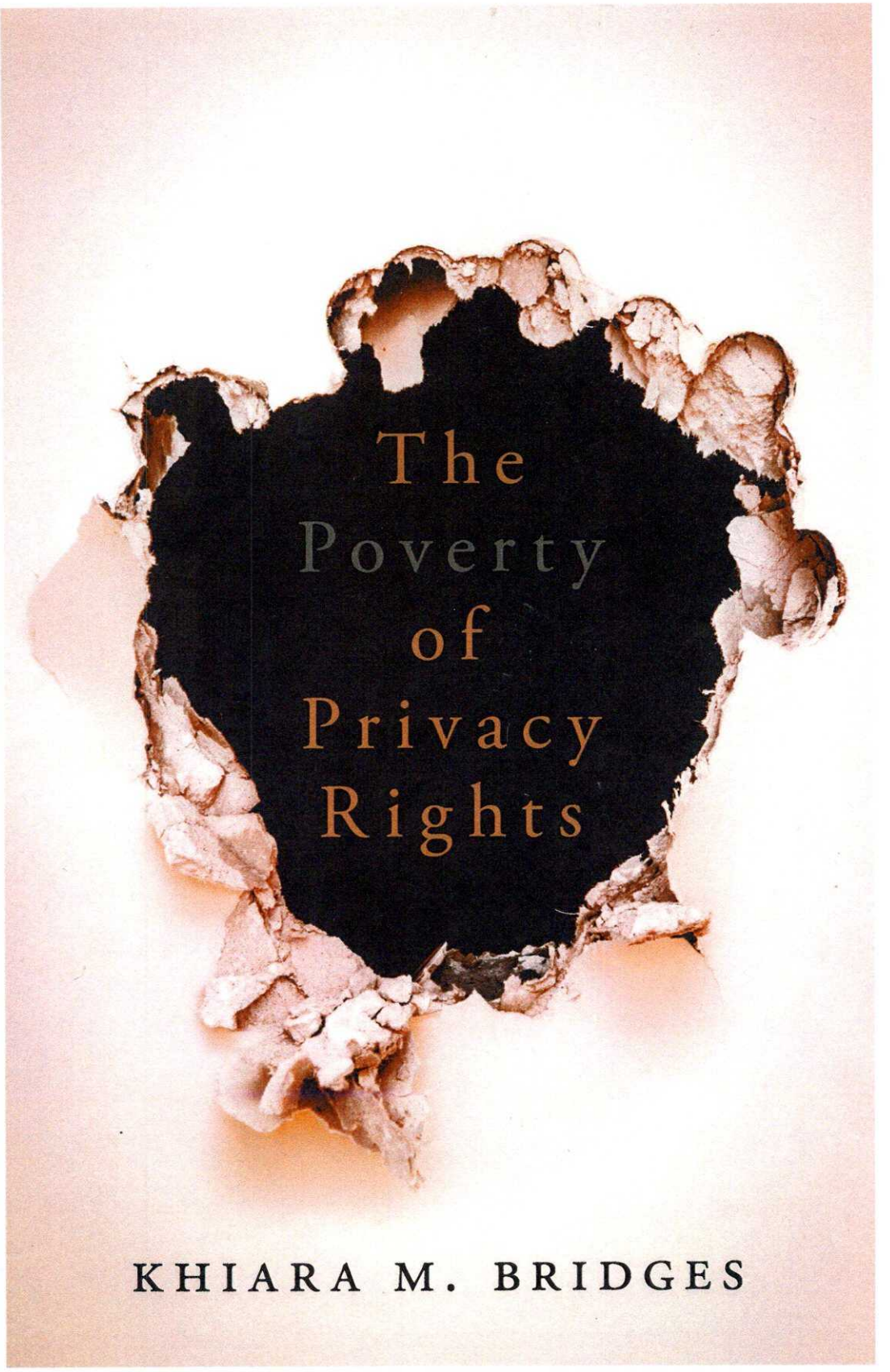
The
Poverty
of
Privacy
Rights
KHIARA M. BRIDGES

THE POVERTY OF PRIVACY RIGHTS

Khiara M. Bridges

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1 The Moral Construction of Poverty

Voices throughout history have insisted that the poor person's poverty necessarily demonstrates his behavioral and ethical deficiencies. Some historians trace this well-documented idea, the moral construction of poverty, in the United States to the industrialization of the American economy. They contend that, prior to the Civil War, it was not widely assumed that a compromised character was responsible for an individual's indigence. However, around the onset of the industrial revolution, "[a] new ideology arose . . . that attributed moral character deficiencies to the poor" (Katz 1985, 252).[1]

Regardless of the precise moment in history when poverty and immorality became linked discursively, our present society certainly is one in which the relationship between the two concepts is firmly established. On any given day, one need not listen especially closely in order to hear a narrative in political or popular discourse that explains poverty in terms of the deficient character of the people living that poverty. The examples really are quite ubiquitous.

Welfare Reform

We can start with Temporary Assistance for Needy Families (TANF), the federal program that partners with state governments to offer cash assistance to indigent families. TANF was created in 1997 by the Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA)—a piece of legislation that does not at all attempt to conceal its authors' conviction that the roots of poverty are located in the individual and her bad behavior. Indeed, PRWORA

bears in its title the behaviorist explanation of poverty that motivates it: It is the *Personal Responsibility* and Work Opportunity Reconciliation Act. While there are several noteworthy features of TANF, the most relevant to the present discussion is the dual emphasis that TANF places on getting beneficiaries of the program into the wage labor market and into marriages.

With respect to getting beneficiaries into the wage labor market, TANF requires recipients to engage in any of a number of "work activities" for varying hours depending on the beneficiary's family structure (U.S. Code 42 (2006), § 607(c)). Should a beneficiary fail to meet the mandatory work requirements, the statute gives states the discretion to reduce her grant or to terminate it altogether (§ 607(e)).

Further, TANF also attempts to steer beneficiaries into marriages. When passing PRWORA, Congress presented the lack of marriage as the reason why there are so many problems in the United States. Indeed, in the congressional findings that open PRWORA, the first facts that Congress "found" were that "[m]arriage is the foundation of a successful society" and that "[m]arriage is an essential institution of a successful society which promotes the interests of children" (§ 601). Presumably, the parade of horribles that makes up the balance of PRWORA's congressional findings stems from the absence of marriage.

Congress tells us that children born "out-of-wedlock" are "3 times more likely to be on welfare when they grow up"; have compromised "school performance and peer adjustment"; have "lower cognitive scores, lower educational aspirations, and a greater likelihood of becoming teenage parents themselves"; are "3 times more likely to fail and repeat a year in grade school than are children from intact 2-parent families"; are "4 times more likely to be expelled or suspended from school"; are living in neighborhoods with "higher rates of violent crime"; and are overpopulating the "[s]tate juvenile justice system." Apparently, marriage is the solution to these social ills. Thus, the legislation lists a series of activities that may promote "healthy marriage," all of which states may fund with TANF monies (§ 603).

