options continue to be limited and low-wage. The employment options open to poor women are characterized by job instability and poor working conditions. Furthermore, some of these labor conditions experienced by the poor are among the worst in the labor market: "[s]ome of the dirtiest jobs in [manufacturing] industries were offered to African-American women."[246] These jobs included labor in the toxic cotton mills where arsenic is used and as waste gatherers.[247]

We emphasize this socio-legal history because the Court largely excludes it from its analysis. Even most scholarship on reproductive rights bypasses this

---

244. For example, in 1873 the Supreme Court upheld a state law that barred female law graduates from becoming lawyers. Bradwell v. Illinois, 83 U.S. 130 (1872). In his concurrence Justice Bradley argued that "[t]he natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life," insisting that instead household harmony and women's identities should belong to their families and that anything contrary to this "is repugnant." *Id.* at 141 (Bradley, J., concurring). State courts reached similar conclusions about the capacities of women. *E.g.*, *In re* Goodell, 39 Wis. 232, 244 (1875) ("So we find no statutory authority for the admission of females to the bar of any court of this state. And, with all the respect and sympathy for this lady which all men owe to all good women, we cannot regret that we do not. We cannot but think the common law wise in excluding women from the profession of the law."). State and federal courts upheld a panoply of economically discriminatory laws and practices targeted at women. Most of these laws impacted low-income workers, denying them the right to wait tables at night, Radice v. New York, 264 U.S. 292 (1924), wear pants to work, Lanigan v. Bartlett & Co. Grain, 466 F. Supp. 1388 (D. Mo. 1979), continue employment after marriage, Cooper v. Doyal, 205 So. 2d 59 (La. Ct. App. 1967) (upholding an employment contract provision that forced airline stewardesses to resign upon marriage), *writ refused*, 206 So. 2d 97 (La. 1968), tend bar, Goesaert v. Cleary, 335 U.S. 464 (1948), or even obtain drivers licenses in their own names, Forbush v. Wallace, 341 F. Supp. 217 (D. Ala. 1971).

245. *See* ISABEL WILKERSON, THE WARMTH OF OTHER SUNS (2010).

246. COLLINS, *supra* note 155, at 57; *see also* Evelyn Nakano Glenn, *Racial Ethnic Women's Labor: The Intersection of Race, Gender and Class Oppression*, 17 REV. RADICAL POL. ECON. 86, 96 (1985).

247. COLLINS, *supra* note 155, at 57; Glenn, *supra* note 246, at 96.

analysis in favor of more traditional arguments that speak only to reproductive privacy or autonomy. Yet we believe contextualizing the broader experiences of poor women's lives, just as Justice Blackmun did in *Roe v. Wade,* confers dignity on poor women and better illustrates their lives and concerns, especially as a connection exists between wealth and reproductive health access.

Perhaps Justices Stewart and Powell were not interested in the relationship between state policies limiting employment opportunity for poor women and access to abortion in *Maher*, *Beal*, and *Harris*. Their opinions implied that women created their own poverty and, therefore, brought the problem of motherhood onto themselves.[248] The state bore responsibility only to make mothers of these women, not to allow them to resituate and restore their lives. The former, a punishment, and the latter an undeserved prize.

By ignoring the lived life experiences of indigent women and girls, Justices Stewart and Powell normalized in legal doctrine stereotypes about indigence and motherhood. The Court contributed then to what we understand a good or bad mother to be. Yet, such willful ignorance and indifference was not uniform among the Court. Justice Brennan's dissenting opinion in *Beal* warned that the Supreme Court's decision to uphold a Pennsylvania law barring poor women from receiving elective abortions through Medicaid could "only result . . . in forcing penniless pregnant women to have children they would not have borne if the State had not weighted the scales to make their choice to have abortions substantially more onerous."[249] Justice Brennan admonished the Court for making a "mockery" of Medicaid's mandate to "provide 'care and services . . . in a manner consistent with . . . the best interests of the recipients.'"[250]

The collateral consequences of this jurisprudence impact the lives of mothers, their children, and the broader community. We are not surprised that Justice Marshall, who knew the stigma and shame poor Black mothers, children, and families encountered all too well, could already observe the effects of the Court's decisions in 1977. He predicted that the Court's insensitivity would foist on women economic hardships that could not be overcome.[251] Moreover, he was well aware that when families of color are economically deprived and disadvantaged, the state morphs its thinking about them. In other words, the state shifts its thinking from regarding welfare recipients as poor to declaring them negligent parents.

---

248. *See supra* notes 183-194 and accompanying text.

249. Beal v. Doe, 432 U.S. 438, 454 (1977) (Brennan, J., dissenting).

250. *Id.* (omissions in original) (quoting 42 U.S.C. § 1396a(a)(19) (1970)).

251. *Id.* at 456-57 (Marshall, J., dissenting).

