

# Challenging Punishment and Privatization: A Response to the Conviction of Regina McKnight

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## INTRODUCTION

After just fifteen minutes of deliberation, a South Carolina jury convicted Regina McKnight of “homicide by child abuse,” making her the first woman in the United States ever to be convicted for giving birth to a still-born baby as a result, prosecutors had argued, of using crack cocaine when pregnant.<sup>1</sup> The judge sentenced McKnight, a twenty-four-year-old, black, homeless, crack-addicted mother of three children, to serve twelve years in jail.<sup>2</sup> McKnight’s last hope, the United States Supreme Court, recently declined to review the South Carolina Supreme Court’s decision upholding her murder conviction.<sup>3</sup>

At the center of this tragedy is a debate about the proper role of the state in fighting poverty, the status of reproductive privacy, and the perceived need for pregnant drug addicts to exercise greater “personal responsibility.” Although the *McKnight* case deals exclusively with a state’s response to one woman’s drug addiction and pregnancy, the issues of welfare reform and privatization serve to frame the policy context for the case.<sup>4</sup>

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<sup>1</sup> *State v. McKnight*, 576 S.E.2d 168 (S.C. 2003), *cert. denied*, 124 S. Ct. 101 (2003). Although women have been convicted for child abuse and involuntary manslaughter under child neglect and child abuse statutes, no one before McKnight had been convicted of murder under a “homicide by child abuse” statute. See CYNTHIA R. DANIELS, *AT WOMEN’S EXPENSE: STATE POWER AND THE POLITICS OF FETAL RIGHTS* 100–04 (1993) (discussing prosecutions for assault, child abuse, child endangerment, and manslaughter). A woman was prosecuted in 1989 for criminally negligent homicide when her two-week-old son died, allegedly of drug-related complications, but McKnight’s case represents the first charge of homicide for a stillbirth. *Id.* at 104.

<sup>2</sup> *McKnight*, 576 S.E.2d at 171.

<sup>3</sup> 124 S. Ct. 101 (2003). See also Neil A. Lewis, *Justices Let Stand Ruling That Allows Forcibly Drugging an Inmate Before Execution*, N.Y. TIMES, Oct. 7, 2003, at A16.

<sup>4</sup> “Privatization” evokes divergent and often ideologically charged meanings, but in

Both progressives and conservatives fail to acknowledge the inevitability of state involvement in the reproductive sphere as well as in market transactions. As a result, the principal question we should address is not *whether* the state should be involved in these decisions, but *to what extent* and *how*? I argue that, to promote both individual agency and well-being, the state should strive to make a range of options realizable in the sphere of reproduction and the labor market. Ultimately, the liberal conception of privacy as “being left alone” and the laissez-faire conception of freedom as “absence of state coercion in the market,” lack the nuance needed to understand the predicament of low-income black women as illustrated in *McKnight*. Scholars such as Dorothy Roberts have articulated an alternative to liberal privacy that both respects women’s reproductive liberty and requires affirmative government obligations to ensure that women of all races have the capacity to exercise the formal freedoms guaranteed by the Constitution.<sup>5</sup> At its core, this alternative recognizes that to be “free” requires both individual agency and well-being.<sup>6</sup>

While everyone—feminists and non-feminists alike—has reason to be shocked and disturbed by the plight of McKnight’s stillborn baby, the state’s treatment of McKnight is also cause for alarm and close scrutiny. The *McKnight* case calls specifically for feminist analysis because it offers a snapshot of the current relationship between the state and the most vulnerable women in America. The problems that the case illuminates are women-centered in at least two ways. First, the state in *McKnight* exploits the unique vulnerability accompanying pregnancy in order to regulate and punish a particular stratum of women for perceived deviance. Second, the state’s overall privatization agenda and concomitant lack of child care services acutely disadvantages mothers—single mothers in particular—by essentially requiring them both to care for their children and to work outside the home.<sup>7</sup> In pushing single mothers into the labor market, despite the dearth of affordable child care and living-wage jobs, the state simply ignores economic deprivation instead of reducing it. In designing a punitive regime to deal with the difficult problems of maternal substance

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this Note it refers simply to a trend toward diminished public spending and public commitments, and the associated rhetoric about the desirability of free markets and centrality of freedom of contract. Some forms of privatization involve partnerships between government and private institutions that produce greater efficacy for both parties. As a result, not all privatization signals an actual decrease in government spending, nor is privatization categorically undesirable from the standpoint of equality or social justice.

<sup>5</sup> Dorothy E. Roberts, *Punishing Drug Addicts Who Have Babies: Women of Color, Equality, and the Right of Privacy*, 104 HARV. L. REV. 1419 (1991) [hereinafter Roberts, *Punishing*].

<sup>6</sup> See AMARTYA SEN, *INEQUALITY REEXAMINED* 39–40, 56–60 (1992) (defining “agency freedom” as the freedom to pursue one’s personal goals and “well-being freedom” as the freedom to achieve well-being, i.e., the substantive freedom to realize a state of “wellness”).

<sup>7</sup> See Martha Minow, *The Welfare of Single Mothers and Their Children*, 26 CONN. L. REV. 817, 822 (1994).

abuse, reproductive choice, poverty, and subordination, the state sends the message that certain women either lack the capacity for personal responsibility and good mothering or that they are disinterested in those virtues.

Concurrently, laissez-faire liberals and defenders of “free markets” have pushed an aggressive privatization agenda during the last decade. From cuts in social and educational programs to “ending welfare as we know it,” state support for women, children, and families has dropped significantly.<sup>8</sup> Instead of addressing dependency and meeting economic and medical needs, the state has “privatized dependency” and pushed previously public obligations into the private sphere.<sup>9</sup> As a result, pregnant women and mothers unable to meet unrealistic market ideals of self-sufficiency and subsistence through the freedom of contract are labeled as lazy, incompetent, or undeserving of a decent life.<sup>10</sup> Although the twin trends of reproductive regulation and economic privatization have doubly penalized poor pregnant women, the *McKnight* case illuminates the disastrous consequences for low-income black women in particular because of the historical devaluation of black mothers and black children in U.S. social policy and political culture.<sup>11</sup>

Part I of this Note presents a critique of the logic underlying the *McKnight* decision, focusing on the court’s flawed privacy analysis, and the special role of privacy more generally in the lives of black women.<sup>12</sup> Part II

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<sup>8</sup> See Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA), Pub. L. No. 104-193, 110 Stat. 2105 (1996). Testimony by a Fellow at the Heritage Foundation indicates that total AFDC/TANF expenditures decreased from \$32.1 billion to \$21.7 billion from 1995 to 1999. Robert E. Rector, *The Size and Scope of Means-Tested Welfare Spending* (Aug. 1, 2001), at chart 6, available at <http://www.heritage.org/Research/Welfare/Test080101.cfm> (last visited Mar. 11, 2004). See also Andrea Wilkins & Jill Glaspey, *State TANF Spending for Federal Fiscal Years 2000 and 2001* (July 2002) (indicating that in fiscal year 2001, South Carolina spent \$282 per poor child per year, down from \$345 per poor child in fiscal year 2000, and outdone in penalty only by Arkansas, Alabama, Idaho, Louisiana, Texas, and Mississippi, while the national average was \$958), available at <http://www.ncsl.org/statefed/welfare/stanfspending.htm>.

<sup>9</sup> Martha L.A. Fineman, *Masking Dependency: The Political Role of Family Rhetoric*, 81 VA. L. REV. 2181, 2187 (1995).

<sup>10</sup> This is reflected in the way in which libertarians and conservatives characterize families on welfare as suffering from “behavioral” problems that must be cured by instilling the virtues of hard work and marriage. See Rector, *supra* note 8. This view ignores both market imperfections and “structural” unemployment that prevents labor markets from clearing even in perfectly competitive markets. Indeed, even if every single able-bodied adult sought a job, there would not be enough to go around. For a defense of a publicly funded “basic income” due to the inability of labor markets to clear, see Philippe Van Parijs, *Why Surfers Should Be Fed: The Liberal Case for an Unconditional Basic Income*, 20 PHIL. & PUB. AFF. 101 (1991). For an early-twentieth-century discussion of the “structural” causes of poverty, see JOHN LEWIS GILLIN, *POVERTY AND DEPENDENCY* 46 (1921).

<sup>11</sup> See *infra* Part I.B.2. For evidence of the pathologization of single black motherhood, see DANIEL PATRICK MOYNIHAN, *U.S. DEP’T OF LABOR, THE NEGRO FAMILY: THE CASE FOR NATIONAL ACTION* (1965), and for a discussion of the disparate policy responses to white and black illegitimate births, see Rickie Solinger, *Race and “Value”: Black and White Illegitimate Babies, 1945–1965*, in *MOTHERING: IDEOLOGY, EXPERIENCE, AND AGENCY* 287 (Evelyn Nakano Glenn et al. eds., 1994) [hereinafter Solinger, *Race and “Value”*].

<sup>12</sup> While much of the analysis in this Note applies to poor women of all races, I focus

considers the case in the context of the broader culture of economic libertarianism, or privatization, which has swept over the United States, and explores the effects of privatization on low-income pregnant women and mothers of color. Part II concludes that the laissez-faire liberal and social conservative positions, despite rhetorical inconsistencies, reinforce each other in a way that ensures neither individual agency nor well-being for low-income black women.

### I. PUNISHING PREGNANT DRUG ADDICTS: SOCIAL CONSERVATIVES IN THE COURTROOM

#### A. *Regina McKnight's Story*<sup>13</sup>

Regina McKnight has three children and lived with her mother for most of her life. She had no prior convictions, and her attorneys told news reporters that McKnight was “borderline mentally retarded.”<sup>14</sup> In 1998, McKnight’s mother was killed in a car accident, and McKnight, at age twenty-one, began living on the streets.<sup>15</sup> When she became homeless, McKnight sent her children to live with relatives to ensure they had a roof over their heads.<sup>16</sup>

McKnight was offered drugs at her mother’s funeral, and she eventually became addicted to crack cocaine and involved in abusive relationships.<sup>17</sup> At age twenty-two, McKnight became pregnant while addicted to crack, and on May 15, 1999, she gave birth at Conway Hospital to a five-pound, stillborn baby girl estimated to be between thirty-four and thirty-seven weeks old and whom McKnight named “Mercedes.”<sup>18</sup> In South Carolina, women who have not had prenatal care or who experience unexplained fetal demise are tested for drug use. After receiving positive results from the drug test administered to McKnight, the hospital staff reported McKnight to the police in Horry County.

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on black women because of the specific historical legacy of state denigration of black motherhood. *See infra* Part I.B.2.

<sup>13</sup> For an excellent discussion of Regina McKnight’s life, as understood by her own appellate attorneys and other people who know her, see Dana Page, Note, *The Homicide by Child Abuse Conviction of Regina McKnight*, 46 *How. L.J.* 363 (2003).