In this way, TANF presents the problem of poverty as stemming from individual bad behavior. In essence, TANF claims that if poor people would just get married and/or get a job, their poverty would go away. Sociologist Loic Wacquant (2009) agrees with this reading, writing that TANF has

> powerfully reasserted the fiction according to which poverty is a matter of individual deed and will, and that it would suffice to stoke the matrimonial fire and zeal for work of those on assistance by means of material constraint and

moral suasion to defeat the culpable "dependency" they evince. . . . These moralistic stereotypes are tailor-made for legitimizing the new politics of poverty. (100–101)

Political Discourse

In 2014, then Speaker of the House John Boehner philosophized that the reason why large numbers of people remained unemployed after the official end of the Great Recession was not because the economy had transformed in ways that made jobs scarce for some segments of the population. Instead, he attributed enduring unemployment to the mindset of the unemployed: "I think this idea that has been born over the last—maybe out of the economy—over the last couple of years: 'You know I really don't have to work. I really don't want to do this. I think I'd just rather sit around.' This is a very sick idea for our country" (Cowan 2014). For Boehner, post-recession unemployment rates do no more than quantify and aggregate individuals' desires to avoid productive, valuable work. Should those individuals eventually find themselves in poverty, it will be due to their "sick" wish to avoid the paid labor force.

Also in 2014, Paul Ryan, who would become Speaker of the House following Boehner's resignation, articulated his sense that the problems of the "inner city"—the facially race-neutral signifier that, nevertheless, signifies a space populated by poor black and brown bodies—were attributable to "culture." He observed that "[w]e have got this tailspin of culture, in our inner cities in particular, of men not working and just generations of men not even thinking about working or learning the value and the culture of work. . . . There is a real culture problem here that has to be dealt with" (Delaney 2014). We can understand Ryan to be arguing that unemployment and poverty, particularly in the "inner city," can be explained in terms of a pathological worldview that misrecognizes the value of engaging in work in the paid labor market.

Pundits and Popular Discourse

On his tremendously popular television show, *The O'Reilly Factor*, television personality and bestselling author Bill O'Reilly has repeatedly articulated the view that poor people engage in imprudent, immoral behavior and that this behavior is responsible for their poverty. While some may be inclined to dismiss O'Reilly as a pundit among many pundits and his views as nothing more than perspectives that are palatable only to the radically conservative, his astonishing reach should not be underestimated. Fox News Channel, which airs

O'Reilly's show, has been the most watched cable news network for several years. Moreover, at the end of the third quarter in 2013, *The O'Reilly Factor* averaged 2.54 million viewers (Bibel 2013). Following the mid-term elections in 2014, *The O'Reilly Factor* had over *4 million* viewers (Mediaite 2014).

On November 13, 2014, *The O'Reilly Factor* invited journalist Bernard Goldberg to discuss race and poverty (Richter 2014). Goldberg began by citing statistics that purport to show that only 8 percent of people who finish high school, who avoid having children before they are married, and who avoid having children before they reach the age of 20 are in poverty. However, almost 80 percent of people who do not finish high school, who have children outside of marriage, and who have children while teenagers are in poverty. When O'Reilly questions Goldberg as to why "the left" does not acknowledge this, he responds,

> I think it's because it's an embarrassment. [Black elites] don't give dysfunctional behavior—and I think that's a fair description, if you drop out of high school, and you have babies when you're a teenager, it is dysfunctional behavior—they don't give that as a reason because it's embarrassing. They blame racism. Maybe once upon a time, when there were less opportunities for black people, racism might have been a legitimate reason. It isn't today.

O'Reilly concludes the segment with the statement, "Poverty is colorblind. And if you make mistakes in your life, and you dig yourself a hole where you're not educated and you gotta be on the dole to support your kids and you're dependent and all of that and you can't develop a career or a talent, you're done."

O'Reilly's sentiments in the November show echoed those that he had articulated earlier in the year. On January 9, 2014, he paused to reflect on President Lyndon Johnson's war on poverty, ultimately concluding that it was a misconceived effort (Fox News Insider 2014). He reached this conclusion because the social programs that Johnson passed in his effort to eliminate poverty in the country did not attempt to reach the true cause of destitution in O'Reilly's view: bad behavior. O'Reilly offered that "[m]aybe we should have a war against chaotic, irresponsible parents. But America will never launch that kind of war—because it's too judgmental and deeply affects the minority precincts. Therefore, cowardly politicians and race hustlers continue to bear witness that our economic system is at fault rather than bad personal decision making." He asserted that "[p]overty will not change until personal behavior does. Addictive behavior, laziness, [and] apathy all override social justice goals."

He described the nation as a meritocracy in which success and wealth are available to all who demonstrate sustained effort. He argued that

> [e]very child on this planet can learn. But, parents must drive the process by forcing the kids to perform in school. Every American can work hard. And if you do, you'll make money. Every American can practice self-respect, and if you do, people will hire you. But, if you're dishonest, embrace intoxicants, conceive children you can't support, act in a crude, self-disrespectful way, and generally believe that you are owed prosperity, poverty may well come knocking.

In short, O'Reilly placed immoral behavior at the foundation of poverty in the United States. When a guest on the show disputed this analysis, redirected attention to the dearth of available jobs that pay livable wages, and contended that "[w]e don't have a problem with workers who are too lazy to work for the jobs with good pay," O'Reilly was moved to cut him off. He interjected, "Yes, we do. We have an enormous underclass. . . . We have a problem of people who can't do the jobs that pay high wages. But, we also have an underclass that's in chaos. Go to Detroit if you don't believe me." When his guest countered that poor people cannot attain jobs that pay a livable wage because they have not been given the skills that they need, O'Reilly replied that poor people necessarily had been presented with the opportunity to acquire the requisite skills. The problem was that they had not *accepted* the skills. He concluded that "[t]he parents have to drive the kid in [to the schools]. And the irresponsible parents don't. You have to work hard to accept the education. And a number of Americans will not do that."

O'Reilly's views and his large viewership are worth discussing for two reasons. First, because millions of viewers watch his show every night, he enjoys a large platform from which to popularize the idea that immoral behavior—the refusal to accept education and job skills that have been offered, the failure to impress upon one's children the importance of going to school and working hard, having sex outside of marriage, having children outside of marriage, allowing oneself to become addicted to intoxicants, and simply being lazy—causes poverty.

Second, O'Reilly's large viewership is significant not only because of its effects—that is, he may convince those who are otherwise unconvinced that behavioral and ethical deficiencies cause poverty. His viewership also is significant because of its *causes*—that is, it may indicate that large numbers of people are *already* convinced that behavioral and ethical deficiencies cause

poverty: Millions may watch the show because, in watching it, they can hear someone articulate the views that are already in line with their own.

. . .

Of course, structural explanations of poverty—which insist that macro forces and institutions cause poverty—have some degree of salience in the United States. Consider that in the early days of the campaign for the 2016 presidential election, Republican candidate Jeb Bush said that Americans needed to "work longer hours and through their productivity gain more income for their families" (O'Keefe 2015). This statement—which might be interpreted to argue that workers are not working hard enough if they are not earning enough income to support themselves and their families—is consistent with individualist explanations of poverty.

