

# PRIVACY RIGHTS AND PUBLIC FAMILIES

KHIARA M. BRIDGES\*

<i>Introduction: The Right to Privacy?</i> .....	113
I. <i>The New York State Prenatal Care Assistance Program</i> ....	124
A. <i>Nutritional Risk Assessment</i> .....	127
B. <i>Psychosocial Assessment</i> .....	129
C. <i>Additional Required Consultations</i> .....	130
1. <i>Medicaid Financial Officer</i> .....	130
2. <i>Nurse/Health Educators</i> .....	131
D. <i>Other States</i> .....	134
II. <i>A Brief History of the Right to Privacy</i> .....	135
A. <i>From Griswold to Eisenstadt Through Casey, or From Entity Privacy to Individual Privacy Through Individual Liberty</i> .....	137
B. <i>Privacy to Liberty</i> .....	143
C. <i>The Persistence of Entity Privacy</i> .....	145
III. <i>Entity Privacy and “Public Families”</i> .....	148
A. <i>Theorizing (and Justifying) Entity Privacy</i> .....	150
B. <i>The Myth of Entity Privacy?</i> .....	155
IV. <i>The Overwhelming of Rights by State Interests</i> .....	157
V. <i>The Bartering of “Rights”</i> .....	168
<i>Conclusion</i> .....	173

## INTRODUCTION: THE RIGHT TO PRIVACY?

From May 2006 until September 2007, I conducted ethnographic fieldwork research in the obstetrics clinic of Alpha Hospital, a large public hospital in Manhattan.<sup>1</sup> After successfully integrating myself into the clinic, I

---

\* Associate Professor of Law and Associate Professor of Anthropology, Boston University. Ph.D., Columbia University Department of Anthropology; J.D., Columbia Law School; B.A., Spelman College. I would like to thank Nicholas P. De Genova, Brinkley Messick, Neni Panourgia, Kendall Thomas, Rayna Rapp, Kris Collins, and Linda McClain for their helpful comments on earlier drafts of this Article. Thanks are also owed to Reneé Burgher for excellent research assistance. Finally, I thankfully acknowledge the mothers and mothers-to-be who I encountered in the Alpha obstetrics clinic for sharing their stories with me.

<sup>1</sup> This research was made possible by a generous grant from the Wenner-Gren Foundation for Anthropological Research. For an extensive analysis of my research in and of the Alpha obstetrics clinic, see KHIARA M. BRIDGES, *REPRODUCING RACE: AN ETHNOGRAPHY OF PREGNANCY AS A SITE OF RACIALIZATION* (forthcoming 2011) [hereinafter BRIDGES, *REPRODUCING RACE*]; see also Khiara M. Bridges, *Pregnancy, Medicaid, State Regulation, and the Production of Unruly Bodies*, 3 *NW. J. L. & SOC. POL'Y* 62 (2008) [hereinafter Bridges, *Unruly Bodies*] (exploring from a Foucauldian perspective the enrollment process of the New York State Prenatal Care Assistance Program, a Medicaid program that covers the prenatal care expenses of indigent women); Khiara M. Bridges,

participated in most aspects of its daily life—making my participant-observations from the waiting areas, the receptionists' intake desk, the nurses' triage rooms, the physicians' and midwives' examination rooms, and the offices of the many categories of professionals who provide medical care and social services to Alpha patients.<sup>2</sup> The overwhelming majority of pregnant patients receiving prenatal care from the Alpha obstetrics clinic are poor, and almost all rely upon Medicaid, specifically the Prenatal Care Assistance Program ("PCAP"),<sup>3</sup> to cover the costs of their prenatal healthcare expenses. Prior to beginning PCAP-subsidized prenatal care at Alpha Hospital, pregnant women are compelled, by law, to be interviewed by a battery of professionals—including nurses, health educators, financial officers, HIV-counselors, and social workers.

I had the opportunity to sit in on a social worker's consultation with an African American woman, Erica, who was pregnant with her fourth child. I had asked the social worker, Tina, an energetic, though overworked woman, to ask Erica if I could sit in during her consultation. Erica consented and allowed me to tape record her session. I quote her consultation at length:

Tina ("T"): Are you working?

Erica ("E"): No—I'm in college still.

T: How are you supporting yourself?

E: [long pause] How could I forget what it's called . . . Welfare!

[laughs]

T: You receive public assistance?

E: Yes.

T: How much?

E: Um, 354 . . . .

T: And does that include what they give you for your rent?

E: Yes. Well, I don't pay rent.

T: You don't pay rent?

---

*Quasi-Colonial Bodies: An Analysis of the Reproductive Lives of Poor Black and Racially Subjugated Women*, 18 COLUM. J. GENDER & L. 609 (2009) (analyzing the continuities and discontinuities between the obstetrics clinic at Alpha Hospital and the classic colony); and Khiara M. Bridges, *Wily Patients, Welfare Queens, and the Reiteration of Race in the U.S.*, 17 TEX. J. WOMEN & L. 1 (2008) [hereinafter Bridges, *Wily Patients*] (exploring the racialized meanings that attach to the receipt of state subsidized care in Alpha Hospital).

<sup>2</sup> I also compiled over 120 hours of in-depth interviews with patients, staff, providers, and hospital administrators.

<sup>3</sup> The Prenatal Care Assistance Program ("PCAP") is a special program within the New York State Medicaid program that provides comprehensive prenatal care services to otherwise uninsured or underinsured women. See N.Y. STATE DEP'T OF HEALTH, PRENATAL CARE ASSISTANCE PROGRAM (PCAP): MEDICAID POLICY GUIDELINES MANUAL (2007), available at [http://www.emedny.org/ProviderManuals/Prenatal/PDFS/Prenatal-Policy\\_Section.pdf](http://www.emedny.org/ProviderManuals/Prenatal/PDFS/Prenatal-Policy_Section.pdf) [hereinafter N.Y. STATE DEP'T OF HEALTH, PCAP POLICY MANUAL]. PCAP is an extension of the Medicaid program insofar as it is available to undocumented immigrant women as well as women who earn up to 200% of the federal poverty level—two categories of women who would otherwise be ineligible for Medicaid. *Id.* at 5. PCAP coverage terminates eight weeks after the woman gives birth. *Id.*

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

T: "Fine now"?

E: Uh-huh.

T: Does he intend to help when the baby comes?

E: Yes—he's my fiancé. I just didn't get my ring yet. He better hurry up.

T: Is he working?

E: Yes. No, he doesn't work. Sorry. He's in college.

T: How does he support himself?

E: I know that he's on public assistance, but I don't know what he gets or anything like that.

T: But, he's going to be able to support you and your child?

E: Yes, he's going to get a job by the time—he's about to be done with college.

T: You feel that when he's done with school, he's going to be financially able to support the child?

E: He's going to be making 43,000 [dollars] a year.

T: You know that already?

E: Yes. His job is already set up.

T: What does he do?

E: He's a computer technician. I don't know how he does it. I hate computers.

T: You are in a better situation than a lot of our patients.

E: I just have to get up out this dag-gone shelter. Then, I'll be fine.<sup>4</sup>

What is remarkable about this exchange is that Erica was led into a conversation about a romantic relationship that tragically involved severe, homelessness-inducing violence, the healthiness of her relationship with the father of her children, her earnings capacity, the earnings capacity of the father of her children, and any previous contact that she had had with the welfare state (in addition to answering questions about her history, if any, with tobacco and alcohol products, controlled substances, mental illness, and a host of other issues that I have not included in this excerpted portion of the interview) *because she was pregnant and had presented herself to a public hospital with the hope of receiving state-assisted prenatal care*. It is important to observe at the outset that this is an intensely personal, painfully intimate conversation that privately-insured pregnant women can avoid enduring.

I attempt to accomplish two goals in this Article. The first goal is to argue that PCAP's compelled consultations function as a gross and substantial intrusion by the government into poor, pregnant women's private lives.<sup>5</sup>

---

<sup>4</sup> Interview with Erica (July 3, 2007) (on file with author). I return to a discussion of this particular interview with Erica *infra* Part IV.

<sup>5</sup> This is an argument that I have made elsewhere. See generally Bridges, *Unruly Bodies*, *supra* note 1.

Indeed, the families that these women seek to create or expand are made “public” inasmuch as the state insists upon expunging the highly-idealized line that is thought to protect the “private family” from state involvement in order to maintain a supervisory, regulatory, and occasionally punitive presence in poor women’s families. The second goal is to investigate why it is that indigent women and families fail to enjoy a presumption of privacy with regard to matters that have been imagined, within political and popular discourse, as private. Poor women’s and poor families’ “privacy,” if it was valued, could prevent the state from accomplishing the wholesale occupation of their lives. This Article attempts to arrive at an explanation for the public nature of indigent women’s and families’ would-be private lives.

One prominent line of feminist thought, best exemplified in the work of Martha Fineman, asserts that the private family becomes “public” whenever the husband/father is absent.<sup>6</sup> With respect to unmarried mothers who are poor, the absence of the male figure makes visible the mother/caretaker’s dependency insofar as she is compelled to call upon the state, rather than the husband/father, for support.<sup>7</sup> With respect to single mothers, specifically divorced mothers, who are not poor, Fineman observes that these women have limitations placed on their physical movement absent the state or their ex-husbands’ consent.<sup>8</sup> She also argues that the “elusive and ill-defined ‘best interest of the child’” standard that determines which parent will be granted

---

<sup>6</sup> In her exposition on the failure of the right to privacy to protect the private lives of some mothers from government intervention, Fineman explains:

[t]here is a presumption with constitutional dimensions that natural families have a right to be free of state intervention and control . . . . These presumptions that cushion traditional families are eroded when single mothers make similar or parallel demands. Single mother families fall outside of prevailing ideological constructs about what (or who) constitutes a complete or real family—they may be thought of as “public” families, not entitled to privacy.

MARTHA ALBERTSON FINEMAN, *THE NEUTERED MOTHER, THE SEXUAL FAMILY, AND OTHER TWENTIETH CENTURY TRAGEDIES 177–78* (1995) [hereinafter FINEMAN, *NEUTERED MOTHER*].

For Fineman, “public families” are families in which the father is absent; thus, the “public family,” as Fineman defines it, is the family headed by an unmarried mother. She notes, “the prevailing presumption for these families is that the absence of a father creates a void, one that is appropriately filled by the state—by the bureaucrats who populate the many institutions, including legal ones, that deal with single mothers.” *Id.* at 178. The failure of the “public family” to conform to hegemonic constructions of the heteronormative family—that is, the failure of the “public family” to consist of the mother-father-child triad—results in its exposure to interference, surveillance, and regulation by the state. *Id.* at 177–80.

<sup>7</sup> *Id.* at 161–66 (describing the “[i]nvariable and [d]erivative [d]ependencies” created by the fact that children, the elderly, the sick, and the disabled must be cared for by someone, noting that “[t]he very process of assuming caretaking responsibilities creates dependency in the caretaker—she needs some social structure to provide the means to care for others,” and arguing that women are problematized when they have no wage earner to support them and they must “‘go begging to the state’”). *Id.* at 161, 163, 165.

<sup>8</sup> *Id.* at 178 (“Divorced mothers . . . are typically precluded from leaving the state with their children without paternal or state consent. They can be threatened with the loss of their children in modification proceedings post-divorce . . .”).

physical and legal custody of children subjects divorced mothers to suspicion, supervision, and punishment.<sup>9</sup> The inclusion of non-poor families within Fineman's definition of the "public family" is an important move; indeed, one of the primary components of Fineman's intervention is to demonstrate that families of all socioeconomic statuses are made "public" whenever the male figure is not present.<sup>10</sup> However, this powerful analysis may miss the phenomenon that a family can still be "public" when a husband/father is present; this is so when the family must rely on certain public services and forms of state assistance.

While many Alpha patients are single or do not otherwise have a husband/father present in their families, many other Alpha patients are, in fact, married or within stable relationships with the fathers of their children. In light of this, the argument that the absence of the male figure is the condition of possibility for state intervention in women's lives must be adapted somewhat: it is not the absence of the male that precipitates the dissolution of Alpha patients' privacy rights, but rather the receipt or intended receipt of government aid. That is, it is poor women's and families' *poverty* that subjects them to the suspension of their rights to privacy.<sup>11</sup> The critical insight

---

<sup>9</sup> *Id.*

<sup>10</sup> See Martha L.A. Fineman, *Masking Dependency: The Political Role of Family Rhetoric*, 81 VA. L. REV. 2181, 2197 (1995) [hereinafter Fineman, *Masking Dependency*] ("What have [mothers on public assistance] done to 'deserve' such harsh words and punitive measures? In large part it is the stigma of being poor. But more than poverty is at issue. The broad general target is unmarried women with children, and the attacks on these mothers are the opening salvo of a reactionary plan to discipline women who do not conform to the roles they are assigned within the traditional scheme of the family.") (footnote omitted).

<sup>11</sup> Other scholars have focused on class as a crucial factor animating the delivery of social services and the construction of family law, more generally. See, e.g., Barbara J. Nelson, *The Origins of the Two-Channel Welfare State: Workmen's Compensation and Mothers' Aid*, in WOMEN, THE STATE, AND WELFARE 123, 133, 145 (Linda Gordon ed., 1990) (comparing the development of welfare programs that were designed to benefit male wage workers (i.e., Worker's Compensation) with welfare programs that were designed to benefit impoverished females (i.e., Mother's Aid) and demonstrating that while the former program was "judicial, public, and routinized in origin," the latter "was characterized by "moralistic, diffuse decision criteria" and was "cumbersome and repeatedly intrusive"); Jean Koh Peters, *Three Systems of Family Law: A Preliminary Historical Investigation*, in REPRESENTING CHILDREN IN CHILD PROTECTIVE PROCEEDINGS: ETHICAL AND PRACTICAL DIMENSIONS 545 app. at 546 (3d ed. 2007) (identifying three systems of family law, which include one designed for "non-poor white people," which primarily functioned to protect family wealth; one designed for "poor white families," which was highly interventionist and frequently removed "children from their homes based primarily on family poverty"; and one designed for "black slaves," who "were not allowed to form as families in the eyes of the law") (emphasis omitted); Jill Elaine Hasday, *Parenthood Divided: A Legal History of the Bifurcated Law of Parental Relations*, 90 GEO. L.J. 299, 357 (2002) ("The law of parenthood, as it is authoritatively understood, remains deferential to parental judgment and strongly predisposed against intervention. But it continues to be the case that the law takes the provision of financial support through certain government programs associated with failed fatherhood and dependency as grounds for subjecting entire families to rules and norms that are interventionist, instrumental, and wholly at odds with those conventionally identified with the law of parental relations."); Jacobus tenBroek, *California's Dual System of Family Law: Its Origin*,

offered by the present analysis is that the reliance on the welfare state (for medical services or otherwise) makes “public” *even* the family that has managed to fulfill heteronormative ideals. Thus, the “public family,” as I use the term, is understood as a family that receives public assistance in the form of Medicaid and whose receipt of public assistance makes possible the violation or disappearance of privacy and parental rights that was insightfully observed and powerfully criticized by Fineman.

The apparent evanescence by legal fiat of poor women’s privacy rights in the Alpha obstetrics clinic allows for an entry into an examination of the right to privacy, more generally. What is the nature of the present right to privacy? Is the right to privacy possessed by poor women in “public families” the same as that possessed by non-poor women? Is it accurate to even call that which is possessed by poor women in “public families” a privacy right?

It ought to be noted at the outset that the language of “privacy” has fallen out of favor in recent years. While jurists invoked “privacy”—and the right to it—throughout the series of cases that articulated the constitutional status of the state’s obligation of noninterference in individuals’ and families’ lives with regard to matters pertaining to the family, sex, and procreation,<sup>12</sup> the Court more recently has shifted to the language of “liberty” when speaking of the same matters.<sup>13</sup> Moreover, even during its heyday as a jurisprudential concept, “privacy,” as the basis upon which to base a funda-

---

*Development, and Present Status*, 16 STAN. L. REV. 257, 257–58 (1963–64) (describing California’s private and public system of family law, the former being “civil, nonpolitical, and less penal” and the latter being “heavily political and measurably penal”). The present Article examines the phenomenon observed by these scholars in the context of the delivery of medical services.

<sup>12</sup> See, e.g., *Roe v. Wade*, 410 U.S. 113, 152–53 (1973) (noting that while “[t]he Constitution does not explicitly mention any right of privacy[,] . . . the Court has recognized that a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution” and holding that the right of privacy protects a woman’s decision to terminate her pregnancy); *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972) (holding that the state was prohibited from banning the sale of contraceptives to unmarried persons and arguing that “[i]f the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child”); *Griswold v. Connecticut*, 381 U.S. 479, 485–86 (1965) (holding that the state was prohibited from banning the sale of contraceptives to married persons and arguing that the Court was “deal[ing] with a right of privacy older than the Bill of Rights”).

<sup>13</sup> See *Lawrence v. Texas*, 539 U.S. 558, 567 (2003) (holding that “[t]he *liberty* protected by the Constitution allows homosexual persons the right to” express their sexuality via “intimate conduct with another person”) (emphasis added); *Planned Parenthood v. Casey*, 505 U.S. 833, 857, 869 (1992) (noting “the scope of recognized protection accorded to the *liberty* relating to intimate relationships, the family, and decisions about whether to beget or bear a child” and arguing that “it follows that it is a constitutional *liberty* of the woman to have some freedom to terminate her pregnancy”) (emphasis added). Indeed, the dissent in *Gonzales v. Carhart*, in which the Court upheld a federal ban on a specific method of performing second and third trimester abortions, appeared to renounce the utility of the rhetoric of privacy when articulating what is at stake in the right to an abortion: “[t]hus, legal challenges to undue restrictions on abortion procedures do not seek to vindicate some generalized notion of privacy; rather, they center on a

mental right, had many detractors—including among them liberals and radicals who otherwise may have been supportive of the liberties and/or activities protected by the privacy right.<sup>14</sup>

However, “privacy” may continue to be a valuable concept. For example, some scholars have argued that privacy, despite its limitations, is foundational to the creation of moral personhood and identity.<sup>15</sup> Linda McClain, for one, has explored privacy as the condition of possibility for the cultivation of the self.<sup>16</sup> She writes that “privacy affords . . . the literal and metaphorical space or opportunity for self-development or self-constitution, as well as for revision of the self.”<sup>17</sup> These “goods of privacy,” for McClain, sustain the concept against its detractors—critics who blame it for both the underparticipation of women in society as well as for the government’s refusal to act affirmatively to help individuals pursue the good life.<sup>18</sup>

---

woman’s autonomy to determine her life’s course, and thus to enjoy equal citizenship stature.” *Gonzales v. Carhart*, 550 U.S. 124, 172 (2007) (Ginsburg, J., dissenting).

<sup>14</sup> See, e.g., Nadine Taub & Elizabeth M. Schneider, *Women’s Subordination and the Role of Law*, in *POLITICS OF LAW: A PROGRESSIVE CRITIQUE* 328, 331–35 (David Kairys ed., 3d ed. 1998) (arguing that state noninterference in the “private” sphere facilitates the subordination of women); Catharine A. MacKinnon, *Reflections on Sex Equality Under Law*, 100 *YALE L.J.* 1281, 1311 (1991) (criticizing the right to privacy as a foundation for reproductive rights and arguing that it obfuscates the violence and disenfranchisement that makes motherhood a status to be avoided for many women); Reva B. Siegel, *‘The Rule of Love’: Wife Beating as Prerogative and Privacy*, 105 *YALE L.J.* 2117, 2158, 2161–70, 2200–05 (1996) (documenting how “privacy talk was deployed in the domestic violence context to enforce and preserve authority relations between man and wife” and noting similar discourses of privacy in interspousal tort immunity laws and in the controversy surrounding the civil remedies available under the Violence Against Women Act).

<sup>15</sup> See Anita L. Allen, *Coercing Privacy*, 40 *WM. & MARY L. REV.* 723, 755 (1999); see generally ANITA L. ALLEN, *UNEASY ACCESS: PRIVACY FOR WOMEN IN A FREE SOCIETY* (1988) [hereinafter ALLEN, *UNEASY ACCESS*] (examining the moral, philosophical, and legal implications of privacy-related issues for American women).

<sup>16</sup> See Linda C. McClain, *Reconstructive Tasks for a Liberal Feminist Conception of Privacy*, 40 *WM. & MARY L. REV.* 759, 772 (1999) [hereinafter McClain, *Reconstructive Tasks*]; see generally Linda C. McClain, *Inviolability and Privacy: The Castle, The Sanctuary, and The Body*, 7 *YALE J.L. & HUM.* 195 (1995) (examining the imagery from privacy jurisprudence and its implications for theories of women’s personhood).

<sup>17</sup> McClain, *Reconstructive Tasks*, *supra* note 16, at 772.