For Justice Marshall, the connection between the Court's decisions to limit family planning coverage through Medicaid and Temporary Assistance for Needy Families (TANF) (formerly AFDC) would leave

> [m]any thousands of unwanted minority and mixed-race children . . . in foster homes, orphanages, and "reform" schools. Many children of the poor, sadly, will attend second-rate segregated schools. And opposition remains strong against increasing Aid to Families with Dependent Children benefits for impoverished mothers and children, so that there is little chance for the children to grow up in a decent environment.[252]

Such prescient observations about how the denial of reproductive health choices would result in unwanted pregnancies and childbirths now manifest in pervasive foster care. The denial of abortion alone does not explain the system's growth. However, the chokehold of poverty is a profound and key factor. Legal scholars offer copious evidence to buttress Justice Marshall's unnerving predictions. Research conducted by Mark Courtney and fellow colleagues at the University of Chicago show the cyclical effects of foster care institutionalization. The researchers followed more than six hundred young men and women[253] who "aged out" of Midwestern foster care systems in Illinois, Iowa, and Wisconsin. The researchers relate that at ages twenty-three and twenty-four, in comparison to their peers, former foster care youth are more likely to be convicted of a crime, institutionalized, homeless, and/or pregnant.

- Convicted of a crime: 23% of young men had been convicted of a crime, and 42% had been arrested.[254]

---

252. *Id.* (citations omitted).

253. Mark E. Courtney et al., *Midwest Evaluation of the Adult Functioning of Former Foster Youth: Conditions of Youth Preparing To Leave State Care*, CHAPIN HALL CTR. FOR CHILD. (2004), http://www.chapinhall.org/sites/default/files/ChapinHallDocument_8.pdf [http://perma.cc/P7X9-F8JR]. Study demographics included:

> [an] almost even[] split between male and female youth, and just fewer than 70 percent identified themselves as belonging to a racial minority group. Most youth came from single-parent families and the birth mother was the most common primary caregiver in their families of origin. Over 70 percent of the youth reported that their primary caregiver(s) experienced one or more problems that might have compromised their parenting, most commonly alcohol abuse, drug abuse, inadequate parenting skills, spousal abuse, and/or having a criminal record.

Id. at 2.

254. Mark E. Courtney et al., *Midwest Evaluation of the Adult Functioning of Former Foster Youth: Outcomes at Ages 23 and 24*, at 67, CHAPIN HALL CTR. FOR CHILD. (2010), http://www.chapinhall.org/sites/default/files/Midwest_Study_Age_23_24.pdf [http://perma.cc/FN7X-89FJ].

- Homeless: Almost 25% had been homeless since exiting foster care.[255]
- Pregnant: More than 65% of young women had been pregnant since leaving foster care.[256]
- Uneducated: Only 6% had a 2- or 4-year degree.[257]
- Unemployed: Almost 52% of those currently not incarcerated were employed.[258]

The cause of this is not simply *one* federal or state policy. Rather, it is a matter of what King would refer to as *unjust laws* operating within a morally corrupt system that deems poverty—indeed the poor—to be damaged and morally blighted.[259]

To these women, the morally blighted and damned "bad mothers,"[260] society offers what Justice Marshall referred to as ethically bankrupt social policies.[261] These polices included banning poor women's access to state-funded abortion,[262] withholding access to contraceptive care by preventing abortion providers (often the only service providers to more than half of poor women) from participating in Medicaid networks,[263] waging the failed drug war primarily within Black and Latino communities (resulting in widespread devastation to those communities),[264] crippling social service programs, and stigmatizing poor

255. *Id.* at 10.

256. *Id.* at 49.

257. *Id.* at 22.

258. *Id.* at 27.

259. King, *supra* note 2.

260. LINDA C. FENTIMAN, BLAMING MOTHERS: AMERICAN LAW AND THE RISKS TO CHILDREN'S HEALTH 3 (2017) (pointing out that "[n]early every day brings a news story—in a major newspaper or on the Internet—suggesting that mothers have fallen short in their obligation to protect their children's health and well-being").

261. Beal v. Doe, 432 U.S. 438, 456 (1977) (Marshall, J., dissenting).

262. *See, e.g.*, Maher v. Roe, 432 U.S. 464 (1977); *Beal*, 432 U.S. 438; *see also* Harris v. McRae, 448 U.S. 297, 311 (1980) ("Title XIX does not obligate a participating State to pay for those medically necessary abortions for which Congress has withheld federal funding . . . .").

263. Stevenson et al., *supra* note 23, at 853 ("The exclusion of Planned Parenthood affiliates from a state-funded replacement for a Medicaid fee-for-service program in Texas was associated with adverse changes in the provision of contraception."); Netburn, *supra* note 23 ("The state of Texas' sustained campaign against Planned Parenthood and other family planning clinics affiliated with abortion providers appears to have led to an increase in births among low-income women who lost access to affordable and effective birth control . . . .").

264. E. Ann Carson, *Prisoners in 2013*, BUREAU OF JUST. STAT. 16 (Sept. 30, 2014), http://www.bjs.gov/content/pub/pdf/p13.pdf [http://perma.cc/7N9D-6XYS] (reporting that "more than half of prisoners serving sentences of more than a year in federal facilities were convicted of drug offenses"); Eric Holder, Att'y Gen., U.S. Dep't of Justice, Remarks at the Annual

mothers who might wish to stay at home with their children, while lauding wealthy women if they do so.[265] These types of coercive conditions and economic exploitations were not limited to poor Black women's experiences.[266]

The vicious cycle of poverty, supported by state economic and reproductive policies that influenced whether they could vote, attend school, or live in unsegregated conditions, shows the state's direct and aggressive role in shaping the conditions of poor Black and Latina women's lives.