<sup>14</sup> Anne Gearan, *Homicide by Child Abuse Conviction Stands; High Court Refuses To Hear Appeal*, *SUN-NEWS* (Myrtle Beach, S.C.), Oct. 7, 2003.

<sup>15</sup> *Id.*

<sup>16</sup> *See* Page, *supra* note 13, at 369.

<sup>17</sup> McKnight was involved with a series of abusive men. *See id.*

<sup>18</sup> *Id.* at 367; *see also* Rick Brundrett, *Woman Wants Court To Overturn Fetus Killing*, *STATE* (Columbia, S.C.), May 28, 2003, at 3. The choice of the phrase “fetus killing” imputes intent to McKnight that she simply did not have. Moreover, the viability of McKnight’s fetus was in dispute. *See* Page, *supra* note 13, at 395.

*B. State v. McKnight*

McKnight was charged and convicted under South Carolina's "homicide by child abuse" law.<sup>19</sup> Under that law, a person is guilty of homicide by child abuse if he or she "causes the death of a child under the age of eleven . . . under circumstances manifesting an extreme indifference to human life . . ." <sup>20</sup> Central to the South Carolina Supreme Court's decision upholding McKnight's conviction were two conclusions: first, that a fetus is a "child" for the purposes of the statute, despite the existence of a separate criminal abortion statute to cover illegal late-term abortions; and second, that McKnight's behavior evidenced an "extreme indifference to human life." The next two subsections address each of these conclusions in turn; subsequent sections address the court's privacy analysis, the limits of liberal privacy, and a non-punitive role for the state in averting similar tragedies in the future.

*1. Equating a Fetus to a "Child in Being"*

South Carolina has led the trend toward prosecuting women for conduct during pregnancy by expanding the notion of "fetal rights."<sup>21</sup> However, the first such prosecution occurred in Florida in 1989.<sup>22</sup> Jennifer Johnson had given birth to her son in 1987 and her daughter in 1989 while she was addicted to cocaine.<sup>23</sup> Florida prosecutors charged twenty-three-year-old Johnson with two counts of delivering a controlled substance to her children and one count of child abuse for allegedly harming her daughter in utero.<sup>24</sup> Because state law at the time did not recognize the fetus as a person with rights distinct from and adversarial to those of the mother, the prosecutor argued that Johnson passed drugs to her children in the sixty-second gap between birth and the time when the doctors cut the umbilical cord.<sup>25</sup>

South Carolina began prosecuting pregnant drug-addicted women shortly thereafter, requiring mandatory arrest of any woman who tested

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<sup>19</sup> S.C. CODE ANN. § 16-3-85 (West 2003).

<sup>20</sup> *Id.*

<sup>21</sup> A full discussion of "fetal rights" and its implications for women's reproductive liberty and well-being is beyond the scope of this Note. See generally DANIELS, *supra* note 1; Janet Gallagher, *Prenatal Invasions & Interventions: What's Wrong with Fetal Rights*, 10 HARV. WOMEN'S L.J. 9 (1987); Lynn M. Paltrow, *Pregnant Drug Users, Fetal Persons, and the Threat to Roe v. Wade*, 62 ALB. L. REV. 999 (1999); Jean Reith Schroedel et al., *Women's Rights and Fetal Personhood in Criminal Law*, 7 DUKE J. GENDER L. & POL'Y 89 (2000).

<sup>22</sup> DOROTHY E. ROBERTS, *KILLING THE BLACK BODY* 162-63 (1997) [hereinafter ROBERTS, *KILLING*].

<sup>23</sup> DANIELS, *supra* note 1, at 87.

<sup>24</sup> ROBERTS, *KILLING*, *supra* note 22, at 162-63. The child abuse charge was dropped due to insufficient evidence that Johnson's daughter was actually harmed by her mother's drug use.

<sup>25</sup> *Id.* at 163.

positive for drugs after delivering a baby.<sup>26</sup> In the South Carolina Supreme Court's landmark 1997 decision of *Whitner v. State*,<sup>27</sup> the court established independent "rights" for the fetus in the context of maternal drug use by holding that the word "child" in a child neglect statute extended to "viable" fetuses.<sup>28</sup> Instead of reading drug distribution statutes in novel ways to capture maternal drug use, prosecutors would now need only to apply statutes that the legislature had passed to protect children in being, because viable fetuses would enjoy an equal level of legal personhood. In his forceful dissent, Justice Moore noted that reading "child" to include a viable fetus misinterpreted the statutory text and demonstrated infidelity to legislative purpose, given the applicability of the criminal abortion statute to the charge of "feticide."<sup>29</sup>

Taken together, these cases send an alarming message that the state has a virtually unbounded prerogative to regulate women's bodies because of the range of conduct that might possibly threaten or harm a fetus.<sup>30</sup> For example, the conventional wisdom counsels that women should not smoke or drink alcohol during pregnancy, due to the dangers of Fetal Alcohol Syndrome (FAS)<sup>31</sup> and Sudden Infant Death Syndrome (SIDS).<sup>32</sup> Often, doctors recommend that women stay off their feet and abstain from sexual intercourse during pregnancy. However, for a variety of reasons, pregnant women engage in all of these behaviors. The appropriate question is not whether these are "best practices" for pregnant women—they certainly are not—but whether the state's response should be rehabilitative, educative, or punitive. Given that women punished for illegal drug use during pregnancy are punished for the alleged harm to the fetus, not for the illegality of the drug use (use is most often a misdemeanor, not a felony),<sup>33</sup> should a woman go to jail for drinking alcohol while pregnant, or even for simply not following her doctor's orders?

In the case of Pamela Rae Stewart, the state of California came perilously close to answering "yes."<sup>34</sup> Stewart's doctor warned her to abstain

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<sup>26</sup> *Id.* at 165.

<sup>27</sup> 492 S.E.2d 777 (S.C. 1997), *cert. denied*, 523 U.S. 1145 (1998).

<sup>28</sup> *Id.* at 779–81.

<sup>29</sup> *Id.* at 787–88 (Moore, J., dissenting).

<sup>30</sup> See ROBERTS, KILLING, *supra* note 22, at 171 (discussing how recognition of the fetus as a "child" under child abuse statutes "opens up a Pandora's box," as "an endless panoply of activities could make pregnant women guilty of a crime"). For example, even though alcohol consumption is legal and crack consumption illegal, it is public knowledge that alcohol may harm a fetus, and on this logic a woman who drinks alcohol while pregnant would be equally susceptible to prosecution. See *id.* at 177.

<sup>31</sup> See, e.g., Cynthia Larkby & Nancy Day, *The Effects of Prenatal Alcohol Exposure*, 21 ALCOHOL HEALTH & RES. WORLD 192 (Nat'l Inst. Alcohol Abuse & Alcoholism 1997).

<sup>32</sup> See, e.g., Kirsten Wisborg et al., *A Prospective Study of Smoking During Pregnancy and SIDS*, 83 ARCHIVES DISEASE CHILDHOOD 203 (2000).

<sup>33</sup> Moreover, these women are prosecuted under child abuse statutes, not drug abuse statutes.

<sup>34</sup> *Fetus Abuse? Against Doctor's Orders (Pamela Rae Stewart Fetus Support Case)*, TIME, Oct. 13, 1986, at 81. Recently, Utah prosecutors charged twenty-eight-year-old Melissa

from sexual intercourse during her pregnancy, to avoid street drugs, to take prescribed medication, and to stay off her feet, because of a misaligned placenta. Stewart neglected these instructions and gave birth to a brain-dead son, who died six weeks after birth.<sup>35</sup> Prosecutors charged her with failure to provide for her baby under the child support laws, but the judge ultimately dismissed the case, and Stewart spent just one week in jail.<sup>36</sup> Although the Stewart case may appear anomalous, under the law of *Whitner* and *McKnight*, the State of South Carolina has the discretion to prosecute women for not following doctor's orders, and any "negligent" behavior<sup>37</sup> that could potentially harm the fetus can trigger liability.<sup>38</sup> Such prosecutions would permit the state to regulate women in their day-to-day pregnant lives, in essence rendering them incubators of miniature "state interests." A pregnant woman "is more than a location for gestation."<sup>39</sup> Yet the potential for such intrusive regulation is inherent in the logic of the *McKnight* decision.<sup>40</sup>

The basic message of *McKnight* is that the state has standards for what constitutes good behavior during pregnancy, and anyone who violates those standards risks being imprisoned. The subtext suggests that a woman has dignity only by virtue of a fetus or a family, and a woman is valuable to society only in the context of pregnancy.<sup>41</sup> Given the dynamics of poverty and the relative hysteria over crack cocaine compared to alcohol, nicotine, and powder cocaine, most women charged as unfit are not going to be middle-class white women. The public seems to view white women who

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Ann Rowland with murder for giving birth to a stillborn baby. Rowland had disobeyed her doctor's recommendation that she have a Caesarian section to save her twin fetuses. See Kirk Johnson, *Harm to Fetuses Becomes Issue in Utah and Elsewhere*, N.Y. TIMES, Mar. 27, 2004, at A9.

<sup>35</sup> See *Fetal Abuse? Against Doctor's Orders (Pamela Rae Stewart Fetus Support Case)*, *supra* note 34, at 81; Paltrow, *supra* note 21, at 1003 n.16.

<sup>36</sup> Andrea Sachs, *Here Comes the Pregnancy Police; Mothers of Drug-Exposed Infants Face Legal Punishment*, TIME, May 22, 1989, at 104.

<sup>37</sup> For an explanation of the intent standard in *McKnight*, see *infra* Part I.B.2.

<sup>38</sup> Dorothy Roberts criticizes the "parade of future horrors" argument for ignoring the situation of low-income black women and basing the argument on the potential danger to white, middle-class women. Roberts, *Punishing*, *supra* note 5, at 1460. However, I view this approach as using the situation of low-income black women to illuminate the broader implications of the law. This resembles the "miner's canary" argument, which suggests that the experiences of subordinated people, such as low-income black women, expose underlying institutional problems that affect all people, not just the subordinated group. See generally LANI GUINIER & GERALD TORRES, *THE MINER'S CANARY: ENLISTING RACE, RESISTING POWER, TRANSFORMING DEMOCRACY* (2002).

<sup>39</sup> Catharine A. MacKinnon, *Reflections on Sex Equality Under Law*, 100 YALE L.J. 1281, 1316 (1991).

<sup>40</sup> Despite the potentially expansive scope of this kind of statute, prosecutors thus far have focused on punishing pregnant women who use illegal drugs. Nonetheless, the prosecutor who charged Jennifer Johnson told the judge he "never viewed this as a drug case." See ROBERTS, *KILLING*, *supra* note 22, at 180 (emphasis omitted). For a discussion of the reasons behind the focus on crack cocaine, see *infra* Part I.B.2.