<sup>18</sup> *Id.* at 762. For other defenses of the concept of privacy, see Annette Ruth Appell, *Virtual Mothers and the Meaning of Parenthood*, 34 *U. MICH. J.L. REFORM* 683, 759 (2001) [hereinafter Appell, *Virtual Mothers*] (arguing that critics of privacy take it for granted, “overlooking the fact that many families are already very public and struggle against state oversight and control that is often uninvited and unhelpful” and noting that “[t]hese families are more public because they are poor or otherwise do not meet dominant norms—norms that frequently privilege White, middle class, married, and heterosexual persons”); Caitlin E. Borgmann, *Abortion, the Undue Burden Standard, and the Evisceration of Women’s Privacy*, 16 *WM. & MARY J. WOMEN & L.* 291, 324–25 (2010) (noting a correlation between the Court’s rejection of the language of “privacy” when speaking about women’s right to terminate an unwanted pregnancy and its recent practice of upholding abortion regulations, such as ultrasound viewing laws, that burden the woman’s abortion decision without directly preventing the abortion altogether); Naomi R. Cahn, *Models of Family Privacy*, 67 *GEO. WASH. L. REV.* 1225, 1227 (1999) (arguing that “family privacy” continues to be a valid concept); Michele Estrin Gilman, *Welfare, Privacy, and Feminism*, 39 *U. BALT. L.F.* 1, 18–19 (2008) (“[I]t is not clear that reproductive rights can be defended without some conception of privacy. Privacy allows women

Moreover, the Court's decision in *Lawrence v. Texas*, striking down a Texas law that criminalized same-sex sodomy, suggests that the rhetoric of privacy has not been retired to the jurisprudential graveyard, but rather persists as a useful way of describing the locations where the government ought not to tread and the activities that it ought not to regulate.<sup>19</sup> While the majority opinion does not ground its decision to strike down the Texas sodomy law at issue in a "right to privacy"<sup>20</sup>—indeed, the Court only mentions the "right to privacy" or the "right of privacy" when it looks to *Griswold* and *Eisenstadt* for their precedential value<sup>21</sup>—the language of privacy is nevertheless abundant in the opinion.<sup>22</sup>

Finally, while the "right to privacy" has been used to describe individuals' and families' interests in being free from government intervention in matters pertaining to the family, sex, and procreation, it is also used to refer to individuals' interest in keeping certain *information* to themselves—even when the information does not necessarily pertain to the family, sex, and procreation.<sup>23</sup> The language of "informational privacy" has not fallen out of favor in the way that "privacy" has fallen out of favor when it is used in reference to state noninterference in matters relating to family, sex, and procreation, etc.<sup>24</sup> As will be described in Part IV, the right to privacy of poor, pregnant women seeking PCAP-subsidized prenatal care is abridged not only in the sense that the government intervenes in matters pertaining to their families, but also in the sense that they lose the ability to keep certain private information to themselves. Accordingly, the "right to privacy" is doubly implicated by the interventions mandated by the PCAP mechanism, making it even more appropriate to speak about the invasions produced by

---

space to reflect and deliberate on moral choices."); Dorothy E. Roberts, *Punishing Drug Addicts Who Have Babies: Women of Color, Equality, and the Right of Privacy*, 104 HARV. L. REV. 1419, 1424, 1462–81 (1991) [hereinafter Roberts, *Punishing Drug Addicts*] (arguing that the feminist critique of privacy does not speak from the perspective of poor women of color and delineating how privacy doctrine could be used to produce and protect reproductive freedom for marginalized women).

<sup>19</sup> *Lawrence v. Texas*, 539 U.S. 558, 572 (2003) ("[L]iberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex.").

<sup>20</sup> The Court based its decision to strike down the law on its determination that the law violated gay persons' "right to liberty under the Due Process Clause." *Id.* at 578.

<sup>21</sup> *Id.* at 564–65.

<sup>22</sup> *See, e.g., id.* at 567 (noting that the regulation at issue touches upon "private human conduct . . . in the most private of places"); *id.* at 569–70 (observing that the "private acts" prohibited by the statute occur "in private" due to "the very private nature of the conduct"); *id.* at 578 (concluding that persons affected by the statute "are entitled to respect for their private lives" and arguing that "[t]he State cannot demean their existence or control their destiny by making their private sexual conduct a crime").

<sup>23</sup> *See Gilman, supra* note 18, at 5 (noting that "[i]nformational privacy concerns the interest individuals have in controlling their personal data and limiting access to such information by others" and arguing that the receipt of government assistance in the form of TANF limits poor women's informational privacy).

<sup>24</sup> *See id.* at 1 (noting that due to recent developments in the form of anti-terrorism efforts, health care reform, and "internet consumerism," privacy—in the form of *informational* privacy—has been a hot topic).

the PCAP apparatus as violations of poor women's and poor families' right to privacy.

The intent of this Article is not to argue that privacy is a useful vocabulary—normatively or descriptively—for all women. However, for the marginalized, indigent women who must turn to the state for assistance if they are to achieve healthy pregnancies and infants, privacy is a concept of great significance; indeed, the devastating absence of privacy may be that which distinguishes their experiences with the state from their monied counterparts. As Dorothy Roberts instructively observes, privacy, when respected, stands as an important limitation on state power—preventing a totalitarian occupation of individuals' lives.<sup>25</sup> This demarcation of legitimate and illegitimate spaces for governmental power is especially important for poor women and women of color, the “private spheres” of whom the state (and, during chattel slavery, other private individuals) has treated as legitimate sites of regulation.<sup>26</sup> Because of the vulnerability that poor women experience as a direct result of the lack of privacy, I, too, am unwilling to “toss out the baby . . . with the bathwater.”<sup>27</sup> This Article, then, explores poor mothers' and families' experiences without privacy—whether it is understood as a freestanding right or, alternatively, a subset of a liberty interest.

The exploration proceeds as follows: Part I gives a detailed description of the requirements that poor, pregnant women must satisfy and the information that they must share in order to enroll in New York State's Prenatal Care Assistance Program and to receive state subsidized prenatal health care. A

---

<sup>25</sup> See Roberts, *Punishing Drug Addicts*, *supra* note 18, at 1469–71 (contending that privacy is a useful concept for defending the reproductive rights of poor women of color).

<sup>26</sup> See *id.* at 1470–71 (“Women of color . . . often experience the family as the site of solace and resistance against racial oppression. For many women of color, the immediate concern in the area of reproductive rights is not abuse in the private sphere, but abuse of government power.”); see also Appell, *Virtual Mothers*, *supra* note 18, at 765–79 (arguing that poor families of color can benefit from more, not less, privacy); Cahn, *supra* note 18, at 1240 (noting the “importance of privacy to poor families, who are generally subject to intrusive governmental intervention”); Gilman, *supra* note 18, at 20 (observing that, recently, the state has moved to privatize poverty while simultaneously denying poor women privacy); McClain, *Reconstructive Tasks*, *supra* note 16, at 770–71 (arguing that privacy provides the stuff that distinguishes experiences of freedom from experiences of unfreedom and noting that while experiences of unfreedom—specifically, in its iteration as chattel slavery in the U.S.—are marked by the pornographic display of bodies, rape, forced reproduction, and the like, privacy provides seclusion, restricted access, and secrecy).

<sup>27</sup> ALLEN, *UNEASY ACCESS*, *supra* note 15, at 71 (remaining committed to the concept of privacy). However, I, too, believe that a more robust conception of privacy—that is, privacy understood as an *affirmative* duty of government—would better protect poor women and women of color than would privacy understood as a negative right. See Roberts, *Punishing Drug Addicts*, *supra* note 18, at 1479 (arguing in favor of a revamped conception of privacy that “includes not only the negative proscription against government coercion, but also the affirmative duty of government to protect the individual's personhood from degradation and to facilitate the processes of choice and self-determination” and clarifying that “[t]his approach shifts the focus of privacy theory from state nonintervention to an affirmative guarantee of personhood and autonomy”).

brief overview of other state Medicaid laws with similar requirements is also given. This Part argues that poor, pregnant women's privacy is violated when they are forced to divulge intimate details about their lives—details that far exceed the purview of their medical care. Part II continues with a brief history of the right to privacy, tracing its history as a right that protected the family *entity* from state interference to a right that protected the *individual* from state power. This Part makes the argument that while the right to privacy, in its contemporary form, is properly understood as an individual-inhering right or liberty, specters of its entity-inhering past nevertheless endure. That is, entity privacy may continue to be a relevant concept in modern family law.

Part III then poses the question: if entity privacy is not a mere anachronism, but rather remains a functional, effective concept and practice, how does one explain the violation of poor families' entity privacy that is required by PCAP and other similar Medicaid laws? This Part argues that entity privacy fails to protect poor families from state intervention, interference, and regulation not because they fail to conform to heteronormative constructions of the family; indeed, many poor families consist of the mother-father-child triad. Rather, entity privacy offers no protection to poor families because wealth is the condition of possibility for the exercise and enjoyment of the right. Moreover, if entity privacy is justified on the grounds that our liberal democratic order depends upon families producing future citizens who, having not been standardized by the state, can stand in opposition to state power, then poor families are thought not to be capable of producing competent citizens; indeed, the parents that helm these families have failed to exhibit one of the most valuable characteristics of the citizen within capitalism—economic independence. State intervention in the family entity is, therefore, justified.

Part IV continues the exploration by conceptualizing the invasion mandated by PCAP as one that is not a violation of poor families' entity privacy, but rather is a violation of the poor, pregnant woman's individual right to privacy. This Part observes that the state is justified in nullifying the rights of the individual—specifically parental rights—when it acts to protect the child. However, the individual women whose rights are nullified by the PCAP mechanism have not demonstrated that their children need protecting; indeed, the state knows nothing about the women as parents except that they are or will be *indigent* parents. The assumption, then, is that parenting by the poor will be poor parenting. This Part concludes that the failure to thrive within capitalism is thought to index a moral and intellectual laxity that could translate into parental neglect or abuse; this is a laxity, moreover, that justifies the state's preemptive nullification of individual rights in the purported service of child protection.

Part V explores the argument that the reason why the state may invade the privacy of poor women and poor families is because they have bartered away their right to privacy in exchange for a welfare benefit. This Part dis-

putes that poor women and poor families enjoy a right to privacy that may be given away. Instead, it argues that it may accord better with poor women's and families' actual experiences to describe them as never having a right to privacy about which to speak. This is because rights within the present economic system are always already premised on wealth. A brief conclusion follows.

### I. THE NEW YORK STATE PRENATAL CARE ASSISTANCE PROGRAM

In the state of New York, uninsured pregnant women with incomes falling below 200% of the federal poverty line are eligible to enroll in PCAP, a Medicaid program that pays the prenatal healthcare expenses of women who qualify.<sup>28</sup> While PCAP is a New York State Medicaid program, it differs from standard New York State Medicaid insurance in terms of the duration of coverage offered, as well as its eligibility requirements.<sup>29</sup> A pregnant woman seeking PCAP coverage is "presumed eligible upon a preliminary showing . . . that her household income falls below [the requisite] poverty level"—much unlike standard Medicaid coverage, which requires that the application be verified before coverage can begin.<sup>30</sup> Further, while "Medicaid applicants are required to exhaust certain household resources for eligibility, . . . PCAP applicants need only satisfy the income requirement."<sup>31</sup> Moreover, in New York, undocumented immigrants are eligible for PCAP coverage, although they remain ineligible for standard Medicaid coverage.<sup>32</sup>

The process of enrolling in PCAP is quite onerous. Women are, by legislative mandate, obliged to divulge a broad swath of information about their lives—what I call an "informational canvassing"—prior to even seeing an obstetrician, nurse midwife, or registered nurse for the initial prenatal examination.<sup>33</sup> It is true that much of the information gathered as part of the

---

<sup>28</sup> See N.Y. STATE DEP'T OF HEALTH, PCAP POLICY MANUAL, *supra* note 3, at 5.

<sup>29</sup> See *id.*

<sup>30</sup> See *Hope v. Perales*, 634 N.E.2d 183, 185 (N.Y. 1994).

<sup>31</sup> *Id.*

<sup>32</sup> N.Y. STATE DEP'T OF HEALTH, DOCUMENTATION GUIDE, IMMIGRANT ELIGIBILITY FOR HEALTH COVERAGE IN NEW YORK STATE 5 (2004), *available at* [http://www.nyhealth.gov/health\\_care/medicaid/publications/docs/gis/04ma003att1.pdf](http://www.nyhealth.gov/health_care/medicaid/publications/docs/gis/04ma003att1.pdf) (stating that "undocumented pregnant women continue to be eligible for PCAP" although they are otherwise ineligible for any treatment other than emergency medical services).

<sup>33</sup> The public advocate for New York City described the requirement that women submit to an informational canvassing prior to receiving an examination from a health-care provider as a "barrier" to prenatal care. See OFFICE OF THE N.Y.C. PUB. ADVOCATE, HURDLES TO A HEALTHY BABY: PREGNANT WOMEN FACE BARRIERS TO PRENATAL CARE AT CITY HEALTH CENTERS 13 (May 2007), *available at* <http://publicadvocategotbaum.com/pages/reports.html> (select from "2007 Reports"). She writes:

Requiring multiple visits prior to the first prenatal care appointment not only delays entry into prenatal care for pregnant women but also may discourage women already struggling to juggle the demands of work and/or childcare or overcome other barriers to appropriate health care, such as immigration, language, or transportation issues, or stigmatized behavioral issues. While social workers, HIV

PCAP enrollment process is information that one would expect all pregnant women—privately-insured and publicly-insured alike—to share upon beginning prenatal care. However, much of the information gathered from PCAP-insured women is not quite typical (when the wealthier, privately-insured woman is taken as the norm), being culled only from the woman whose pregnancy intersects with her indigence and need for public assistance.

The informational canvassing of indigent women is a product of PCAP providers' statutory obligation to have women consult with a nurse, health educator, HIV counselor, Medicaid financial officer, nutritionist, and social worker.<sup>34</sup> Below, I describe the nutritional risk assessment<sup>35</sup> and the psychosocial assessment<sup>36</sup> in greater detail.

Before beginning that discussion, however, it is relevant to ask at the outset whether the informational canvassing of indigent pregnant women is a product of pregnant women's indigence rather than a product of their *pregnancy*. Some scholars have argued that pregnancy itself invites outside intrusion and control into women's lives.<sup>37</sup> Are poor, pregnant women being

---

counselors, and nutritionists provide valuable services, meeting with them should not be a precondition for prenatal care . . . .

*Id.*

<sup>34</sup> I have described this canvassing, as well as women's experiences with it, elsewhere. Bridges, *Unruly Bodies*, *supra* note 1, at 70–86. Interestingly, the informational canvassing and concomitant invasion of privacy required during the PCAP enrollment process parallels the invasions of privacy that poor women can expect upon the receipt of welfare in the form of cash benefits. Gilman, *supra* note 18, at 2 (“[F]ormal welfare requirements overlay routinized surveillance of poor women, who must comply with extreme verification requirements to establish eligibility, travel to scattered offices to procure needed approvals, reappear in person at welfare offices at regular intervals to prove their ongoing eligibility and answer intrusive questions about their child rearing and intimate relationships.”).

<sup>35</sup> The statute provides:

The PCAP provider shall establish and implement a program of nutrition screening and counseling which includes . . . individual risk assessment including screening for specific nutritional risk conditions at the initial prenatal care visit and continuing reassessment as needed; . . . [and] documentation of nutrition assessment, risk status and nutrition care plan in the patient medical record . . . .

N.Y. COMP. CODES R. & REGS. tit. 10, § 85.40(f)(1), (f)(3) (2009).

<sup>36</sup> The statute provides: “A psychosocial assessment shall be conducted and shall include: (1) screening for social, economic, psychological and emotional problems; and (2) referral, as appropriate to the needs of the woman or fetus, to the local Department of Social Services, community mental health resources, support groups or social/psychological specialists.” *Id.* § 85.40(h).

<sup>37</sup> See, e.g., BARBARA DUDEN, *DISEMBODYING WOMEN: PERSPECTIVES ON PREGNANCY AND THE UNBORN* 28 (Lee Hoinacki trans., Harvard University Press 1993) (1991) (“Prenatal care programs . . . transform [the pregnant woman’s] body into a field of operations for technocratic and bureaucratic interventions.”); CATHARINE A. MACKINNON, *WOMEN’S LIVES, MEN’S LAWS* 135 (2005) (“[T]he law of reproductive issues has implicitly centered on observing and controlling the pregnant woman and the fetus using evidence that is available from the outside. The point of these interventions is to control the woman through controlling the fetus.”); Paula A. Treichler, *Feminism, Medicine, and the Meaning of Childbirth*, in *BODY/POLITICS: WOMEN AND THE DISCOURSES OF SCIENCE* 113, 120 (Mary Jacobus et al. eds., 1990) (“The health of childbearing becomes a signal for the health of the state . . . . Many decisions about pregnancy, childbirth, and maternity have

asked intrusive questions because they are poor or because they are pregnant? Accordingly, it is instructive to compare the requirements imposed by PCAP with the requirements imposed by private insurances to determine whether the experiences of the pregnant poor with having to divulge intimate details about their lives are qualitatively different from the experiences of the pregnant non-poor. Such a comparison would be difficult to conduct, however. To begin, most private insurances do not oblige obstetricians, nurse practitioners, or midwives to conduct any particular examination or provide any particular form of education or counseling.<sup>38</sup> Rather, the question with most private insurances is whether they will cover the cost of a service that the prenatal care provider deems necessary or advisable.<sup>39</sup> As a result, the inquiry turns to whether most private healthcare providers conduct a form of “informational canvassing” that, although not mandated by law, is nevertheless considered standard medical care. The American College of Obstetricians and Gynecologists (“ACOG”), a non-profit organization comprised of physicians, is the leader in reporting standards of healthcare in the OB/GYN specialty;<sup>40</sup> accordingly, one could expect that many, if not most, private prenatal care providers look to ACOG guidelines when providing care.<sup>41</sup> Moreover, while the guidelines suggest that providers impart “gen-

---

therefore been concerns of the state as well as of the childbearing woman and her family.”); *see also* Barbara Stark, *Reproductive Rights and the Reproduction of Gender*, in *GENDER EQUALITY: DIMENSIONS OF WOMEN’S EQUAL CITIZENSHIP* 345, 345–46 (Linda C. McClain and Joanna L. Grossman eds., 2009) (discussing several countries’ pro-natalist and anti-natalist policies, which function to make a woman’s pregnancy a matter of state concern and subject to state intervention).

<sup>38</sup> *See, e.g.*, Benefit Detail: Maternity Services, Blue Care Elect Preferred, Blue Cross Blue Shield of Massachusetts (July 1, 2010) (on file with author) (stating in the “Covered Services Description” that members are covered for the “[d]elivery of one or more than one baby, including prenatal and postnatal medical care by a Physician or Nurse Midwife”). The policy does not oblige pregnant women to undergo any specific medical care or informational canvassing pursuant to that medical care. The Benefit Detail does provide that “all members *may* take part in a program that provides support and education for expectant mothers. Through this program, members receive outreach and education that add to the care the member gets from her obstetrician or Nurse Midwife.” *Id.* (emphasis added). It should be noted that the policy provides that members “*may*”—as opposed to “*must*” or “*shall*”—receive “support and education for expectant mothers.” Additionally, the policy provides coverage for a home visit subsequent to the birth of the infant; the “*visit may* include: parent education; assistance and training in breast or bottle feeding; and appropriate tests.” *Id.* (emphasis added). Again, the stress here is on the use of the word “*may*.”

<sup>39</sup> *See, e.g., id.* (providing that the insurance will cover the cost of more than one home visit by a healthcare provider if “Blue Cross Blue Shield determines [additional visits] are clinically necessary”).

<sup>40</sup> THE AMERICAN COLLEGE OF OBSTETRICIANS AND GYNECOLOGISTS, [http://www.acog.org/from\\_home/ACOGFactSheet.pdf](http://www.acog.org/from_home/ACOGFactSheet.pdf) (last visited Oct. 6, 2010) (noting that over 90% of OB/GYNs in the U.S. have an ACOG affiliation and stating that ACOG “keeps its members informed about current medication standards and ACOG’s professional recommendations” through various publications).

<sup>41</sup> GENETICS AND PUBLIC POLICY CENTER, PROFESSIONAL PRACTICE GUIDELINES FOR GENETIC TESTING, 4 (Feb. 1, 2006), [http://www.dnapolicy.org/resources/Professional\\_Guidelines\\_Meeting\\_Summary.pdf](http://www.dnapolicy.org/resources/Professional_Guidelines_Meeting_Summary.pdf) (reporting the results of a survey that “found that ACOG’s

eral patient education”<sup>42</sup> to their patients, counsel them on “nutrition in pregnancy,”<sup>43</sup> and provide “psychosocial services,”<sup>44</sup> it is important to remember that these guidelines are just that—guidelines. Ultimately, the provider decides whether or not to provide care in accordance with them. On this point, the guidelines note:

The guidelines should not be viewed as a body of rigid rules. They are general and intended to be adapted to many different situations, taking into account the needs and resources particular to the locality, the institution, or the type of practice. Variations and innovations that improve the quality of patient care are to be encouraged rather than restricted. The purpose of these guidelines will be well served if they provide a firm basis on which local norms may be built.<sup>45</sup>

Consequently, the extent to which privately-insured women are asked to undergo the intrusive informational counseling experienced, as a legal mandate, by poor women relying upon Medicaid for prenatal care is an empirical question—the subject of further ethnography, perhaps. However, it may be sufficient to note that individual medical practices likely vary quite extensively; further, a privately-insured pregnant woman can simply find another provider if she encounters a physician, nurse practitioner, or midwife who insists upon including the counseling and educational portions of the ACOG guidelines as part of his or her practice. Publicly-insured women, if they wish to receive healthcare at all, do not have this option.

#### A. *Nutritional Risk Assessment*

At Alpha Hospital, the nutritional risk assessment begins with the nutritionist asking the woman to recount her most recent four meals. As the woman recounts in exacting detail what was eaten and in what amounts, the nutritionist diligently documents the information in the medical chart. The woman is then given a form with an itemized list of foods; she is asked to circle the number of times per week or per day she eats each food item. If,

---

guidelines are a primary resource for OB/GYNs and that guidelines do dictate and change practices”).

<sup>42</sup> AMERICAN ACADEMY OF PEDIATRICS AND THE AMERICAN COLLEGE OF OBSTETRICIANS AND GYNECOLOGISTS, *GUIDELINES FOR PERINATAL CARE* 88–89 (6th ed. 2007). “General patient education” includes topics such as the symptoms that should be reported to the physician, the cost to the patient of prenatal care, and the encouragement of breastfeeding.

<sup>43</sup> *Id.* at 89–92 (“Each pregnant woman should be provided with information about balanced nutrition, as well as ideal caloric intake and weight gain.”).

<sup>44</sup> *Id.* at 124–25 (noting that “[a] woman with ambivalent feelings about her pregnancy may benefit from additional support from the healthcare team” and suggesting that “[p]hysicians . . . be aware of individuals and community agencies to which patients can be referred for additional counseling and assistance when necessary”).

<sup>45</sup> *Id.* at ii.

after this process, the nutritionist determines that the woman is at “nutritional risk,” she checks a box labeled “inadequate/unusual dietary habits” on the bottom of the form that the woman has completed.<sup>46</sup> The “nutritional risk assessment” concludes with the woman making a verbal commitment to meeting the nutritional needs of herself and her fetus. The entire process takes anywhere from fifteen minutes to half an hour, depending on the care taken by the nutritionist as well as whether there is a need for interpreter services.<sup>47</sup>

Information about one’s diet may not be “protected” information but there is a strong argument to be made that it is fairly described as “private” information. Indeed, divulging one’s nutritional successes and failures—the “good” and the “bad” foods that we eat, the frequency at which we eat too much (or not eat enough), etc.—may be experienced as the sharing of *intimate* knowledge about oneself. Moreover, the information might be considered intimate and private because very rarely are people required to share their dietary habits with others, especially persons who are unfamiliar to them and who may be situated in an antagonistic relationship to themselves. The autonomy to keep this information to herself or to share with others is denied to the poor, pregnant woman seeking PCAP coverage of her prenatal care expenses, as she is required to give this private information about herself if she hopes to receive prenatal care with the assistance of the state.