Indeed, economist and *New York Times* columnist Paul Krugman (2015) argues that to interpret Bush's remarks as motivated by the moral construction of poverty is consistent with Bush's professed intellectual inclinations. Krugman writes that Bush has expressed an affinity for conservative social analyst Charles Murray's scholarship. And in Murray's recent book *Coming Apart*, Murray has observed that "working-class white families are changing in much the same way that African-American families changed in the 1950s and 1960s, with declining rates of marriage and labor force participation" (quoted in Krugman 2015). Krugman continues:

> Some of us look at these changes and see them as consequences of an economy that no longer offers good jobs to ordinary workers. This happened to African-Americans first, as blue-collar jobs disappeared from inner cities, but has now become a much wider phenomenon thanks to soaring income inequality. Mr. Murray, however, sees the changes as the consequence of a mysterious decline in traditional values, enabled by government programs which mean that men no longer "need to work to survive." And Mr. Bush presumably shares that view. (Krugman 2015)

Bush eventually disputed this interpretation of his "work longer hours" remark. He stated that the remark was not an argument that workers who are having trouble supporting their families are lazy; instead, it was an indictment of the lack of full-time jobs available in the labor market (O'Keefe 2015). Bush stated that his comment was a measure of his concern for the "6.5 million part-time workers [who] want to work full-time" (O'Keefe 2015). Thus, Bush rec-

ognized the political inadvisability of blatantly individualist explanations of poverty and low income, and he instead embraced structural explanations of the phenomena—arguing that the country needed "high, sustained economic growth" in order to solve the problem of the evaporation of the livable wage (O'Keefe 2015).

Moreover, in recent years, studies that endeavor to show the precise structural mechanisms that produce poverty have been well received. For example, economist David Autor (2010) has documented in his scholarship the macro forces that have combined to produce poverty in the United States. In one well-cited paper, he notes that

> the structure of job opportunities in the United States has sharply polarized over the past two decades, with expanding job opportunities in both high-skill, high-wage occupations and low-skill, low-wage occupations, coupled with contracting opportunities in middle-wage, middle-skill white-collar and blue-collar jobs. . . . [J]ob opportunities are declining in both middle-skill, white-collar clerical, administrative, and sales occupations and in middle-skill, blue-collar production, craft, and operative occupations. The decline in middle-skill jobs has been detrimental to the earnings and labor force participation rates of workers without a four-year college education, and differentially so for males, who are increasingly concentrated in low-paying service occupations. (2010, 1)

Autor notes that middle-skill jobs likely have disappeared in the United States because they have been offshored or because technology has made it unnecessary to hire workers to perform the tasks that the job requires (2010, 4). Consequently, these jobs have rapidly vanished from the labor market in the United States.

The thrust of Autor's oeuvre is that the jobs that pay wages that can support middle-skill workers are simply not there. If these workers are poor, it is not because they are lazy, or promiscuous, or criminally inclined. It is because the market does not contain opportunities for them to be anything but poor. Notably, people and organizations from both sides of the political spectrum have frequently cited Autor's work (Sherk 2014; Stark and Zolt 2013).

Nevertheless, structural explanations of poverty have not deeply saturated the culture. In fact, a poll that the Pew Research Center conducted in January 2014 confirms that a majority of Americans believe that the poor are responsible for their poverty: 60 percent of respondents agreed with the proposition that "most people who want to get ahead can make it if they are willing to work hard" (Pew Research Center 2014).

Indeed, there is a substantial literature documenting that the most favored explanation of poverty in the United States is one that identifies individual behaviors as the root of indigence. In summarizing the literature, social psychologist Catherine Cozzarelli and her coauthors[2] write that

> most of these studies find that Americans believe that there are multiple determinants of poverty[,] but that individualistic or "internal" causes (e.g., lack of effort, being lazy, low in intelligence, being on drugs) tend to be more important than societal or "external" ones (e.g., being a victim of discrimination, low wages, being forced to attend bad schools). (Cozzarelli, Wilkinson, and Tagler 2001, 210)

We might wonder why individualist explanations of poverty are so readily accepted and believed in the United States. Indeed, many people with progressive politics subscribe to individualist explanations of poverty. Consider that the 2014 Pew poll discussed above notes that 76 percent of Republicans versus 49 percent of Democrats reported holding the belief that most can get ahead through hard work (Pew Research Center 2014). While those figures can be cited to show that people with conservative politics are more likely than those with liberal politics to believe that individual effort (and the lack thereof) produces economic success and failure, they can also be cited to show that *close to half of those with liberal politics believe that individual effort produces economic success and failure.*

The attraction of individualist explanations of poverty may be due to the fact that the alternative—structural explanations of poverty—strip those of us who are economically successful of the chance to claim those successes as entirely our own. That is, if the poor do not occupy that economic and social station because of their own efforts (or lack thereof), then those who are *not* poor do not occupy our own economic and social stations because of our own efforts. Stated differently, if structural forces contribute to and/or cause "their" failure, then structural forces likely contribute to and/or cause "our" success. That our achievements may not be entirely *earned*—but may have been gifted to us, in some important sense, by forces outside of our control—is a discomfiting reality that many people, even progressive ones, may reject.

The wide acceptance of individualist explanations of poverty may explain why programs that are designed to help the poor tend to be only slightly less harsh than the poverty that entraps them. Indeed, powerful cultural discourses assert that poor people who receive public assistance to help them cope with

their poverty are even more morally impoverished than those who are poor but do not seek help from the state. Consider one philosopher's articulation of this notion:

> The welfare state seems to be corrupting some of our core moral principles. . . . To be specific: The welfare state encourages people to ignore, to violate—even to pretend that it does not exist—the moral principle that it is wrong to live at other people's expense. . . . Able-bodied adults who live at the unwilling expense of others degrade themselves even as they demean those forced to support them. . . .
>
> [T]he welfare state seems to have clouded this central moral principle. Indeed, it seems it has entirely inverted it, even institutionalized its perversion. It has created a legal apparatus that allows, even encourages, some to live at others' expense, and this apparatus has given rise to the feeling among increasingly many people that they have the right—that they are "entitled," perhaps as a matter of "social justice"—to live at others' expense. (Otteson 2011)

The frequently punitive aspects of many public assistance programs might be understood as institutionalized responses to both the sense that the poor bear a bad moral character and the sense that the policies and programs that endeavor to help them are immoral because they allow the poor to benefit from the labor of others. As a result, many of the programs that are designed to relieve the poor of some of the most degrading aspects of poverty—like TANF and Medicaid—are themselves degrading, as they reflect the ideology that the programs are immoral endeavors to assist immoral people.

The Court and the Moral Construction of Poverty

In this book I assert that poor mothers have been (effectively or actually) deprived of privacy rights because, as poor people, they are presumed to suffer from behavioral and/or ethical deficiencies; moreover, because these deficiencies necessarily implicate children—as poor mothers are *mothers*, after all—they are not bestowed with (effective or actual) privacy rights that could constrain the government from regulating their private lives and protecting their children.

In order to establish this claim, it is not enough to show that ideologies linking poverty and immorality are popular. Instead, one also has to show that the jurists charged with interpreting the Constitution have come to accept these ideologies and to embody them in the cases that they decide; one has to

show that the Court has constructed a jurisprudence that reflects the discursive link between poverty and immorality. When one looks in the corner of the Court's jurisprudence in which it has wrestled with the question of whether the government has any responsibility at all to its poorest citizens, one can see shadows of the moral construction of poverty.

There is *Dandridge v. Williams* (397 U.S. 471 (1970)), in which the Court upheld Maryland's policy of capping the size of AFDC (Aid to Families with Dependent Children) grants such that families consisting of seven or more persons were left with their needs unmet. After finding that rational basis review was the appropriate level of scrutiny for the law, the Court affirmed that the law was reasonably related to the state's goals of encouraging gainful employment and providing incentives for family planning. It is here that the Court reveals an underlying faith in the belief that people are impoverished because of their own character flaws. With respect to the state's goal of encouraging gainful employment by capping AFDC grants, the Court "invites the reader to make a series of associations that likely lead to the specter of the welfare recipient shirking employment—choosing to be a welfare recipient and not a wage earner—which is the most common contemporary version of the moral weakness of the poor" (Ross 1991, 1519).