<sup>41</sup> "Indeed, it shows how powerless women are that it takes a fetus to make a woman look powerful by comparison." MacKinnon, *supra* note 39, at 1317.

drink alcohol during pregnancy as women who have erred but who can learn from their mistakes. In contrast, under the punitive approach, black women addicted to drugs cannot be educated or rehabilitated—only imprisoned.<sup>42</sup>

## 2. Constructing “Recklessness”

The second basic conclusion at the core of McKnight’s conviction is that McKnight acted with reckless indifference to her fetus. The court interpreted reckless disregard for the safety of others to denote “a conscious failure to exercise due care or ordinary care or a conscious indifference to the rights and safety of others or a reckless disregard thereof.”<sup>43</sup> Coupled with the assumption of widespread “public knowledge” of the negative effects of crack consumption on fetuses, the *McKnight* court concluded that McKnight had demonstrated the requisite criminal intent by consuming crack while pregnant.

### a. Devaluing Black Mothers

The court’s conclusion about McKnight’s intent grows out of a history of assumptions denigrating black motherhood and robbing black women of agency. The prosecution of black mothers’ occurs in the context of a tradition in American social policy that assumes black women lack the capacity to care for their fetuses and are presumptively unfit, i.e., unmarried, unemployed, and “reckless.”<sup>44</sup> Adrien Katherine Wing claims that, while “[t]he law rewards the self-sacrificing, nurturing, married, white, solvent, stay-at-home, monogamous, heterosexual, female mother,” few people who do the work of mothering fit this description today.<sup>45</sup> Specifically, black motherhood has been viewed alternatively as either

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<sup>42</sup> See Janet Golden, “A Tempest in a Cocktail Glass”: *Mothers, Alcohol, and Television 1977–1996*, 25 J. HEALTH POL. POL’Y & L. 473, 482–87 (2000) (discussing the way crack abuse is portrayed by the media to be a criminal choice, while alcoholism is portrayed as an individualized disease from which repentant mothers may recover, and the racial dimension of this perception). By denying the possibility of rehabilitation, the law denies many black women agency, while permitting many white women to “learn from their mistakes.” At the same time, it imposes punishment on conduct without considering the effects of structural barriers to agency, such as economic deprivation, political powerlessness, and social isolation.

<sup>43</sup> *McKnight*, 576 S.E.2d at 173.

<sup>44</sup> See Gwendolyn Mink, *Welfare Reform in Historical Perspective*, 26 CONN. L. REV. 879 (1994) [hereinafter Mink, *Welfare Reform*]; ROBERTS, KILLING, *supra* note 22, 202–08. This assumption has existed since the welfare state’s inception and has been manifested in the often-humiliating “morals” screening to which aid recipients are subjected. See Mink, *The Lady and the Tramp: Gender, Race, and the Origins of the American Welfare State, in WOMEN, THE STATE, AND WELFARE* 110 (Linda Gordon ed., 1990) [hereinafter Mink, *The Lady and the Tramp*].

<sup>45</sup> Adrien Katherine Wing & Laura Weselmann, *Transcending Traditional Notions of Mothering: The Need for Critical Race Feminist Praxis*, 3 J. GENDER RACE & JUST. 257, 258 (1999).

unthinking and wholly “natural,” or completely cold-hearted and premised on economic calculation.<sup>46</sup> Rickie Solinger recounts an era of welfare policy in which psychologists presumed black women to embody unrestrained sexuality and a natural predisposition to love their children regardless of legitimacy.<sup>47</sup> They experienced none of the psychological and emotional complexity experienced by white unwed mothers. On this view, black women were seen as programmed to love their babies, while white woman struggled with stigma. These assumptions facilitated a policy of “benign neglect,” under which the state had no role in supporting unwed black mothers, because illegitimacy was an inherited trait of the black race.<sup>48</sup> The state justified inaction by appealing to the supposedly intractable, genetic roots of black unwed motherhood.<sup>49</sup>

In contrast, a competing approach to illegitimacy advocated an active state role in punishing black “delinquency.” Solinger situates this approach in the context of illicit adoption markets for white babies that generated huge profit. Although white illegitimate babies began life with a moral taint, the willingness of upscale families to adopt them erased the “sin” of their birth.<sup>50</sup> In contrast, because black babies did not fetch a high price in these same adoption markets, black women were viewed as producers of “valueless” black children.<sup>51</sup> To make matters worse in the eyes of the so-called “punishers,” black women’s valueless reproduction was bankrolled by the public via welfare.<sup>52</sup> By subsidizing illegitimacy, the state fueled the black woman’s decision to “trade on her reproductive function,” or produce children to amass a welfare fortune.<sup>53</sup> This fiction persisted, even though most unwed black mothers did not receive welfare.<sup>54</sup> The “bad value” and “high price” of black babies led punishers to believe that “[b]lack, unmarried mothers should pay dearly for the bad bargain they foisted on society.”<sup>55</sup> By characterizing black women’s reproductive decisions as a fusion of “sexual and fiscal irresponsibility,” the punishers advanced an agenda that cast black women as economic calculators, not mothers capable of complex emotional connections, or compassion.<sup>56</sup>

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<sup>46</sup> Solinger, *Race and “Value,”* *supra* note 11. For a modern articulation of this view, see Charles Krauthammer, *Subsidized Illegitimacy . . .*, WASH. POST, Nov. 19, 1993, at A29 (“In cold economic terms, a baby can be an asset, which is without doubt an important factor behind exploitative sex and out-of-wedlock babies.”) (quoting University of Pennsylvania Professor Elijah Anderson).

<sup>47</sup> Solinger, *Race and “Value,”* *supra* note 11, at 298–99.

<sup>48</sup> *Id.* at 298.

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> *Id.* at 300.

<sup>52</sup> “Punishers” is a term coined by Solinger that refers to individuals who maintained that “for a poor, Black woman to have a baby was an act of selfishness, as well as of pathology, and deserved punishment.” *Id.* at 299.

<sup>53</sup> *Id.* at 300.

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> *See id.* at 301.

These assumptions help contextualize the state's judgment that McKnight acted recklessly toward her fetus. By denying the possibility that McKnight wanted to be a mother to "Mercedes," that she was capable of a complex emotional connection to her child, and that she needed support and care to play this role, the state denied McKnight's dignity as a person. The prosecutor dismissed her as uninterested in overcoming her drug addiction because she "didn't seek help,"<sup>57</sup> but did not consider that a woman in a subordinated position cannot live up to a standard of motherhood ("married, white, solvent"<sup>58</sup>) that assumes privileges she does not have. Although McKnight's use of drugs during her pregnancy is tragic, the state erroneously judged her intent.

*b. The "War on Drugs" and Questions of Causation*

The state's evaluation of McKnight's intent must also be understood in the context of a decades-old hysteria over crack cocaine in low-income communities of color. In the 1980s, the Reagan Administration announced a war on illegal drugs in America. Even though similar percentages of whites and blacks use drugs, much of the public continues to identify drug use as a "black problem," and blacks continue to be incarcerated at higher rates for drug offenses.<sup>59</sup> Although the result of neither "an accident nor a conspiracy," the war on drugs has had well-documented disparate effects on people of color versus whites.<sup>60</sup> The NAACP has recently noted that despite the higher prevalence of both crack and powder cocaine use among Caucasians, "almost 97% of all crack cocaine defendants are African American or Latino."<sup>61</sup> The problem has been exacerbated by disparate sentencing for crack and powder cocaine. In passing the Anti-Drug Abuse

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<sup>57</sup> Jeffrey Collins, *Poll: Prison Not For Pregnant Users: 600 S.C. Voters Answered Survey*, SUN-NEWS (Myrtle Beach, S.C.), Mar. 13, 2003 (discussing remarks of prosecutor Greg Hembree).

<sup>58</sup> I do not mean to argue that black motherhood embraces a concept of maternal drug use, nor am I suggesting that white pregnant women do not use drugs. Instead, following Wing & Weselmann, *supra* note 45, at 258, I am suggesting that the ideal of motherhood—the nurturing, stay-at-home mother with no medical or social problems—is racialized, i.e., built on white privilege.

<sup>59</sup> See Donna Coker, *Foreword: Addressing the Real World of Racial Injustice in the Criminal Justice System*, 93 J. CRIM. L. & CRIMINOLOGY 827, 833 (2003) (citing the 2001 National Household Survey on Drug Abuse, which found rates of illicit drug use to be 7.4% among blacks, 7.2% among whites, and 6.4% among Hispanics). *But see* R. Richard Banks, *Beyond Profiling: Race, Policing, and the Drug War*, 56 STAN. L. REV. 571, 581 n.50 (2003) (noting that the major national surveys of drug use exclude individuals who are incarcerated, thus undercounting drug use among minorities).

<sup>60</sup> Kenneth B. Nunn, *Race, Crime, and the Pool of Surplus Criminality: Or Why the "War on Drugs" was a "War on Blacks"*, 6 J. GENDER RACE & JUST. 381, 384 (2002).

<sup>61</sup> Memorandum from Kweisi Mfume, President & CEO, NAACP, & Hilary O. Shelton, Director, NAACP Washington Bureau, to NAACP Membership (Aug. 7, 2003) (discussing statistics from the Office of National Drug Control Policy), at [http://www.naacp.org/work/washington\\_bureau/CocaineSent080703.shtml](http://www.naacp.org/work/washington_bureau/CocaineSent080703.shtml) (last visited Mar. 11, 2004) [hereinafter NAACP Action Alert].

Act of 1986, Congress established the 100-to-1 drug quantity ratio for powder cocaine and crack cocaine offenses.<sup>62</sup> Largely as a result of this disparity, the average sentence for crack offenses is sixty percent longer than for powder cocaine.<sup>63</sup> Because the vast majority of crack defendants are black, while whites and blacks are more equally represented among powder cocaine defendants, this sentencing disparity has led to disproportionately heavy sentences for blacks.<sup>64</sup> Congress initially justified the disparity on the suspicion that crack was more pure and addictive than powder cocaine, more harmful to fetuses, associated with more violence and systemic crime, and more likely to be used by young people.<sup>65</sup> However, a new consensus has emerged within the U.S. Sentencing Commission that Congress operated with faulty empirical data, and that none of the suggested rationales supports the disparity today.<sup>66</sup>

Part of the hysteria over crack cocaine also originates in concerns over prenatal exposure to the drug. Early studies suggested that prenatal crack exposure produced greater negative effects on babies than prenatal exposure to powder cocaine. Contrary to these early conclusions, the Sentencing Commission notes that “prenatal exposure to crack cocaine produces identical effects as prenatal exposure to powder cocaine and is far less devastating than previously reported.”<sup>67</sup> Some studies suggest that prenatal exposure to crack cocaine or powder cocaine produces smaller head circumferences, lower motor scores, greater fussiness and reflex deficiencies.<sup>68</sup> Cocaine-exposed babies may have shorter attention spans, experience tremors, and appear agitated and generally “inconsolable.”<sup>69</sup> More seriously, a drug-exposed fetus may experience a stroke. All of these potential consequences are tragic and cause for tremendous public concern. Nonetheless, not all fetuses are affected the same way by maternal substance abuse, and the legal and medical question of causation is difficult. Researchers have concluded that environmental factors, such as poverty, inadequate health care, disorganization of the home, and social isolation operate as confounding variables, casting doubt on conclusions about causation.<sup>70</sup>

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<sup>62</sup> U.S. SENTENCING COMM’N, REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY 90 (2002), available at [http://www.ussc.gov/r\\_congress/02crack/2002crackrpt.htm](http://www.ussc.gov/r_congress/02crack/2002crackrpt.htm) [hereinafter U.S. SENTENCING COMM’N, COCAINE AND FEDERAL SENTENCING POLICY].