C. Reproductive Health, Privacy, and Unjust Laws

In the preceding Sections, we have shown how society's distrust of poor women, the central theme of Bridges's project, has historically manifested in court rulings and discriminatory medical practice like eugenics. Such distrust has long wreaked havoc on the lives of poor women through the law, long after *Roe v. Wade* guaranteed their right to privacy. This Section contends that the same arguments regarding the immorality of poverty are not only relevant to the programs discussed by Bridges, including Medicaid abortion funding and TANF family caps but also serve as a rallying call in response to TRAP legislation around the country.

Bridges, recognizing the power of unjust laws, explains that poor women could enjoy reproductive privacy in two ways: first, when they live in states that

---

Meeting of the American Bar Association's House of Delegates (Aug. 12, 2013) (transcript available at http://www.justice.gov/opa/speech/attorney-general-eric-holder-delivers-remarks-annual-meeting-american-bar-associations [http://perma.cc/2VX5-DPH3]) (asking whether the war on drugs has "been truly effective"); Barack Obama, Remarks at the NAACP Conference (July 14, 2015) (transcript available at http://www.whitehouse.gov/the-press-office/2015/07/14/remarks-president-naacp-conference [http://perma.cc/L6A7-DVES]) (noting that Blacks and Latinos are disproportionately incarcerated in the United States); Jenifer Warren, *One in 31: The Long Reach of American Corrections*, PEW CTR. ON STS. 5 (Mar. 2009), http://www.pewtrusts.org/~/media/Assets/2009/03/02/PSPP_1in31_report_FINAL_WEB_32609.pdf [http://perma.cc/D6SQ-A4X8] (emphasizing the high incarceration rate in the United States and the disproportionate imprisonment of Black and Hispanic Americans); *see also* Roy Walmsley, *World Prison Population List*, INT'L CTR. FOR PRISON STUD. 3 (May 2011), http://www.prisonstudies.org/sites/default/files/resources/downloads/wppl_9.pdf [http://perma.cc/4VBV-LR7K] (comparing incarceration rates across the globe).

265. *See generally* BRIDGES, *supra* note 1, at 52.

266. Thomas A. Arcury et al., *Work and Health Among Latina Mothers in Farmworker Families,* 57 J. OCCUPATIONAL & ENVTL. MED. 292, 292 (2015) (citing A.J. Marín et al., *Evidence of Organizational Injustice in Poultry Processing Plants: Possible Effects on Occupational Health and Safety Among Latino Workers in North Carolina*, 52 AM. J. IND. MED. 37 (2009)) (presenting research specifically relating to Latina mothers in farm-working families that found "[a]ssociations of abusive supervision with health indicators among manufacturing workers are stronger for women than for men").

do not cap TANF and structure their Medicaid programs to provide therapeutic and non-therapeutic abortions and underwrite the costs of childbirth; or, second, when there is no TANF program and the state "refuses to fund nontherapeutic abortions, therapeutic abortions, and the costs attendant to childbirth."[267] Both of these scenarios remove state bias, expressed monetarily, from the reproductive choice of women. Bridges emphasizes that although her research is anthropologically rooted, she is concerned about law and reproductive privacy as a legal tool "to enforce government abstention and to enable individuals to enjoy procreative liberty."[268] To the point, she, like us, is troubled by government abuse of power such that it would "compel" a woman "to act in alignment" with its desires.[269] In other words, the state advances "just laws" when its citizens share the same benefits and detriments without regard for race and class.

Although Bridges roots the fragility of poor women's privacy rights in the underdeveloped academic justification of these rights and moral construct of poverty, we would argue even more emphatically that it is our courts and legislatures that have allowed our social notions to undermine legal rights. The overlapping effects of sexism, racism, and paternalism — believing that women and children benefit from overly invasive state actions and restrictions in the lives of pregnant women — severely undermine the dignity and privacy of poor women. These policies invariably impact women's health and freedom to live their full lives and reach their desired potential.

Furthermore, as discussed above, states — responsible for serving the interests and rights of their constituency — continue to ignore the realities of poor women, insisting that the very rights that they render meaningless and hollow will protect vulnerable communities. Reproductive rights are a strong example.

The scale and scope of recent efforts to abolish reproductive privacy rights is concerted and alarming. These laws include: legislation requiring that doctors acquire medically unnecessary hospital-admitting privileges;[270] banning the use

267. BRIDGES, *supra* note 1, at 191.

268. *Id.* at 179.

269. *Id.*

270. H.B. 57, 2013 Reg. Sess. (Ala. 2013); S.B. 2305, 63rd Leg. Assemb., Reg. Sess. (N.D. 2013) (to be codified as N.D. CENT. CODE. § 14-02.1-04(1) (2013)); H.B. 2, 83d Leg. Sess., 2d Spec. Sess. (Tex. 2013); S.B. 206, 2013 Reg. Sess. (Wisc. 2013).

of telemedicine;[271] barring insurance providers from covering abortions;[272] prohibiting abortions after six[273] and twelve weeks;[274] proscribing abortion coverage to state employees;[275] requiring the governor's approval of Medicaid funded abortions;[276] mandated ultrasounds;[277] and waiting periods.[278]

According to a 2015 article published by the Guttmacher Institute, "[t]he goal of antiabortion advocates is to make abortion impossible to obtain by layering multiple restrictions, even though many claim that their motivation is only to protect women's health."[279] Thus, between 2011-2013, legislatures enacted more regulations to constrain abortion access than in the prior decade.[280] In an ACLU report, thirty-five states proposed over three hundred abortion rights restrictions in 2013 alone.[281] This derailment of women's privacy rights was well-coordinated and well-funded. Seventy of these restrictions were enacted in twenty-two states[282]—the second highest number of restrictions passed in one legislative session. In fact, "[n]o year from 1985 through 2010 saw more than 40