Further, the trope of the *welfare queen* not so subtly lurks behind the state's goal of providing incentives for family planning. The statute is haunted by the specter of the woman who bears children for none of the myriad legitimate and honorable reasons that motivate women with class privilege to become mothers; instead, the welfare queen has children in large part because she knows that the state will finance them: "For these women, becoming pregnant is an act of moral weakness. The grant ceiling encourages them to do the right thing (have no more children), albeit for the wrong reason (in response to the state's financial incentive rather than as a matter of individual moral strength)" (Ross 1991, 1520).

There is also *Wyman v. James* (400 U.S. 309 (1971)), in which the Court upheld the constitutionality of New York's policy of requiring beneficiaries of AFDC to submit to home visits as a condition of eligibility. Justice Blackmun, writing for the majority, found the visits legitimate attempts by the state to protect children from exploitation. Indeed, there was some evidence that the named plaintiff who had challenged New York's policy had either been neglecting or abusing her son. The Court observes: "There are indications that all was not always well with the infant Maurice (skull fracture, a dent in the head, a

possible rat bite). The picture is a sad and unhappy one" (Wyman v. James, 400 U.S. 309, 322 n.9 (1971)). However,

> [T]he issue in *Wyman* was whether the New York home visit regulations were constitutional, not whether Mrs. James had committed child abuse. The state had not premised its need to visit Mrs. James' home on any suspicion of child abuse. Thus, Blackmun's suggestion seems an irrelevant expression of his suspicion that she was physically abusing her son. But his suggestion of abuse becomes relevant to the constitutional issue the moment one plugs in the premise of moral weakness. The story of Mrs. James and the infant Maurice becomes a story of all AFDC mothers and their propensity, by virtue of their poverty, to abuse their children. Blackmun's suspicion then becomes relevant; it provides a state interest in home visits for the purpose of monitoring a group of parents especially prone to child abuse. (Ross 1991, 1524–25)

If the poor are likely to commit child abuse, then the state surely is justified in searching their homes for signs of that abuse. However, the only evidence that the Court marshals to support the proposition that the poor are likely to commit child abuse is their poverty. Their poverty can demonstrate this likelihood if one believes that poverty evidences some sort of moral degradation. *Wyman* embalms this understanding of poverty into the Constitution.

Yet, flowing in the jurisprudence, beside the undercurrent apparent in *Dandridge* and *Wyman* that links poverty with immorality, is a parallel stream asserting that poverty is an enduring feature of modern society. In some iterations of this stream, poverty is altogether incapable of eradication; other iterations propose that while it may be possible to eradicate poverty, it is impossible or inappropriate for the *judiciary* to achieve this feat. Other sections of the Court's opinion in *Dandridge v. Williams* provide a clear example of this parallel stream—what legal scholar Thomas Ross labels a "rhetoric of helplessness" (1991, 1522). After holding that Maryland's family cap policy did not violate the Equal Protection Clause, the majority concluded its opinion by professing that it was agnostic on the question of whether

> the Maryland regulation is wise, that it best fulfills the relevant social and economic objectives that Maryland might ideally espouse, or that a more just and humane system could not be devised. . . . *But the intractable economic, social, and even philosophical problems presented by public welfare assistance programs are not the business of this Court.* (Dandridge v. Williams, 397 U.S. 471, 487 (1970); emphasis added)

With this statement, the Court declares two things. First, it states that the institution of the judiciary is not well situated, or even empowered, to decide how best to redistribute income such that the least successful players in market capitalism are saved from the privation that comes with economic failure. Second, it states that the question of how to redistribute income in order to eliminate the cruelties endemic to poverty may be a question that *no* institution can solve. Indeed, for the Court, poverty is an "intractable" problem. In this way, the Court characterizes

> poverty as a product of a mix of abstract forces and ideas, beyond our practical control. Poverty is built into the basic structure of our society, it is a product of our history, traditions, philosophies, political structures, and economic structures. . . . [There is] no realistic solution or . . . [the solution] entails the loss of our most basic social structures. (Ross 1991, 1510)

Ross notes that there is a tension between the claim that the source of poverty is the immoral character of the poor and the claim that the causes of poverty are so hugely *macro* that even the judiciary is an impotent tool with which to address it. If the source of poverty is the poor person's moral lack, then the causes of poverty are not macro at all. Rather, they are intensely *micro.* And we only can eradicate poverty by repairing the broken moral compasses that erroneously guide the impoverished to their impoverishment. Ross reconciles the seeming contradiction with two observations. First, he notes that, even if the source of poverty is the poor's immorality and not structural imperfections, then the judiciary remains impotent to eradicate poverty. How can a court of law fix a person's character? Second, he notes that the two currents can be reconciled if a dichotomy is made between the undeserving and the deserving poor: The undeserving poor are those whose immorality has led to their poverty, while the deserving poor are those whose poverty is caused by powerful, uncompromising structural forces beyond anyone's and everyone's control.

The Deserving and Undeserving Poor

Thus, one must complicate the systematic relationship between poverty and moral lack. While it is true that "the culture of capitalism measures persons, as well as everything else, by their ability to produce wealth and by their success in earning it," and while it is true that this "leads to the moral condemnation of those who, for whatever reason, fail to contribute or to prosper," those who have failed to contribute or prosper are not equal subjects of

moral condemnation (Katz 1989, 7). There are those who escape moral censure due to the fact that they cannot be blamed for their failure to contribute or prosper: the deserving poor. And then there are those who are the proper subjects of moral contempt, as they are to be blamed for their own failures: the undeserving poor. Poverty scholars Joel Handler and Yeheskel Hasenfeld (1991) explain it in terms of which categories of people are morally excused from work. The deserving poor enjoy this moral excuse; the undeserving poor do not.

While the line that demarcates the deserving from the undeserving poor has shifted throughout the nation's history, the blind, the deaf and mute, the insane, and others who are mentally or physically incapable of working have always been conceptualized as the deserving poor. Their poverty has never invited assumptions of personal shortcomings. Their disabilities have always rendered them morally excused from work.

However, other groups have varyingly existed on either side of the line that separates the deserving and the undeserving poor. The elderly are one example. At present, very few would argue that an indigent elderly person ought to be blamed for her poverty. For the most part, we conceptualize such individuals as too old to work—as having graduated out of the population of people who belong within the pool of available labor (Brodkin 1993, 658). As such, the indigent elderly are morally excused from work; they are the deserving poor.

Yet, the indigent elderly have not always been considered rightful members of the deserving poor. Prior to the New Deal, the elderly poor were more morally ambiguous. Discourses circulated in which the elderly poor were imagined to be those who had not worked hard during their youth (Handler and Hasenfeld 1991). They were those who had not engaged in the morally valuable activities of living thriftily and of saving one's earnings. They were those who had engaged in the morally corrupt activities of profligate spending and extravagant consumption.