<sup>63</sup> *Id.*

<sup>64</sup> U.S. SENTENCING COMM’N, SOURCEBOOK OF FEDERAL SENTENCING STATISTICS tbl.34 (2001), available at <http://www.ussc.gov/ANNRPT/2001/SBTOC01.htm>.

<sup>65</sup> U.S. SENTENCING COMM’N, COCAINE AND FEDERAL SENTENCING POLICY, *supra* note 62, at 90.

<sup>66</sup> *Id.* at 91.

<sup>67</sup> *Id.*

<sup>68</sup> *Id.* at 26, 28.

<sup>69</sup> DANIELS, *supra* note 1, at 113–15.

<sup>70</sup> U.S. SENTENCING COMM’N, COCAINE AND FEDERAL SENTENCING POLICY, *supra* note 62, at 21, 27. These factors “may have as great or an even greater influence than the effect of prenatal drug exposure on children’s subsequent growth, performance, or behavior.” *Id.* at 27.

Dr. Glen Hanson, acting director of the National Institute on Drug Abuse, urged policy-makers to be “cautious in drawing causal relationships in this area, especially with a drug like cocaine.”<sup>71</sup> Dr. Deborah Frank, Professor of Pediatrics at Boston University School of Medicine, has characterized “crack baby syndrome” as “a grotesque media stereotype, not a scientific diagnosis.”<sup>72</sup> The *McKnight* court glossed over this difficult issue of causation and permitted the jury to find that the hazardous effects of cocaine consumption on fetal health are “public knowledge.”<sup>73</sup>

*c. Judging Pregnant Drug Addicts*

Instead of questioning whether an abused woman with an I.Q. of seventy-two fully understood the consequences of cocaine consumption, let alone had the capacity to end an addiction without medical support or the economic resources to obtain treatment, the *McKnight* court assumed that McKnight knowingly endangered her fetus in a way that showed “disregard for human life.”<sup>74</sup> The court never considered whether drug use during pregnancy exposes a lack of prenatal care and drug treatment rather than a callous indifference to the unborn.<sup>75</sup> Instead, all agents of the state depicted McKnight as lazy and disinterested in her fetus. The prosecutor described how “the only time [McKnight] cried like she did was when she was sentenced. She slept through a lot of the trial. I don’t think she showed that she really cared.”<sup>76</sup> Despite the insinuation that McKnight

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<sup>71</sup> *Id.* at 24 (quoting Glen R. Hanson, Ph.D., D.D.S., acting director of the National Institute on Drug Abuse).

<sup>72</sup> *Id.* at 22 n.64 (quoting Deborah A. Frank, M.D., professor of pediatrics, Boston University School of Medicine). See also Paltrow, *supra* note 21 (discussing the role of poverty and home environment in producing negative effects on “crack babies”).

<sup>73</sup> *McKnight*, 576 S.E.2d at 173. The difficulty of proving causation between substance abuse and fetal harm has led to the dismissal of some charges against new mothers. In a show of restraint, a South Carolina prosecutor reduced a child abuse felony charge to a misdemeanor after learning that placental abruption could have been caused by high blood pressure, as well as by maternal drug use. See *Mother Pleads Guilty to Abuse for Cocaine Use*, SUN-NEWS (Myrtle Beach, S.C.), Jan. 7, 2004. But to the extent that a prosecutor is bent upon punishing drug use as opposed to proving causation between drug use and the resultant harm, such prosecutorial restraint is too slender a reed on which to rely for equity. Putative concerns for fetal health also mask concerns about the public coffer: “[C]rack has sent shock waves through the region’s major public institutions, imposing a vast hidden tax on an unsuspecting populace . . . [T]he drug’s drain on public agencies became enormous, running into the hundreds of millions of dollars annually and stealing tax money desperately needed for libraries, recreation, schools.” Rich Connell, *The Hidden Devastation of Crack*, L.A. TIMES, Dec. 18, 1994, at A1.

<sup>74</sup> An attorney at the prosecutor’s office contended that McKnight “didn’t try to get help.” Collins, *supra* note 57 (discussing remarks of prosecutor Greg Hembree).

<sup>75</sup> Although total spending is a crude indicator of a state’s commitment, it is significant and noteworthy that South Carolina ranks last in spending on drug treatment. See Editorial, *Hitting an Easy Target*, HERALD (Rock Hill, S.C.), Oct. 8, 2003, at 7A.

<sup>76</sup> Sue Anne Pressley, *S.C. Verdict Fuels Debate Over Rights of the Unborn; Jury Finds Mother Guilty of Homicide in Stillbirth*, WASH. POST, May 27, 2001, at A03 (quoting prosecutor Bert Von Hermann).

was unmoved by the tragedy, the hospital nurse testified that McKnight grieved like “anyone would in the circumstances,” held her baby, and requested photographs after the birth.<sup>77</sup> The trial was a blur to McKnight, a nightmare in which she was accused of “murdering” her fetus,<sup>78</sup> but the prosecution treated McKnight as if she was simply a “typical” reckless black woman who treated pregnancy and its subsequent termination as unexceptional.<sup>79</sup>

The attitudes of the prosecutor and the court reveal a nasty kind of paternalism—not only a belief that the state knows what is better for people than they know themselves, and that those who deviate from the state’s conception “deserve” to go to jail, but that the state knows what is better for *black* women in particular.<sup>80</sup> The ability of the prosecutor, jury, and the judiciary to find McKnight recklessly indifferent resulted in part from their inability to see her as a woman with the capacity to be a mother.

### 3. *The Right to Privacy*

Aside from its harsh approach to the problem of drug abuse during pregnancy, the court’s reasoning in *McKnight* rests on dubious constitutional ground. By imprisoning McKnight for her choice to have a child while addicted to drugs—and for the tragic consequence that may or may not be attributable to her drug use—the state infringed on her fundamental right to reproductive privacy. Since *Skinner v. Oklahoma*,<sup>81</sup> the Supreme Court has recognized that the “right to procreate” is a “sensitive and important area of human rights,” protected by the Constitution’s grant of substantive liberties and equal protection.<sup>82</sup> Moreover, since *Roe v. Wade*,<sup>83</sup> the Court has recognized the symmetrical dimension of this right, i.e., that the “qualified” right of a woman to terminate her pregnancy constitutes part of her substantive due process liberty protected by the Fourteenth Amendment. *Roe* stands for the proposition that a woman has a liberty

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<sup>77</sup> Page, *supra* note 13, at 367.

<sup>78</sup> Pressley, *supra* note 76 (discussing McKnight’s disbelief that she was prosecuted for the stillbirth).

<sup>79</sup> The myth of black “hyper-fertility” suggests the demise of one fetus is not significant, because getting pregnant and having babies is common for black women. See ROBERTS, KILLING, *supra* note 22, at 12.

<sup>80</sup> This conclusion is based on the to-date exclusive focus on maternal crack cocaine use, as opposed to other drugs or alcohol. Given that the vast majority of crack defendants are black, this mode of prosecution will disproportionately target black women, even in the absence of explicit racial animus. See NAACP Action Alert, *supra* note 61.

<sup>81</sup> *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942) (invalidating on equal protection grounds a forced sterilization law of “habitual criminals,” and asserting that the law infringed on the “basic liberty” to procreate).

<sup>82</sup> *Id.* at 536, 541.

<sup>83</sup> 410 U.S. 113 (1973) (invalidating a Texas law prohibiting abortions, holding that a woman’s qualified right to terminate her pregnancy is part of her substantive due process liberty protected by the Fourteenth Amendment).

interest in choosing whether to bear a child, and that the state does not have a compelling interest in a fetus in the first two trimesters.

Although the Court scaled back protection of this liberty and rejected the trimester framework in *Planned Parenthood of Southeastern Pennsylvania v. Casey*,<sup>84</sup> it reaffirmed what it saw as the “central holding” of *Roe*—that the right to terminate a pregnancy before fetal viability is a fundamental right.<sup>85</sup> The Court found that:

The fact that a law which serves a valid purpose, one not designed to strike at the right itself, has the incidental effect of making it more difficult or more expensive to procure an abortion cannot be enough to invalidate it. Only where state regulation imposes an undue burden on a woman’s ability to make this decision does the power of the State reach into the heart of the liberty protected by the Due Process Clause.<sup>86</sup>

Applying this general approach, the Court upheld a parental consent and twenty-four-hour waiting period provision in Pennsylvania abortion statutes on the grounds that these provisions did not impose an “undue burden” on a woman’s decision to terminate her pregnancy.<sup>87</sup> However, the Court invalidated a portion of the Pennsylvania law requiring married women to notify their husbands before obtaining an abortion under most circumstances, finding that such notification constituted an undue burden.<sup>88</sup>

As *Skinner*, *Roe*, and *Casey* suggest, the U.S. Constitution protects a private sphere of conduct from government interference in recognition that some decisions are so personal and intimate that state involvement would threaten our very personhood. The specific guarantees of the Bill of Rights “have penumbras, formed by emanations from those guarantees that help give them life and substance.”<sup>89</sup> State regulation of highly personal decisions would fail to acknowledge the distinction between persons and treat them as diffuse subjects without boundaries. Less dramatically, whether understood simply as a room of one’s own or a deeper freedom from the state’s coercive apparatus, privacy gives people the opportunity to craft identities apart from state orthodoxy, and to develop and pursue self-chosen goals. Linda McClain writes, “In effect, what privacy affords is the literal or metaphorical space or opportunity for self-development or self-constitution, as well as for revision of the self.”<sup>90</sup> On

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<sup>84</sup> 505 U.S. 833 (1992) (plurality opinion).

<sup>85</sup> *Id.* at 871–73.

<sup>86</sup> *Id.* at 874.

<sup>87</sup> *Id.*

<sup>88</sup> *Id.* at 894–95.

<sup>89</sup> *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965).

<sup>90</sup> Linda C. McClain, *Reconstructive Tasks for a Liberal Feminist Conception of Privacy*, 40 WM. & MARY L. REV. 759, 772 (1999).

this view, privacy fosters moral independence, or independent thinking about one's roles and obligations. A private sphere beyond the state's immediate reach facilitates free choice, unburdened by government regulation.