---

<sup>46</sup> If “inadequate/unusual dietary habits” are found, the woman is made eligible for the Women, Infants and Children Program for Pregnant, Breastfeeding and Postpartum Women (“WIC”). WIC is a federal program, administered by the New York State Department of Health, with the mission of “safeguard[ing] the health of low-income women, infants, and children up to age 5 who are at nutritional risk” by providing food vouchers for foods that are high in the nutrients (like protein, calcium, iron, and vitamins A and C) found lacking in the diets of poor women and their families. *About WIC*, FOOD & NUTRITION SERV., U.S. DEP’T OF AGRIC., <http://www.fns.usda.gov/wic/aboutwic/default.htm> (last visited Mar. 2, 2009); *see also* FOOD & NUTRITION SERV., U.S. DEP’T OF AGRIC., NUTRITION PROGRAM FACTS (2009), *available at* <http://www.fns.usda.gov/wic/WIC-Fact-Sheet.pdf>; N.Y. COMP. CODES R. & REGS, tit. 10, § 85.40(f)(4) (2009) (stating that the PCAP provider must, as part of its duty to provide “nutrition services” to its patients, make “arrangements for services with funded nutrition programs available in the community including provision for enrollment of all eligible women and infants in the Supplemental Food Program for Women, Infants and Children (WIC), at the initial visit”). The WIC statute provides that the program is only available to women who are at “nutritional risk.” 7 C.F.R. § 246.7(e) (2006) (stating that a determination of “nutritional risk . . . may be based on referral data submitted by a competent authority”). Accordingly, if the woman is interested in receiving WIC vouchers, it is to her benefit that the nutritionist deems her diet “inadequate/unusual.”

<sup>47</sup> One of the most remarkable things about Alpha Hospital is the vast diversity that characterizes the patients who receive their care there. As a result, the hospital has in place a highly effective system for providing to healthcare workers and their patients interpreter services in a wealth of languages—from common languages like Spanish, Urdu, and Cantonese to more unexpected languages like Zapotec, spoken by groups of Indians in Mexico. When interpreter services are required, the length of consultations tends to double.

### B. Psychosocial Assessment

During the “psychosocial assessment,” a social worker screens the patient for several “risk factors,” including: the unplanned-ness and/or unwanted-ness of the current pregnancy; the woman’s intention to give up the infant for adoption or to surrender the infant to foster care; an HIV-positive status; a history of substance abuse; a lack of familial or environmental support; marital or family problems; a history of domestic violence, sexual abuse, or depression; mental disability; a lack of social welfare benefits; a history of contact with the Administration for Children’s Services (the bureau responsible for investigating charges of child abuse and neglect); a history of psychiatric treatment or emotional disturbance; and a history of homelessness.<sup>48</sup> If a woman admits to the presence of a “risk factor,” the social worker gathers more information about it with the goal of putting the woman in contact with additional professionals who may be able to assist her.

Expectedly, the interview with a social worker can be quite invasive, as the social worker asks the patient a series of intimate, private questions in order to discover the presence of a “risk factor” and, if found, to ask a series of more intimate, private questions. Tina, one of two social workers who worked in the Alpha obstetrics clinic, helpfully itemized the questions that she asks the pregnant women that she encounters in the clinic as part of the “psychosocial assessment”:

Was this pregnancy wanted and do you want to have this baby? Do you have any experience? . . . If you’re a first-time mom, do you have anybody who can teach you how to take care of a baby? Is the father involved? Do you have a place to live? Money to buy things for the baby? A social support system? Do you have anything in your history that might make the parenting difficult? There might be things that surface for you at a time when you need to be at your best for your baby. Is there any child abuse, sexual abuse, domestic violence? . . . Is there any substance abuse? Does she consider it a problem? Is she in a program? Has she been arrested? Has she ever had any children taken away from her—which means that she has a history of poor parenting? Are you breastfeeding, bottle-feeding? Did you apply for WIC?<sup>49</sup> . . . After you deliver this child and are taking care of a newborn, do you plan on having another baby right away? If you’re not, it’s easier to not [become pregnant again] if you [choose a contraceptive that you could leave in place for long periods of time]. Do you know what options are out there? Are you going to breastfeed? If

---

<sup>48</sup> Alpha Hospital Psychosocial Screening Form (on file with author).

<sup>49</sup> See *supra* note 46 and accompanying text.

you are, there are [contraceptives] that are better while you're breastfeeding. Do you have everything that you're going to need to know? Do you want parenting classes? Yes—you can go here for them. Do you have everything that you're going to need for the baby? No—try going to this place. Maybe they can help you. You have to be in the best condition that you can be in for your baby. So, maybe you should get counseling. Here are some places that you can go . . . Do you want to kill yourself? If so, come with me.<sup>50</sup>

It should also be noted that, even when the woman does not have a “risk factor,” she leaves the interview with the social worker having answered a universe of intimate questions about herself—much of it prosaic, much of it private.

### C. *Additional Required Consultations*

The nutritional risk assessment and the psychosocial assessment are conducted alongside several other consultations—including those with a Medicaid financial officer<sup>51</sup> and a nurse/health educator.<sup>52</sup>

#### 1. *Medicaid Financial Officer*

During this interview, women are obliged to share financial information about themselves. This interview can be experienced by women as obliging them to confess facts that are deeply personal to them. Due to the necessity of having to prove their incomes, these women—who, because of their precarious economic and structural position, exist as a vulnerable and exploitable labor force—are frequently compelled to confess that they or their partners have worked “off the books” or have engaged in criminalized activities in order to support themselves.

Moreover, women frequently find themselves in the position of having to confess their immigration statuses during this interview. A woman's immigration status is made relevant during this interview because she is required to prove her identity.<sup>53</sup> Proof of identity may be established by a state driver's license or ID card, birth certificate, United States or foreign pass-

---

<sup>50</sup> Interview with Tina (Jan. 12, 2007) (on file with author)

<sup>51</sup> N.Y. COMP. CODES R. & REGS. tit. 10, § 85.40(b)(2) (2009) (“Following the determination of a pregnant woman's presumptive eligibility for Medicaid benefits, the PCAP provider shall act as a pregnant woman's authorized representative in the completion of the Medicaid application process if the woman provides consent for such action.”).

<sup>52</sup> N.Y. COMP. CODES R. & REGS. tit. 10, § 85.40(g) (2009) (“Health and childbirth education services . . . shall be provided by professional staff . . . and shall include . . . family planning.”).

<sup>53</sup> Alpha Hospital, “Frequently Asked Questions about Applying for PCAP” (on file with author).

port, or a permanent resident alien card.<sup>54</sup> That the woman is residing in the country “illegally” is usually admitted when the woman, faced with her lack of “official” documentation in the form of a driver’s license or state ID card, asks how she will be able to establish her identity for the purposes of the Medicaid enrollment process. It is an understatement of the highest degree to describe this as a frightening admission for women, pregnant or not, who are residing in the country without documentation.

## 2 Nurse/Health Educators

During this interview, women receive an “education” about their contraceptive options; moreover, this is an education that continues every trimester until the woman gives birth, and then once again during her postpartum visit.<sup>55</sup> In addition to obliging a woman to hear about her contraceptive “options” at least three times while she is pregnant and yet again during the weeks following the birth of her infant, there is also an institutional practice of having nurses visit women in their postpartum recovery rooms, mere days after the birth of their babies, to offer them the long-acting Depo-Provera injection.<sup>56</sup> Further, the childbirth education classes offered within the hospital similarly place a strong emphasis on the importance of electing and using a method of contraception.<sup>57</sup> It is not unreasonable to interpret the stress that the hospital places on contraceptives as a condemnation of patients’ future pregnancies and a censure of the present pregnancy that has immediately brought them to the institution.<sup>58</sup>

The effect of the consultations with the nutritionist, social worker, Medicaid financial officer, and nurse/health educator is that poor women’s private lives are made available for state surveillance and problematization, and they are exposed to the possibility of punitive state responses. Pursuant to the PCAP mandate, private information about women’s immigration status, health status, and economic status is gathered and undoubtedly made into objects of knowledge for citywide, statewide, and nationwide statistics; their diets are quantified, problematized, and censured; and their histories with substance abuse, sexual abuse, public assistance, and any and all forms of contact with the state—no matter how remote and seemingly irrelevant to the woman—are made salient once again. Moreover, their fertility is condemned as they are repeatedly encouraged to begin considering the method of contraception that they will use after giving birth, a repetition of “contra-

---

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

<sup>55</sup> I have described elsewhere the institutional emphasis that is placed on encouraging the pregnant patient to think about and elect a contraceptive method that she will use after the birth of her baby. See Bridges, *Wily Patients*, *supra* note 1, at 34–44 (describing this emphasis).

<sup>56</sup> See *id.* at 32–33.

<sup>57</sup> *Id.*

<sup>58</sup> *Id.* at 43 (arguing that the present pregnancies of Alpha patients are implicitly scorned as a result of the institution’s stress on containing the patients’ future fertility).

ceptive education” that implicitly constructs the present pregnancy as an event that never should have occurred. In essence, consequent to the PCAP mechanism, a poor, pregnant woman’s right to privacy—that is, her right to prevent the government from intruding into her personal, intimate affairs—has been violated.

Moreover, this invasion of poor, pregnant women’s privacy facilitates the enduring surveillance and regulation of poor families by the state. Subsequent to the PCAP enrollment process, the state has all the information necessary to sweep poor families within the ambit of child protective services, the foster care system,<sup>59</sup> Immigration and Customs Enforcement,<sup>60</sup> and, if deemed necessary, the criminal justice system. Indeed, the invasion of poor, pregnant women’s privacy that is mandated by the PCAP mechanism *is* surveillance. It is regulation. It is an intervention into the private lives of poor women and their families—as the state, through “education,” begins the process of forming women into the kind of parents that the state thinks that they should be.

Finally, to add a bit of context, indigent pregnant women at Alpha experience these violations of privacy rights in an environment marked by a hospital staff that tends to be hostile, belligerent, and antagonistic.<sup>61</sup> Below, I quote at length an interview that I had with an African American patient, Cheryl, describing her experience with hostile staff and her reaction to it. Like many patients, Cheryl had arrived at the hospital for her initial prenatal care appointment with the expectation that she would receive a medical examination by a physician, midwife, or nurse practitioner. Instead, she was informed that her appointment that day would consist of the informational canvassing described above. She explains:

It began with the lady at the front desk. She was sucking her teeth at me. And I was like, “You don’t need to suck your teeth at me.” I said, “We need to speak about this calmly.” And she cut me off and yelled “You were misinformed!”

I was really disappointed because I felt . . . . It is probably not just Alpha . . . . I am used to a level of compassion and care that I really found lacking here. I don’t understand why people work in a hospital if you don’t care about the people that you are dealing

---

<sup>59</sup> I could relate numerous stories about women losing custody of their infants once born, as well as losing custody of their older children, subsequent to their contact with the PCAP bureaucratic apparatus. For those stories, *see generally* BRIDGES, REPRODUCING RACE, *supra* note 1.

<sup>60</sup> Immigration and Customs Enforcement is the federal agency responsible for deporting persons residing in the country “illegally.” *See ICE Enforcement and Removal Operations*, U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, <http://www.ice.gov/about/offices/enforcement-removal-operations/> (last visited Oct. 15, 2010).

<sup>61</sup> *See* Bridges, *Wily Patients*, *supra* note 1, at 4–12, 25–30 (describing several instances of staff antipathy toward patients and explaining this characteristic of the hospital staff as the enactment of larger cultural and political discourses within which indigent mothers are constructed as legitimate objects of contempt).

with. Isn't that a part of your job, and isn't that part of the reason why you became a nurse or OB/GYN or midwife? There was one lady who took my blood. She was nice to me, and I cried. By the time I saw her, I felt defeated. I was like, "Just take my blood. I don't really care what you do." But, she was nice. And I was like, "Why isn't anyone else like you?"

I understand that this is a large hospital and they care for so many minorities and different people all the time. I know the patients aren't necessarily the smartest people in the world and don't have the best personalities . . . . I just felt like they don't care . . . . I even went to the Medicaid office to find a listing of different places that I could go to, and they were like, "No, we don't provide that information." And I said, "How do you not provide that information? You are Medicaid. You are supposed to." And they said, "No. We don't; we never have; and we never will."

I kind of feel stuck here . . . . The way that I've been treated has been really surprising to me, and a part of me can't wait for this to be over so I can just take my baby home. I don't want to come back here and deal with these people.

I've been watching those baby shows on TV. [On one of them,] there is this lady who had severe itching, and the doctor said she had something with her liver and that it could cause complications in her delivery. So, I am, like, freaking out. I have severe itching. When I get out of the shower, it feels like my legs are like on fire. It is, like, really bad. So, the last time I was here a few weeks ago, I went to ask [the midwife about it] real quick before I was getting ready to leave . . . . The whole visit was real quick—like, "Oh yeah, that is the baby's heartbeat. Blah blah." And I was, like, "Hey, I have some dry skin . . . ." And she cut me off and said, "Oh, you have to go to a dermatologist." Not even taking the time to hear what I am saying. I was just going to say, "Yeah, I was watching TV, and I saw this lady, and I was just wondering . . . ." I don't feel like I need a dermatologist to check me out. You are my midwife. You should be able to sit there calmly and listen to me. She just kept looking at me like, "Damn, I have to deal with this girl . . . ." <sup>62</sup>

Cheryl's interview demonstrates, dramatically, that indigent women's privacy rights are not simply violated by the PCAP apparatus; but rather, not infrequently, their rights are violated in an environment of disgust and disregard.

---

<sup>62</sup> Interview with Cheryl (Feb. 15, 2007) (on file with author)

#### D. Other States

It is worth noting that the New York State PCAP program is not unique; several other states' Medicaid-funded prenatal care programs require pregnant women to submit to various non-medical assessments as a condition of their receipt of state-subsidized healthcare. For example, California's Comprehensive Perinatal Services Program provides "nutrition services,"<sup>63</sup> "health education services,"<sup>64</sup> and "psychosocial services"<sup>65</sup> to pregnant, indigent women. Moreover, pregnant women must be "reassessed" every trimester during their pregnancy and once again postpartum.<sup>66</sup> The statute also specifies that indigent pregnant women should be referred to other services that are not, by statute, part of the Comprehensive Perinatal Services Program—including WIC, family planning services, and genetic disease counseling.<sup>67</sup>

In order for providers in Massachusetts to be reimbursed for the prenatal healthcare services that they provide an indigent woman under the state's Medicaid program, they must also provide a social work referral, if needed,<sup>68</sup> as well as "health-care counseling," which includes, among other topics, instruction on "hygiene and nutrition during pregnancy" and "family planning."<sup>69</sup>

---

<sup>63</sup> CAL. CODE REGS. tit. 22, § 51348(c) (2010) (providing that women must have an assessment of their nutritional health at their first prenatal care visit and subsequent reassessments every trimester, with the goal of "prevent[ing] and/or resol[v]ing . . . nutrition problems" and "helping the patient understand the importance of . . . maintain[ing] good nutrition during pregnancy and lactation.").

<sup>64</sup> *Id.* § 51348(d). In exacting detail, the statute spells out on what bases women should be evaluated during their "health education status" assessment:

current health practices; past experience with health care delivery systems; prior experience with and knowledge about pregnancy, prenatal care, delivery, postpartum self-care, infant care, and safety; client's expressed learning needs; formal education and reading level; learning methods most effective for the client; educational needs related to diagnostic impressions, problems, and/or risk factors identified by staff; languages spoken and written; mental, emotional, or physical disabilities that affect learning; mobility/residency; religious/cultural influences that impact upon perinatal health; and client and family or support person's motivation to participate in the educational plan.

*Id.*

<sup>65</sup> *Id.* § 51348(e). Again, the statute spells out in exacting detail what should be reviewed during the assessment of the patient's "psychosocial status": "current status including social support system; personal adjustment to pregnancy; history of previous pregnancies; patient's goals for herself in this pregnancy; general emotional status and history; wanted or unwanted pregnancy, acceptance of the pregnancy; substance use and abuse; housing/household; education/employment; and financial/material resources." *Id.* § 51348(e)(1)(A).

<sup>66</sup> *Id.* § 51348(d).

<sup>67</sup> *Id.* § 51348(j).

<sup>68</sup> 130 MASS. CODE REGS. 433.421(B)(4)(c) (2010).

<sup>69</sup> *Id.* § 433.421(B)(5). Other topics that must be addressed during the "health-care counseling" session include "smoking and substance abuse," "care of breasts and plans for infant feeding," "obstetrical anesthesia and analgesia," "the physiology of labor and

Finally, Illinois has enacted a detailed statute that sets out an exhaustive list of services that providers must give to indigent, pregnant women.<sup>70</sup> In addition to the expected nutritional assessment,<sup>71</sup> a history must be taken of the patient, during which the provider gathers information about her “social and occupational . . . background, health habits, [and] previous pregnancies.”<sup>72</sup> Moreover, the patient must submit to “counseling,” which addresses everything from “[p]hysical activity and exercise,” “[c]hild care arrangements,” “[p]arenting skills, including meeting the physical, emotional and intellectual needs of the infant, with specific appraisal to detect parents at risk of child abuse or neglect,” “[e]motional and social changes occasioned by the birth of a child, including changes in marital and family relationships, the special needs of the mother in the postpartum period, and preparing the home for the arrival of the newborn,” “[d]iscussions regarding postpartum family planning options,” and “other relevant topics in response to patient concern.”<sup>73</sup>

## II. A BRIEF HISTORY OF THE RIGHT TO PRIVACY<sup>74</sup>

The privacy right first articulated in *Griswold v. Connecticut*<sup>75</sup> was not an individual-inhering right, but rather an *entity*-inhering one; that is, the *Griswold* right to privacy protected the family *as a unit* from governmental intervention and regulation.<sup>76</sup> Moreover, it was only with later articulations

---

the delivery process, including detection of signs of early labor,” “plans for transportation to the hospital,” “plans for assistance in the home during the postpartum period,” and “plans for pediatric care for the infant.” *Id.*

<sup>70</sup> ILL. ADMIN. CODE tit. 77, § 630.30(b) (2010).

<sup>71</sup> *Id.* § 630.30(b)(3)(F).

<sup>72</sup> *Id.* § 630.30(b)(3)(A).

<sup>73</sup> *Id.* § 630.30(b)(3)(L).

<sup>74</sup> The history of the right to privacy given here only touches on the right as it protects individuals from government intervention in matters pertaining to the family, sex, and procreation. While the right to *informational* privacy is also implicated by the PCAP enrollment process, see *supra* notes 23–24 and accompanying text, I have omitted this history in the immediate account.

<sup>75</sup> 381 U.S. 479 (1965).

<sup>76</sup> *Id.* at 485–86 (describing the case as concerned with “a relationship lying within the zone of privacy” and noting that the “right of privacy” that protects the marital relationship “[is] older than the Bill of Rights”). The Court had long described the heteronormative family as a unit that enjoys a constitutionally-protected right to be free from state regulation. See, e.g., *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944) (describing *Meyer* and *Pierce* as decisions that “respected the private realm of family life which the state cannot enter”); *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 534–35 (1925) (concluding that a state law requiring children to attend public schools infringed upon the liberty of parents to direct their children’s education); *Meyer v. Nebraska*, 262 U.S. 390, 401 (1923) (striking down a law that prohibited the teaching of modern foreign languages in schools on the basis that the law interfered with parents’ rights to direct the education of their children). *Prince* upheld a law prohibiting minors from selling merchandise in public places—a regulation that functioned to interfere with the family insofar as it proscribed a parent’s ability to direct a child to work. 321 U.S. at 170. The Court based its decision on the ability of the state, pursuant to the doctrine of *parens patriae*, to protect minors. *Id.* at 166. Interestingly, the Court articulated the state’s expansive right of

of the right, most notably in *Eisenstadt v. Baird*,<sup>77</sup> that the right was transformed such that it inhered in the *individual* and functioned to protect private aspects of individuals' lives from state intervention.

The privacy right's history as entity privacy<sup>78</sup> raises interesting questions when it is put into conversation with the "problem" of the "public

*parens patriae*—going on to use the doctrine to uphold an interference in the family unit—in a case that arose out of a fact pattern that did not involve a heteronormative family; Sarah Prince, the named plaintiff, was the *aunt* of the minor who was caught selling magazines on a city street. *Id.* at 159. In an interesting article, Richard Storrow argues that *Prince* was consistent with privacy jurisprudence because the jurisprudence evidences a commitment to using the privacy right to protect traditional, nuclear family units; because the minor was not Sarah Prince's daughter, the Court refused to allow the privacy right to protect their "family" from interference by the state. See Richard F. Storrow, *The Policy of Family Privacy: Uncovering the Bias in Favor of Nuclear Families in American Constitutional Law and Policy Reform*, 66 MO. L. REV. 527, 538–39 (2001).

<sup>77</sup> 405 U.S. 438, 454 (1972) (striking down a Massachusetts law prohibiting the sale of contraceptives to unmarried persons).