---

271. H.B. 57, 2013 Reg. Sess. (Ala. 2013); S.B. 371, 1st Reg. Sess. (Ind. 2013); S.B. 90, 2013 Reg. Sess. (La. 2013); S.B. 2795, 128th Leg., Reg. Sess. (Miss. 2013); H.B. 400, 97th Gen. Assemb., 1st Reg. Sess. (Mo. 2013); S.B. 353, Gen. Assemb., 2013 Sess. (N.C. 2013); H.B. 2, 83rd Leg. Sess., 2d Spec. Sess. (Tex. 2013).

272. MICH. COMP. LAWS ANN. § 550.542(2) (West Supp. 2014); H.B. 1100. 89th Gen. Assemb., Reg. Sess. (Ark. 2013) (to be codified as ARK. CODE. ANN. § 23-79-156 (2013)); H.B. 818, 197th Reg. Sess. (Pa. 2013); H.B. 1900, 2013 Reconvened. Sess. (Va. 2013) (to be codified as VA. CODE ANN. § 38.2-3451 (2013)).

273. N.D. CENT. CODE ANN. §§ 14-02.1-05.1 to -05.2 (West 2017), *invalidated by* MKB Mgmt. Corp. v. Stenehjem, 795 F.3d 768 (8th Cir. 2015). In *MKB Mgmt.*, experts testified that a fetal heart beat is detectable at six weeks. *Id.* at 771.

274. ARK. CODE ANN. §§ 20-16-1301 to -1307 (2013).

275. S.B. 98, 152d Gen. Assemb., Reg. Sess. (Ga. 2013); H.B. 730, Gen. Assemb., 2013 Sess. (N.C. 2013).

276. S.F. 446, 85th Gen. Assemb., Reg. Sess. (Iowa 2013).

277. WIS. STAT. ANN. § 253.10 (West 2017).

278. S.D. CODIFIED LAWS § 34-23A-56 (2014).

279. Andrea Rowan, *Prosecuting Women for Self-Inducing Abortion: Counterproductive and Lacking Compassion*, 18 GUTTMACHER POL'Y REV. 70, 70 (2015).

280. Laura Bassett, *More Abortion Laws Enacted in Past Three Years than in Entire Previous Decade*, HUFFINGTON POST (Jan. 3, 2014, 12:21 PM), http://www.huffingtonpost.com/2014/01/03/states-abortion-laws_n_4536752.html [http://perma.cc/MUH5-AKXJ].

281. *States Where They Think We're Stupid: Abortion Access Under Attack in 2013*, ACLU (Aug. 5, 2013), http://www.aclu.org/maps/states-where-they-think-were-stupid-abortion-access-under-attack-2013 [http://perma.cc/V6NS-3JBN].

282. *See* Heather D. Boonstra & Elizabeth Nash, *A Surge of State Abortion Restrictions Puts Providers—and the Women They Serve—in the Crosshairs*, 17 GUTTMACHER POL'Y REV. 9, 9 (2014).

new abortion restrictions; however, every year since 2011 has topped that number."[283]

Legal scholars who find consolation in the 2016 *Whole Woman's Health v. Hellerstedt*[284] decision should not celebrate too soon, notwithstanding the import of that decision. In that case, the Court struck down two Texas laws that imposed onerous burdens on poor women's access to abortion services: a surgical center requirement and the legislature's admitting privileges rule. Justice Breyer wrote that "[t]he record also contains evidence indicating that abortions taking place in an abortion facility are safe—indeed, safer than numerous procedures that take place outside hospitals and to which Texas does not apply its surgical-center requirements."[285] To emphasize this point, the Court noted that a colonoscopy, which takes place outside of a surgical center and hospital setting, "has a mortality rate 10 times higher than an abortion," and liposuction (also performed outside of a surgical center and hospital) has a mortality rate "28 times higher than the mortality rate for abortion."[286] Justice Breyer concluded that:

> [t]he upshot . . . [of this] record evidence, along with the absence of any evidence to the contrary, provides ample support for the District Court's conclusion that "[m]any of the building standards mandated by the act and its implementing rules have such a tangential relationship to patient safety in the context of abortion as to be nearly arbitrary."[287]

In fact, the World Health Organization has reported that a legal abortion in the United States is as safe as a penicillin shot;[288] as we know, a penicillin shot does not require an ambulatory surgical center to facilitate that procedure.

Turning to amicus briefs filed in the case, Justice Breyer took special note of the long and distinguished career and service of Dr. Lynn, a doctor at the

---

283. *Id.* (explaining that states enacted ninety-two abortion restrictions in 2011, forty-three restrictions in 2012, and seventy restrictions in 2013).

284. 136 S. Ct. 2292 (2016). In that case, the Supreme Court struck down *only* two Texas TRAP laws: the requirement that doctors obtain hospital admitting privileges and a mandate that clinics adopt surgical center standards. Other Texas TRAP laws, including mandatory wait periods, parental consent laws, and requirements that women listen to inaccurate health scripts prior to terminating their pregnancies, remain in effect.

285. *Id.* at 2315.