The *McKnight* court, however, dismissed McKnight's privacy claim and framed the constitutional right at stake as the "right" to use crack cocaine.<sup>91</sup> Framing the "right" in that way precludes the possibility of a meaningful privacy analysis, for no one would argue seriously that smoking crack is a fundamental right protected by the U.S. Constitution. This method of framing the question belittles efforts to define and give content to substantive liberties protected by the Due Process Clauses of the Fifth and Fourteenth Amendments.<sup>92</sup> In contrast to the South Carolina court's approach, Roberts suggests that the appropriate constitutional question is: what liberty has the woman engaged in when she decides to have a baby, even though she was using drugs?<sup>93</sup> The answer: the right to carry a child to term, i.e., the right to refrain from having an abortion. If McKnight had chosen to abort the fetus early in her pregnancy, or if she had used crack cocaine prior to viability, when the fetus is most vulnerable, she would not have been prosecuted at all. Under the law of South Carolina and most states, drug possession and distribution is criminal, but use itself is not.<sup>94</sup> Thus, the state punished McKnight precisely for her decision to carry the fetus beyond viability.<sup>95</sup>

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<sup>91</sup> *McKnight*, 576 S.E.2d at 176–77 (quoting *Whitner v. State*, 492 S.E.2d 777, 786 (S.C. 1997)).

<sup>92</sup> This resembles Justice White's notorious characterization of the question presented in *Bowers v. Hardwick*, 478 U.S. 186 (1986), as whether petitioners had a fundamental right to "engage in homosexual sodomy," *id.* at 191. Professor Tribe and Michael C. Dorf contend that this formulation of the question presented represents an impoverished view of the proper level of generality in defining a fundamental right. See Laurence H. Tribe & Michael C. Dorf, *Levels of Generality in the Definition of Rights*, 57 U. CHI. L. REV. 1057 (1990).

For discussion of the scope of fundamental liberties, see generally, *Skinner*, 316 U.S. 535 (characterizing marriage and procreation as a fundamental, basic liberty); *Griswold*, 381 U.S. 479 (invalidating a Connecticut law prohibiting the use or distribution of contraceptives, citing the fundamental right of privacy in the "marital bedroom"); *Eisenstadt v. Baird*, 405 U.S. 438 (1972) (extending to unmarried couples the holding of *Griswold*); *Roe v. Wade*, 410 U.S. 113 (noting that the right of privacy encompasses a woman's decision whether or not to terminate a pregnancy).

<sup>93</sup> ROBERTS, KILLING, *supra* note 22, at 181.

<sup>94</sup> S.C. CODE ANN. § 44-53-375 (West 2002) (criminalizing possession and distribution of narcotics and other controlled substances). If McKnight had used illegal drugs to induce an abortion unlawfully in the first twenty-four weeks of her pregnancy, her conduct would have been subject to the more specific criminal abortion statute, which carries a maximum of two years in jail. S.C. CODE ANN. § 44-41-80 (West 2002). Because this statute requires a woman to have the "intent" to induce an illegal abortion, it is unclear whether the prosecution could prove its case against McKnight even on that charge. The South Carolina Supreme Court did not address the possibility that McKnight should have been prosecuted under this more specific statute, stating that, because McKnight's attorney did not raise the issue at the trial level, the issue was "unpreserved." *McKnight*, 576 S.E.2d at 174.

<sup>95</sup> The South Carolina Supreme Court justices reasoned that because crack is an illegal substance, the fact of pregnancy may "enhance" any penalties for a crack offense. *McKnight*, 576 S.E.2d at 176–77. I will not address this argument in detail, but I note that first,

Some will argue that McKnight should not enjoy the same privacy rights as non-pregnant individuals because her actions affect the unborn fetus, which depends on her for survival. On this view, privacy is an inappropriate, and somewhat frivolous, governing principle, and women have no right to damage their unborn babies by carelessly and selfishly using drugs. Indeed, pregnancy should not elevate undesirable behavior or insulate criminal conduct. This mode of analysis, however, undermines fundamental rights jurisprudence by defining the woman's privacy interest *with reference to the state interest*. As Professor Laurence Tribe argues in *Abortion: The Clash of Absolutes*, the danger in defining the right with reference to the state interest is that the state interest will always defeat the right and "would give the state nearly absolute power over all of us."<sup>96</sup> For example, in a paternity dispute, the man who had fathered the child in question claimed a "fundamental liberty interest" in his parental connection to the child. However, Justice Scalia rejected the claim by framing it in terms of whether the man had a "right" to "interfere with a marital relationship."<sup>97</sup> In so doing, he was able to negate the liberty interest by incorporating the countervailing state interest, i.e., preservation of the marital bond, in the definition of the right.<sup>98</sup> In order to take seriously women's reproductive liberty, courts must closely scrutinize the strength of the reasons for state infringement of this liberty.<sup>99</sup> If they presume the legitimacy of the state's interest and then define the woman's liberty in a way to accommodate that interest, they will always reduce the right to a *de minimis* liberty interest.<sup>100</sup> Thus, a woman's reproductive liberty must be understood as analytically distinct from and not contingent on whether a woman is a "good" pregnant woman. State judgments of a woman's conduct must not eviscerate a woman's basic choice to carry a child to term.

The *McKnight* court's analysis falters not only because it misframed the constitutional question, but because it violated the central holding of *Roe* and *Casey*, i.e., that the rights of personhood attach after birth. The *McKnight* court undermined the very possibility of recognizing McKnight's right to privacy by first defining the fetus as a child, thereby obliterating the woman's liberty interest by casting it as the right to "kill children." Framed this way, the woman will always lose.

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McKnight was charged under a homicide statute, not a drug abuse statute; second, this genre of cases is not about illegal drug use per se, but rather, harm to the fetus, which the state attributed to illegal drug use.

<sup>96</sup> LAURENCE H. TRIBE, *ABORTION: THE CLASH OF ABSOLUTES* 97 (1992).

<sup>97</sup> *Id.* (discussing *Michael H. v. Gerald D.*, 491 U.S. 110 (1989) (plurality opinion)).

<sup>98</sup> *Id.* at 97.

<sup>99</sup> *Id.* at 98.

<sup>100</sup> *See id.* ("If we incorporate the state's reason for its regulation into the initial definition of the liberty . . . the fundamental nature of that liberty *inevitably vanishes*. We don't even look to the strength of the state's reason for its intrusive action.").

#### 4. *The Significance and Limits of Liberal Privacy*

Critical race feminists such as Dorothy Roberts have argued that some freedom from government coercion, or “negative liberty,” is crucial for poor black women.<sup>101</sup> When the government regulates the reproductive choices of poor black women, it generally advances a paternalistic, racist agenda premised on the belief that black women cannot be trusted to make decisions themselves, let alone raise children without white supervision. Roberts notes that during the slave trade, the government facilitated the sale or rental of black children, forcibly separating them from their black mothers.<sup>102</sup> The prevailing ideology regarded black women as useful workers, but not homemakers.<sup>103</sup> Early welfare programs conditioned aid, known as “mother’s pension,” on fulfilling a variety of criteria, including what scholar Gwendolyn Mink has called a “racially charged ‘moral fitness’” assessment.<sup>104</sup> Under modern welfare reform, the policy of “workfare” pushes women into the wage-labor market, again forcing them to leave their children behind.<sup>105</sup> According to Roberts, “[W]orkfare’s harm lies in its failure to provide meaningful support for working mothers, such as day care, jobs, housing, health care, education and a guaranteed income.”<sup>106</sup> Romantic notions of the nurturing, stay-at-home mother do not apply to poor black mothers.<sup>107</sup> Roberts notes that the historical image of “Mammy,” a plump, docile black woman who cared selflessly for white children, is the closest the public has come to recognizing the work of mothering performed by black women.<sup>108</sup> Given the continued salience of the association of welfare and black mothers in the public consciousness,<sup>109</sup> and the pervasive impatience with “too fertile” black women who continue to strain the welfare rolls, the public seems to have accepted the absence of black mothers from the home as a reasonable price to pay for inculcating the virtues of discipline, self-restraint, and personal responsi-

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<sup>101</sup> Roberts, *Punishing*, *supra* note 5, at 1476. Ultimately, however, Roberts calls for a “new privacy jurisprudence” premised not on state “nonintervention” as much as affirmative protection of personhood and autonomy.

<sup>102</sup> Dorothy E. Roberts, *The Value of Black Mothers’ Work*, 26 CONN. L. REV. 871, 876 (1994) [hereinafter Roberts, *Value*].

<sup>103</sup> *Id.*

<sup>104</sup> Mink, *The Lady and the Tramp*, *supra* note 44, at 110.

<sup>105</sup> Roberts, *Value*, *supra* note 102, at 874 (arguing that the maternalist rhetoric invoking the moral worth of mothering, exploited by early twentieth-century feminists lobbying for mothers’ pensions and other maternalist legislation, has never been viewed as applying to black mothers).

<sup>106</sup> *Id.* at 876.

<sup>107</sup> *Id.*

<sup>108</sup> ROBERTS, KILLING, *supra* note 22, at 13.

<sup>109</sup> President Ronald Reagan demonstrated this association best when he attacked a hypothetical black “welfare queen” who bilks the public to fund her lavish lifestyle in a speech on allegedly rampant welfare fraud. *See, e.g.*, Steven V. Roberts, *Food Stamps Program; How It Grew and How Reagan Wants to Cut It Back*, N.Y. TIMES, Apr. 4, 1981, at § 1, 11.

bility in this particular group of women. Based on these background assumptions about the value of black mothers and black children, taxpayers and the state expect poor black mothers to work in the marketplace and compete for survival, instead of taking care of their children full-time.

In addition to latent, racially charged assumptions that facilitate state coercion, explicit forms of discrimination have also emerged. Empirical evidence suggests that government agencies target black women in reporting pregnant drug users to law enforcement.<sup>110</sup> While studies indicate that the prevalence of drug use among pregnant women does not differ significantly between white and black women, black women are ten times more likely to be reported.<sup>111</sup> State actors have also evinced a desire to limit black reproduction. Famously, a nurse named Shirley Brown at the Medical University of South Carolina, the site of the prenatal substance abuse hospital reporting program struck down in *Ferguson v. City of Charleston*,<sup>112</sup> expressed distaste for interracial couples, and for pregnant black women specifically. She went so far as to state that birth control should be put in black women's drinking water.<sup>113</sup> In some cases involving women of child-bearing age, judges have shown a willingness to suspend a prison sentence in "exchange" for low-income women of color's consent to long-term birth control, such as Norplant.<sup>114</sup> Although the use of Norplant originally emerged in cases of alleged maternal drug abuse or child abuse, judges began imposing Norplant even for offenses unrelated to reproduction or mothering, such as stealing.<sup>115</sup>

Viewed in the context of the myths of black promiscuity and "hyper-fertility," these attitudes reveal a palpable fear of black reproduction.<sup>116</sup> Moreover, the continued associations of blacks with criminality<sup>117</sup> and illegal drug use has fueled a fear of crack babies, members of a "bio-underclass," destined for a life of crime.<sup>118</sup> The legacy of pervasive racism

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<sup>110</sup> See ROBERTS, KILLING, *supra* note 22, at 175.