<sup>78</sup> Fineman identifies entity privacy as a common law concept—an outgrowth of nineteenth century, liberal ideology that divided society into public and private spheres. See FINEMAN, NEUTERED MOTHER, *supra* note 6, at 186–87; Martha Albertson Fineman, *What Place for Family Privacy?*, 67 GEO. WASH. L. REV. 1207, 1212 (1999) [hereinafter Fineman, *Family Privacy*] ("The idea of the entity of the family as something 'private' predates, and is analytically separate from, the constitutional idea of individual privacy, although this 'new' arena of privacy seems rooted in older notions about family relations."); Vivian Hamilton, *Principles of U.S. Family Law*, 75 FORDHAM L. REV. 31, 39 (2006) ("Long before the U.S. Supreme Court explicitly named it a constitutionally protected individual right, states implicitly recognized and respected the concept of marital and family privacy."); cf. *Nicholson v. Williams*, 203 F.Supp. 2d 153, 234 (E.D.N.Y. 2002) (arguing that it is "beyond peradventure that the existence of a private realm of family life which the state cannot enter has its source not in state law, but in . . . intrinsic human rights") (quoting *Duchesne v. Sugarman*, 566 F.2d 817, 824 (2d Cir. 1977)). Because the right attached to the family entity and not the individuals that composed the family, and because the state/public sphere could not interfere in the private sphere, entity privacy had the effect of rendering the less powerful individuals in the family—that is, women and the children—without recourse to state/public protection. See Fineman, *Family Privacy*, *supra*, at 1216; Hamilton, *supra*, at 39 ("State noninterference permitted husbands to exercise authority over (and reflected their obligations towards) their wives, children, and other household members."). Fineman observes that entity privacy is damning to women and children because they, "as individuals[,] . . . are undifferentiated, and therefore invisible, within the family as an entity. The reluctance to look beyond entity to individuals within the family has meant that they have been subject to potential dominance and oppression." Fineman, NEUTERED MOTHER, *supra* note 6, at 188. Fineman notes that the concept of entity privacy has been critiqued by many feminists because it "only operated as a mask for male oppression within families . . ." *Id.* See also Pamela Scheininger, *Legal Separateness, Private Connectedness: An Impediment to Gender Equality in the Family*, 31 COLUM. J. L. & SOC. PROBS. 283, 304 (1998) ("[I]n categorizing the marital unit and family as 'private' and insulating them from government intervention, the courts have also protected that unit from judicial and state scrutiny of patriarchal and sexist practices that harm women and children. Specifically, the state is unwilling and unlikely to interfere with the family even if the intra-family practice involves violence against women and children."); Barbara Bennett Woodhouse, *The Dark Side of Family Privacy*, 67 GEO. WASH. L. REV. 1247, 1254 (1999) (critiquing entity privacy because it is incongruent with state intervention in the family although abused or neglected children may desperately require the intervention, and noting, more generally, that "[w]hen we adopt a theoretical framework that endows any 'unit' of persons with 'autonomy,' or a 'right' to be free of state intervention, in practice, we are conferring

family.” That is, within the right to privacy in its present, individual-inhering articulation,<sup>79</sup> are specters of entity privacy nevertheless extant? If so, are spectral entity privacy protections afforded to all families—including “public families”? Moreover, does entity privacy offer a more effective avenue of protecting the privacy interests of poor women and their families than does individual privacy? This inquiry can only properly begin with an examination of the *Griswold* opinion.

A. *From Griswold to Eisenstadt Through Casey, or From Entity Privacy to Individual Privacy Through Individual Liberty*

In *Griswold*, the Court found unconstitutional a Connecticut ordinance that proscribed contraceptive use.<sup>80</sup> The Court decided upon the constitutionality of the statute as it applied to married persons—although, as written, the ordinance applied to both married and unmarried persons alike.<sup>81</sup> Unaddressed within the text of the decision is the basis for the Court’s decision that the marital status of the appellants’ clients carried such significance that it could rule on the constitutionality of the statute *only* as it applied to married persons. Which is to say: the Court might have ruled on the ordinance’s constitutionality as it applied to persons of the same racial identification/ascription, socioeconomic status, age, or religious affiliation (or disaffiliation) as the appellants’ clients. Yet, it did not. Instead, it found only the marital status of the clients constitutionally significant,<sup>82</sup> thereby necessitat-

---

unregulated authority on the dominant member within this closed community of persons”).

Entity privacy has had its fair share of supporters. *See, e.g.*, Appell, *Virtual Mothers*, *supra* note 18, at 686 (“Dismantling family privacy while leaving in place the larger political scheme that permits autonomy-limiting income and power disparities will effectively target poor and non-dominant families who already must struggle to maintain their integrity.”); Cahn, *supra* note 18, at 1243 (“Without some notion of family privacy, the state can and will intervene . . .”); Fineman, *Family Privacy*, *supra*, at 1223 (making an argument in favor of entity privacy because of the needs of families, however configured, for self-government). Communitarians have also advocated the return of entity privacy. The charge is that individual-inhering privacy has worked to pit individual family members against other family members, therefore contributing to the decline of the family. Professor Mary Ann Glendon has most cogently articulated this argument. I will discuss her work *infra* note 98.

<sup>79</sup> Arguably, a right to privacy that protects individuals’ entitlement to be free from state intervention in matters pertaining to family, sex, and procreation is no more—having been subsumed by, or transformed into, a liberty interest. For a discussion of this possibility, see *supra* notes 13–15 and accompanying text.

<sup>80</sup> The central statute provided: “Any person who uses any drug, medicinal article or instrument for the purpose of preventing conception shall be fined not less than fifty dollars or imprisoned not less than sixty days nor more than one year or be both fined and imprisoned.” *Griswold v. Connecticut*, 381 U.S. 479, 480 (1965). A separate statute made it a crime for any person to aid or abet the commission of another crime. *Id.* Thus, in concert, the statutes criminalized the activities of those who helped other persons obtain contraceptives, i.e., physicians and family planning advocates.

<sup>81</sup> *See id.*

<sup>82</sup> *Id.* at 486.

ing *Eisenstadt* seven years later to definitively expand *Griswold*'s holding to unmarried persons.<sup>83</sup>

The opinion in *Griswold* frames the law in question as one that "operates directly on an intimate relation of husband and wife and their physician's role in one aspect of that relation."<sup>84</sup> It then takes a brief sojourn through its previous holdings and finds that other unarticulated, yet extant rights can be found in the shadowy penumbras of the Bill of Rights.<sup>85</sup> The exploration ends with the rhetorical question: "Would we allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives?"<sup>86</sup> Answering its own question, the Court states that "[t]he very idea is repulsive to the notions of privacy surrounding the marriage relationship."<sup>87</sup> The Court terminates its opinion by waxing philosophically and eloquently about the nature of marriage:

We deal with a right of privacy older than the Bill of Rights—older than our political parties, older than our school system. Marriage is the coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bi-lateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions.<sup>88</sup>

This concluding paragraph of the decision serves to emphasize the centrality of the marital relation in this first articulation of the privacy right.<sup>89</sup> Thus, it misrepresents *Griswold* to claim that the constitutionalized right to privacy has always been about an individual's bodily integrity, or that the privacy right, since its first articulation, has been about an individual's personal decisional autonomy.<sup>90</sup> Bodily integrity and personal autonomy may

<sup>83</sup> *Eisenstadt v. Baird*, 405 U.S. 438, 443 (1972).

<sup>84</sup> *Griswold*, 381 U.S. at 482.

<sup>85</sup> *Id.* at 482–85.

<sup>86</sup> *Id.* at 485.

<sup>87</sup> *Id.* at 485–86.

<sup>88</sup> *Id.* at 486.

<sup>89</sup> Also informing the Court's decision in *Griswold* are "zonal" notions of privacy. That is, the Court finds in the text of the Constitution recognition of the privacy that should be given to the physical space, the zone, of the home. See Borgmann, *supra* note 18, at 293 (noting that the right of privacy, when first articulated, "had a distinctly spatial sense"). The Court describes the Fourth and Fifth Amendments as protections "against all government invasions 'of the sanctity of a man's home and the privacies of life.'" *Griswold*, 381 U.S. at 484 (quoting *Boyd v. United States*, 116 U.S. 616, 630 (1886)). However, the relevant home is not just any home; when understood in the context of the *Griswold* Court's initial framing of the constitutionally-suspect Connecticut law and the final paragraph lauding the institution of marriage, we understand that the home spoken of in the opinion is the heteronormative, *marital* home.

<sup>90</sup> Justice Brennan appears to make such an assertion in *Carey v. Population Services International*, 431 U.S. 678 (1977). He argues that, while *Griswold* clearly appears to be about the marital relationship, *Eisenstadt* and *Roe* "put *Griswold* in proper perspective." *Id.* at 687. Indeed, "*Griswold* may no longer be read as holding only that a State may not

accurately describe what the right to privacy, and now a liberty interest locatable in the Due Process Clause, has come to protect.<sup>91</sup> However, a faithful reading of *Griswold* demands the conclusion that the right to privacy was *really* about the sanctity of the heterosexual marital relation and the protection from governmental intrusion that the Court believed should be afforded to that unit.

The *Griswold* privacy right very closely corresponds to what has been understood within liberalism as the “private sphere”<sup>92</sup>—that is, a purportedly “natural” and “prepolitical” arena into which the government cannot intrude without violating supposedly “widely-held” notions of decency and propriety. Within liberalism, state intervention in the private sphere is always and necessarily a restriction on liberty, as “the state should restrict itself to formally guaranteeing the equal liberty of everyone to pursue in the private sphere their particular conceptions of the good.”<sup>93</sup> Subsequent to the state’s successful guarantee of the formal equality of individuals, it becomes illegitimate for that same state to interfere in the relationships and activities that take place in the private sphere. This spatialized dichotomization of society into private and public spheres appears to serve as the theoretical underpinning of the privacy right as articulated in *Griswold*. Per *Griswold*,

---

prohibit a married couple’s use of contraceptives. Read in light of its progeny, the teaching of *Griswold* is that the Constitution protects individual decisions in matters of childbearing from unjustified intrusion by the State.” *Id.*; see also JEAN L. COHEN, REGULATING INTIMACY: A NEW LEGAL PARADIGM 6 (2002) (“What was new in this jurisprudence was not the application of the concept of privacy to the marital relationship or to the family construed as an entity. Rather, the innovation lay in the Court’s attempt to articulate constitutional grounds for directly protecting the personal privacy and decisional autonomy of individuals in relation to ‘intimate’ personal concerns, whether these arise within the family setting or outside it.”). Perhaps, in disregarding the relatively unambiguous language of *Griswold* by contending that the decision ought not to be read as articulating a privacy right that inhered in the marital unit, Justice Brennan and those who would make this countertextual assertion feel that an admission that the right to privacy has transformed over the years would open the Court to charges of judicial activism; that is, these countertextualists might suspect that permitting that the right has evolved and experienced modifications in the decades since its first articulation would be equivalent to admitting that the right to privacy has no anchor in the text of the Constitution—making the right even more susceptible to elimination in the age of political conservatism and originalist interpretations of the Constitution.

However, there is a compelling argument to be made that the right to privacy should be retained because of what it has become. For example, Cohen argues that the right “shield[s] the personal dimensions of one’s life from undue scrutiny or interference” and therefore “protect[s] experimental, creative processes of personal identity formation.” *Id.* at 51. Admitting that the right to privacy has *become* about individual decisional autonomy and bodily integrity ought not to impugn the right’s defensibility. Indeed, the right’s advocates might acknowledge the disunity that characterizes the right’s form from *Griswold* to *Eisenstadt*, yet nevertheless argue for the persistence of the right based on the significance of that which it has come to protect.

<sup>91</sup> See *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 857 (1992) (arguing that the Court’s decision in *Roe*, which found that there was a constitutional right to privacy that protected a woman’s decision to terminate a pregnancy, may be seen “as a rule (whether or not mistaken) of personal autonomy and bodily integrity”).

<sup>92</sup> COHEN, *supra* note 90, at 3.

<sup>93</sup> *Id.*

the borders of the private sphere were coexistent with the four walls of the marital home; further, the activities that historically and rightfully took place there—i.e., procreation and the avoidance thereof—were not legitimately subject to regulation by the public/state.<sup>94</sup> As such, the Court in *Griswold* took upon itself the duty of enforcing a separation between these two spheres; that the public sphere would intrude into the private sphere to enforce a ban on activities that justly belonged there was “repulsive” to the Justices rendering the decision.<sup>95</sup> Therefore, it seems wholly accurate to describe the *Griswold* privacy right as a sphere-inhering right (that is, one inhering in the *private* sphere) or entity-inhering right (that is, one inhering in the private sphere-residing *family* entity).

However, subsequent articulations of the right to privacy supposedly sounded a death knell for privacy as an entity- or sphere-inhering right. Beginning with *Eisenstadt*, decided seven years after *Griswold*, and continuing

<sup>94</sup> Counterpoised to this legal paradigm is a stance more amenable to state intervention in the private sphere. In this paradigm, it is acknowledged that the private sphere is frequently the site of power inequalities, domination, and repression. Accordingly, “direct, substantive legal regulation in a domain once considered off-limits to state intrusion—the private family—is indispensable to justice between genders.” *Id.* at 2. Thus, it appears that while the decision in *Griswold* is consistent with the liberal paradigm, its progeny (i.e., *Eisenstadt*, *Roe*, *Casey*, and *Lawrence*), in their abandonment of the private/public sphere dichotomy, is more congruent with the latter legal paradigm.

<sup>95</sup> It is worth noting that the private sphere protected by the Court in *Griswold* does not fully correspond to liberal dichotomizations of society. Within liberalism, the private sphere is comprised of the heteronormative family *in addition to* the economic market. Thus, to the extent that *Griswold* recognizes a private sphere notably devoid of the economic market, its notion of such a sphere more closely corresponds to the patriarchal private sphere recognized by feminists rather than traditional, liberal notions of the private sphere. See, e.g., Carole Pateman, *The Patriarchal Welfare State*, in *FEMINISM, THE PUBLIC AND THE PRIVATE* 241 (Joan B. Landes ed., 1998). In her critique of traditional, liberal dichotomies of society, Pateman writes that there exists:

a double separation of the private and public: the *class* division between civil society and the state (between economic man and citizen, between private enterprise and the public power); and the *patriarchal* separation between the private family and the public world of civil society/state. Moreover, the public character of the sphere of civil society/state is constructed and gains its meaning through what it excludes—the private association of the family.

*Id.* at 245.

Pateman argues that the traditional liberal formulation does not fully grasp the gender politics of Western societies. Rather, the gendered division of these societies is better ascertained by dichotomizing society into a public world of civil society/state versus a private sphere of the family. Thus, Pateman would note that *Griswold* only recognizes a division “between the private family and the public world of civil society/state”—what Pateman identified as a patriarchal dichotomy of affairs. *Id.* at 245; see also Fineman, *Family Privacy*, *supra* note 78, at 1207 (“Family is distinguished from both the market (a chameleon institution, public vis-à-vis the family but ‘private’ vis-à-vis the state) and the state (the quintessential public institution).”); Frances E. Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 *HARV. L. REV.* 1497, 1501–02 (1983) (noting that there are two dichotomies involved in the distinction between the “public sphere” and the “private sphere”: “on the one hand, a dichotomy between the market, considered public, and the family, considered private” and “on the other hand, a dichotomy between the state, considered public, and civil society, considered private”).

through the succeeding re-articulations of the privacy right, the right has been held to inhere no longer in the family entity, but instead in the autarkic, atomistic individual. The facts of *Eisenstadt* differ from *Griswold* only insofar as the woman to whom the contraceptive was dispensed was unmarried.<sup>96</sup> Thus, a new question of constitutional import was raised: Did unmarried persons, like their married counterparts, enjoy a right to privacy that protected their use of contraceptives from state sanction? The Court answered in the affirmative, holding that the Equal Protection Clause prohibited the state from discriminating between married and unmarried persons: “[W]hatever the rights of the individual to access to contraceptives may be, the rights must be the same for the unmarried and the married alike.”<sup>97</sup> Thus, the Court transformed the right of privacy articulated in *Griswold* from something that concerned the heteronormative conjugal unit and the boundaries of the marital home into something decidedly different; that is, the right of privacy was made over into one that was possessed and enjoyed by the *individual*.<sup>98</sup> The Court explains itself at some length:

---

<sup>96</sup> *Eisenstadt v. Baird*, 405 U.S. 438, 440 n.1 (1972).

<sup>97</sup> *Id.* at 453.

<sup>98</sup> Communitarians have critiqued the transformation of the right to privacy from one that inheres in an entity to one that inheres in individuals. For example, Mary Ann Glendon argues that the Court made a grave error when it reinterpreted the right of privacy as one possessed by an individual. See MARY ANN GLENDON, *RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE* (1991). She argues that it is *because* the privacy right is individual-inhering that “poor, pregnant women . . . have their constitutional right to privacy and little else. Meager social support for maternity and childraising, and the absence of public funding for abortions in many jurisdictions, do in fact leave such women largely isolated in their privacy.” *Id.* at 65; cf. Woodhouse, *supra* note 78, at 1261–62 (advocating the replacement of the concept of privacy with dignity and arguing that “[m]ost struggling mothers would trade a right to be left alone, which does little to help them survive, for the right to be treated in a respectful manner, even as one accepts government assistance”). However, there is a compelling argument to be made that it is not because the right to privacy is an individual right that there is “meager social support for maternity and childraising.” Nor is the construction of the right to privacy as an individual-inhering right responsible for the fact that in many jurisdictions, there is no public funding for abortions. In fact, there is no reason to believe that an entity- or sphere-inhering privacy right would better protect indigent women, as Glendon seems to suggest. Actually, it may be naive to suppose that an entity-based privacy right (for which the middle-class, heteronormative family is the model) would protect the unmarried, low-income women that Glendon claims “have their constitutional right to privacy and little else.” The problem is not juridical constructions of the bearer of the right to privacy, but rather *class*. The problem lies with the verity that the state has not been conceptualized as bearing a fundamental responsibility to protect the dispossessed and disenfranchised.

The crux of Glendon’s critique of the individual-inhering privacy right is that an entity-inhering privacy right better protects the integrity of the family, community, and nation within which the individual is embedded and by which the individual is constituted. Yet, this argument leads to the conclusion that the group (i.e., family, community, or nation) would be the entity to make choices pertaining to a woman’s reproduction—a result that may be terribly unjust and frightening. Thus, I agree with Cohen that, despite the fact that all individuals are constituted by and embedded within groups, the privacy right must nevertheless reside with the individual. She correctly notes that, even though individuals may be accurately understood as group-constituted entities, this recognition does not:

It is true that in *Griswold* the right of privacy in question inhered in the marital relationship. Yet the marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals with a separate intellectual and emotional makeup. If the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.<sup>99</sup>

In making an argument under the Equal Protection Clause to expand *Griswold's* holding, *Eisenstadt* alters the base of the right to privacy to one that is closer to (individual) decisional autonomy and (individual) bodily integrity—that is, the ability to decide what happens to one's own body. Entity privacy had been rejected; the right to privacy as an individual-inhering right had been affirmed.<sup>100</sup>

---

obviate[ ] the need for privacy as decisional autonomy when it comes to certain choices that the relational, embedded, interdependent, communicative individual may have to make in modern societies. We do not initially choose the communities we are born or socialized into, or the strong evaluations and commitments these generate; but surely as adults we must have the opportunity to affirm and embrace some of these communities and commitments and abandon those which, upon reflection, we cannot. Only if decisional autonomy in this sense is respected in every person, however situated, only if the individual's capacity for moral deliberation and justification, on the one side, and for ethical judgment and self-reflection . . . , on the other, are protected against coercion by the state or the majority of the community, can the individual function as a moral agent at all.

COHEN, *supra* note 90, at 47. Indeed, a group-inhering right, without additional regulation of group politics, offers no protection against "state paternalism, whether in the guise of community norms or majority will." *Id.* at 48.

<sup>99</sup> *Eisenstadt*, 405 U.S. at 453.

<sup>100</sup> While abandoning the family entity and the marital relation as the crux of the right to privacy, *Eisenstadt* might not have abandoned basing the right of privacy in a relation altogether. That is, the Court might have recognized that contraceptives are only relevant to individuals engaged in a sexual relationship *with someone else*. Thus, the Court might have anchored the right in that relation of two persons—not a marital relation, but rather a *sexual* relation. An alternative holding might have found that sexual intercourse between two persons conceivably created a different, yet equally legitimate, sphere of activity into which the state could only improperly intrude—an entity that the state could not properly regulate. I should not be read as arguing in favor of the conceptualization of *all* sexual relationships as constitutive of "families"; instead, I simply note that when the parties involved in a sexual relationship so choose, an alternate *Eisenstadt* holding might have made a constitutionally-protected variety of the "family" available to them. However, such a pronouncement would have been quite a radical holding, as the decision might have compelled the acknowledgment and recognition of different types of "family"-like relations that comprise the private sphere. The "family" might no longer only be constrained in such a way that it always and only coincides with its heteronormative, patriarchal variety; instead, it would be able to be identified in various formations of individuals—including formations that are comprised of individuals of the same sex.

Had the Court elected to democratize the notion of the family and maintained the right to privacy as a right that inheres in a relation among two people, this form of "entity privacy" need not have retained the problematic characteristics that "entity privacy" possessed when it rendered patriarchal violence and domination immune from state intervention. See *supra* note 78 and accompanying text. Cohen suggests the same when she

### B. *Privacy to Liberty*

As noted in the Introduction, while the Court, since *Eisenstadt*, has reaffirmed constitutional protection for the activities once protected under the rubric of the “right to privacy,” it has shied away from attaching the appellation of “privacy” to this interest.<sup>101</sup> This resignifying of the right to privacy began in *Casey*, in which a plurality of the Court reaffirmed *Roe v. Wade*<sup>102</sup> by declaring that there exists a right to an abortion—albeit one that was more limited than the abortion right first articulated nineteen years earlier.<sup>103</sup> The *Casey* plurality declined to use the language of privacy when describing the source of the abortion right, instead opting to use the language of liberty.<sup>104</sup> The plurality noted that there is a substantive component to the Due Process Clause’s protection against deprivations of “life, liberty, and property”;<sup>105</sup> moreover, the plurality argued that the “liberty” protected by the Due Process Clause was expansive enough to encompass the interests and activities—including, most relevantly to the decision, a woman’s choice to terminate an unwanted pregnancy—that had been protected previously under the rubric of privacy.<sup>106</sup> Thus, we witness in *Casey* the somewhat

---

advocates a notion of “relational privacy,” which would “cover what entity privacy covered without its patriarchal baggage.” COHEN, *supra* note 90, at 40–41. She observes, “[o]ther family forms and other intimate relationships could all benefit from entity privacy—that is, from protection against unfair and unwarranted state regulations. Yet legal regulation can provide a protective shield as well as a structure of justice for a range of intimate relationships.” *Id.* at 40.

<sup>101</sup> See *supra* note 13 and accompanying text.