286. *Id.*

287. *Id.* at 2316 (alteration in original) (quoting *Whole Woman's Health v. Lakey*, 46 F. Supp. 3d 673, 684 (W.D. Tex. 2014)).

288. *Unsafe Abortion: Global and Regional Estimates of the Incidence of Unsafe Abortion and Associated Mortality in 2008*, WORLD HEALTH ORG. 14 (Apr. 2, 2011), http://apps.who.int/iris/bitstream/10665/44529/1/9789241501118_eng.pdf [http://perma.cc/WRU3-F4QN].

McAllen Clinic in Texas. Lynn performed over 15,000 deliveries, but could not — in nearly forty years of practice — obtain "admitting privileges at any of the seven hospitals within 30 miles of his clinic."[289] In ruling that the admitting privileges mandate "does not serve any relevant credentialing function,"[290] Breyer referenced a letter from a hospital that rejected Lynn's petition for admitting privileges. In pertinent part, the letter noted that the denial of such privileges was "not based on clinical competence considerations."[291]

Despite the apparent victory that *Whole Woman's Health* represents, it does not relate to — in deeper and more meaningful ways — poor women's access to abortion. Nor does it address the numerous other TRAP laws in place in states like Texas or elsewhere, where only one abortion clinic exists in the entire state. As discussed earlier, Doe's odyssey to end her pregnancy in Texas lasted over seven weeks. Eventually, she prevailed, but only after securing the legal help of the ACLU, the nation's largest civil liberties organization.

We are concerned about states' illegitimate and immoral attempts to suppress reproductive rights of vulnerable women. And, we are not persuaded that *Whole Woman's Health* will stop states bent on denying poor women reproductive health rights. That is, the inordinate number of TRAP laws untouched by *Whole Woman's Health* will continue to impose unjust limitations on women's reproductive healthcare access. In 2016, states enacted more than sixty new abortion restrictions[292] and while many of these restrictions were enacted pre-*Whole Woman's Health,* some critical provisions were legislated and signed into law in the second half of 2016, *after* the Supreme Court's decision barring states from unduly burdening women's reproductive privacy rights.[293]

In fact, during 2017, legislators in six states enacted bans on some or all abortions,[294] showing complete disdain for poor women's reproductive privacy

---

289. *Whole Woman's Health,* 136 S. Ct. at 2312.

290. *Id.* at 2313.

291. *Id.* (quoting Appendix, *Whole Woman's Health*, 136 S. Ct. 2292 (No. 15-274)).

292. *2016 State of the States: A Pivotal Time for Reproductive Rights*, CTR. FOR REPROD. RTS. 5 (Jan. 2017), http://www.reproductiverights.org/sites/crr.civicactions.net/files/documents/USPA_StateofStates_11.16_Web_Final.pdf [http://perma.cc/U43D-LLKD].

293. For example, Ohio recently banned all abortions performed after twenty weeks, OHIO REV. CODE ANN. § 2919.201 (West 2017), and a new Michigan law prevents physicians from selling or donating fetal tissue, MICH. COMP. LAWS § 333.2690 (2017).

294. *See* Elizabeth Nash et al., *Policy Trends, 2017*, GUTTMACHER INST. (Jan. 2018), http://www.guttmacher.org/article/2018/01/policy-trends-states-2017 [http://perma.cc/43WQ-Z3F8]; *Restricting Insurance Coverage of Abortion*, GUTTMACHER INST. (Feb. 1, 2018), http://www.guttmacher.org/state-policy/explore/restricting-insurance-coverage-abortion [http://perma.cc/D2GX-4S44] (showing that "26 states restrict abortion coverage in plans offered

rights. In those states, wealthy women could travel elsewhere to end their pregnancies. Pragmatically, for poor women, this would not be an option, and their reproductive rights would be rendered ineffective. In 2017, thirty states introduced legislation that would restrict abortion in some circumstances.[295] And eight states have passed legislation that would prohibit dilation and evacuation procedures, effectively banning most second-trimester abortions, although only two such laws are in effect.[296]

Iowa is home to the single most intrusive law, which mandates that Medicaid reimbursement for low-income women's medically necessary abortions be approved by the governor, even in cases of rape or endangerment of the mother's life.[297] Not only did the law, signed by Governor Terry Branstad, take the decision about how to handle serious health issues away from women, putting them in the hands of a "more responsible" male, it also burdens the right of poor women, while leaving the rights of wealthy women unaffected. Elizabeth Nash of the Guttmacher Institute thinks the law could also have a chilling effect, causing poor women to think twice about undergoing a life-saving procedure because they are worried about the giant bill if the governor does not agree with their doctor.[298] Iowa's law mimics and exaggerates the effects of court decisions such as *Maher* and *Beal*, emphasizing the state's continued disregard of the lived experiences and dignity of poor women.

In sum, forty years after *Roe*, twenty-four states banned abortion coverage in health exchanges and nineteen limited coverage for state employees.[299] To state the obvious, it is poor women who suffer from these policies and, given the correlation of race and poverty in American society, it is usually women of color who

through the insurance exchanges" and "20 states restrict abortion coverage in insurance plans for public employees").