<sup>111</sup> *Id.* (discussing a *New England Journal of Medicine* study indicating no significant difference in the prevalence of drug use during pregnancy between white and black women, despite greater likelihood of hospitals to report black women to the police for drug use during pregnancy).

<sup>112</sup> 532 U.S. 67 (2001). See also *infra* note 127.

<sup>113</sup> ROBERTS, KILLING, *supra* note 22, at 174–75.

<sup>114</sup> *Id.* at 194–98.

<sup>115</sup> *Id.* at 199.

<sup>116</sup> See *id.* at 12 (noting the continued salience of the myths of black promiscuity and "hyper-fertility"); Solinger, *Race and "Value," supra* note 11, at 300 (describing the assumptions underlying punitive government policy toward unwed black mothers: "Repeatedly, Black, unmarried mothers were construed as 'women whose business is having illegitimate children.'").

<sup>117</sup> ROBERTS, KILLING, *supra* note 22, at 10–12.

<sup>118</sup> See Charles Krauthammer, *Children of Cocaine*, WASH. POST, July 30, 1989, at C7 ("A cohort of babies is now being born whose future is closed to them from day one. Theirs will be a life of certain suffering, of probable deviance, of permanent inferiority. At best, a menial life of severe deprivation. And all this is biologically determined from birth."). See also ROBERTS, KILLING, *supra* note 22, at 112 ("White Americans resent the welfare queen who rips off their tax dollars, but even more they fear the Willie Horton she

suggests that women of color would benefit from privacy understood as freedom from coercive state regulation.

Despite the rhetorical appeal of a sphere wholly immune from state intervention, such a sphere remains beyond the reach of nearly all women, most of all low-income women of color.<sup>119</sup> A scheme premised on “non-intervention” may seek to celebrate women’s agency and individuality, but it misses the point that, due to entrenched economic, political, and social deprivation, the agency of some women remains trapped under layers of subordination. It also neglects the basic point that the state’s decision whether to recognize reproductive liberty or to fund medical services including abortion are all forms of “intervention,” depending on how one characterizes the baseline.<sup>120</sup> If one considers a regime outlawing abortion as the “neutral” starting point, then a court decision recognizing a right to reproductive liberty will be a form of state intervention. Alternatively, if one considers reproductive liberty as the norm, then laws prohibiting the use of contraceptives or certain kinds of sexual acts will constitute state intervention. More concretely, *Roe*, *Casey* and their progeny ignore the unique obstacles low-income women face in obtaining abortion services.<sup>121</sup> In this sense, the government has erected barriers to low-income women by enshrining the status of affluent or middle-class women as the baseline. Despite the impossibility of state neutrality, on this view, particular state policies may coerce some people more than others or some policies may be generally more coercive than others. As a result, even after

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gives birth to.”).

<sup>119</sup> For feminist critiques of liberal privacy and rights-based approaches to reproductive liberty, see, for example, Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to Roe v. Wade*, 63 N.C. L. REV. 375 (1985) (arguing that reproductive rights should have been grounded in women’s equality interests); MacKinnon, *supra* note 39 (arguing the same); P. Lealle Ruhl, *Disarticulating Liberal Subjectivities: Abortion and Fetal Protection*, 28 FEMINIST STUDIES 37 (2002). See also Jennifer Nedelsky, *Reconceiving Autonomy: Sources, Thoughts, and Possibilities*, 1 YALE J.L. & FEMINISM 7 (1989) (discussing the familiar feminist critique of liberal autonomy and arguing for reconceptualizing autonomy as requiring sustained interactions with the government and participation in creating the laws that govern one’s self).

<sup>120</sup> See Frances E. Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 HARV. L. REV. 1497, 1505–07 (1983).

<sup>121</sup> In *Harris v. McRae*, 448 U.S. 297 (1980), the Supreme Court rejected the notion that the government has an affirmative obligation to fund abortion services when it upheld the Hyde Amendment, Pub. L. 96-123, § 109, 93 Stat. 926 (1980), which excludes abortion from the comprehensive health care services provided to low-income people through Medicaid. Professor Tribe has convincingly argued that for the state to truly respect every woman’s inalienable and “relational” right to reproductive privacy, it should fund abortion services so that all women can exercise their constitutionally protected right not to carry a pregnancy to term. See Laurence H. Tribe, *The Abortion Funding Conundrum: Inalienable Rights, Affirmative Duties, and the Dilemma of Dependence*, 99 HARV. L. REV. 330 (1985). However, feminists are on the defensive in the current political landscape and appear unwilling to make public funding for abortion a centerpiece of the reproductive rights agenda. This is another inadequacy with mainstream liberal feminism, but careful treatment exceeds the scope of this Note.

accepting the inevitability of state intervention, the debate over how much protection to afford reproductive choices is far from moot.

### 5. *A Role for the State*

The trial and appellate judges and the prosecutor cloaked their judgment of McKnight in terms of vindicating the rights of her stillborn fetus. However, they demonstrated no actual concern for fetal health. Upon learning that McKnight was again pregnant at the time of trial, the prosecutor congratulated himself on “saving lives,”<sup>122</sup> but he failed to consider that jail is possibly the very worst place in the world for a fetus to develop. If the legislature of South Carolina cared about saving fetuses, it could have provided greater access to prenatal care and drug rehabilitation, and educational efforts to help women understand the value of such care and treatment. Instead, South Carolina ranks last in providing drug rehabilitation services.<sup>123</sup> According to a Children’s Defense Fund survey of states and the District of Columbia, South Carolina ranks fiftieth in infant mortality and forty-eighth in low-birth-weight babies.<sup>124</sup> Finally, South Carolina provides cash welfare benefits that amount to only 16.7% of the federal poverty level for a family of three, ranking forty-sixth in the nation.<sup>125</sup>

The efficacy of the punitive strategy is also dubious, as the fusion of public medical and law enforcement purposes may deter women completely from seeking care out of fear of criminal sanctions. This punitive ethic pervades a range of public institutions, including hospitals, which have designed seamless procedures for reporting women to law enforcement. Thus, when a pregnant woman comes to the hospital McKnight visited and has had no prenatal care, the procedures manual permits the hospital staff to perform a medical urine drug screening. The results of this screening may be forwarded to the police if the patient signs a form indicating she is aware that the screening may be used for “legal purposes.”<sup>126</sup> In McKnight’s case, in accordance with this procedure, the nurse tested McKnight and obtained her written consent for using the drug tests in a criminal prosecution.<sup>127</sup> In fact, the nurse notified McKnight, who was illiterate and there-

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<sup>122</sup> Upon learning that McKnight was again pregnant at the end of the trial, the prosecutor responded, “[I]f we’ve done any good, we’ve saved one child’s life.” Pressley, *supra* note 76.

<sup>123</sup> See Editorial, *Hitting an Easy Target*, *supra* note 75.

<sup>124</sup> CHILDREN’S DEFENSE FUND, STATE OF CHILDREN IN AMERICA’S UNION 60–61 (2002), available at <http://www.childrensdefense.org/data/minigreenbook.pdf>.

<sup>125</sup> *Id.* at 51.

<sup>126</sup> *McKnight*, 576 S.E.2d at 178 (referring to the Conway Hospital Protocol for the Management of Drug Abuse during Pregnancy).

<sup>127</sup> Page, *supra* note 13, at 366. In 2001, the U.S. Supreme Court struck down hospital rules requiring nurses to collect urine samples from pregnant suspected drug addicts for law enforcement purposes without the women’s consent, on the grounds that they violated the Fourth Amendment’s ban on unreasonable searches and seizures. *Ferguson v. City of Charleston*, 532 U.S. 67 (2001). Although in McKnight’s case, the constitutional defect in

fore unable to read the consent form herself, that the form “could have legal consequences,” without explaining that this meant the results would be forwarded to the police.<sup>128</sup> It would be difficult to read into these events anything other than a desire to facilitate law enforcement’s involvement in McKnight’s hospital experience.

As a result, the claim that the state has designed these punitive measures primarily to protect fetuses rings hollow. Because black women have lower rates of prenatal care than white women, it stands to reason that they are more likely to be tested.<sup>129</sup> Thus, despite its rhetoric about saving the unborn, it follows that the state sought primarily to punish McKnight for her perceived moral delinquency and her nonconformity to the ideal of motherhood.

Under current law, the state has a compelling interest in fetal life after viability, and the state may exercise that right as it sees fit. However, if the state truly seeks to protect fetal life as well as women’s reproductive liberty, it should allocate resources toward prenatal care, women’s health care, and drug treatment as opposed to incarceration.<sup>130</sup> Reducing maternal substance abuse will require more than merely allocating resources. It will also require macro-level policy change, such as expanding affordable housing, access to income support, affordable child care, vocational training, coordination across a range of actors in business, government, and the community, and the political will to enact and sustain change.<sup>131</sup> Allocating resources is nevertheless the first step. Until South Carolina does so, the public has every reason to question the state’s motives in punishing drug addicts.

## II. THE FAILURE OF LAISSEZ-FAIRE ECONOMICS: THE NEED FOR STATE SUPPORT

Part I argued why the *McKnight* case rests on dubious constitutional grounds and how the court violated the reproductive liberty and privacy of Regina McKnight. Part I further argued that privacy is a crucial value for all women, especially low-income black women because of historically racist state regulation of black reproduction. Part I also suggested that pure liberal privacy is a fiction that obscures the important policy choices

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the scheme was cured by obtaining “consent,” evidence from the trial suggests McKnight did not actually understand the consequences of the drug test. *See* Page, *supra* note 13, at 366 n.13.

<sup>128</sup> Page, *supra* note 13, at 366 n.13 (quoting Transcript of Record at 209–213).

<sup>129</sup> In 1999, South Carolina ranked twenty-ninth in white prenatal care, but thirty-ninth in black prenatal care. CHILDREN’S DEFENSE FUND, *supra* note 124, at 58.

<sup>130</sup> Philip H. Jos et al., *Substance Abuse During Pregnancy: Clinical and Public Health Approaches*, 31 J.L. MED. & ETHICS 340, 345–46 (2003) (arguing that maternal substance abuse requires broad public health initiatives, the political will to sustain funding, and coordination efforts to improve the social context of at-risk women, but that South Carolina’s punitive approach seeks to ascribe blame to the individual).

<sup>131</sup> *Id.* at 345.

the public faces regarding the appropriate level and manner of state involvement in reproductive decisions. Part II seeks to explore the *McKnight* decision in the context of liberal privacy in the economic sphere, i.e., pure freedom of contract in the marketplace. Although both privacy and freedom of contract call for the state to “stay out,” they affect poor women in different ways. Progressives embrace personal privacy, but question the laissez-faire ideology as unrealistic and inhumane. In contrast, social conservatives support free markets and limited government, but they insist that the state has a compelling interest in commandeering women’s bodies to protect fetuses.