<sup>102</sup> 410 U.S. 113 (1973).

<sup>103</sup> *Casey* rejected *Roe*’s trimester framework and replaced it with the “undue burden standard,” by which abortion regulations that burden, but do not *unduly* burden, a woman’s ability to terminate a pregnancy are constitutional. *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 878 (1992).

<sup>104</sup> *Id.* at 844 (“Liberty finds no refuge in a jurisprudence of doubt. Yet 19 years after our holding that the Constitution protects a woman’s right to terminate a pregnancy in its early stages, that definition of liberty is still questioned.”); see also Borgmann, *supra* note 18, at 299 (observing that *Casey* may have “essentially abandoned privacy as a basis for abortion rights in favor of liberty”); COHEN, *supra* note 90, at 63 (noting that the *Casey* plurality “did not invoke a general right to privacy [but rather] a right to liberty” and underscoring that “[l]iberty, not privacy, was the centerpiece of the plurality opinion”); Hamilton, *supra* note 78, at 63 (noting that the “concept of privacy itself may be ceding ground to the broader notion of liberty (with its more explicit constitutional grounding) as the justification for individual protections”).

<sup>105</sup> *Casey*, 505 U.S. at 846–50 (defending the doctrine of substantive due process and arguing that the Court must discern that which is protected by the due process clause through “reasoned judgment”).

<sup>106</sup> Substantive due process protects “personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education.” *Id.* at 851 (citing *Carey v. Population Serv. Int’l*, 431 U.S. 678, 685 (1977)). “These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment.” *Id.*

subtle transformation of privacy to liberty,<sup>107</sup> the consequences of which are not entirely clear.<sup>108</sup>

Moreover, the *Casey* opinion reiterates that the right of privacy-cum-liberty interest resides with the individual—not with a family entity, a sphere, or heteronormative home. The plurality notes that there is “a constitutional liberty of the woman to have some freedom to terminate her pregnancy”; yet, “[t]he woman’s liberty is not so unlimited”; therefore, before viability, “the woman has a right to choose to terminate her pregnancy”; indeed, “[t]he woman’s right to terminate her pregnancy before viability is the most central principle of *Roe v. Wade*.”<sup>109</sup> *Casey* clearly pronounces that the right to privacy/liberty interest is an individual-inhering one. As an individual right/interest, the extent of the activity protected by it must be limited by others’ interests: “What is at stake is the woman’s right to make the ultimate decision, not a right to be insulated from all others in doing so.”<sup>110</sup> It is arguably because the right-holder is conceptualized as atomistic and individualized—that is, because the right/interest is possessed by the individual woman in her solitariness—that the Court was compelled to consider the right of the individual exercising it against the interests of others.<sup>111</sup>

---

<sup>107</sup> It should be noted that the Court in *Lawrence v. Texas* articulated an individual’s interest in being free from state intervention in the more intimate aspects of his/her physical and emotional life—that is, his/her right to privacy—as a component of his/her liberty. 539 U.S. 558, 578 (2003). The *Lawrence* Court also notes that, “liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex.” *Id.* at 572; see also *Casey*, 505 U.S. at 915 (Stevens, J., concurring) (“The woman’s constitutional liberty interest also involves her freedom to decide matters of the highest privacy and the most personal nature.”). Notably, the Court in *Lawrence* looked to privacy jurisprudence when tracing the genealogy of the liberty interest that was violated by the Texas statute. 539 U.S. at 564–66 (citing *Pierce*, *Meyer*, *Griswold*, *Eisenstadt*, and *Roe*). For a discussion of the language of privacy in the *Lawrence* opinion, see *supra* notes 19–22 and accompanying text.

<sup>108</sup> Borgmann has suggested that the constitutionality of the recent spate of laws that burden the abortion right by requiring biased counseling prior to the abortion procedure may be due, in part, to the reframing of the right to abortion as an issue of “liberty” and not one of “privacy.” See Borgmann, *supra* note 18, at 325 (“The cost of winning *Casey* is that women have protection for the ultimate abortion decision, but almost no protected zone of privacy in which to make that decision. Perhaps the right to abortion would benefit from renewed attention to the more familiar sense of privacy—not just privacy as an awkward and unsuitable synonym for equality, liberty, or autonomy . . . , but privacy as a protected space within which a person can make these kinds of important moral decisions without interference from the state.”).

<sup>109</sup> *Casey*, 505 U.S. at 869–71 (emphasis added).

<sup>110</sup> *Id.* at 877.

<sup>111</sup> To this end, the Court in *Casey* was asked to determine the constitutionality of spousal notification provisions in state abortion laws. The Pennsylvania abortion law at issue provided that, “except in cases of medical emergency . . . no physician shall perform an abortion on a married woman without receiving a signed statement from the woman that she has notified her spouse that she is about to undergo an abortion.” *Id.* at 887. The Court struck down the regulation. *Id.* at 895. The question posed by the spousal notification provision is interesting when one considers that the right to privacy, as originally enunciated in *Griswold*, was derived from the heteronormative family and the marital abode. The irony is in the fact that the right to privacy, which has its foundations in romantic notions of an ideal, healthy marital relation, was now being deployed to

C. *The Persistence of Entity Privacy*

Although the liberty interest that protects that which was previously protected by the right to privacy is clearly, in its more current expressions, something that inheres in the individual, specters of its entity-inhering past nevertheless endure. In *Michael H. v. Gerald D.*,<sup>112</sup> a plurality of the Court used an entity-inhering variety of the privacy right to deny a father visitation rights to his biological child.<sup>113</sup> The child, Victoria—the paternity of whom the biological father, Michael H., had established and with whom he had begun a meaningful relationship—was conceived and born while her mother, Carole, was married to another man, Gerald D.<sup>114</sup> After Carole reconciled with Gerald D., the married couple sought to preclude Michael H. from having any contact with or legal rights to Victoria.<sup>115</sup> Justice Scalia, writing for the plurality, held that Michael H. had no legal claim to his biological child, as the latter had been born within a marital relationship to which he was not a part.<sup>116</sup> The plurality held that it was improper for the state to intervene in that marital relationship in order to permit or facilitate the parental rights of an outside party.<sup>117</sup> Spectres of entity privacy inform the outcome and haunt the interstices of the opinion, as when Scalia poses the question of whether the legal tradition in the U.S. historically has protected the relationship between an unmarried father and his child. Answering in the negative, he writes:

[Q]uite to the contrary, our traditions have protected the marital family (Gerald, Carole, and the child they acknowledge to be theirs) against the sort of claim Michael asserts . . . .  
 . . . .

---

protect one individual in a far-from-ideal marital relation from the other. However, had a similar question been posed under a *Griswold*-version of the privacy right—asking whether a state could compel a woman to inform her husband about her intent to abort—the regulation probably would have been found to violate the Constitution. That is, a Court using *Griswold*-era definitions of privacy likely would have held that the ordinance violated notions of entity privacy as well: insofar as the private, intimate sphere of the family was a realm into which the public/state could not intrude under entity privacy, state regulations encroaching into that sphere with the intent of regulating the interactions between husband and wife might have been viewed as “repulsive” by the Justices deciding the case. A Court using a *Griswold* definition of privacy likely would have held that it was unacceptable for the state to impose itself into the marital unit in order to mandate such conjugal decision-making.

<sup>112</sup> 491 U.S. 110 (1989).

<sup>113</sup> Dailey has offered a similar reading of the case, describing the decision as one in which “the Justices appear to agree that constitutional liberty protects the family unit from unjustified state intrusion.” Anne C. Dailey, *Constitutional Privacy and the Just Family*, 67 TUL. L. REV. 955, 980 (1993) [hereinafter Dailey, *Constitutional Privacy*].

<sup>114</sup> *Michael H.*, 491 U.S. at 113–14.

<sup>115</sup> *Id.* at 115–16.

<sup>116</sup> *Id.* at 125–27.

<sup>117</sup> *Id.* at 124–27.

. . . What counts is whether the States in fact award substantive parental rights to the natural father of a child conceived within, and born into, an extant marital union that wishes to embrace the child. We are not aware of a single case, old or new, that has done so.<sup>118</sup>

Spectral concerns with the marital relation and the deference that ought to be shown to it are most apparent in the conclusion of the plurality opinion, in which Scalia writes:

The primary rationale underlying [the California statute's] limitation on those who may rebut the presumption of legitimacy is a concern that allowing persons other than the husband or wife to do so may undermine the integrity of the marital union. When the husband or wife contests the legitimacy of their child, the stability of the marriage has already been shaken. In contrast, allowing a claim of illegitimacy to be pressed by the child—or, more accurately, by a court-appointed guardian ad litem—may well disrupt an otherwise peaceful union.<sup>119</sup>

In the same way, Justice O'Connor, in a concurring opinion, appears also to have been visited by apparitions of entity privacy, encouraging her to find the marital entity deserving of protection from state interference-quarantenable parental rights held by an outside party:

[A]fter its rather shaky start, the marriage between Carole and Gerald developed a stability that now provides Victoria with a loving and harmonious family home. In the circumstances of this case, I find nothing fundamentally unfair about the exercise of a judge's discretion that, in the end, allows the mother to decide whether her child's best interests would be served by allowing the natural father visitation privileges.<sup>120</sup>

This short excursus on the ghost of entity privacy, clearly present within *Michael H.*, should not be read as arguing that the right to privacy-cum-liberty interest no longer exists as an individual-inhering right. I am not making the claim that individual privacy/liberty has been defeated in the wake of entity privacy's triumphant return. Instead, what I contend is that the privacy right/liberty interest as an entity-inhering concept is not a mere anachronism, relevant only inasmuch as it represents a stage in the history of privacy jurisprudence that has long ago been superseded. Far from being abandoned to the annals of antiquity, entity privacy is present—informing privacy, equal protection, and liberty claims decades after it was thought to

---

<sup>118</sup> *Id.* at 124, 127.

<sup>119</sup> *Id.* at 131.

<sup>120</sup> *Id.* at 135–36 (O'Connor, J., concurring).

be deemed constitutionally antiquated.<sup>121</sup> Entity privacy may be considered germane when scholars and activists seek to ascertain the content of constitutional protections, even if opinions within privacy jurisprudence no longer articulate it as dispositive. As such, entity privacy continues to inform judicial and non-judicial notions of the propriety of some state interventions and the proper role of the state.<sup>122</sup>

If entity privacy is undestroyed and relevant, what does it mean that the families of the pregnant seekers of prenatal care at Alpha Hospital can be inquired into, subsequently problematized, and, if the “need” is discerned, directly regulated by the state?<sup>123</sup> If PCAP indeed functions as a violation of poor families’ entity privacy, it is relevant to ask why there is no presumption of entity privacy within the Alpha obstetrics clinic.<sup>124</sup> Why do not no-

---

<sup>121</sup> Dailey has argued similarly, writing: “[T]he family as an independent institution has not in fact withered out of constitutional existence, but is very much alive in privacy doctrine.” Dailey, *Constitutional Privacy*, *supra* note 113, at 964. And again: “The interpreters of constitutional liberty have never withdrawn protection for the ‘sanctity’ of family life. . . . In case after case involving constitutional privacy, the Court has emphasized that the family unit and familial relationships define the core of this fundamental interest.” *Id.* at 979.

<sup>122</sup> Fineman, for one, champions the return of entity privacy, in part because of her belief that families that do not conform to the heteronormative ideal need protection from state power. See Fineman, *Family Privacy*, *supra* note 78, at 1210–11 (advocating an entity privacy that “could be drawn around caretaking or dependency units” and clarifying that this entity privacy “would not be a right to separation, secrecy, or seclusion, but the right to autonomy or self-determination for the family even though it is firmly located within a supportive and reciprocal state”).

<sup>123</sup> In an insightful article, Radhika Rao argues that the right to privacy is not properly understood as a tool to protect a sole individual from state power; rather, it protects an association of individuals from state power. Radhika Rao, *Reconceiving Privacy: Relationships and Reproductive Technology*, 45 UCLA L. REV. 1077, 1103 (1998). She describes the right as one of “relational privacy”: “Privacy is not a right attached to isolated individuals; it nurtures social institutions, such as marriage and the family, that mediate between the individual and the state.” *Id.* at 1078. However, Rao underscores that this right of relational privacy ends when the individuals that comprise the relation are in conflict; the privacy right only protects their activities when they are “allied against the state.” *Id.* at 1099. If Rao’s description of the privacy right is correct, it reveals an interesting assumption about the poor families that I have argued do not enjoy a robust right to privacy. That is, if privacy as a limitation on state power is only available to associations of individuals who are not in conflict, then the fact that there are little or no limitations on state power to intervene in poor families—i.e., they do not enjoy a right to privacy that is respected—reveals that these families are presumed to be in conflict; they are imagined as presumptively conflicted. Thus, the state apprehends the members of poor families as already situated in antagonistic relationships to one another and treats them accordingly.

Interestingly, Rao writes that “[w]henver two or more individuals are engaged in intimate activities without oppression within the group and without *external effects* upon others, they should receive shelter under the right of relational privacy.” *Id.* at 1105 (emphasis added). Perhaps the reason why poor families do not receive shelter via the right of relational privacy is because they are imagined to have “external effects.” Perhaps the external effects that they are imagined to have are consequences of their economic dependence and the likelihood that they will raise future citizens who “suffer” from a similar economic dependence. I explore this argument *infra* Part III.

<sup>124</sup> Indeed, why also is there no presumption of individual privacy? I explore this question *infra* Part IV.

tions of entity privacy make inquiries into the intimate corners of families seem like a “repulsive” enterprise? Why is “repulsion” not felt by the professionals who perform these inquiries several times per day on a daily basis? Why has not the coerced permeability of the boundaries surrounding poor families generated protests that the endeavor is indecent, unseemly, and indecorous? This lack may say less about the viability of entity privacy as a legal and moral concept than it does about contemptuous perceptions of poor families. That is, the absence of protest about the privacy violations enabled—indeed, *required*—by Medicaid does not demonstrate that entity privacy has been abandoned; instead, it demonstrates that poor families, when they have been affronted or insulted, are not conceived of as entities worthy of romantic philosophic waxing and defiled senses of decency.

### III. ENTITY PRIVACY AND “PUBLIC FAMILIES”

To reach the conclusion presented above—that poor women’s families are not apprehended as entities deserving of the romanticism conferred upon the families of their non-poor counterparts—one can observe that traditional notions of entity privacy were designed to protect “traditional” families.<sup>125</sup> The insufficiency attributed to the poor families (such as those of Alpha patients) derives from their presumed failure to conform to the “traditional” family archetype, frequently consisting of the mother-child dyad as opposed to the husband-wife-child triad.<sup>126</sup> This argument would conclude with the observation that the nonconformance of the families of Alpha patients to ideals of the patriarchal heteronormative family results in their construction as undeserving of state noninterference.<sup>127</sup>

---

<sup>125</sup> See Cahn, *supra* note 18, at 1235 (noting that entity privacy, or marital privacy, “narrowly” protects “traditional marital unit[s]”); Fineman, *Family Privacy*, *supra* note 78, at 1216 (noting that, historically, entity privacy only protected “family units that conform to ideological conventions about appropriate form and function—intact nuclear families”).

<sup>126</sup> It may reveal that noninterference is not afforded to families as such, but rather to *men* as the only properly entitled heads of patriarchal families. See Hamilton, *supra* note 78, at 61 (“Family privacy protected from undue state interference the individual rights of the husband/father as the head and public representative of his family.”).

<sup>127</sup> Dailey makes such an argument in her analysis of the family within privacy jurisprudence; she contends that when family formations fall short of emulating those arrangements that society and government are interested in promoting and protecting, they do not receive the benefit of state noninterference. Dailey, *Constitutional Privacy*, *supra* note 113, at 956. She writes:

From laws prohibiting divorce in the early years of the republic to contemporary laws denying homosexuals the right to marry, the state has continually shaped and promoted a particular vision of family life. Far from prohibiting state intervention in a prepolitical social sphere, the ideal of family privacy expresses a particular set of family values by protecting only those social relations that the state deems worth protecting. The boundaries of family privacy are drawn by political choice

.....

A different route through which to reach a similar conclusion is to argue that the “entity” term within “entity privacy” contemplates the heteronormative family—that is, the husband-wife-child triad. Accordingly, the argument would be that families helmed by unmarried women are not “families” within the ambit of “entity privacy” and, thus, enjoy neither a presumption nor actual experience of privacy. Olsen references this construction of the family in her analysis of “the private family” within liberal political theory; she notes that “[t]he notion of noninterference in the family depends upon some shared conception of proper family roles . . . .”<sup>128</sup> And that is the dilemma presented by families headed by unmarried women: inasmuch as the parental roles within the heteronormative family are distributed across two (married) individuals, single mothers necessarily collapse the distribution into a sole person. In such a collapse, the “propriety” of the “proper family roles” is lost, and noninterference as a state policy loses its justification. Alternatively, perhaps it is thought that the unmarried mother does not assume the “family role” traditionally assumed by the husband/father; instead of the distribution of “proper family roles” into a lone female individual, perhaps what is presumed is *abandonment* of the “family role” historically assumed by the husband. Confronted with the unfulfilled role of the father, the state occupies the space. As such, state noninterference, and privacy/liberty, becomes bad public policy.

*Hodgson v. Minnesota*,<sup>129</sup> holding unconstitutional a statute that required an adolescent to notify both of her parents prior to receiving an abortion, exemplifies this concern with the familial roles that (two) parents assume—the delineation of parental duties—when raising a child. Justice Stevens’ majority opinion notes that “[t]he family may assign one parent to guide the children’s education and the other to look after their health.”<sup>130</sup> The opinion goes on to note that “[a] natural parent who has demonstrated sufficient commitment to his or her children is thereafter entitled to raise the children free from undue state interference.”<sup>131</sup> Reading these two propositions together suggests that the rejection of single-parent families as worthy of entity privacy may, at least partially, be premised on the belief that unmarried women have not “demonstrated sufficient commitment to . . . her children.”<sup>132</sup> That is, if those who enjoy entity privacy and are free to raise their children without state interference are those who have “demonstrated

---

*Id.* Because single parent families—especially those helmed by poor women of color—are not a “social relation[ ] that the state deems worth protecting,” entity privacy is not drawn in such a way that includes these families within its ambit. *Id.*

<sup>128</sup> Olsen, *supra* note 95, at 1506.

<sup>129</sup> 497 U.S. 417 (1990).

<sup>130</sup> *Id.* at 446.

<sup>131</sup> *Id.* at 447; *cf.* Appell, *Virtual Mothers*, *supra* note 18, at 701–02 (“Parental rights doctrine bestows the right to make these decisions on adults who have shown a prescribed level of commitment to the child . . .”).

<sup>132</sup> *Hodgson*, 497 U.S. at 447.

sufficient commitment to [their] children,”<sup>133</sup> and the poor, pregnant single woman appears to have no right to raise her children free of state interference, then perhaps she is perceived as not having demonstrated commitment to her children—a commitment that her marriage to the father of her children might presumably evidence. One could argue that the marriage of the mother is imbued with the power to index her commitment to her child; as such, the failure or refusal to add a paternal, third term to the mother-child dyad signals the absence of her allegiance to the second term in her “family”; the non-married status of the mother signals the absence of her commitment to provide her children with a (real) family. This deficiency of the mother-child bond, demonstrated by the mother’s marital status, justifies the exercise of the state police power within the deficient “family.” Or so the argument goes.

However, this does not conclude the analysis because, as noted earlier, the “public families” that I encountered in the Alpha obstetrics clinic were not infrequently composed of the mother-father-child (or soon-to-be-child) triad. That is to say, many of the families that I met did, indeed, conform to notions of the heteronormative family. In spite of this, entity privacy was universally denied to the families of *all* patients within the clinic—not just single pregnant women or the families headed by single women—as all patients were required to submit to the informational canvassing by which they enroll in PCAP. Consequently, the explanation for the non-presumption of entity privacy in the Alpha obstetrics clinic does not follow the structure of the families at hand, but rather the *class* of those families. That is, the obvious characteristic that all of the families seeking healthcare in the Alpha obstetrics clinic share is not family structure, but *poverty*. Moreover, it is the characteristic of poverty that destroys the assumptions that motivate traditional notions of entity privacy.

#### A. *Theorizing (and Justifying) Entity Privacy*

But, what are those assumptions? Some scholars have argued that that which is at stake in state noninterference with the family—explicitly, that which is at risk every time the state intervenes in the family unit—is the ability of the family to independently produce productive citizens into whose hands the nation will ultimately fall.<sup>134</sup> Parental authority, and the limitation of state power in matters regarding the family, is necessary if children are to

---

<sup>133</sup> *Id.*

<sup>134</sup> See, e.g., Anne C. Dailey, *Developing Citizens*, 91 IOWA L. REV. 431, 440 (2006) [hereinafter Dailey, *Developing Citizens*] (“In a democratic republic, . . . it is the proper role of parents rather than the State to ‘prepare’ children for citizenship. This understanding of children’s place in a democratic polity follows from the Justices’ views about the vulnerability of children to state coercion and the important role that parental rights play in shielding young children from state indoctrination.”). Appell understands this justification for state noninterference in family life as a species of “public family” theory. See Appell, *Virtual Mothers*, *supra* note 18, at 707 (observing that public family theories

grow up to one day participate freely in a free society.<sup>135</sup> As Dailey explains:

Family privacy protects a realm of parental authority that is not in itself a sphere of negative liberty, but that is a means for the development of responsible citizens . . . .

. . . .

Parental authority is not, of course, without limits. Yet those limits are themselves set by reference to the public ends of family life. Parental authority is exceeded when it threatens to impair the child's development into a responsible civic individual. The settled boundaries of parental authority inject a strong normative vision of the "good citizen" into family life . . . . It must be exercised in the service of creating citizens equipped to participate in a liberal democracy.<sup>136</sup>

If one transports Dailey's line of reasoning to the poor women whose interests in the privacy of their family entities are not respected within the Alpha obstetrics clinic, one understands that these families are thought to be incapable of producing desired and desirable future citizens; state intervention in these family entities, then, is required for the protection of liberal democracy. Expressed differently, parental authority with regard to the development of future citizens is not deferred to when the parents do not inspire confidence.<sup>137</sup> If the maintenance of the "liberal democratic order" is at risk when the state intervenes in families deserving of entity privacy, then the liberal democratic order is similarly at risk when the state *fails* to inter-

---

justify protecting families from state intervention because families prepare children for citizenship in a democratic society).