295. Nash et al., *supra* note 294. Two states outlawed all abortions occurring after twenty weeks. S.F. 471, 87th Gen. Assemb., Reg. Sess. (Iowa 2017); KY. REV. STAT. ANN. § 311.782(1) (West 2017). Several states enacted omnibus antiabortion legislation packages. S.B. 8, 85th Leg., Reg. Sess. (Tex. 2017); H.B. 1128, 120th Gen. Assemb., Reg. Sess. (Ind. 2017); S.B. 5, 99th Gen. Assemb., 2d. Extraordinary Sess. (Mo. 2017). Three states introduced bans on abortions sought due to fetal genetic anomalies, other states enacted bans on abortions due to race or gender selection, which are alleged to target women of color. Boonstra & Nash, *supra* note 281; *Abortion Bans in Cases of Sex or Race Selection or Genetic Anomaly*, GUTTMACHER INST. (Oct. 1, 2017), http://www.guttmacher.org/state-policy/explore/abortion-bans-cases-sex-or-race-selection-or-genetic-anomaly [http://perma.cc/37SJ-V5NZ].

296. Nash et al., *supra* note 294.

297. 2013 Iowa Acts ch. 138, § 142.

298. Nora Caplan-Bricker, *Poison Pen*, NEW REPUBLIC (June 5, 2013), http://newrepublic.com/article/113378/iowa-budget-would-give-governor-power-over-medicaid-abortion-benefits [http://perma.cc/8F7A-PBS5].

299. Boonstra & Nash, *supra* note 282; *see Restricting Insurance Coverage of Abortion*, *supra* note 294.

bear the brunt of these laws. Similar to TANF funding, limitations on funding and insurance coverage do not abridge the rights of wealthy women who can pay out of pocket. These laws mandate that poor women, who cannot pay for the reproductive care they desire, do not have the right to such care. Such thinking continues a long history of using state resources to hold the poor and "immoral" captive. Although the tactics are new, the state continues to choose those who are fit and those who are unfit for full reproductive rights and freedom. Collectively, these laws exert enormous power and control over women's reproductive privacy and capacity to such a degree that procreative liberty simply does not apply to them.

III. DANGEROUS TIMES: A REPRODUCTIVE HEALTH WARNING

The normalization of a culture of unjust laws and dubious enforcement of those laws creates norms that will ultimately spill beyond racial lines. Poor women of color bear the overwhelming brunt of the state's hostility and deprivations related to reproductive health (and beyond as we describe in this Review). However, we predict this will not always be the case. As states enact restrictive abortion laws, and courts enforce them, an abusive precedent is set that eventually may hurt all women. This Part issues our warning call.

In *Letter from A Birmingham Jail*, King famously wrote that "injustice anywhere is a threat to justice everywhere."[300] On one hand, his point was that a threat to the civil rights and liberties of people in one community by the government could eventually become the problem of people elsewhere. We can call this the *canary in the coalmine theory*.[301] On the other hand, King flagged a discontent with those who would be passive to the harms which others experienced. He wrote of being "gravely disappointed" of those more concerned about order than justice, and frustrated by those who thought that Blacks should be more patient and wait for their constitutional rights to be realized.[302]

We believe both concerns apply to the plight described by Bridges regarding poor women's disenfranchisement of reproductive privacy protections. Bridges contends that "poor mothers will only bear the privacy rights that wealthier people bear when immorality is disarticulated from poverty and mothering while poor."[303] Simply put, poor women, especially women of color, have been hurt by the government and denied the rights accorded others by hurdles instantiated

300. King, *supra* note 36.

301. *See* LANI GUINIER & GERALD TORRES, THE MINER'S CANARY: ENLISTING RACE, RESISTING POWER, TRANSFORMING DEMOCRACY 11-12 (2002).

302. King, *supra* note 37.

303. BRIDGES, *supra* note 1, at 228.

by the State and its courts. We add that because wealthy women have enjoyed a wide range of reproductive choices since *Roe v. Wade*, they have not been the advocates for reproductive rights that poor women have needed.

Roe v. Wade provides little solace to a poor woman in Texas who wants to end her pregnancy but lives hours from the nearest clinic equipped to legally perform the procedure. *Whole Woman's Health* offers little relief to the poor woman still burdened by state-imposed waiting periods, which in some states exclude weekends and holidays—purportedly to protect her health and inform her consent.

We are deeply worried about the status of reproductive healthcare rights for poor women in the United States, especially for women of color—the population to which Bridges rightfully devotes critical attention. Because racial disparities infect many aspects of society (including healthcare delivery), Blacks, Latinas, Native Americans, and Asians may be subjected to harassing, discriminatory, and unlawful treatment triggered simply because of their racial and ethnic identities.[304] In combination, the hobbling impacts of race, sex, and class bias may render reproductive privacy rights more illusory than real for them—or, as Bridges says in her strong claim, nonexistent.

As we argued in Part II, ineffective reproductive rights can influence many aspects of poor women's lives, including employment opportunities, their children's future, and their ability to break through the state-reinforced cycle of poverty. In addition, we argue that reproductive privacy rights are deeply tied to women's health rights in general.

Although the rates of maternal mortality are generally disconcerting in the United States, they are particularly horrendous for Black women. Black women's maternal mortality is nearly three and half times that of white women,[305] and rates are even worse in states like Mississippi, Arkansas, and Louisiana, where few or only one abortion clinic remains.[306] For example, one report shows that while "Black mothers gave birth to 11.4% of babies born in Texas in 2011 and 2012 . . . they accounted for 28.8% of all pregnancy related deaths."[307] Another

304. *See, e.g.*, ROBERTS, KILLING THE BLACK BODY, *supra* note 157 (discussing different ways in which racial disparities operate in society).