Moreover, even if an aged person was poor despite his having lived morally during his youth, the fact of his poverty revealed the immorality of another group of persons: his children. If an older person was poor, then his able-bodied children, who bore the responsibility for caring for him in his dotage, were morally blameworthy. Thus, the figure of the poor aged body carried suggestions of immorality. As such, it was situated on the undeserving side of the deserving/undeserving poor binary. Cultural shifts would cause it to be moved to the deserving side, where it currently, and uncontroversially, resides.

Poor mothers also have existed on both sides of the deserving and undeserving poor binary throughout history. In the colonial period, women with children, along with everyone else, were expected to labor (Padavic and Reskin 2002). Motherhood did not provide a moral excuse from work. If a mother was poor because she could not work or was poor despite the fact that she did work, she did not escape moral censure.

Culture shifted, however. By the early nineteenth century, discourses had developed that declared that the proper location for a mother was not the workforce but rather the home (Cahn 2000). In fact, the working-as-moral and not-working-as-immoral schema reversed itself. Not only did motherhood provide a moral excuse from work, thereby making the decision not to work outside of the home an imminently moral one, but it became morally inexcusable for mothers to work outside of the home.

Powerful voices argued that working women were morally suspect because the workplace was an environment that cultivated and sanctioned the corruption of morals (Handler and Hasenfeld 1991). Working women's "associations with men, impulsive spending, immodest dress, and profane language inevitably led to moral laxity. . . . Running through all of the debates was deep concern about the effects of women's working on morality" (55). Women in the labor force also threatened the moral fabric of society because they "depressed wages, depriving men of the ability to marry" (55). Further, *mothers* who worked outside of the home were castigated twice over because their time spent in the morally debasing workplace was time spent away from their children. Cultural discourses constructed this as child neglect—the height of morally condemnable behavior. Insofar as working mothers knowingly exposed themselves to the corrupting forces found in the labor market, they were moral failures as *women*. Insofar as working mothers needed to be absent from the home during their workdays and had to leave their children in the care of others, they were moral failures as *mothers*.

Poor mothers who worked were also condemned by the assumption that they needed to work because they were "unfit" to receive financial support from social programs designed to relieve mothers from the necessity of working outside the home. These programs had policies of excluding women who were thought to have behaved immorally; they made women who had engaged in premarital sex and childbearing, had divorced, or had been deserted by their husbands ineligible for benefits (McClain 1996). The fact that a mother worked was taken to mean that she had been excluded from these programs, and the fact

of her exclusion from these programs was taken to mean that she had engaged in immoral behavior. Thus, working mothers' immorality could be assumed.

But, culture shifted once again. By the 1960s, this shift had reestablished the working-as-moral and not-working-as-immoral schema that had reigned at the dawn of the nation. One might explain this shift as a function of the insistence with which women entered the workforce. Female labor force participation skyrocketed despite powerful cultural discourses that declared that the appropriate place for them was the home.

Perhaps because women insisted upon working outside the home, the narratives that were told about working women transformed. And the more moral it became to work as a mother, the more immoral it became *not* to work as a mother. "The respectability of working married mothers only heightened the perceived deviance and moral depravity of single mothers, especially those with children born out of wedlock, who are on welfare rather than working" (Handler and Hasenfeld 1991, 137). This is the current culture within which we live: one in which all (except the wealthiest) mothers are expected to work. As such, those mothers who are poor and not working are firmly situated on the undeserving side of the binary, enjoying no moral excuse from work.[3]

Race and the Undeservingness of the Nonworking Poor Mother

Yet, explanations of the morality of the working mother that overlook race are radically incomplete. Race—that social force that both obviously and obliquely shapes the nation—must be considered in any analysis of how the working mother became moral and the nonworking mother became immoral. When one folds race into the story, one sees that it has operated to both naturalize and justify changes in the ethics of working motherhood.

When cultural discourses attached a badge of immorality to mothers who worked outside of the home, the fact that many of those mothers were black—indeed, the fact that *most* black mothers worked outside the home—validated this judgment. Certainly, the exclusion of black mothers from the home facilitated its construction as the "proper" site for mothers.

Part of the reason why many black women had been pushed out of the home and into the labor market is that the welfare programs that were designed to shield mothers from that very phenomenon systematically excluded black women (Huda 2001). In the 1960s, black women began agitating for access to these public assistance programs that historically had refused to serve

them. Their efforts were quite successful on many fronts (Huda 2001). In contrast to the 1930s, when the beneficiaries of cash assistance programs for mothers were predominately white, by 1975 black women made up 44 percent of the beneficiaries of the then-existing cash assistance program for mothers, Aid for Families with Dependent Children (AFDC); white women constituted only 40 percent of the program's beneficiaries that year.[4] Access to AFDC meant that black mothers could now stay in the home and raise their children—a privilege that had only been available to white mothers for much of the nation's history.

However, although black women gained access to the home as a site of labor—a place that, up until then, had been understood as the "proper" moral site for mothers—they nevertheless remained incapable of accessing discourses that affirmed them as moral individuals. The justification for their continued exclusion from these discourses centers on the reasons why they did not have a male wage on which to depend: They were divorced, had been deserted by their husbands, or were never married to the fathers of their children (Huda 2001).

To be fair, divorce, desertion, and reproduction outside of marriage always had been understood as morally problematic behaviors. Prior to black women's agitation in the 1960s for access to welfare programs that benefited poor mothers, being divorced, deserted, or an unwed mother served as a moral disqualification from these programs. Interestingly, however, when divorce, desertion, and reproduction outside of marriage described the circumstances under which white women became single mothers, it was understood as a problem of patriarchy. White women's "single motherhood was viewed as evidence of their failure to abide by the sex-gender system's conventions governing marriage and the traditional two-parent family. Their anti-patriarchal conduct rendered them morally responsible for their poverty and justified the government's refusal to provide them with assistance" (Crooms 1995, 620).

However, when divorce, desertion, and never marrying described the circumstances under which black women became single mothers, it was understood as something bigger than a problem of patriarchy. It became a "tangle of pathology" (Moynihan 1965): If it was not generative of all of the social ills that plagued black people in the United States, then it certainly was responsible for most of them. Politician and sociologist Daniel Patrick Moynihan (1965) notoriously theorized problematic black motherhood in his 1965 report "The Negro Family." He observed that almost 25 percent of "urban Negro marriages" were dissolved, almost 25 percent of "Negro births" were "illegitimate," and almost 25 percent of "Negro families" were female-headed households (6). He noted

that a fundamental fact of Negro American family life is the often reversed roles of husband and wife" (30). And he lamented the emasculation that black women visited upon their male partners:

> Consider the fact that relief investigators or case workers are normally women and deal with the housewife. Already suffering a loss in prestige and authority in the family because of his failure to be the chief breadwinner, the male head of the family feels deeply this obvious transfer of planning for the family's wellbeing to two women, one of them an outsider. His role is reduced to that of errand boy to and from the relief office. (19)

If patriarchy is a moral order, then black mothers—in their insistence upon assuming the roles that belonged to men, in their banishing of men to the roles that women occupied in years past, and in their creation of the conditions that invited men to abandon their families altogether—were agents of immorality.

This might explain why the home became understood as an improper, immoral place for mothers to be just as soon as black mothers could remain there to raise their children. As immorality attached to the space where black mothers could be found, the workforce became the site of moral righteousness. The poor black mothers who no longer needed to labor there were moral failures.