<sup>135</sup> See Dailey, *Constitutional Privacy*, *supra* note 113, at 957–58; see also Appell, *Virtual Mothers*, *supra* note 18, at 708 ("[When the state does not interfere in families,] [c]hildren then mature into adults who possess pluralistic values and the ability to think critically because of their allegiance to family and community. This rearing function enriches the government by creating citizens separate enough from the state to be capable of exercising the power to govern.").

<sup>136</sup> Dailey, *Constitutional Privacy*, *supra* note 113, at 991–92. Mangold would concur: "Colonial fathers were charged with the proper upbringing of their children, responsible for educating and training them to be productive citizens of the community . . . . Colonial laws allowed . . . intervention into the parent-child relationship to assure that child rearing was appropriate for raising employable and moral children." Susan Vivian Mangold, *Transgressing the Border Between Protection and Empowerment for Domestic Violence Victims and Older Children: Empowerment as Protection in the Foster Care System*, 36 NEW ENG. L. REV. 69, 81 (2001).

<sup>137</sup> Rosenbury makes an interesting argument that entity privacy and parental authority are respected when the decisions that parents make are consistent with the state's views. See Laura A. Rosenbury, *Between Home and School*, 155 U. PA. L. REV. 833, 889–90 (2007) ("The boundaries of family privacy are thus constructed not by respect for parental prerogatives, but by the views of the states and courts . . . . When childrearing conforms to those views, family privacy is respected. When childrearing challenges those views, family privacy ends."). One could argue that the denial of entity privacy as a matter of course to poor families seeking PCAP coverage evidences a presumption that the decisions made by poor families will be inconsistent with the state's views.

vene in those families undeserving of entity privacy—that is, poor families. Moreover, it is the *poverty* of the families that warrants the denial of the presumption that they will ultimately generate productive citizens.<sup>138</sup>

The unwillingness to defer to the families of poor, pregnant clients of the Alpha obstetrics clinic may be interpreted as manifesting a hegemonic discourse within which the failure to realize economic self-sufficiency justifies distrust, suspicion, and antipathy. The inability to thrive within capitalism—which, hegemonically, is understood as manifesting a lack of “American” values<sup>139</sup>—is such an anathema that, if and when those who have demonstrated this failure decide to reproduce, they are perceived as not deserving of trust to produce desirable citizen-progeny; rather, the presumption is that, absent state interference, they will likely produce children who will mature into adults like themselves—“un-American,” economically dependent threats to the nation’s coffers, values, and future.<sup>140</sup> Justice Stevens’ opinion in *Hodgson* ought to be reconsidered at this point—specifically his statement that “a natural parent who has demonstrated sufficient commitment to his or her children is thereafter entitled to raise the children free from undue state interference.”<sup>141</sup> There is something suggestive about the fact that an indigent “public family” that is wholly triumphant in its fulfill-

---

<sup>138</sup> Interestingly, Dailey writes that severe poverty may threaten the ability of families to develop the citizens that sustain a democratic republic. Dailey, *Developing Citizens*, *supra* note 134, at 475–76 (“The kind of chronic, severe poverty experienced by families . . . operates as a form of political disenfranchisement for this entire class of children.”). She ultimately argues that, because of the threat that poverty poses to families’ ability to develop citizens, it is imperative that the government support these families. *Id.* at 487–88 (noting the “important constitutional interest in helping families to succeed in their constitutionally defined caregiving duties”). However, the danger of her insight is that, in the absence of a robust system of support for poor families and in the presence of the dismantling of the welfare state, poverty’s effect on families’ ability to develop citizens can be used to justify state intervention in poor families.

<sup>139</sup> For an exploration of the simultaneity of “American” values and the values associated with market capitalism, see Bridges, *Wily Patients*, *supra* note 1, at 20–22; see also NICHOLAS DE GENOVA & ANA Y. RAMOS-ZAYAS, *LATINO CROSSINGS: MEXICANS, PUERTO RICANS, AND THE POLITICS OF RACE AND CITIZENSHIP* 78 (2003) (“[T]he quiet and routine exploitation of seemingly docile ‘immigrants’ can be conveniently reinterpreted by employers—as ‘hard work,’ the stuff that perpetually animates the ‘American Dream.’”).

<sup>140</sup> If entity privacy is respected because state noninterference allows parents to cultivate “diverse private preferences [and] moral values” in their children, then when entity privacy is not respected, it demonstrates a distrust of those private preferences and moral values that parents would instill. Dailey, *Developing Citizens*, *supra* note 134, at 482. See also Appell, *Virtual Mothers*, *supra* note 18, at 785 (noting that state intervention in families “minimize[s] or eliminate[s] these families as sites of production of values that diverge from that status quo”); Storrow, *supra* note 76, at 566 (noting that state noninterference in families is “basic to the structure of our society because the family is ‘the institution by which we inculcate and pass down many of our most cherished values, morals and culture’” (quoting *Bellotti v. Baird*, 443 U.S. 622, 634 (1979))). Perhaps the state fears that poor parents will cultivate a “preference” for removing oneself from the labor market and the “moral value” of economic dependence. See Dailey, *Developing Citizens*, *supra* note 134, at 483 (“One approach to the problem of parental authority in a democracy has been to set some limits on acceptable parental values and behavior.”).

<sup>141</sup> *Hodgson v. Minnesota*, 497 U.S. 417, 447 (1990).

ment of heteronormative ideals in terms of the marital status of the parents still does not enjoy the entity privacy that would otherwise entitle the natural parents to parent their children without state intervention. Indeed, this fact suggests that the economic insufficiency of the family *is* the commitment that has not been demonstrated. In line with Justice Stevens' reasoning, parents who have not triumphed financially within capitalism have not demonstrated an adequate commitment to their children.

Economic self-sufficiency is the unspoken condition of possibility upon which state noninterference rests.<sup>142</sup> As one scholar writes, “[A] long tradition of family case law extols the ‘autonomous’ family unit and protects it, except in the most compelling circumstances, from state intervention.”<sup>143</sup> I emphasize the use of “autonomous.” Because the families that seek prenatal care services from Alpha are dependent upon the government for their economic viability, they cannot be said to exist within *autonomous* family units; these families instead exist, or persist, as a result of government intervention. Any commitment to governmental noninterference in the family that might otherwise exist is nullified by “public families’” inability to be that “autonomous family unit” that traditional liberal theory posits as existing prior to, or otherwise independent of, state intervention. “Public families,” because they confound the public/private dichotomy that is the foundation of the liberal state, are marked as sites where the intervention of the state into the family can be effected without threatening the social order.

Olsen similarly notes that the family is conceptualized as an “independent” institution within liberal political theory—making it possible to rationalize state intervention into “public families” as a consequence of these families’ nonconformance to traditional schemas due to their dependence on public assistance.<sup>144</sup> She writes that one of “[t]he basic assumptions that

---

<sup>142</sup> Indeed, the Court, in the course of holding that the Amish families in *Wisconsin v. Yoder*, 406 U.S. 205 (1972), were entitled to state noninterference in their decisions to reject formal education for their children after they had completed the eighth grade, makes much of the economic self-sufficiency of the Amish families. The Court writes that, while the Amish may have “idiosyncrasies” that distinguish them from mainstream society, “[i]ts members are *productive* and very law-abiding members of society [who] *reject public welfare in any of its usual modern forms.*” *Id.* at 222 (emphasis added); *see also id.* at 222 n.11 (observing that “the Green County Amish had never been known to commit crimes, that *none had been known to receive public assistance*, and that *none were unemployed*”) (emphasis added); *id.* at 223 (noting the “self-sufficiency of the community”); *id.* at 224 (noting that there had been no showing that “upon leaving the Amish community Amish children, with their practical agricultural training and habits of industry and self-reliance, would become burdens on society because of educational shortcomings”); *id.* (“There is nothing in this record to suggest that the Amish qualities of reliability, self-reliance, and dedication to work would fail to find ready markets in today’s society.”); *id.* at 234 (arguing that the state had not demonstrated that removing Amish children from traditional schools after the eighth grade would “result in an inability to be self-supporting”); *id.* at 235 (noting the Amish’s “long history as a successful and self-sufficient segment of American society”).

<sup>143</sup> Janet L. Dolgin, *The Family in Transition: From Griswold to Eisenstadt and Beyond*, 82 GEO. L.J. 1519, 1539 (1994).

<sup>144</sup> *See* Olsen, *supra* note 95, at 1504.

underlie arguments in favor of the private family” is that “the family is capable of existing in some sense apart from state activity, as a natural formation rather than only as a creation of the state.”<sup>145</sup> Yet, “public families” violate this “basic assumption.” Indeed, their acceptance of money and services from public coffers inverts the description that is thought to govern the relationship between the family and the state; instead of “existing in some sense apart from state activity,” “public families” are thought to be viable entities only as a *result* of state activity. Having confounded the logic of state nonintervention, state *intervention* becomes the rule that governs the state’s relationship to the family. Within the binary that situates “natural” formations antithetically to state-inflected configurations, “public families” lose their “naturalness”—and, consequently, their privacy.

One can say that having breached the assumption postulating the autonomy of the family, “public families” are thought to similarly defy the second assumption—that “‘the family’ is a coherent way of talking about [the] relations among [these] people.”<sup>146</sup> Without regard to whether the persons in the family consider themselves as such, the “public family” within liberal theory becomes a random, heterogeneous collection of individuals, ill-deserving of the designation of “family.”<sup>147</sup> Further, the suppositions that are concomitant with notions of the “family”—namely that the heads of such families can competently raise the younger members of the families—do not append to the association of individuals that is the “public family.” As the limits that surround this “family”—marking the space that ought to be free from the state’s presence—have been compromised by the financial dependence of the entity, the state’s presence is reiterated, becomes more brazen, and acquires another directive: to raise the children in the face of the parents’ presumed inability to do so.

---

<sup>145</sup> *Id.*

<sup>146</sup> *Id.*

<sup>147</sup> See Storrow, *supra* note 76, at 529 (arguing that “groups of persons not regarded as families have no shield of privacy against governmental interference with their relationships”). Appell makes a similar argument in her analysis of the overrepresentation of poor families of color within the foster care system in this country. See Annette R. Appell, *Protecting Children or Punishing Mothers: Gender, Race, and Class in the Child Protection System*, 48 S.C. L. REV. 577, 579–80 (1997) [hereinafter Appell, *Protecting Children*]. She notes that while there exists a “high political currency of ‘family values,’” *id.* at 579, poor families are frequently, and somewhat glibly, dismantled when the foster care system intervenes in these families and seizes custody of children. She notes, as a potential explanation of the ease with which the state extinguishes poor families, the possibility that their families “are not viewed as ‘real families,’ so the larger society tolerates their fissure . . . . This ‘othering’ of poor families, particularly when they are of color, makes it easy for the dominant culture to devalue them: to view them as dysfunctional and not families at all.” *Id.* Similarly, “[j]ust as these families are not families, these mothers are not really mothers.” *Id.* I will take up this point further in the following Part.

B. *The Myth of Entity Privacy?*

Teitelbaum makes an interesting claim that ought to be considered alongside the question of “public families” and the entity privacy that is not afforded to them.<sup>148</sup> He argues that “social, political, intellectual, and legal” historians have generally agreed with one another that the industrialization of the economy and the progression of capitalism produced the family as an entity to be counterpoised to the market; because the sphere of commodity exchange was decidedly public, the family became the designedly private refuge from the self-interested jockeying within the market.<sup>149</sup> He writes:

Liberal theory sees the nineteenth century family as a functional response to industrial capitalism . . . . The family as refuge, in which the wife assumed a special role in preserving moral values, managing the home, and rearing the children was an essential condition of survival in industrial society: no man could endure an unrelieved competitive existence.<sup>150</sup>

He argues that the family within critical theories has been similarly conceptualized.<sup>151</sup> Teitelbaum argues that in most theories postulated by historians, the privatization of the family parallels the development of the public sphere of market relations.<sup>152</sup>

Teitelbaum was one of many who sought to explode commonly-held notions of the private family by underscoring the interest that the state has had in the family throughout history.<sup>153</sup> This sustained *public* interest in the family—an interest that not uncommonly manifested in state assumption of custody of children within “inadequate” families—defeats any position that would hold the family to be a *private* entity.

This reading, if applied to the poor, pregnant women whom I encountered within the Alpha obstetrics clinic, could be used to argue that that

<sup>148</sup> Lee Teitelbaum, *Family History and Family Law*, 2006 UTAH L. REV. 197 (2006).

<sup>149</sup> *Id.* at 199.

<sup>150</sup> *Id.*

<sup>151</sup> *Id.* (“The Marxist theory of the family is not crucially different. Small households, in which the wife performed uncompensated services, facilitated both the amassing of capital and then its expenditure on industrial commodities. In at least this sense, the bourgeois family is an integral part of the capitalist economy. Changes in the family . . . respond directly to changes in economic arrangements or demands.”) (footnote omitted).

<sup>152</sup> *Id.* at 200–06 (describing a “general theory of family history” in which the predominant view of the family is “developmental, moving from an hierarchically ordered household closely integrated with the community towards an egalitarian, companionate family sharply separated from the public world”). *Id.* at 200, 206.

<sup>153</sup> Teitelbaum is not alone in his dissidence; Dailey joins him, articulating a “competing, subversive strand within both family history and constitutional case law . . . [which] argues that the modern family has never constituted a purely private institution, but has always been subject to state regulation and public control” and noting “the extensive state involvement in the formation and structure of the family as well as on the family’s political role in both facilitating and constraining governmental power.” Dailey, *Constitutional Privacy*, *supra* note 113, at 994.

which is in operation during their attempts at Medicaid-subsidized prenatal care is *not* the violation of the “entity privacy”—as the family entity has never, throughout history, enjoyed privacy in any coherent sense of the word. Instead, the programmatic inquiry into the affairs of the woman, and consequently the family, who will be the primary influence upon the unborn child is simply another incidence of the exercise of the public interest in the family. This interpretation would suggest that there is nothing anomalous about this exercise; neither does it reveal anything about the sociopolitical location of these particular families. Instead, the apparatus erected by Medicaid within the Alpha obstetrics clinic evidences a concern that has applied to all families throughout the history of the nation.

It is undeniable that the state-qua-public indeed has had a long-standing interest in the family as the formation within which future citizens of the society originate. However, what should not be elided is that some family formations are more susceptible than others to becoming objects of the state’s interest in protecting its future citizens. Moreover, the characteristic that determines the ability of the public interest to reach a particular family is *class*. That is, it is the *class* of the family that tends to determine whether state power will be able to touch it and, consequently, whether the public interest in the raising of children will be realized in any particular instance.<sup>154</sup>

The obstetrics clinic of a public hospital is a public space par excellence within which the state can find subjects upon which to exercise its regulatory, and potentially punitive, power. Without the capture of a subject upon which to implement its power, the state interest in the family remains abstract and theoretical; it exists, but nominally so. However, the poverty of an individual or a family produces them as a medium upon which the state can enact its promises. It is through them that the state interest can become material and tangible. Essentially, the physicality of the poor body asking for state assistance within the clinic enables the actualization of that which might otherwise exist in theory only.

Moreover, “public families” might be understood to allow the explicit demonstration of a power that the state has over all families—a power that some may have denied and buried beneath romantic notions of the family’s insularity. As such, “public families” reveal the precariousness of *all* families’ privacy. The invasive prodding to which “public families” are exposed

---

<sup>154</sup> Appell makes this point cogently and eloquently:

Poor families are more susceptible to state intervention because they lack power and resources and because they are more directly involved with governmental agencies . . . . [P]oor families lead more public lives than their middle-class counterparts: rather than visiting private doctors, poor families are likely to attend public clinics and emergency rooms for routine medical care; rather than hiring contractors to fix their homes, poor families encounter public building inspectors; rather than using their cars to run errands, poor mothers use public transportation.

Appell, *Protecting Children*, *supra* note 147, at 584 (footnote omitted).

demonstrates the existence of a reviled power that is universally available to all; thus, “public families” become produced as a site for revulsion. The projection of disgust for the power onto that which makes the power visible may explain the dearth of sympathy for the families so invaded.<sup>155</sup>

#### IV. THE OVERWHELMING OF RIGHTS BY STATE INTERESTS

That “public families” do not enjoy an entity privacy that the state is bound to respect—an entity privacy that is, arguably, still enjoyed by non-poor families—represents only one instance of the failure of privacy rights/liberty interests to manifest within the space of the Alpha obstetrics clinic. What I will explore in this Part is the sense in which *individual* privacy rights/liberty interests similarly fail to manifest within the clinic. Essentially, the intrusive inquiries required by the state prior to Medicaid subsidization of prenatal care expenses demonstrate that the women who seek prenatal care from Alpha Hospital are apprehended as subjects whose privacy rights the state is not bound to respect. This Part explores the sense in which the individual privacy rights/liberty interests of the poor, pregnant women that I encountered within the Alpha Hospital have been compromised by their economic dependence.

It may be unreasonable to expect entity privacy to protect “public families” from state intervention owing to the fact that entity privacy may be solely spectral, phantasmic and without substance. The line of reasoning would contend that the holding in *Michael H.* was an anomaly, an exception to the contemporary articulation of the right to privacy as an individual-inhering right or interest. As discussed above, *Eisenstadt*, *Roe*, and *Casey*—the last in the triumvirate having been decided subsequent to *Michael H.*—have firmly established the current right to privacy/liberty interest as one that proscribes the state from intervening in certain “private” aspects of the *individual’s* life.<sup>156</sup> If this argument is correct, it makes more sense to interrogate the ways in which the programmatic inquiries posed by the state prior to Medicaid subsidization of prenatal care violate not the entity privacy of the poor family, but the right of the poor woman to individual privacy.<sup>157</sup>

---

<sup>155</sup> The dearth of sympathy for “public families” invaded by state power may be evidenced most competently by the fact that PCAP and other similar state laws remain on the books and are materialized in clinics across the nation every day, having not been repealed through democratic processes.

<sup>156</sup> See *supra* Parts II.A–B.

<sup>157</sup> But, at certain moments, she who attempts to disentangle individual privacy from entity privacy is engaged in a perilous enterprise. This is due to the fact that the individual right of parental autonomy regarding private matters (i.e., those that pertain to the family and the individual’s children) *looks* a lot like the right of the family to be free from state intervention. See Rosenbury, *supra* note 137, at 866 (“[E]ntity-based privacy usually amounts to parental autonomy—the right of parents to speak for their children and to make decisions about their upbringing, free from state intrusion.”). Nevertheless, some would maintain that the language of individual privacy (as the right of an individual to decisional autonomy regarding matters that pertain to her family) must be employed if

The argument would be that, in order to follow the tack that privacy jurisprudence has taken since *Eisenstadt*, we ought to ask how the demand for knowledge concerning the intimate provinces of a woman's life is a violation of the woman's individual right to keep these intimate details to herself. We ought to also ask how the interjection of the state into the woman's decision-making process regarding parenting and future childbearing is a violation of the woman's individual right to make these decisions without state interference and coercion. We may then conclude that it infringes on the woman's individual-inhering privacy right/liberty interests to compel her to give details about her eating habits, sexual history, past and present tobacco, drug and alcohol use and/or abuse, employment status, history of domestic or sexual violence, past and present contact with state agencies, history of physical or emotional abuse, past and present receipt of financial assistance from the government, etc. We may then conclude that it infringes on the woman's individual-inhering privacy right/liberty interests to stipulate that in order for her to receive a welfare benefit, she allow the state into her decisions concerning "whether to bear or beget a child" by compelling her to undergo mandatory contraception counseling. Essentially, the state compels the woman to make her private life available to state surveillance, intervention, and regulation; the analysis is properly focused when it asks how this compulsion violates *her* individual right to privacy/liberty interests—not the entity privacy of her family.

When formulated in this way, we must consider the ostensible motivation for the state's inquiry: the governmental interest in protecting the unborn child and the child, once she/he is born, from abuse or neglect.<sup>158</sup> Indeed, the state's inquest and its ability to limit individual rights is arguably a product of its power of *parens patriae*, by which the state has authority to intervene in the family in order to protect children.<sup>159</sup> This interest in child protection, it may be argued, must be pursued without regard to the damage that it inflicts upon the integrity of the woman's right to privacy/liberty interest in privacy. The exhaustive itemization of the particularities of the woman's existence enables the state to ascertain the environment into which the wo-

---

only because entity privacy—in spite of *Michael H.*—is no longer a cognizable right subsequent to *Eisenstadt*. See *id.* at 864. ("The right [to entity privacy] is frequently viewed as attaching to parents as individuals, not to the family as a whole.")

<sup>158</sup> Appell has noted instructively that "abuse" and "neglect" are not objective concepts, but rather may embody classist and racist preferences. See Appell, *Virtual Mothers*, *supra* note 18, at 788–89 ("Neglect and, to a lesser extent, abuse, are problematic standards that are extraordinarily contingent on cultural norms of decisionmakers. Many . . . have criticized these standards as class-based and racially discriminatory."). It may also be noted that the counseling could be interpreted as being geared towards maximizing the health of the fetus and subsequent infant. However, there is a concomitant presumption that the mother is incapable of, or unwilling to, ensure the health of the fetus and subsequent infant absent the state's intervention (and, thus, potentially a poor parent).

<sup>159</sup> See Hamilton, *supra* note 78, at 42–43 (describing the concept of *parens patriae* as existing in tension with parental authority and noting that the state exercises its power of *parens patriae* in order to "protect families' more vulnerable members").

man's child will be born as well as the likelihood that the woman will properly parent the child once born. It is pursuant to this state interest that intimate, private data about the woman is gathered. For example, any prior contact that a woman has had with the Administration for Child Services ("ACS"), which investigates charges of child abuse and neglect, is inquired into because it plausibly evidences a history of poor parenting and, by implication, indicates that the woman is likely to be a poor parent in the future. The same is true of inquiries that, for example, confirm that a woman continues to smoke cigarettes, drink alcohol, or use illegal drugs although she is aware that she is pregnant; the information is thought to index a woman's neglect of herself and, through and simultaneous to that neglect, the neglect of her fetus.<sup>160</sup> If the encyclopedic inquisitive net cast by the state indicates that a woman is likely to be a poor parent, the state will use the information gathered to maintain her within its regulatory apparatus in order to protect the child once it is born. The exhaustiveness of the inquest—and that it touches on information that the woman may consider private—is necessary, it may be argued, because the end in mind, always, is the protection of the child. The means to this end, the violation of poor women's right to privacy/liberty interest in privacy, is thought to be an unfortunate, yet inevitable, happenstance.