305. Mary Beth Flanders-Stepans, *Alarming Racial Differences in Maternal Mortality*, 9 J. OF PERINATAL EDUC. 50, 50-51 (2000); *Pregnancy Mortality Surveillance System*, CTRS. DISEASE CONTROL & PREVENTION (Nov. 29, 2017), http://www.cdc.gov/reproductivehealth/maternalinfanthealth/pmss.html [http://perma.cc/7V2Z-LNR2].

306. *See 2016 Health of Women and Children Report: Measure: Maternal Mortality*, AM.'S HEALTH RANKINGS, http://www.americashealthrankings.org/explore/2016-health-of-women-and-children-report/measure/maternal_mortality/state/ALL [http://perma.cc/MNM4-VU8T].

307. *Id.*

recent report observes that the maternal mortality rates in Chicksaw, Mississippi surpasses that of Rwanda: "[i]n some rural counties and dense cities alike, the racial disparity in maternal deaths is jaw-dropping."[308] In New York City, "Black women are twelve times more likely than white women to die from pregnancy-related causes."[309] Indiana, Vice President Pence's home state, has one of the worst records of maternal mortality in the nation.[310] Sadly, the global health goals established and adopted by the United States more than a decade ago have not been met, even as developing nations made great strides in addressing maternal morbidity.[311]

Courts have yet to protect women from some states' assaultive measures, like mandating vaginal ultrasounds as a condition of receiving an abortion, requiring pregnant women to hear the fetal heartbeat as a condition of receiving an abortion, or sharing information that the procedure might cause cancer and mental illness; many of these are based on dubious science.[312] It is true that even if a woman must travel to another state, it is much less of a cost than being forced into a life she does not want with a child she does not wish to have. The gravity of the distinction is quite clear. Nevertheless, it remains a cruel and immoral impingement on a right if a woman is required to leave her home state in order to access it.

Just as we have become comfortable with the idea that poor women do not deserve privacy rights, we also note that the normalization of medically unnecessary, invasive interference in poor women's reproductive lives creates cultural norms and precedents in medicine, society, law enforcement, legislatures, and courts that will undoubtedly spill over to all classes of women. Race privilege or economic affluence cannot protect wealthy white women against the encroachment of antiabortion laws. Even while middle-class women may be able to escape some of the crueler impacts of state infringements on their reproductive privacy, we predict they too will suffer if the onslaught on reproductive privacy is not brought to an end.

---

308. Meaghan Winter, *A Matter of Life & Death: Why Are Black Women in the U.S. More Likely To Die During or After Childbirth?*, ESSENCE (Sept. 26, 2017), http://www.essence.com/news/black-women-mortality-rate-child-deaths-united-states [http://perma.cc/63UE-DV7R].

309. *Id.*

310. *Id.*

311. MacDorman et al., *supra* note 24, at 453-54.

312. Elaine Schattner, *Do Abortions Cause Breast Cancer? The Shaky Science Behind Kansas' House Abortion Act*, SLATE (May 23, 2012, 6:16 AM), http://www.slate.com/articles/health_and_science/medical_examiner/2012/05/do_abortions_cause_breast_cancer_kansas_state_house_abortion_act_invokes_shaky_science_for_political_gain_.html [http://perma.cc/X8X6-P2WH].

This future is already upon us.[313] Forced cesarean sections and civil confinement of pregnant women illustrate our point. Consider the case of Lisa Epsteen, a white middle-class mother of five threatened with arrest for refusing to undergo a cesarean section. Epsteen informed her doctor that she simply wanted to wait two additional days before submitting to the operation. Her request was met with a threatening email, sent by the chairman of the University of South Florida's obstetrics and gynecology department. In the email, he threatened to have law enforcement arrest her, because as he put it, "you are leaving the providers of USF/TGH no choice."[314] Clearly, there were other choices, options, and approaches to take with this pregnant mother. The doctor simply chose a cruel and demeaning tactic, one that, if enforced, would have robbed his patient of her dignity and autonomy.

Epsteen's case is not isolated and represents a broader and troubling public health trend in the United States, where cesarean surgeries occur at a rate over double what is recommended or considered safe by the World Health Organization.[315] In Melissa Ann Rowland's case, refusal to submit to a cesarean section prompted her arrest.[316] She was ultimately charged with murder in the stillbirth of one of her fetuses.[317] Similar cases are documented in Washington, D.C., Illinois, Florida, New York, New Jersey, and other states.[318] When women are treated as medical research subjects, required to undergo procedures against their will, then their reproductive rights have become illusory.

In perhaps the most shocking of such cases, Angela Carder was forced to undergo a cesarean section over her dying objections.[319] In that case, she in-

313. *Cf.* Goodwin, *supra* note 35 (describing modern state interventions into women's pregnancies).

314. Letitia Stein, *USF Obstetrician Threatens To Call Police If Patient Doesn't Report for C-Section*, TAMPA BAY TIMES (Mar. 6, 2013, 4:59 PM), http://www.tampabay.com/news/health/usf-obstetrician-threatens-to-call-police-if-patient-doesnt-report-for/2107387 [http://perma.cc/XKN3-PF73].