The racialized figure of the welfare queen is worth mentioning here. This caricature of indigent black motherhood can be described as

> a poor, black mother who first became pregnant as a teenager. Her sexual irresponsibility resulted in her dropping out of school and joining the AFDC rolls. Rather than marry the child's father and make the best of the situation, she chose to remain single, to collect AFDC and to have more children by different fathers. Her choices were driven by an AFDC program which rewarded her for remaining promiscuous, single, and prolific. Her sexual irresponsibility placed her at the beginning of a chain which ultimately ended with an impoverished and dysfunctional community. (Crooms 1995, 622)

We can credit President Ronald Reagan with giving birth to the mythos of the welfare queen (Cammett 2014). He tactically deployed her in an effort to gain popular and political support for his goal of reducing the size of "extreme" redistributive policies and social welfare programs. She came to stand for "big government." The more that he could get the public to fear and loathe her, the more that he could get the public to fear and loathe big government. Thus, Reagan often told the story of a Chicago woman who had "'80 names, 30 addresses,

12 Social Security cards and tax-free income over $150,000'" (Edsall and Edsall 1991, 148). And he asked the public to believe that this woman—who, in actuality, was "not a garden-variety cheat, but . . . rather a full-fledge[d] psychopath and con artist . . . whose other possible crimes include murder and kidnapping" (Cammett 2014, 244 n.66)—represented all AFDC recipients.

Reagan also told the tale of a "housing project in New York City in which a slum dweller . . . can get an apartment with 11-foot ceilings, with a 20-foot balcony, a swimming pool and a gymnasium, laundry room and play room, and the rent begins at $113.20 and that includes utilities" (Cammett 2014, 245). He asked the public to believe that this housing project, which was actually part of a larger development designed to serve 200,000 residents in the community, represented the housing that was generally available to any poor person who asked for state assistance.

However, simply because the fables Reagan wove were empirically false, it does not mean that they were untrue. That is, in a culture wherein black people have been constructed as sexually lascivious and intractably indolent since the dawn of the nation, the stories Reagan told made complete sense. And importantly, they were attractive to wealthier individuals inasmuch as the more that poor people could be understood as morally depraved, the more that they, the non-poor, could be understood as morally righteous.

The welfare queen merits discussion for two reasons. First, Reagan and others claimed that liberal welfare policies that generously and indiscriminately provided cash and other relief to the poor were responsible for the welfare queen's existence. Thus, the disgust that the public felt for the welfare queen could be productively channeled toward those policies, with AFDC being the primary target. In this way, the welfare queen created, or simply supported and strengthened, a popular and political climate within which the replacement of AFDC was possible. Essentially, the road to TANF winds by the welfare queen's luxury condominium.

Second, the welfare queen merits discussion because she is the apotheosis of immorality. If one is immoral because one has sex and has children outside of marriage, then the welfare queen is immoral for that reason. If one is immoral because one fails to engage in the morally valuable activity of laboring in the market, then the welfare queen is immoral for that reason. If one is immoral because one receives public assistance and, as such, lives at another's expense, then the welfare queen is immoral for that reason. Further, if one's immorality at living at another's expense is made more corrupt by living *lavishly*

at another's expense, then the welfare queen is immoral for that reason. She is immoral four times over.

. . .

Political scientist Evelyn Brodkin has argued that current welfare policies treat the poor as enemies of the nation—as villains. She notes that *Webster's Dictionary* defines "villain" as "one who is capable of gross wickedness or crimes; a vile wretch; a scoundrel" (Brodkin 1993, 654). She then offers an instructive etymology of the word "villain," writing that the word

> has its origins in the obsolete French word "villein," a farm servant. By the 13th century, English peasants working feudal estates under the terms of villeinage were nominally regarded as "freemen" yet remained economically and socially subjects of their lord. This paradoxical condition of formal freedom coexisting within a system of economic and social subjugation might well be said to describe the status of the poor in postmodern America, where legal equality remains at considerable remove from one's social and economic status. Under these conditions, the social citizenship of the poor may be limited both by the "moral construction of poverty" and the material requirements for political influence. (Brodkin 1993, 654–55)

It is edifying that Brodkin describes the poor's status in terms of "citizenship," arguing that attributing impoverished people's poverty to their own bad behavior functions to limit this citizenship. Some scholars have described citizenship as the status whereby a person is granted a baseline set of rights bestowed by the relevant government. For example, legal scholar Kevin Lapp (2012) notes the argument that "to be a citizen means you possess a particular or minimum set of rights and privileges." Accordingly, if an individual does not possess that baseline set of rights—if she has been deprived of a right—then she is not a full citizen; she is a "second-class or semicitizen" (Lapp 2012, 1576).

This book serves to buttress Brodkin's intuition that the belief that poor mothers' immorality has caused their poverty limits their citizenship. To be precise, the conviction that moral deficiencies cause poverty serves to justify depriving poor mothers, either in the moderate or strong sense, of their family, informational, and reproductive privacy rights. As a result, they do not possess the full set of legal rights that the government bestows to citizens. Their citizenship is partial. They are second-class or semicitizens.

The Failure of the Positive Rights Solution

After taking an accounting of the dismal state of poor mothers' privacy—and the impotence of their ostensible privacy rights—some scholars have been moved to argue that the reason poor mothers are subject to indignities that wealthier mothers never have to endure is that the Constitution has been interpreted to be a charter of negative rights. That is, the Court has declared that the rights that the Constitution protects are those that simply immunize protected activities from government intervention and regulation (Appleton 1981). Advocates for poor mothers argue that this interpretation of the Constitution is at the root of the humiliations that poor women are obliged to suffer. What is needed, they contend, is an alternate interpretation—one in which the Constitution confers positive rights. Positive rights, unlike negative rights, "would compel affirmative governmental involvement—the official provision or facilitation of the activity or good protected by the right" (Appleton 1981, 735).

The Court unambiguously declared that the Constitution primarily protects negative rights in *DeShaney v. Winnebago County* (489 U.S. 189, 195–97 (1989)). In *DeShaney*, the Court denied that the Due Process Clause provided Joshua DeShaney with a right to the competent provision of services by his jurisdiction's child protection agency, which had returned him to the home of his father even though several state actors knew that Joshua's father was abusive. Eventually, Joshua's father beat Joshua so viciously that he suffered permanent brain damage. In holding that the Due Process Clause did not provide Joshua with the positive right to protection by the state, the Court argued that the clause

> is phrased as a limitation on the State's power to act, not as a guarantee of certain minimal levels of safety and security. It forbids the State itself to deprive individuals of life, liberty, or property without "due process of law," but its language cannot fairly be extended to impose an affirmative obligation on the State to ensure that those interests do not come to harm through other means. . . . Consistent with these principles, our cases have recognized that the Due Process Clauses generally confer no affirmative right to governmental aid. . . . If the Due Process Clause does not require the State to provide its citizens with particular protective services, it follows that the State cannot be held liable under the Clause for injuries that could have been averted had it chosen to provide them. (DeShaney v. Winnebago County Department of Social Services, 489 U.S. 189, 195–97 (1989))

For scholars concerned about poor mothers, the Court's decisions in *Maher v. Roe* (432 U.S. 464 (1977)) and *Harris v. McRae* (448 U.S. 297, 318 (1980)) underscore the problem posed by interpreting the Constitution to be a document that protects only negative rights. In *Maher* and *Harris*, the Court upheld the constitutionality of prohibitions on the use of Medicaid funds to pay the costs of indigent beneficiaries' abortions. The Court reasoned that the abortion right that it recognized in *Roe v. Wade* (410 U.S. 113 (1973)) did no more than prohibit governments from erecting obstacles in women's path to abortion; that is, the right *constrained* the government. The indigent plaintiffs in *Maher* and *Harris* who sought Medicaid coverage for their abortions wanted to compel the government to act—to oblige the government to facilitate their access to abortion. The *Harris* Court thought that this was a fantastical proposition, one that would "mark a drastic change in our understanding of the Constitution" (318). It claimed that while "the liberty protected by the Due Process Clause affords protection against unwarranted government interference with freedom of choice in the context of certain personal decisions, it does not confer an entitlement to such funds as may be necessary to realize all the advantages of that freedom" (317–18).