This conflict—between the *individual's* interest in protecting herself from state intervention in matters that pertain to herself and her family, on the one hand, and the *state's* interest in protecting the child from the parent who raises her, on the other—has been industriously explored within the

---

<sup>160</sup> Scholars have noted how the state translates a pregnant woman's perceived neglect of her fetus into a presumption that she will be a poor parent in the context of determinations of parental unfitness and the termination of parental rights of women who drink alcohol or use illegal drugs while pregnant. See, e.g., David C. Brody & Heidee McMillin, *Combating Fetal Substance Abuse and Governmental Foolhardiness Through Collaborative Linkages, Therapeutic Jurisprudence and Common Sense: Helping Women Help Themselves*, 12 HASTINGS WOMEN'S L.J. 243, 250 (2001) (noting several cases in which courts found that a pregnant woman's use of drugs or alcohol during pregnancy authorized the removal from the mother's custody of the infant once born and any siblings); Lynn M. Paltrow, *Pregnant Drug Users, Fetal Persons, and the Threat to Roe v. Wade*, 62 ALB. L. REV. 999, 1050–51 (1999) (citing a brief submitted to a Colorado court in which state officials argued that the parental rights of a pregnant drug user should be terminated before the child was born because of the "[m]other's unfitness during the critical prenatal care stages of her pregnancy") (alteration in original); Ian Vandewalker, *Taking the Baby Before It's Born: Termination of the Parental Rights of Women who Use Illegal Drugs While Pregnant*, 32 N.Y.U. REV. L. & SOC. CHANGE 423, 423 (2008) ("Several states allow a mother and child to be permanently separated for something the mother did before the child was born. These states have made the use of illegal drugs while pregnant a ground for terminating a mother's parental rights. The intuition motivating such a policy is that drug users are bad parents, and the state protects children by removing them from such parents.") (footnote omitted); see also 750 ILL. COMP. STAT. 50/1(D)(t) (2010) (defining an "unfit person" who is legally incapable of having custody of a child as someone who is responsible for the presence in "the child's blood, urine, or meconium [of] any amount of a controlled substance").

literature that investigates the foster care system.<sup>161</sup> Although many scholars problematize the discriminatory enforcement of child protection laws insofar as poor, racially-subjugated families are swept within the state's regulatory ambit at disproportionately high rates,<sup>162</sup> most scholars do not question that it is licit for the state to limit parental rights when the circumstances demand it. "The state has the right to intervene within the family or parent-child relationship as long as it has a significant interest."<sup>163</sup> Moreover, a "significant interest" that constitutes the condition of possibility for the legitimate limitation of parental rights is the state's interest in keeping the child safe from harm—even (or, perhaps, especially) if the threat comes from the child's own parent.<sup>164</sup> This tension between parental rights and the state's interest in child protection is dramatized daily in the child protection system.<sup>165</sup>

Most scholars do not question the legitimacy of the state's *parens patriae* power to limit or countermand the individual's (parental) right to direct the upbringing of her child as long as the state acts to protect the child.<sup>166</sup>

---

<sup>161</sup> Dorothy Roberts has also explored this conflict in her analysis of the prosecutions of pregnant drug addicts. See Roberts, *Punishing Drug Addicts*, *supra* note 18, at 1422 ("[P]unishing a woman for using drugs during pregnancy pits the state's interest in protecting the future health of a child against the mother's interest in autonomy over her reproductive life—interests that until recently had not been thought to be in conflict.").

<sup>162</sup> See, e.g., Appell, *Protecting Children*, *supra* note 147, at 580 (analyzing "the policies, practices, and perspectives that help to fuel the growing industry that has arisen from the state's 'protective' involvement with poor families and families of color and the state's punitive treatment of the mothers of these families"); Appell, *Virtual Mothers*, *supra* note 18, at 770–79 (describing the predominance of poor families of color within the child protection system); Cahn, *supra* note 18, at 1244 (noting that poor women are more likely to be swept up within the ambit of child protection systems and agencies); Sally K. Christie, *Foster Care Reform in New York City: Justice for All*, 36 COLUM. J.L. & SOC. PROBS. 1, 12–15 (2002) (investigating the causes of the overrepresentation of poor and African American children in foster care).

<sup>163</sup> Christie, *supra* note 162, at 27.

<sup>164</sup> See Appell, *Virtual Mothers*, *supra* note 18, at 703 (observing that parents have rights to raise their children without state interference "absent proof that the parent is abusing or neglecting the[ir] child[ren]"); Fineman, *Family Privacy*, *supra* note 78, at 1215 (noting that parental conduct is deferred to unless it is abusive or neglectful); Rosenbury, *supra* note 137, at 846 (observing that the state may intervene in the parent-child relationship in order to protect the child's welfare).

<sup>165</sup> Mangold, *supra* note 136, at 74 ("While parents have a right to raise their children free from state intervention, children have a countervailing right to protection from abuse and neglect. This tension between parental rights and child protection is the key conflict in the child protection system . . ."); see also Hamilton, *supra* note 78, at 43 ("The state intervenes in the 'intact' family in limited situations—namely, when it perceives a serious threat to the physical or mental health of the child, and even then, not in all cases.") (footnotes omitted).

<sup>166</sup> See, e.g., Storrow, *supra* note 76, at 575 ("[P]arens patriae is not properly invoked 'except when necessary for the protection of the child.'" (footnote omitted)). Some scholars would argue that the rights that are overridden by the state's power of *parens patriae* are parental rights—not individual rights; that is, they would argue that parental rights are not a type of individual right, but rather are entirely distinct from them. See, e.g., Appell, *Virtual Mothers*, *supra* note 18, at 697–98 ("[T]hese parental rights are not individual rights, but rights that arise out of these relationships and apply to decisions for or about others. They are distinct from other decisional privacy rights that involve

This uncontroversial formulation of the condition precedent for the legitimate limitation of parental rights raises an intriguing question when it is analogized to the women seeking prenatal care within the Alpha obstetrics clinic. But first, a caveat: the analogy to the state's power of *parens patriae* and its ability to limit parental rights must be adapted a bit to the circumstance confronted by poor, pregnant women in the Alpha obstetrics clinic. The doctrine of *parens patriae* allows the state to supersede the individual's right to direct the upbringing of his/her child—a right that may be understood in the language of privacy rights/liberty interests.<sup>167</sup> However, the privacy right/liberty interest that is abridged in the Alpha obstetrics clinic is not so much the individual's right to direct the upbringing of her child, but rather the individual's right to keep private, intimate information to herself and to make decisions autonomously. Nevertheless, the comparison is instructive.

When one makes the analogy between the state's power of *parens patriae* and the circumstance confronted by poor, pregnant women attempting to receive a welfare benefit in the form of state subsidization of prenatal healthcare expenses, and when one observes that the state's use of its *parens patriae* power to limit an individual's (parental) rights is legitimate only when it seeks to protect a child from abuse and neglect, one can conclude that the limitation of poor, pregnant women's individual (privacy) rights is legitimate as long as it is premised on the protection of children from abuse and neglect. But, one must ask: why is the state convinced—so much so that it has erected an elaborate, cumbersome, bureaucratic apparatus—that the children born (or to be born) to poor women are in need of protection such that the meticulous and methodical audit of *all* of the pregnant poor is imperative?<sup>168</sup> It deserves underscoring that, if the formulation described above is true and the state only *legitimately* nullifies individual (parental or privacy) rights when it acts to protect the child, then the PCAP apparatus is either illegitimate, or it is the legitimate result of the state's interest in protecting poor, pregnant women's children. If the latter, one must ask: why

---

decision making for oneself.") (footnotes omitted). However, many scholars elide, or otherwise do not recognize, the distinction. *See id.* (noting that many commentators conceptualize parental rights as a species of individual rights). For the purpose of putting the state's general power of *parens patriae* in conversation with the circumstance confronted by poor women attempting to enroll in PCAP, I, too, conceptualize parental rights as a species of individual rights.

<sup>167</sup> *See* Hamilton, *supra* note 78, at 42 ("The concept of privacy restrains the state's ability to interfere in the family."); Rosenbury, *supra* note 137, at 862 (noting that "most protections of parental authority sound in privacy").

<sup>168</sup> Hasday has also questioned why regimes of family law have comfortably tolerated the denial of rights to poor parents and families in the absence of actual child abuse and/or neglect. *See* Hasday, *supra* note 11, at 385 ("[T]he tradition of legal regulation extending from the child cruelty societies to [TANF] evinces an enthusiasm for disrupting parental prerogatives that turns on particular forms of economic failure rather than . . . actual evidence of child abuse.").

does the state presume that poor, pregnant women will abuse or neglect their children?<sup>169</sup>

The salient characteristic that is shared by all women seeking prenatal care at Alpha is their poverty. Moreover, it is reasonable to conclude that it is this characteristic that casts suspicion over poor women's ability to *not* fail their children such that state nullification of these women's privacy rights is rational, expected, and appropriate. The most benign interpretation of this fact states, simply, that a mother's poverty yields the possibility that she will be unable to meet the material needs of her child. Indeed, the inability of a parent to provide for the material subsistence of her child has, in the past, justified the removal of the child from the parent's home by child protective agencies.<sup>170</sup> The benign interpretation posits that the state nullifies a woman's right to privacy because in her poverty, the state assumes a likelihood of parental neglect in the form of the inability to meet an infant's basic, fundamental needs.

---

<sup>169</sup> While some scholars observe that the state has arguably expanded its power of *parens patriae* and may intervene in the family more frequently than it did in years past, none have argued that this expansion is legitimate when the state uses its power to intervene in the family preemptively—that is, absent proof of abuse or neglect or the parent's demonstrated propensity to abuse or neglect a child. See Hamilton, *supra* note 78, at 64 (observing that states have given themselves even broader powers of *parens patriae* in recent years).

<sup>170</sup> In 1998, it was estimated that ten percent of the children removed from their parents' homes by the state were so removed because of "environmental neglect"—defined as the lack of those basic materials that persons need to survive (i.e., food, clothing, and housing). Christie, *supra* note 162, at 13. Christie also perceptively notes that a family's poverty may also cause stress within the unit, which child protective agents may perceive as abuse or neglect of the child: "Poverty can also lead to added stress and greater tension within poorer families. Upon seeing such tensions, caseworkers evaluating these families may conclude that a child is better off in foster care." *Id.* at 14 (footnotes omitted). On this issue, Appell persuasively describes how the poverty of a woman may be perceived as abuse or neglect by state agents whose socioeconomic status preclude their ability to empathize with those who are subject to abuse or neglect investigations. I quote her at length:

Food, jobs, and decent housing are elusive. Five sisters may live together with their fifteen children in a roach infested slum: their only other housing option being a roach infested apartment in a public housing high-rise where their children will be in daily danger of being shot or "shaken down." Because they live where they do, the state charges these mothers with neglect for subjecting their children to an injurious environment.

These mothers do not have access to affordable childcare. They depend on informal kinship and community networks for babysitting. If a mother leaves her child with a neighbor or an aunt, rather than a nanny or a licensed day-care center, she is considered to have neglected her child . . . .

Poor mothers are more likely to live in high risk areas under high stress related to the blight and violence which surrounds them and under the strain of living on government benefits that are below subsistence level . . . . When judged by someone who has a car or car-fare and who does not have to spend much time worrying about obtaining food, clean clothing, toiletries, or dodging bullets and crack dealers, these mothers appear not to care enough about mothering.

Appell, *Protecting Children*, *supra* note 147, at 585–86 (footnotes omitted).

However, were this benign interpretation true, the questions asked of women upon their initiation of prenatal care would concern, more specifically, their ability to provide food, clothing, and shelter for their children. If this interpretation were true, the ambit of the state's inquisition would focus on the question of the woman's economic viability and whether her financial condition could support an expanded family. Instead, inquiries about women's sexual histories, experiences with substance use and abuse, histories of sexual and domestic violence, and strategies for preventing the conception and birth of more children far exceed the purview of a concern about the material conditions in which newborn children can expect to be placed. Indeed, a less benign interpretation is required: the state's presumption of the abusive potentials of the poor, pregnant women who present themselves at Alpha is a consequence of the discursive construction of poverty as an index of the moral integrity of the person so impoverished.<sup>171</sup> Explicitly, the inability to thrive within a capitalist economy and the consequent reliance upon the state for financial survival is thought to index a perceived moral laxity that results in the production of unplanned, unwanted children and their subsequent mistreatment and exploitation;<sup>172</sup> moreover, the mistreatment and exploitation of children is sufficiently probable and expected that

---

<sup>171</sup> Other scholars have made similar insights about the discursive construction of poverty as an index of the poor person's moral integrity. See, e.g., JOEL F. HANDLER & YEHESEKEL HASENFELD, *THE MORAL CONSTRUCTION OF POVERTY: WELFARE REFORM IN AMERICA 17–18* (1991) (noting the “moral values of work” and arguing that, historically, the poor have been constructed as “morally deviant” and arguing that “[s]tigmatizing those who fail to conform affirms the moral worth of those who do”); MICHAEL KATZ, *IN THE SHADOW OF THE POORHOUSE: A SOCIAL HISTORY OF WELFARE IN AMERICA*, at xi–xii (1986) (“In the land of opportunity, poverty has seemed not only a misfortune but a moral failure.”); Joel F. Handler, *The Transformation of Aid to Families with Dependent Children: The Family Support Act in Historical Context*, 16 N.Y.U. REV. L. & SOC. CHANGE 457, 467 (1987–88) (arguing that throughout history, “the failure to earn one's living was a moral failure”); Hasday, *supra* note 11, at 304–05 (observing that the New York Society for the Prevention of Cruelty to Children “focused on families that had not been successful in the wage labor economy, operating on the principle that this economic failure had been caused by some crucial moral or character flaw”); Jack Katz, *Caste, Class, and Counsel for the Poor*, 1985 AM. B. FOUND. RES. J. 251, 251 (1985) (“In modern society, poverty has been defined not only by quantitative measures of well-being but as a morally distinct category.”); Thomas Ross, *The Rhetoric of Poverty: Their Immorality, Our Helplessness*, 79 GEO. L.J. 1499, 1501 (1991) (“The premise of moral weakness suggests that the problem is really quite simple. If poor people simply chose to ‘straighten up and fly right,’ all would be well. If they would accept and commit to the moral norms of those of us not in poverty, they would cease to be poor, albeit only after a long time and much hard work.”).

<sup>172</sup> Alternately, indigent mothers' failure might be understood not as the inability to sell their labor within market capitalism, but rather their failure to attach themselves to a man who has successfully sold his labor such that women's dependency is masked. See Fineman, *Masking Dependency*, *supra* note 10, at 2182 (“Those members of society who openly manifest the reality of dependency—either as dependents or caretakers in need of economic subsidy—are rendered deviants. Unable to mask dependency by retreating to contrived social institutions like the family, single mother caretakers in particular are stigmatized . . . for embodying a dependency that society would rather deny.”). I thank Kris Collins for making me aware of this argument.

the prevention thereof justifies the violation or dramatic limitation of *all* poor, pregnant women's rights to be free from state intervention in private matters.<sup>173</sup> That there is a professed relationship between an individual's ostensible failure as a purveyor of her labor and that same individual's commitment to love, nurture, and care for her own children speaks to the power of society's commitment to capitalism.<sup>174</sup>

In this way, one can make sense of the term "social risk," the term that serves as the justification for requiring all women seeking Medicaid subsidization of their prenatal care expenses to submit to consultations with a social worker: as explained to me by one of the social workers who works within the Alpha obstetrics clinic, she and her colleague are required, by legislative mandate, to consult with all Alpha prenatal care patients who have been identified as at "social risk"; further, a woman is identified as at "social risk" due to her mere status as a seeker of Medicaid subsidization of her prenatal care expenses. Hence, a woman's lack of access to private insurance through an employer and her inability to purchase it independent of that channel serve to denote her poverty, and her poverty renders apposite and obligatory an intrusive inquest into her private life.

Further, the content of what is designated by "social risk"—that is, what exactly the poor woman, by virtue of her poverty, is at risk of—is revealed when one examines the questions that are asked of women during their requisite conference with the social worker. That "social risk" signifies more than the risk that the woman's poverty will make her unable to meet the material needs of her infant is made apparent by the fact that the interrogation into the woman's economic circumstances comprises only a small portion of the consultation. That there are moralistic undercurrents within the "social risk" designation is made obvious when the social worker poses state-mandated questions into matters—like how long she has been in a relationship with the father of her child, whether this pregnancy and previous pregnancies were unplanned, or whether she has thought about how she

---

<sup>173</sup> It is interesting to consider an argument made by Dailey in this context: Dailey argues that when the state refuses to intervene in the family—whether premised on entity privacy or premised on the parental right to autonomy with regard to matters that concern her child—the effect is the granting of rights to the parent *over* the child. She writes, "[A]ny allotment of liberty to the parent necessarily diminishes the liberty of the child; conversely, any enhancement of a child's liberty curtails that of the parents . . . . [P]arental rights entitle parents to rights against the state, but over another person." Dailey, *Constitutional Privacy*, *supra* note 113, at 986–87. Insofar as the Medicaid apparatus effectively dismantles any right that the woman-as-parent has against the state with regard to her personal affairs that may (or may not) affect her child, then one can understand Medicaid as the manifestation of a distrust of the poor, pregnant woman: before giving the poor, pregnant woman rights against the state over her child, the state must deem her deserving of the right. Conversely, non-poor women receive this clearance as a matter of course; it is a function of their class status.

<sup>174</sup> Again, Hasday makes a similar observation in the context of the nineteenth century reform literature. See Hasday, *supra* note 11, at 323 ("[I]t reasoned that mothers who failed to constantly supervise their children at home, and fathers who failed to make that possible, had to lack love and concern for their children.").

will prevent future pregnancies<sup>175</sup>—that are irrelevant to a determination of whether and how a pregnant woman will meet her infant's basic requirements for food, shelter, and clothing.

Further still, even those questions that are designed to interrogate the woman's economic circumstances and whether she will be able to meet the material needs of her infant—that is, queries that are *legitimate* insofar as they are posed by a state concerned with the physical security of a woman's child—nevertheless produce a sense of discomfort and *illegitimacy*. This is to say that although these questions seek information about the economic sufficiency of the woman, they often produce a sense of disquietude within the women being interrogated because they elicit information that damns the woman within a hegemony that associates economic success with the moral rectitude of the person.

Consider the excerpt of the interview with Erica, an indigent Black woman who was, at the time of her pregnancy, living in a shelter because of domestic violence that she had experienced at the hands of a former boyfriend.<sup>176</sup> When the social worker, Tina, asks Erica how she supports herself, there is a long pause, after which Erica says, "How could I forget what it's called?" After another long pause, she answers, "Welfare!" Tina then asks her if she receives "public assistance." Erica answers in the affirmative. Yet, her apparent inability to remember the signifier "welfare" is fascinating. Arguably, the "welfare" signifier, and the confession that it performs of the dejectedness of the speaker's economic-qua-moral position within market capitalism, was so odious to Erica that she "forgot" it in an attempt to spare herself the embarrassment of saying it out loud. Tina's offer of the signifier "public assistance," then, could be understood as an effort to help Erica describe her reliance upon state aid without the moralistic connotations that "welfare" has acquired. Erica accepted the more morally agnostic "public assistance," and, consequently, later used "public assistance" to describe that upon which her fiancé relied for financial support. Also noteworthy is the defensive stance that Erica inhabited when speaking about her fiancé's financial future. Her fiancé's expected annual salary of forty-three thousand dollars would expiate at least some of the condemnation that, as a

---

<sup>175</sup> Admittedly, it is possible to link a pregnant woman's future pregnancies with her ability to provide for the material needs of the fetus that she carries once born. However, given the discursive condemnation of poor women's fertility, it is nevertheless consistent to interpret the institutional focus on future contraceptive use as evidencing a skepticism of the moral integrity of the poor woman. For discussions regarding the regulation of indigent women's fertility, see DOROTHY ROBERTS, *KILLING THE BLACK BODY: RACE, REPRODUCTION, AND THE MEANING OF LIBERTY* 202–45 (1997) (discussing proposals to regulate the fertility of women who rely on state assistance and the constitutional implications of them); Dorothy E. Roberts, *The Only Good Poor Woman: Unconstitutional Conditions and Welfare*, 72 *DENV. U.L. REV.* 931, 945 (1995) [hereinafter Roberts, *Unconstitutional Conditions*] ("Poor women are entitled to the benefits of society only if they agree not to reproduce. According to these policies, an acceptable poor woman is one who consents to use birth control: *the only good poor woman is an infertile poor woman.*").

<sup>176</sup> See *supra* Introduction.

consequence of Erica and her partner's present and avowedly temporary reliance upon public assistance, would be visited upon them within a hegemony that associates the absence of economic self-sufficiency with immorality. Tina's statement that Erica was "in a better situation than a lot of [her] patients" could be understood as a—perhaps magnanimous, perhaps disingenuous—gesture that allowed Erica to understand herself as morally distinct from other persons who *really* deserved the blame and censure that had been given to Erica and her partner, i.e., those who were "really" at fault for their poverty. When Erica could physically dissociate herself from those persons, whom her fellow residents in the shelter came to represent, her penitence would be complete and she would "be fine."

I should note that the transcript of the interview fails to communicate the palpable tension that was produced in the room when Tina began to ask Erica about her relationship with the father of her children and the relationship that she had had with the man whose violence had forced her into a shelter. After the interview, and after Erica had been escorted to the next professional that she was scheduled to see that day, I asked Tina how she would explain Erica's protective deportment:

Tina: She wasn't being open. She wasn't being open. She was being guarded. And she was being a little—if I had pushed her, she might have gotten hostile. She was a bit hostile. I don't know if you picked up on it.

Khiara: What hostility did you see?