315. Anna Almendrala, *U.S. C-Section Rate Is Double What WHO Recommends*, HUFFINGTON POST (Apr. 16, 2015, 10:58 AM), http://www.huffingtonpost.com/2015/04/14/c-section-rate-recommendation_n_7058954.html [http://perma.cc/V8UD-DAYR].

316. Alexandria Sage, Associated Press, *Mother Denies Murder Charges*, L.A. TIMES, (Mar. 14, 2004), http://articles.latimes.com/2004/mar/14/news/adna-mom14 [http://perma.cc/77DG-K5SV].

317. *Id.*

318. *See* Goodwin, *supra* note 35.

319. *See In re* A.C., 573 A.2d 1235, 1237 (D.C. 1990) (en banc) (holding that when a pregnant patient is near death and her fetus is viable, the decision of what is to be done is to be decided by the patient, unless the patient is incompetent).

formed doctors that she wanted to receive chemotherapy and did not want a cesarean section. Her doctors successfully sought a court order, which granted them the authority to open her womb and remove her fetus. The fetus died in two hours and Ms. Carder died soon thereafter, never receiving the medical treatment she requested. When women are punished for choosing vaginal deliveries, the most natural way for a woman to give birth, then reproductive rights are in serious jeopardy for all women.

Recent cases in Wisconsin involving the civil punishment of pregnant women are also troubling. Wisconsin has revisited the Unborn Child Protection Act,[320] which largely targeted poor Black mothers in the 1990s for drug use during pregnancy. However, the most recent civil confinements have not concerned Black women. Instead, Alicia Beltran was forced into civil confinement for more than seventy days in 2013 for the supposed protection of her fetus, even while no medical threat to her fetus existed.[321]

Beltran's prenatal visit, where she disclosed prior dependence on prescription medications, triggered medical providers to disclose private patient information to law enforcement and state officials. Beltran was arrested, and although no lawyer was provided for her, the state granted representation for her fetus.[322] Soon thereafter, Tamara Loertscher, was forced into solitary confinement by the state, also for the purpose of protecting her fetus.[323] According to Lynn Paltrow, the Executive Director of National Advocates for Pregnant Women, while the exact number of women in Wisconsin who have been civilly confined under its laws is unknown, since 2006 at least 470 women are reported to have broken its Unborn Child Protection Act.[324]

Our warning call is not to minimize the important fact that poor women of color stand on the frontlines of legislative assaults on reproductive privacy. We recognize those harsh realities. But by understanding the broader impacts of

---

320. 1995 WISC. ACT 292 (1997). The constitutionality of this act is currently being challenged in the courts. *See* Andrew Chung, *Supreme Court Lifts Ban on Wisconsin's 'Cocaine Mom' Law During Appeal*, REUTERS (July 7, 2017, 5:10 PM), http://www.reuters.com/article/us-usa-court-cocaine/supreme-court-lifts-block-on-wisconsin-cocaine-mom-law-during-appeal-idUSKBN19S2YX [http://perma.cc/BSB6-HHRZ].

321. Daniella Silva, *Shackled and Pregnant: Wis. Case Challenges 'Fetal Protection' Law*, NBC NEWS (Oct. 24, 2013, 9:32 AM), http://usnews.nbcnews.com/_news/2013/10/24/21117142-shackled-and-pregnant-wis-case-challenges-fetal-protection-law [http://perma.cc/8594-RVHR].

322. *Id.* (reporting that "what started as a routine visit ended with Beltran eventually handcuffed and shackled in government custody").

323. Nina Liss-Schultz, *A Judge Struck Down the "Cocaine Mom" Law That Put Pregnant Women in Jail*, MOTHER JONES (May 1, 2017, 9:58 PM), http://www.motherjones.com/politics/2017/05/tamara-loertscher-unborn-child-protection-wisconsin-pregnant-jail [http://perma.cc/SW6F-G3GD].

324. *Id.*

these privacy encroachments, all women will recognize their shared interests in agitating for change. Middle-class white women must come to see a shared destiny with poor women of color. Failure to comprehend this reality will doom them too.

CONCLUSION

Sadly, in this Review, we report that for poor women, reproductive privacy, including access to the family planning that King called "urgent" and "necessary" has become more illusory than real. That is, women's abilities to act autonomously of the state in control of their bodies continues to be determined by their race and class, and threatened by assaultive reproductive health laws, coercive judicial opinions, and sometimes indifferent medical providers. The effect has been to neuter the meanings of reproductive privacy, procreative liberty, and choice.

The impacts are cruel and immoral in the lives of poor women of color. This is the point of *The Poverty of Privacy Rights*. Bridges urgently intervenes in the scholarly literature on motherhood and state power[325] to argue that to be poor in the United States and dependent on governmental assistance is to experience intrusions and trampling on constitutional rights unrivaled by all others in society.

325. *See* LINDA BURNHAM, WORKING HARD, STAYING POOR: WOMEN AND CHILDREN IN THE WAKE OF WELFARE "REFORM" (2000); GUSTAFSON, *supra* note 149; Ann Cammett, *Deadbeat Dads & Welfare Queens: How Metaphor Shapes Poverty Law,* 34 B.C. J.L. & SOC. JUST. 233 (2014); Camille Gear Rich, *Reclaiming the Welfare Queen: Feminist and Critical Race Theory Alternatives to Existing Anti-Poverty Discourse,* 25 S. CAL. INTERDISC. L.J. 257 (2016).