This Part explores how the *McKnight* decision reveals the complementary relationship between laissez-faire economic policies and social conservative views about pregnant women. Ultimately, it argues that the trend toward greater privatization and reliance on market-based solutions to meet public needs is a necessary material and cultural prerequisite to the McKnight tragedy and serves to reinforce the social conservative agenda in particular ways.<sup>132</sup>

The paradox of diminished material support in the context of increased moral regulation is evident in *McKnight*. The state has designed the entire statutory framework to punish those who deviate from the social conservative moral ideal, and this effort has reinforced the privatization agenda of outsourcing public needs and obligations. In response, progressives need to advance a concept of freedom premised on anti-subordination, a concept that respects both personhood and the affirmative obligations of government in securing personhood for all women.<sup>133</sup>

#### A. *Market Assumptions*

Regina McKnight’s status as an unemployed, homeless welfare recipient and mother of three epitomizes the profound vulnerability and dependency that laissez-faire liberals eschew as pathology.<sup>134</sup> The two major assumptions underlying a defense of markets are: (1) markets enhance freedom, defined as the absence of government coercion; and (2) markets reward productivity and skills valued by others. In the idealized picture of markets, individuals experience maximum freedom to fulfill their preferences through a series of consensual exchanges of labor, capital, and consumption goods. The market facilitates free choice and permits

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<sup>132</sup> See Brenda Cossman, *Family Feuds: Neo-Liberal and Neo-Conservative Visions of the Reprivatization Project*, in *PRIVATIZATION, LAW, AND THE CHALLENGE TO FEMINISM* 169–217 (Brenda Cossman & Judy Fudge eds., 2002) (discussing how neo-liberal and neo-conservative agendas sometimes reinforce and sometimes challenge each other).

<sup>133</sup> See, e.g., Roberts, *Punishing*, *supra* note 5.

<sup>134</sup> See Krauthammer, *supra* note 46, at A29 (“[The] only realistic way to attack this cycle of illegitimacy and its associated pathologies is by cutting off the oxygen that sustains the system: Stop the welfare checks.”).

individuals to pursue their particular conceptions of the good life. Although this absolute freedom produces economic and political inequalities, these simply reveal natural inequalities in ability or the perceived value of one's skills in the market.<sup>135</sup> For the state to redistribute wealth or entitlements *ex post* would coerce some people for the benefit of others. It would undermine the freedom of contract, without which there is no economic liberty.<sup>136</sup>

This thoroughly procedural and contentless view of justice as free exchange falters on several grounds. First, this view fails to recognize the inescapability of coercion, even when the state declines to "intervene."<sup>137</sup> Private markets depend on the government to define what constitutes property entitled to state protection.<sup>138</sup> The choice to recognize land, but not a job, as property represents a policy choice to benefit land-owners and not workers.<sup>139</sup> Moreover, when the government enforces a property right, it imposes a legally enforceable duty on all non-owners.<sup>140</sup> It aligns its punitive apparatus with the property owner and will imprison or fine any who threaten to impose on the owner's right to exclude. The state's failure to protect welfare benefits as entitlements, and the pervasive view of welfare as a "hand-out," reflects a judgment that low-income people do not "deserve" support.<sup>141</sup> In *McKnight*, the South Carolina Supreme Court did not even mention McKnight's poverty and homelessness as factors that might complicate the prosecution's narrative of McKnight as a woman who simply did not seek help. It saw nothing remiss in a state that ignores deprivation and responds only with incarceration.

Second, beyond their failure to recognize state policy preferences in the act of "nonintervention," proponents of the laissez-faire view ignore the pervasive market coercion that limits the liberty of those with little bargaining power. When a worker "agrees" to a wage, it could be because the worker desired precisely that wage and no more, or it could be because the employer has exhausted its coercive power to threaten to hire

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<sup>135</sup> See Olsen, *supra* note 120 at 1502–03.

<sup>136</sup> See generally, MILTON FRIEDMAN, *CAPITALISM AND FREEDOM* (1962); FRIEDRICH HAYEK, *THE CONSTITUTION OF LIBERTY* (1960); ROBERT NOZICK, *ANARCHY, STATE, AND UTOPIA* (1979). Importantly, Nozick and Hayek explicitly disavow the popular idea that the market distributes goods according to some conception of "moral merit." Instead, they defend markets on the grounds of negative liberty, or the absence of state coercion.

<sup>137</sup> For a classic articulation of this critical approach to state "intervention," see Olsen, *supra* note 120.

<sup>138</sup> See Robert L. Hale, *Coercion and Distribution in a Supposedly Non-coercive State*, 38 *POL. SCI. Q.* 470, 471–73 (1923).

<sup>139</sup> *Id.* at 489.

<sup>140</sup> See Hale, *supra* note 138, at 471–72; see also *Goldberg v. Kelly*, 397 U.S. 254, 263 n.8 (1970) (noting that welfare benefits constitute "property"); Charles A. Reich, *Property Law and the New Economic Order: A Betrayal of Middle Americans and the Poor*, 71 *CHI.-KENT L. REV.* 817, 821 (1996) (concluding that the government has failed to protect public benefits such as social security, unemployment insurance, and welfare, the "property" interests of poor and middle-class Americans).

<sup>141</sup> See Reich, *supra* note 140, at 821.

someone else and the worker has exhausted her coercive power to threaten to work for someone else.<sup>142</sup> To speak of coercive equilibrium as “voluntary” and “free” is to abstract away from how people experience these transactions. Without a framework in which to understand coercion underlying facially voluntary contracts, laissez-faire theorists are unable to understand why anyone would have a claim on anyone else. They cannot conceive of dependency as a public phenomenon, our social starting point.

Finally, the laissez-faire view of markets (and the merit they reward) as “natural” and to some extent, pre-political, ignores the way in which markets reward and perpetuate a particular conception of “merit,” reflecting the skills and attributes valued by market actors at any particular time. Critical race feminist Kimberlé Crenshaw states: “[C]ertain conceptions of merit function . . . as a repository of hidden, race-specific preferences for those who have the power to determine the meaning and consequences of ‘merit.’”<sup>143</sup> Crenshaw challenges the notion of merit or excellence as natural and inherent rather than socially constituted and contingent, and she suggests that the idea of “merit” makes sense only in relation to an institutional purpose or practice. One must ask: What factors do we use to gauge merit? What factors do they reward and why are these relevant? Crenshaw’s critical assessment of the meaning of merit exposes laissez-faire assumptions as both fallacious and inadequate. Instead of concluding that a woman like McKnight was too lazy to work or incapable of “competing,” the state should have recognized that self-sufficiency in the marketplace is an option only for those who display the qualities the market demands. By casting “merit” as a concept that is both political and contestable, Crenshaw destabilizes the liberal rights regime that separates law and politics, and by extension, economics.<sup>144</sup>

On the surface, the laissez-faire and social conservative positions appear to be in tension. The former emphatically wants the state to leave private individuals alone, while the latter seeks to impose and then enforce a moral code. However, the ideology of free markets feeds into social conservative moral judgments. Instead of viewing the market simply as the guardian of freedom and diverse conceptions of the good, social conservatives characterize the market as a moral instrument: they assert

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<sup>142</sup> See Hale, *supra* note 138, at 477.

<sup>143</sup> Kimberlé Crenshaw, *Introduction*, in *CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT*, xiii, xxix (Kimberlé Crenshaw et al. eds., 1995); see also Lani Guinier, *Admissions Rituals as Political Acts: Guardians at the Gates of Our Democratic Ideals*, 117 HARV. L. REV. 113, 121–22 (2003) (discussing “the complexity and arbitrariness of our current normative conceptions of merit”).

<sup>144</sup> See Crenshaw, *supra* note 143, at xxix. The practice of characterizing “freedom” and “merit” as neutral, uncontroversial terms penalizes people of color, women, and working people generally—if they contest the meaning of market freedom or moral merit, they are viewed as either advocating “coercion” or violating the taken-for-granted principle of distribution according to desert. Both positions are branded “irrational” and then dismissed.

that the market gives people what they morally deserve in a free competition.<sup>145</sup> On this view, because the market rewards hard work, excellence, and the extent to which others perceive one's skills to be valuable, it would violate the rights of the independent and self-sufficient members of society for the government to tax them to support those people whom the market exposes as incompetent. Instead of subsidizing incompetence and weakness, the government should protect property rights and enforce contracts.

### *B. The Fusion of Moral Judgment and Fiscal Restraint*

This belief that people receive what they deserve in the marketplace explains much of the moral zeal behind privatization. The Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA),<sup>146</sup> also known as "welfare reform" under the Clinton Administration, deployed the rhetoric of moral desert in a variety of ways, including in the title of the statute. By suggesting that self-sufficiency is a matter of *responsibility*, those who find themselves unmarried and dependent are *irresponsible*, or morally delinquent. The market needs little or no supplementation, the argument goes, for if aid recipients work hard, they will be rewarded. "Welfare reform" signals to the voting public that they should not have to subsidize other people's immoral excesses, i.e., out-of-wedlock births. Conservatives have consistently emphasized the corrosive effects of illegitimacy on both the individual child and society as a whole, and recent government efforts to promote marriage reveal a growing impatience with illegitimacy.<sup>147</sup> Reflecting the same dissatisfaction with welfare dependency and its subsidy of "undesirable" lifestyles, PRWORA establishes a five-year lifetime aid limit, protecting the treasury from unemployed mothers and their demands for food, shelter, and clothing.<sup>148</sup> Sometimes these women even require health care or need drug rehabilitation. But if women are to be good mothers and raise their children, PRWORA does not answer how they are to generate the income to pur-

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<sup>145</sup> See, e.g., *Executive Back Pay: A Special Report*, WALL ST. J., Apr. 9, 1998, at R8. *The Wall Street Journal* published excerpted comments on the topic of executive pay that indicate hostility to those who question pay disparities between corporate managers and the average worker: "Leave the CEOs alone!! They work hard to get where they are, they deserve the high salaries. They work long hours, are away from home many nights, travel a lot. Put up with a lot of unhappy, unskilled and unappreciative people." *Id.*

<sup>146</sup> Pub. L. No. 104-193, 110 Stat. 2105 (1996) (codified as amended in scattered sections of 42 U.S.C.).

<sup>147</sup> CHARLES MURRAY, *THE UNDERCLASS REVISITED* 16-17 (1999) (arguing that illegitimacy produces delinquency in individual children, and the absence of fathers leaves young urban males "unsocialized," more apt to engage in crime and "sexual conquest"); Robert Pear and David D. Kirkpatrick, *Bush Plans \$1.5 Billion Drive for Promotion of Marriage*, N.Y. TIMES, Jan. 14, 2004, at A1 (discussing pressure from conservative groups to promote marriage among low-income people).