Tina: Just in the way that she was answering questions. It could just be—she has built up a little bit of a roughness. It's not as blatant as other people. She has an edge. She has an edge. In the—what?—ten minutes that she was here, I couldn't tell you how she is normally. Maybe that's the way she is all the time. But, I did perceive an edge. And you can imagine that if somebody was in a domestic violence situation and is now living in a shelter, they might pick up an edge. And maybe if you have survived a domestic violence relationship, then it's probably your edge that got you through it.<sup>177</sup>

As mentioned earlier, however, the social worker's interrogation into the woman's economic circumstances comprises only a fraction of her legislatively-mandated consultation with the woman seeking to initiate prenatal care. Accordingly, it is not unreasonable to conclude that "social risk" denotes more than the risk that the woman's poverty will make her unable to meet the material needs of her infant. The "social risk" condition of the woman not only makes relevant questions about how a woman supports herself, but also makes legally relevant a slew of other intimate questions unrelated to economic circumstance. It is not outside the universe of reason to

---

<sup>177</sup> Interview with Tina (July 3, 2007) (on file with the author).

conclude that the woman's poverty, which *alone* qualifies her as "social risk," is what makes questions that inquire into her moral integrity somehow germane, and this because poverty is thought to index a moral permissiveness, the magnitude of which the state has the duty to determine and upon which the health and safety of the woman's unborn child hinges.

To the extent that the state's intervention in the private lives of poor, pregnant women is premised upon an ideology within which economic failure indexes a moral failure and the concomitant likelihood of harming a child, a relevant query at this point is the extent to which the state is acting to protect the child from abuse and neglect as opposed to merely punishing the mother for her failure to thrive within capitalism. This is a question that is also raised within the foster care reform literature, where scholars have questioned the fact that child protective agencies frequently focus on the perceived personal shortcomings of poor women and not on their ability to parent their children.<sup>178</sup> Instead of directing the inquiry to whether the child has been harmed or is at risk of being harmed due to the actions or inactions of the parent—that is, instead of *protecting* the child—child protective services frequently direct their inquiry to whether the parent (the mother, commonly) has made "good" choices in terms of sexual partners, drug and alcohol usage, and educational attainment.<sup>179</sup> The outcome is that the state often intervenes into poor, single mothers' families and seizes custody of their children not because the children have been, or are at risk of being, injured in some way, but rather because these poor, single mothers have engaged themselves in supposedly insalubrious relationships with unsavory men, have used drugs or alcohol, or have not otherwise lived their lives in conformance with traditional social norms.<sup>180</sup> The state focuses on the "inadequacies" within their personal lives as opposed to their competence to parent. This "punitive maternal focus serves . . . to expand the scope of state

---

<sup>178</sup> See, e.g., Appell, *Protecting Children*, *supra* note 147, at 579 (noting that poor mothers of color "deviate from the normative notions of mother and womanhood and are defined as bad," resulting in an "often punitive, rather than empowering, system focused more on mothers than on their children"); Bernadine Dohrn, *Bad Mothers, Good Mothers, and the State: Children on the Margins*, 2 U. CHI. L. SCH. ROUNDTABLE 1, 6 (1995) ("From the beginning, the juvenile courts and the broader social welfare system intervened in the lives of destitute women to regulate and monitor their behavior, punish them for 'deviant' mothering practices, and police the undeserving poor."); Justine A. Dunlap, *Sometimes I Feel like a Motherless Child: The Error of Pursuing Battered Mothers for Failure to Protect*, 50 LOY. L. REV. 565, 588 (2004) ("[F]ailure-to-protect charges cast the abused mother as a bad mother . . . . The system and the batterer have the same refrain towards the mother: it—whatever 'it' is—is her fault. The charge revictimizes the mother by removing her children and promising their return on her conformity with governmental edict."); Odeana R. Neal, *Myths and Moms: Images of Women and Termination of Parental Rights*, 5 KAN. J.L. & PUB. POL'Y 61, 62 (1995) (arguing that termination of parental rights is often "not based on the mother having harmed the child, but rather on the mother exhibiting the characteristics of being a bad woman" and concluding that "[s]ince bad women can never be good mothers, their relationships with their children are terminated on that basis").

<sup>179</sup> Appell, *Protecting Children*, *supra* note 147, at 588.

<sup>180</sup> *Id.* at 605.

intervention beyond child protection into every realm of mothers' lives in the name of making them good mothers."<sup>181</sup>

It is helpful to apply this critique to the pregnant women seeking prenatal care at Alpha Hospital and to take the analysis one step further: the PCAP device not only improperly seeks to discover the inadequacies within women's personal lives, but through the search for those inadequacies, the state punishes the women for being poor and pregnant. Indeed, the scope of the survey made by PCAP far exceeds the determination of whether a woman has harmed her fetus or whether she will harm her child once delivered. Instead, the inquiry focuses on coercing the confession of, and enabling the documentation of, the *personal* failures of the woman. It should be emphasized that these particular women's personal failures are assumed to be extant principally because these are women who have made the "imprudent," "irresponsible" decision of becoming pregnant and maintaining a pregnancy when they have not managed to either attain economic self-sufficiency within market capitalism or attach themselves to a man who has. Questions are asked of a poor woman not because the child to whom she will give birth might be wounded or wronged in some way by her mother's imperfect diet, cigarette smoked years ago, or the other banalities about which information is demanded as a condition of the receipt of Medicaid. Instead, this information is gathered because the patient's poverty is presumed to indicate the absence of a moral vigilance that might manifest in harm to her child, and also because, in the articulation of that information—in the routing of the poor, pregnant woman's right to privacy/liberty interests—the state exacts punishment on the woman for allowing her poverty to intersect with her pregnancy.

In the following Part, I explore a question that becomes emergent from the inquiry: if the right to privacy/liberty interest in privacy can be preemptively limited because of the economic dependence of the rights-holder, can one argue that that which is possessed by the poor is a "right" at all? Is the right to privacy/liberty interest in privacy always already a function of class, such that it is more accurate to speak of the *absence* of poor persons' rights instead of the *violation* of their rights?

## V. THE BARTERING OF "RIGHTS"

There is an argument that PCAP does not demand the violation of the privacy rights/liberty interests of poor, pregnant patients; instead, the women, through their acceptance of Medicaid and other forms of state aid, have bartered away their rights to privacy/liberty interests.<sup>182</sup> The disquisition of

---

<sup>181</sup> *Id.* at 579–80.

<sup>182</sup> See Roberts, *Unconstitutional Conditions*, *supra* note 175, at 941 (noting that "[t]he sphere of privacy protected by liberal rights largely evaporates once the individual invites in state assistance" and that "[a]n individual's acceptance of government benefits

intimacies mandated by Medicaid does not infringe upon women's right to privacy/liberty interests because these women have given away the privacy rights/liberty interests that they have in exchange for government assistance.<sup>183</sup>

---

is deemed to constitute a waiver of privacy"). The dilemma raised by the PCAP program is a subset of the more general problem of unconstitutional conditions, a doctrine holding that "government may not grant a benefit on the condition that the beneficiary surrender a constitutional right, even if the government may withhold that benefit altogether." Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413, 1415 (1989). As Sullivan argues, the doctrine is "riven with inconsistencies." *Id.* at 1416–17 (describing cases in which the Court has held that a government action is an unconstitutional condition while declining to find an unconstitutional condition in cases with similar fact patterns). Moreover, the Court has refused to find unconstitutional conditions imposed by state laws affecting the reproductive rights and autonomy of indigent women. *See id.* at 1464, 1500–01 (discussing *Maier v. Roe*, 432 U.S. 464 (1977), and *Harris v. McRae*, 448 U.S. 297 (1980), in which the Court held that the government's funding of indigent women's childbirth-related expenses, but refusal to fund indigent women's abortion-related expenses, did not force poor women to surrender their abortion rights in exchange for a welfare benefit and was, therefore, not an unconstitutional condition). Sullivan's analysis of the doctrine reveals that, in many areas—some involving poor people, some not—the government may burden an individual's constitutionally-protected rights when the government concomitantly grants some benefit to that individual. *See id.* at 1416–17. The question then becomes why the phenomenon discussed in this Article, whereby indigent women and families are required to exchange privacy rights/liberty interests for a welfare benefit, should raise our hackles any more than the other myriad areas in which the government requires individuals to relinquish rights in exchange for a benefit. The answer may be that *this particular exchange* has little justification. As Hasday has argued, very little time and energy have been devoted to justifying the two-tiered system of family law. She writes:

Why should it be the case that a . . . mother and child's call for government support through certain tainted programs[ ] is still enough to subject every member of that family to legal rules and presumptions that are interventionist, instrumental, and wholly opposed to those conventionally associated with family law? Why should the law sustain two separate and very different normative regimes for governing parenthood whose application turns on whether money is transferred in this particular social modality?

Hasday, *supra* note 11, at 385. Further, when one acknowledges that the exchange has effects that may be repulsive to our notions of equality, effectively producing a class of people and families that have robust rights and a class of people and families with no rights about which to speak, it may be that we conclude that the doctrine of unconstitutional conditions in *this* area should work to strike down laws like the ones discussed in the present Article. *See Sullivan, supra*, at 1497–99 (describing the creation of a "system of constitutional caste" when the government may restrict the constitutional rights of some (i.e., the poor) but not others).

<sup>183</sup> In an influential article, Rubenfeld has argued that the right to privacy protects individuals from being standardized by a biopolitical state interested in normalizing its citizens. *See Jed Rubenfeld, The Right of Privacy*, 102 HARV. L. REV. 737, 784 (1989) (arguing that without a right to privacy, there is a danger of a "particular kind of creeping totalitarianism, an unarmed *occupation* of individuals' lives"). If poor persons, indeed, must barter their right to privacy for a government benefit, Rubenfeld's insight reveals that this exchange is required because of the belief that it is to the benefit of society that the poor become normalized. The state takes their request for government assistance as an opportunity to "occupy" the lives of the poor—to normalize the abnormal who, due to their indigence, have existed on the margins of society.

In a different, but related, context, Roberts explores the constitutionality of requiring poor women to surrender their privacy rights in order to receive government assistance: she analyzes welfare reform proposals made by several states, pursuant to which the provision of a welfare grant to a woman is conditioned on her use of contraception.<sup>184</sup> As outlined by Roberts, there are numerous variations on this theme:

The most benign is to make contraceptives freely available to welfare recipients . . . . This approach might be combined with the added incentive of offering a cash bonus to women on welfare for using [contraceptives] . . . . A third option is to deny additional benefits for children born to women who are already receiving public assistance . . . .

A fourth possibility is to use more coercive means to ensure that women receiving government aid remain infertile . . . . At least two states have proposed legislation to mandate the use of [a temporary, yet long-term contraceptive device] as a condition of receiving welfare benefits.<sup>185</sup>

In order to avoid the conclusion that such proposals are manifestations of the hegemonic devaluation of poor women's fertility, one must accept some vision of the dissolution of the protective boundary around poor women's private affairs upon their acceptance of public assistance. Through her receipt of public aid, she has declined to "immunize [her] private sphere from state interference."<sup>186</sup> As a result, "[t]he sphere of privacy protected by liberal rights largely evaporates once the individual invites in state assistance. An individual's acceptance of government benefits is deemed to constitute a waiver of privacy."<sup>187</sup> Thus, "the government's spending power" is used as a technique with which to "supervise the everyday lives of poor families."<sup>188</sup>

Roberts acknowledges that an inevitable tension arises when a demand for government intervention in the form of welfare entitlements is simultaneous to a demand for government *non*intervention in the form of a woman's right to determine her reproductive present and future. She writes that those

---

<sup>184</sup> See Roberts, *Unconstitutional Conditions*, *supra* note 175, at 933–34; see also Cahn, *supra* note 18, at 1243 (noting the history of welfare programs that make women comply with "morality requirements" as a condition of receiving state aid).

<sup>185</sup> Roberts, *Unconstitutional Conditions*, *supra* note 175, at 933–34.

<sup>186</sup> *Id.* at 940.

<sup>187</sup> *Id.* at 941.

<sup>188</sup> *Id.* As another example of how the offer of state aid forces women to cede access to other aspects of their lives that do not readily appear to exist within the purview of that aid, Roberts cites the "man-in-the-house" rules, which allowed states to condition the granting of welfare benefits on the recipients' conformance to the state's notion of "appropriate" sexual behavior for unmarried women. *Id.* at 942. And, "[m]ore recently, women on welfare have been required, as a condition of receiving benefits, to undergo mandatory paternity proceedings that include state scrutiny of their intimate lives." *Id.* at 942.

who would champion the persistence of welfare recipients' privacy rights paradoxically seek to:

disconnect the demand for privacy from government intrusion and the demand for government intervention through financial support. [They] rel[y] on the liberal resistance to government while hoping for the illiberal assistance of government . . . . [They] require[ ] us to close our eyes for a moment and pretend that poor women are not dependent on government assistance; then we may open our eyes the next moment and plead for government support for their decision to have children.<sup>189</sup>

Those who find the PCAP apparatus discomfoting in light of its ostensible vacating of poor women's privacy rights/liberty interests are faced with the same tension articulated by Roberts—a tension that is produced at the intersection of the woman's petition for Medicaid subsidization of her healthcare expenses with her desire to maintain the invisibility of her intimate affairs. We are asked to understand the disquietude generated by this felt tension as the quixotic longing for the persistence of the poor woman's privacy rights/liberty interests. We are told to surrender our notions of the inalienability of rights like the right to privacy. And we are expected to realize that the conflict exists only when we insist upon the continuance of the woman's privacy right/liberty interests; indeed, when we allow that the woman has bartered her rights in exchange for government assistance, the tension resolves and in its place remains a "legitimate," unfettered state presence in women's private lives.

This begs the question: what does it reveal about the nature of rights in our particular sociopolitical location when a right—once imagined as fundamental among jurists and legal scholars, as well as among those who believe themselves to be in possession of it—is so easily bartered away? Perhaps we misspeak when we assert that poor women's rights have been *exchanged* for state assistance. And perhaps we dissemble the actual nature of rights within our political economy when we claim that the state violates the "right" of the pregnant woman seeking Medicaid coverage of her prenatal care expenses. Perhaps nothing has been bartered, nothing has been violated.

That is, perhaps "rights" are always already a function of class, such that the poor do not have any rights about which to speak. The Medicaid-mandated apparatus within the Alpha obstetrics clinic does not violate the rights of the pregnant patients because their socioeconomic status precludes their possession of any "rights" that the state is bound to respect. Many scholars have intimated towards this conclusion without decisively arriving

---

<sup>189</sup> *Id.* at 940.

at it.<sup>190</sup> For example, in her attempt to problematize Fineman's notion of the "public family" by attempting to add a class analysis to a problematic that proceeds solely upon gender lines, Roberts notes that while "single mothers' privacy is based on patriarchal definitions of the family, it is also true that dependence on government aid provides an additional rationale, as well as the opportunity, for state regulation. Wealth can help to buy the presumption of privacy."<sup>191</sup> That which is at operation within the Alpha obstetrics clinic calls into question whether Roberts' formulation, while true, is sufficiently robust. It is not that Alpha patients, because of their poverty, do not have presumptions of privacy; rather, their privacy is presumed altogether nonexistent. So framed, it does not appear that wealth helps to buy the presumption of privacy, but rather wealth *is the condition of possibility* for privacy.<sup>192</sup> Class is the salient characteristic within Alpha because it enables an

---

<sup>190</sup> See, e.g., Cahn, *supra* note 18, at 1242 (observing that privacy depends on class); Gilman, *supra* note 18, at 18 ("[F]or poor women, this privacy 'right' can be illusory if they lack the resources to exercise it."). Attendant to Appell's argument for foster care reform, she notes the existence of a private family law system for the wealthy and a public family law system for the poor; while the private system helps to resolve custody disputes between wealthier parents, the public system resolves custody disputes between poor mothers and the state. See Appell, *Protecting Children*, *supra* note 147, at 581. She notes that "[a] key difference between the private and public systems, at least historically, is that the former is more deferential to parental rights and family autonomy, whereas the latter is more tolerant of, indeed at times has mandated, state usurpation of custody." *Id.* If what I have suggested is true, and rights that are easily bartered are not rights at all, then it is inaccurate to contend that, upon their receipt of public benefits, the poor mothers whose familial drama is negotiated within the public system have bartered away any entity privacy rights, parental rights, or individual privacy rights. Rather, their poverty renders their rights illusory; consequently, the public system is more tolerant of the state usurpation of a child's custody because the parents whose claims are adjudicated there do not have any rights with which they can argue against the prospect of state usurpation of custody. Indeed, that which explains why the private system is "more deferential to parental rights" is the fact that the wealthier individuals whose claims are adjudicated there actually possess parental rights to which the state may show deference.

<sup>191</sup> Roberts, *Unconstitutional Conditions*, *supra* note 175, at 943.

<sup>192</sup> In a similar vein, Roth suggests that rights may be a function of the right-holder's power to defend the right. See Louise Marie Roth, *The Right to Privacy is Political: Power, the Boundary Between Public and Private, and Sexual Harassment*, 24 *LAW & SOC. INQUIRY* 45, 45 (1999). She argues that the discursive boundary between the public and private is contingent, shifting, and subject to the influence of systemic social power. *Id.* at 56. Thus, those with power have the ability to define that which is public and that which is private; further, these powerful few also have the ability to defend those elements of life that have been identified as private from the public. *Id.* at 47. In contrast, the powerless can only receive definitions of public and private from those who make those determinations; further, the powerless many are incapable of defending the exposure of the private elements of their lives from the public. *Id.* at 56. In order to make her argument, Roth relies upon Weber's definition of power as "the probability that one actor within a social relationship will be in a position to carry out his own will despite resistance, regardless of the basis on which this probability rests." *Id.* at 47 (quoting MAX WEBER, *The Fundamental Concepts of Sociology*, in MAX WEBER: THE THEORY OF SOCIAL AND ECONOMIC ORGANIZATION 87, 152 (Talcott Parson ed., A.M. Henderson & Talcott Parson trans., 1947)). Moreover, the power that determines the placement of the discursive boundary between public and private is a "a structural power held by certain more powerful collectivities and their members, in relation to less powerful ones, which is intentional, impositional, and latent when not being exercised." *Id.* at 48. While not

exit from the Medicaid device that demands the evacuation of the pregnant woman's rights.

#### CONCLUSION

Through the examination of women's interaction with the PCAP apparatus, this Article has argued that indigent families are made public upon their receipt of state assistance; further it has explored why it is that indigent women and families fail to enjoy a presumption of privacy with regard to matters that have been discursively constructed as private. This exploration suggests that poverty, as constructed within our present sociopolitical location, is believed to index a lack of moral integrity—a lack that, in turn, justifies the erasure of the line that is imagined to separate private conduct from public intervention. The exploration leads to the possibility that, perhaps, the poor barter their privacy rights in exchange for government assistance. Yet, the ease with which the poor barter their rights suggests that it may be more accurate to describe the poor as never having rights to begin with. Indeed, a more *honest* description may entail admitting that, in our particular sociopolitical location, wealth is a condition of possibility for rights.

That wealth is a condition of possibility for rights would help to explain the generally dismal state of poor women's privacy rights/liberty interests in the U.S. insofar as the Supreme Court has determined that a poor woman's right to privacy/liberty interests does not impose any duty upon the state to help her pay the cost of an abortion.<sup>193</sup> When one considers that the right to privacy for non-poor women enables their access to abortion services, while the "right" to privacy for poor women dismally fails to accomplish the same feat, can we still argue that non-poor women and poor women possess the same right? We are confronted with a situation wherein the right to privacy for poor women is without content and without effect. Again, is a right that is devoid of substance a right at all? The Supreme Court has similarly held that the right to privacy possessed by a poor woman does not impose upon the state the obligation to provide even those abortions that would save her from being maimed.<sup>194</sup> Simply stated, the right to privacy possessed by the

---

intending to argue that Weberian power can be reduced to Marxist class, I do not think it inaccurate, in the least, to claim that that which determines the inability of the Alpha patient to defend elements of her life that have been discursively constructed as private from public exposure is her lack of power derived from her subordinate class position. When rights are understood as the stuff through which persons defend private elements of their lives, then the inability of that defense can be understood as the absence of the right. *Id.*

<sup>193</sup> *Maier v. Roe*, 432 U.S. 464, 469 (1977) (holding that "[t]he Constitution imposes no obligation on the States to pay the pregnancy-related medical expenses of indigent women, or indeed to pay any of the medical expenses of indigents," and, therefore, that a State had no obligation to fund "nontherapeutic" abortions for indigent women).

<sup>194</sup> *Harris v. McRae*, 448 U.S. 297, 316–17 (1980) (noting that because "a woman's freedom of choice" does not carry with it "a constitutional entitlement to the financial

poor woman is so impoverished of value and consequence that it can not even protect her physical health. Once again, do we overstate that about which we speak when we call this a “right”? Further, the insignificance of the “rights” possessed by the poor is not particular to the right to privacy; the Supreme Court has similarly held that poor people’s “rights” do not entitle them to shelter<sup>195</sup> or other life-sustaining services.<sup>196</sup>

It deserves underscoring that my argument is not about the impoverishment of rights discourse. My claim is not that, at this time, rights are formulated as rights *against* government interference when what is needed are rights *to* some conception of liberty. While a reformulation of rights as imposing an affirmative duty on the state, rather than an interdiction upon state action—that is, a conversion of rights to “rights *to*” rather than “rights *against*”—would be a dramatic improvement to the present state of rights within the U.S., this transformation within rights discourse may not adequately resolve the dilemma at hand. That is, even if rights were conceptualized and enforced as rights *to* some conception of liberty, the poor may still find themselves without these new rights *to* positive government action. Is there reason to believe that “rights *to*” would not still remain a function of class? There is a danger that the poor would, in spite of a revolutionary reformulation of rights, find themselves in the same predicament in which they now find themselves: possessing “rights” without substance, meaning, or effect.

---

resources to avail herself of the full range of protected choices,” a State is under no obligation to fund abortions that are “medically necessary” for indigent women).

<sup>195</sup> *Lindsey v. Normet*, 405 U.S. 56, 74 (1972) (finding that no obligation exists for the government to provide adequate housing).

<sup>196</sup> *Youngberg v. Romeo*, 457 U.S. 307, 317 (1982) (observing that “[a]s a general matter, a State is under no constitutional duty to provide substantive services for those within its border”).