Indeed, the suggestion that the government could be obliged to facilitate poor women's abortions was deeply disturbing to the Court. "To translate the limitation on governmental power implicit in the Due Process Clause into an affirmative funding obligation would require Congress to subsidize the medically necessary abortion of an indigent woman even if Congress had not enacted a Medicaid program to subsidize other medically necessary services" (318). To a majority of the Court, this interpretation of the Constitution was simply implausible.

Scholars interested in poor mothers thought that *Maher* and *Harris* exemplified the danger of limiting the Constitution to be one that recognizes only negative rights (Appleton 1981; Soohoo 2012). To these scholars, the decisions demonstrated just how desperately poor women required positive rights. Wealthier women needed *negative* rights, they argued; they needed entities that would constrain the government from interfering with their ability to access the goods and services that they wanted, and could afford, to purchase in the market. Poorer women, on the other hand, needed *positive* rights; they needed entities that would enable them to access the goods and services in the market that their indigence rendered unavailable to them (Appleton 1981). For many

indigent women, their lack of funds means that *Roe v. Wade* might just as well have never been decided.

Many have advocated for the recognition of positive privacy rights beyond the context of abortion, arguing that negative privacy rights alone do not enable poor mothers to be autonomous agents of their reproductive bodies. For example, legal theorist Dorothy Roberts (1995) has interrogated the Court's failure to invoke the unconstitutional conditions doctrine to strike down conditions on welfare benefits that burden poor mothers' ostensible privacy rights (931). As explored more expansively in the following chapter, the unconstitutional conditions doctrine prohibits the government from conditioning a benefit on the beneficiary's surrender of a constitutional right, even when the government is not obliged to provide the benefit in the first instance. The Court might have used the doctrine to strike down laws and policies that require poor mothers to surrender their theoretical privacy rights in order to receive a welfare benefit. The Court has refused to do so.

Roberts acknowledges that poor mothers' attempts to claim *privacy* while receiving *public* benefits produces an obvious tension. Yet, she writes that the unconstitutional conditions doctrine does not resolve that tension because it does no more than attempt "to preserve poor people's liberty within a constitutional framework designed to protect only property owners" (931).[5] Roberts argues that the unconstitutional conditions doctrine is weak for that very reason: It does not try to shift the constitutional framework from one that protects property owners to one that *also* protects the propertyless. Instead, it tries only to "minimize the harm to those who fall at the bottom (or completely out of bounds), without changing the basic order of things" (940). For Roberts, the solution is to actually transform the constitutional framework. She observes that

> [i]f the government were required to subsidize the activities at issue, and if reliance on public assistance therefore did not constitute a waiver of privacy, there would be no place for a special doctrine to prohibit government conditions that threaten these activities. It is our inability to defend poor women's reproductive liberty in terms of traditional constitutional discourse that forces us the rely on this weak-kneed doctrine. (939)

Essentially, Roberts imagines that the solution is positive privacy rights.

We can begin a response to the claim that positive rights will resolve poor mothers' predicament by recalling the basic legal realist insight that positive rights and negative rights are not analytically distinct entities. That is, every

right to be free of government action entails some form of government action. Even Judge Posner (1996), a proponent of the belief that it is useful to distinguish positive and negative rights, acknowledges the analytical indistinctiveness between the two. He notes that the right to property commonly is understood as a negative right: The government may not take actions that deprive individuals of their property. However, an individual's right to government inaction with respect to her property requires extensive government action to protect that same property:

> The rights of property and of personal safety, which are negative liberties enforced by criminal and tort laws, imply a public machinery of rights protection and enforcement, a machinery that includes police, prosecutors, judges, and even publicly employed or subsidized lawyers for criminal defendants who cannot afford to hire their own lawyer. . . . [I]t is difficult to believe that negative liberties could be made meaningful without intervention by the public sector. (Posner 1996, 3)

Moreover, many negative rights can be reframed as positive rights, and vice versa. For example, the state was sued in *White v. Rochford* (592 F.2d 381 (7th Cir. 1979)) after police arrested an adult who was driving a car and, after making the arrest, left the children who were also riding in the car on the side of the road without adult supervision or any means of getting help. The court found that the state could be liable for damages, as it had acted when it "abandoned" the children and "deprived" them of adult protection (382). The dissent disagreed, arguing that the state had not acted at all; it had merely failed to bring the children to a safe place—an affirmative act that the dissent felt the Constitution did not impose.

Analogously, the state was sued in *Bowers v. De Vito* (686 F.2d 616 (7th Cir. 1982)) after it released from a state psychiatric institution a mentally ill patient who subsequently stabbed a woman to death. The court held that the state had no liability toward the decedent's family because the state had not affirmatively acted: "[The state] simply failed adequately to protect her, as a member of the public, from a dangerous man" (618). However, we can easily reformulate into affirmative terms that which the state did: It *deinstitutionalized* the patient and *released* him into society.

Nevertheless, even if we assume that there is a principle that can definitively distinguish between government action and inaction (and in so doing, definitively distinguish between when a claim is being made for a positive right or

negative right),[6] we must confront the fact that many of the examples of poor mothers' lack of privacy that this book explores are actually *interventions* into their lives as a consequence of government action—not *deprivations* that are occasioned as a result of government inaction. When the government demands intimate information from a pregnant woman, when it shares that same information, when it enters a poor mother's home to investigate claims of child neglect, when it removes a child from her family and places her in foster care, and when it funds the costs of childbirth but not the costs of abortion, the government is actively *invading* the private lives of poor mothers. In these instances, the government is not sitting idly by as poor mothers endure the consequences of their propertyless condition. A reformulation of privacy rights into positive rights will not stop the government from actively intervening in poor mothers' private lives. Instead, actual *negative* rights—the rights that the Constitution has been interpreted to protect—would prevent the government from intruding into poor mothers' lives.[7] In this way, positive rights are not the solution to all of the problems that this book identifies; instead, *effective* negative rights are an important solution.

Nevertheless, it is true that positive rights may remedy some privacy deprivations. For example, if the right to abortion were understood as a positive right, then poor mothers would enjoy privacy in the sense that they would have tangible access to abortion. Thus, we ought not to dismiss positive rights simply because they will not remedy *all* of the privacy invasions that poor mothers experience; positive rights may still be valuable insofar as they can provide poor mothers with some protection from the deprivations that are concomitant to poverty. Such positive rights, coupled with effective negative rights, may be what poor mothers need to enjoy a life and a relationship with the state that resembles the life and relationship with the state that their counterparts with class privilege enjoy.