<sup>148</sup> PRWORA § 408(a)(7) (codified at 42 U.S.C. § 608(a)(7) (2003)).

chase the necessities of life.<sup>149</sup> Instead of recognizing that child-rearing and market participation create conflicting obligations, PRWORA indulges in the mythology of the moral market that gives individuals what they deserve. If these women were moral, they would not have children out-of-wedlock; they would be married and therefore not have to participate in the market, or they would find a way to arrange free care for their children and generate the income they need, like other taxpayers.<sup>150</sup> In short, they would just work harder to achieve self-sufficiency. Sadly, while privatization initiatives such as PRWORA push public obligations and dependency into the private sphere, they only hide rather than eliminate them. And when the relationships and institutions that inhabit the private sphere (such as family, friends, one's community or faith-based institution) fail to offer adequate support, individuals have no alternatives but to suffer in private.

While the state has cut back on its material support of women under the guise of relieving itself of burdensome obligations, it has increased its regulation of poor women. Under PRWORA, a state will reduce a woman's benefits if she is unable to identify the father of her child; if the woman fails to cooperate, the state will eliminate her benefits entirely.<sup>151</sup> The federal government has also implemented additional "morality" provisions, such as "bonus" funds for states that reduce illegitimate births.<sup>152</sup> As an example of a possibly well-meaning, but problematic policy, consider "Learnfare," a program under what was formerly known as Aid to Families with Dependent Children (AFDC) that conditioned AFDC payments on school attendance.<sup>153</sup> In an effort to incentivize teenagers' school attendance and "good behavior," the program identified the problem causing truancy as the perceived "irresponsibility" of the mother. In so doing, it completely ignored the external, non-family causes of truancy, such as a lack of counseling or advice for students who are "already years behind in educational achievement," or a lack of access to alternative schools or vocational programs.<sup>154</sup> While the notion of empowering women through education respects each woman's agency, the policy of conditioning aid—money that feeds and clothes a family living in poverty—blames mothers

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<sup>149</sup> Cf. Minow, *supra* note 7 (criticizing the work requirements of the Family Support Act of 1988, Pub. L. No. 100-485, 102 Stat. 2343 (1988)).

<sup>150</sup> See Robert E. Rector & Kirk A. Johnson, *Understanding Poverty in America* (Jan. 5, 2004), available at <http://www.heritage.org/Research/Welfare/bg1713.cfm> (suggesting that the two main reasons for poverty are that the poor "don't work much" and fathers are absent, and noting, without revealing sources, that the typical poor person owns a DVD player and "is able to obtain medical care").

<sup>151</sup> Fineman, *supra* note 9, at 2194 n.34.

<sup>152</sup> See Patricia Donovan, *Special Report: The "Illegitimacy Bonus" and State Efforts To Reduce Out-of-Wedlock Births*, FAMILY PLANNING PERSPECTIVES (Alan Guttmacher Inst. Mar./Apr. 1999), available at <http://www.agi-usa.org/pubs/journals/3109499.html>.

<sup>153</sup> Nathalie A. Augustin, *Learnfare and Black Motherhood*, in CRITICAL RACE FEMINISM: A READER 148 (Adrien Katherine Wing ed., 1997).

<sup>154</sup> *Id.*

fully for structural inequities, and imposes on them a false agency. Ultimately, moral regulation through welfare is nothing new, but the simultaneous desires to regulate women closely and to extricate the state financially are more distinctive of the dual trend driving the tragedy of *McKnight*.

The fusion of moral judgment and fiscal restraint has been facilitated by social conservatives' penchant for looking to family values to "cure" the behavioral ills that purportedly produce poverty. Social conservatives recognize that women and their dependents often need help and support; but instead of looking to the public for resources, they look to men and the institution of marriage.<sup>155</sup> Consider the example of the D.C. General Hospital. In the push to privatize health care, the city decided to cut D.C. General's labor and delivery department, where experts on emergency childbirth had dealt with the birthing complications produced by crack addiction.<sup>156</sup> Pregnant women addicted to crack would now have to go to the emergency room, where the doctors are not OB/GYN specialists trained to deal with drug-related complications.<sup>157</sup> Conservative journalist Courtland Milloy framed the issue as not about the public's commitment to providing adequate health care, but marriage: "What's missing from the story [told by those concerned about closing part of D.C. General] is an abiding belief that a father and mother, preferably married—not some hospital emergency room—are responsible for the health of a newborn."<sup>158</sup> While parental responsibility is an important value, focusing exclusively on it presumes that parents have all the resources they need to secure health care, and that, but for a moral defect, a public support system would be unnecessary and obsolete. This line of thought suggests that the absence of marriage reveals a moral defect. Such a view neglects the possibility that some women desire to marry, but only when the relationship is based on love and respect—not simply economic necessity.<sup>159</sup>

Ultimately, while the proponents of fiscal restraint might remain agnostic about the "moral worth" of pregnant drug addicts, they endorse the conservative moral ideal, which pushes social problems into the private sphere. Despite this strong convergence, social conservatives and laissez-faire liberals may also diverge on occasion within the discourse of how to "handle" pregnant drug addicts. In the case of Tanya P., a homeless, pregnant crack addict, the conservative moralists decried a decision by a New York state judge to permit Tanya's release from a mental institution one

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<sup>155</sup> See, e.g., PATRICK F. FAGAN ET AL., THE POSITIVE EFFECTS OF MARRIAGE: A BOOK OF CHARTS, at <http://www.heritage.org/Research/Features/Marriage/index.cfm> (last visited Mar. 14, 2004).

<sup>156</sup> Courtland Milloy, *Nurse-Midwife Can't Save Newborns Alone*, WASH. POST., Feb. 21, 2001, at B01.

<sup>157</sup> *Id.*

<sup>158</sup> *Id.*

<sup>159</sup> Linda M. Blum & Theresa Deussen, *Negotiating Independent Motherhood: Working Class African-American Women Talk about Marriage and Motherhood*, 10 GENDER & SOC'Y 199, 204 (1996).

month before she was due.<sup>160</sup> Under the guise of concern for protecting “those who can’t help themselves,” *The Wall Street Journal* called the decision an act of “radical feminism.”<sup>161</sup> To achieve their desired result, social conservatives show a willingness to sacrifice their alliance with laissez-faire liberals and may even invoke “the best interests of society.”<sup>162</sup> Thus, when women need help paying for basic needs, they are irresponsible deviants with no claim on the state, but when they seek reproductive freedom or privacy, the state has a compelling interest in regulating them—or even locking them up.

In contrast, the standard laissez-faire response to Tanya P.’s case would be to encourage the state to minimize its obligations and financial commitments by releasing people from state institutions as early as possible without imposing other costs on society (such as crime). The logic of fiscal restraint says that the faster that an individual can be made to take care of herself, the better off individuals, especially taxpayers, are. Because the absence of taxation represents the baseline and an ideal of freedom from state coercion, only exceptional needs and public goods (such as roads) warrant taxing individuals’ incomes. According to this view, neither institutionalizing nor rehabilitating a drug-addicted mother necessarily qualifies as one of these public goods.

Despite their occasional differences, laissez-faire liberals and social conservatives both want private, low-cost solutions to pervasive social problems. Social conservatives seek to control those whom they perceive to threaten the moral fiber of society, while laissez-faire liberals fear individuals who impose financial costs on society. In the context of pregnant drug addicts, these populations generally converge. Using moralistic language to legitimize state retrenchment, i.e., the moral market and the need for traditional family support systems like marriage, social conservatives have advanced an agenda that reinforces the push to privatize the provision of social services. In return, the laissez-faire approach to economic policy has perpetuated an “underclass,” which conservatives then use as a self-evident classification of “deviant” people.<sup>163</sup> Thus, “free market” proponents demonstrate a rhetorical commitment to freedom and efficiency, but remain functionally complicit in the punishment of the most vilified and vulnerable women in America.

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<sup>160</sup> Editorial, *Babying Bad Law*, WALL ST. J., Mar. 17, 1995, at A10.

<sup>161</sup> *Id.*

<sup>162</sup> *Id.* (“If we lived in a saner age, there wouldn’t be any question that society has a responsibility to look after mentally ill women and the babies they carry. Instead, too many judges and civil libertarians continue to sacrifice the best interests of society in the interest of some higher morality of their own devising.”).

<sup>163</sup> Charles Murray defines underclass not only as people on welfare, but people outside mainstream society; in this sense, he concludes that the “underclass” is “mostly black.” See MURRAY, *supra* note 147, at 2.

C. *Conclusion: Toward a More Robust Conception of Freedom*

In this way, the twin trends of privatization and state regulation of pregnant women have eviscerated the basic liberties of low-income black women, including the freedom to bear a child. The *McKnight* court's recognition of a viable fetus as a legal person, its racially charged judgment of McKnight's intent, simplistic approach to difficult questions of causation, and flawed privacy analysis, all contributed to the injustice imposed upon Regina McKnight. In finding McKnight irresponsible and criminally reckless, the court implicitly accepted a narrative that absolves the state completely and ignores structural economic, political, and social inequities—a narrative in which McKnight failed to provide for herself by working outside the home, failed to find a decent husband who would take care of her and her children, and failed to find help in an under-funded, hostile medical system.

In response to this narrative and its narrow conception of free choice, progressives must advance a conception of freedom that accommodates women's needs and aspirations, a definition that permits the pursuit of both personal goals and overall well-being. The longstanding feminist critique of privacy as too feeble a ground on which to pursue women's political equality has demonstrated the need for affirmative government support to help women realize freedom of choice in their personal lives.<sup>164</sup> The traditional liberal notion of freedom as negative liberty ignores the material conditions that facilitate or hinder the pursuit of individual goals, and fails to consider what kind of life individuals would choose to lead if their aspirations were not “muffled” or muted due to conditions of entrenched deprivation.<sup>165</sup> As Roberts argues, “[T]he abstract freedom to choose is of meager value without meaningful options from which to choose and the ability to effectuate one's choice.”<sup>166</sup>

In this context, the question that social policy must answer is not *whether* the state should be involved, but in what ways? How can society support individuals in need, but give them and everyone else enough private space to flourish? These questions require careful, nuanced answers. They require articulating a more robust, if complex, concept of freedom, one that recognizes that freedom consists not only in being left alone to pursue one's goals, but in the capability to be healthy, nourished, and able to achieve those goals.<sup>167</sup> They require a vision of society in which the state

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<sup>164</sup> See MacKinnon, *supra* note 39, at 1324–28.

<sup>165</sup> SEN, *supra* note 6, at 7, 56–72.

<sup>166</sup> Roberts, *Punishing*, *supra* note 5, at 1478.

<sup>167</sup> I am not suggesting that the state make everyone equally healthy, nor that it would be possible—only that the capability to be healthy, nourished, etc., is part of freedom, and programs designed to improve health, nourishment, etc., advance this goal better than programs that ignore this dimension of freedom altogether. See SEN, *supra* note 6.

respects women as persons and affirmatively protects their personhood.<sup>168</sup> Most of all, they call for sustained dialogue and a commitment to promoting women's agency and their well-being.

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<sup>168</sup> Roberts, *Punishing*, *supra* note 5, at 1478–79.