However, there is a very real danger that, despite a reformulation of rights, poor mothers would find themselves in the same predicament in which they are now: deprived of privacy rights in either the moderate or strong sense. That is, just as poor mothers have been (effectively or actually) deprived of negative privacy rights, they may be (effectively or actually) deprived of positive privacy rights.

In this book I contend that the moral construction of poverty counsels that privacy rights will not generate the value that otherwise justifies their recognition when poor mothers enjoy them. Hence, they have been effectively (con-

sistent with the moderate claim) or actually (consistent with the strong claim) stripped of them. I have also described this in terms of a condition being put on the negative privacy rights that the Constitution has been interpreted to recognize. That is, if one is pregnant or parenting, one must be presumed to be sound—behaviorally and ethically—in order to bear an effective or actual right to compel state nonintervention with respect to the various arenas of life that the privacy right protects.

The question, then, is this: Will positive privacy rights be imagined to generate the value that otherwise justifies them when poor mothers bear them? If there is a condition on extant negative privacy rights, can we rest assured that a similar condition would not be imposed on positive privacy rights if they came to be recognized? Will the recognition of positive privacy rights entail reimagining the causes of poverty?

We have no assurances that the answer to these questions will be in the affirmative. The Court may interpret the Constitution to provide positive privacy rights without necessarily being committed to the proposition that better explanations of poverty can be found by looking to structural forces and not individual moral shortcomings. If there is an enduring belief that individual bad behavior lies at the root of poverty, then poor mothers would be presumed to be the immoral agents of their own misfortune—even in a legal landscape that recognizes positive privacy rights. Poor mothers may find themselves deprived of positive privacy rights just as they have been deprived of negative privacy rights.

Some may claim that positive privacy rights would not be conditioned on the presumed moral character of the rightsbearer because positive rights, unlike negative privacy rights, are unconditional. They may assert that once a positive right is recognized, the state is obliged to provide to everyone, without condition, whatever good or service to which the right pertains. However, this claim is incorrect. Positive rights, like negative rights, are legal rights. And, as explained in the Introduction, legal rights can be conditioned on whatever the institution that recognizes or enforces them prescribes. Stated another way, positive rights are not natural or human rights, which are unconditional. As such, if the state that recognizes positive rights decides to impose a condition on them, then they will be so conditioned. Further, the example that the Introduction gives of a conditional constitutional right—the Sixth Amendment right to jury trial, which is conditioned on the rightsbearer being within the borders of the continental United States, Hawaii, or Alaska—is a positive right

in the sense that it imposes an obligation on the state to provide a jury trial before it punishes an individual for a crime.[8] The case of Puerto Rico demonstrates that positive constitutional rights, like their negative counterparts, can be conditional.

A more compelling argument in favor of the positive rights solution is that a Court that is moved to interpret the Constitution to contain positive rights that would provide for individuals' well-being would also be a Court that does not subscribe to the moral construction of poverty. That is, the belief that the Constitution ought to be interpreted to provide positive rights may be described as a politically liberal one. (Indeed, the political liberals on the Court—Justices Blackmun, Brennan, and Marshall—dissented from *DeShaney v. Winnebago County*'s holding that the Due Process Clause did not provide a child with a right to compel the state to protect him from his abusive father.) Moreover, the belief that macro forces, and not individual moral failings, cause poverty is also one that may be described as a liberal one.

Indeed, a wealth of studies document that political liberals, more so than political conservatives, tend to favor explanations of poverty that locate its causes in the societal structures in which individuals exist as opposed to the individuals themselves (Griffin and Oheneba-Sakyi 1993). For example, legal scholars Adam Benforado and Jon Hanson condense the literature into this summary:

> [C]onservatives tend to believe that "people are poor because they are lazy, do not improve themselves, cannot manage money, and abuse drugs or alcohol. Less conservative beliefs correlate with situational attributions: perceiving societal causes. . . . In this view, people are poor because of prejudice and discrimination, inadequate education, exploitation by the rich, and low wages." (2008, 383–84)

If these convictions—that the Constitution is properly interpreted to provide positive rights and that there is no causal link between poverty and immorality—are both liberal views, then it is unlikely that a majority of the Court would act liberally by recognizing positive privacy rights but then turn around and act conservatively by disqualifying the poor from possessing them.

It is mostly true that the Court acts liberally when a majority of the justices sitting on the Court are political liberals and acts conservatively when a majority are political conservatives.[9] However, the composition of the Court changes over time. And culture, which the Court's jurisprudence eventually reflects, shifts over time—a position that the Conclusion defends. Accordingly, the

Court that interprets the Constitution to contain positive privacy rights need not be the same Court that imposes a moral condition on those rights. And the dominant cultural discourses that counsel the Court to interpret the Constitution to contain positive rights need not retain their dominance; they may be replaced by cultural discourses that counsel the Court to impose a moral condition on those rights. Essentially, we could have a Constitution that contains positive privacy rights while also disqualifying poor mothers from possessing those rights. Positive rights, alone, are not the solution. Positive rights without a simultaneous rejection of the ideology that holds that the poor are morally responsible for their own poverty will leave poor mothers in the same situation in which they currently find themselves—disenfranchised.

What this discussion suggests is that the solution to poor mothers' predicament lies not in a reformulation of rights. The answer is not to change law. Instead, the answer is to change cultural discourses. If explanations of poverty in terms of individual moral shortcomings were pushed to the margins—if these explanations of poverty were understood to be no more than empirically false theories—then we would exist in a society that would support bestowing the privacy right to all persons equally. And even if moral conditions still were imposed on privacy rights, we would exist in a society that did not assume that poor mothers did not satisfy the condition.

If cultural discourses shifted, the jurisprudence that reflects those discourses would embody the sense that privacy rights, be they positive or negative, are valuable in the hands of poor mothers. It would embody the sense that it is as valuable to enable the poor to remain unstandardized by the state as it is to enable the wealthier. It would echo the conviction that the beliefs and values that the poor will inculcate in their children will contribute as wonderfully to our pluralist society as do the beliefs and values that the wealthier inculcate in their children. It would reflect a culture that believes that enabling poor mothers to make the decisions that are central to their ideas of personhood and parenthood is as valuable as allowing wealthier persons to make those decisions. In essence, privacy rights may be less valuable when individuals with problematic or nonexistent moral compasses possess them. But, if cultural discourses shifted, we would exist in a society that rejects the idea that we can make assumptions about the quality of an individual's moral compass based on her socioeconomic status.

Further, in a transformed society, we likely would not tolerate a jurisprudence that is built on the notion that there would be no value or negative value

realized from poor mothers bearing privacy rights. The law would not assume that poor mothers would be more likely to abuse or neglect their children than their wealthier counterparts. It would not assume that poor mothers would be more likely to use their privacy rights to shield their bad decisions and bad behaviors from a state that is interested in protecting children. We would be a society that rejects the idea that we can make assumptions about the likelihood of a mother harming her child based on nothing more than that mother's socioeconomic status.

Finally, if cultural discourses shifted, jurists would be more likely to give poor mothers' interests in preserving their dignity the same deference that they give to wealthier mothers. We would live in a society that understands that an individual's poverty does not diminish her humanity. We would understand that an individual's poverty does not make her less deserving of having her desires respected.

Essentially, if culture and law exist in a dialectical relationship, a change in one term will be met with a change in the other term. As such, if our culture transformed into one in which the poor are considered moral equals to the wealthy, then the law would transform into one that treated the poor and the wealthy equally.