Privacy and Equality:
Rethinking Reproductive Justice After the Fall of *Roe*

Sharon Stanley
University of Memphis
sastanly@memphis.edu
Prepared for WPSA, 2024

This is a work in progress; please do not cite.

The decision in *Dobbs v. Jackson Women's Health Organization* (2022) to overturn *Roe v. Wade* (1973) and permit states to restrict or prohibit abortion has already had devastating effects for countless women and people who can become pregnant across the United States. It represents a terrible crisis for reproductive freedom in the country. Yet it is also a crisis that compels us to reconsider the goals of the mainstream pro-choice movement that dedicated itself for many decades to the preservation of *Roe* and of the legal right to seek an abortion. Perversely, the destruction of the constitutional right to seek an abortion has finally put the struggle for reproductive freedom in a central rather than a peripheral place in our political and media discourse, and we should seize this opportunity born of crisis to re-imagine the tactics, rhetoric, and ultimate vision of this struggle. This paper aims to contribute to a small part of this project by reconstructing the theoretical foundations of reproductive freedom in a way that supports a broad, coalition-based movement that includes the voices and concerns of the most marginalized.

Fortunately, we need not perform this task in a vacuum. The reproductive justice movement, spearheaded by women of color and drawing its theoretical resources from Black feminism, has long offered a compelling critique of the limits of the mainstream pro-choice movement. By calling attention to the unique reproductive burdens imposed on poor women, women of color, and other multiply marginalized groups, it has effectively highlighted how

narrow and inadequate is a movement dedicated simply to the preservation (or restoration) of the post-*Roe* (and, even worse, post-*Casey*) status quo. By itself, formally legal abortion was never equally accessible to all, did nothing to address other forms of reproductive unfreedom such as coerced sterilization or welfare family caps, and failed to speak to existing social, cultural, and economic constraints that necessarily circumscribed the reproductive "choices" of all but the most privileged. The pursuit of reproductive freedom in the wake of *Dobbs* must heed these critiques and provide a far more expansive vision than *Roe* itself.

Yet activists and theoreticians of reproductive justice have not always agreed on all points. One notable point of divergence concerns the original constitutional rationale in *Roe* for protecting abortion rights. Many in the reproductive justice movement have adapted and modified earlier feminist critiques of privacy as a rationale for abortion rights, such as those offered by Catherine Mackinnon, Frances Olsen, and Rosalind Petchesky.[1] Critics of the privacy rationale for abortion typically advocate an equality rationale instead. And for good reason: the equality rationale helps to illuminate the critical necessity of a broad array of reproductive freedoms. But not all in the movement agree that privacy should be discarded in favor of equality. Indeed, one of the theoretical founding mothers of the movement, Dorothy Roberts, has occasionally suggested the possibility of a combined privacy-equality rationale that would speak particularly effectively to the reproductive needs of poor women of color.[2] And more recent works such as Khiara Bridges' *The Poverty of Privacy Rights* and Michele Goodwin's *Policing the Womb: Invisible Women and the Criminalization of Motherhood* place privacy

[1] Catherine Mackinnon, "Privacy v. Equality: Beyond *Roe v. Wade,*" in *Feminism Unmodified: Discourses on Life and Law* (Cambridge, MA: Harvard University Press, 1987), 93-102; Frances Olsen, "A Finger to the Devil: Abortion, Privacy, and Equality," in *Dissent* (Summer 1991): 377-382; Rosalind Petchesky, *Abortion and Women's Choice: The State, Sexuality, and Women's Freedom* (Boston: Northeastern University Press, 1984).

[2] Dorothy Roberts, "Punishing Drug Addicts Who Have Babies: Women of Color, Equality, and the Right of Privacy," in *Harvard Law Review* 104.7 (1991): 1419-1482.

rights at the center of their analysis. Revisiting these disagreements in the wake of *Dobbs* yields the question: what role, if any, should privacy play in our defense of restored abortion rights and a far more capacious vision of reproductive freedom?

This paper defends privacy as a crucial component of the rationale for reproductive freedom and a crucial tool for the reproductive justice movement. That is to say, a suitable conception of privacy captures much of what is at stake in the ability to determine the course of one's own reproductive life and illuminates much of the history of reproductive injustice disproportionately impacting poor women and women of color. A defense of privacy does not entail a rejection of equality, though. Instead, I follow Dorothy Roberts' suggestion to theorize a combined privacy-equality rationale for reproductive freedom. When privacy and equality are theorized together in this fashion, they become mutually supportive and each sheds new light on the significance of the other. Accordingly, I seek to rebut those in the reproductive justice movement who argue that privacy rights only support reproductive freedom for middle- and upper-class white women and actually further undermine or simply ignore the reproductive needs of poor women and women of color.

The paper proceeds in several sections. First, I offer a very brief historical and theoretical account of the reproductive justice movement. Second, I highlight and critically evaluate views within this movement about the privacy rationale for abortion rights. Third, I offer a reconceptualization of a privacy rationale for abortion that combines effectively with an equality rationale, and demonstrate how this combined rationale is especially well-suited to the demands of the reproductive justice movement. Finally, I conclude by considering how the combined rationale helps to reveal the contours of our post-*Dobbs* landscape of reproductive (un)freedom. **(NOTE FOR WPSA READERS: Due to the length of this paper, I've left out**

this fourth section. It will still appear in the book chapter that this paper is a draft of and I am happy to answer questions about it.)

The Reproductive Justice Movement

Twelve Black women collectively conceived the modern concept of "reproductive justice" at a pro-choice conference in Chicago in June 1994 convened in response to the Health Security Act proposed by the Clinton administration the previous year.[3] Loretta Ross, who was among these women, explains:

> We created 'reproductive justice' because we believed that true health care for women needed to include a full range of reproductive health services. While abortion is one primary health issue, we knew that abortion advocacy alone inadequately addressed the intersectional oppressions of white supremacy, misogyny, and neoliberalism. From the perspective of African American women, any health care plan must include coverage for abortions, contraceptives, well-woman preventive care, pre- and postnatal care, fibroids, infertility, cervical and breast cancer, infant and maternal morbidity and mortality, intimate partner violence, HIV/AIDS, and other sexually transmitted infections. In simplest terms, we spliced together the concept of reproductive rights and social justice to coin the neologism, 'reproductive justice.'[4]

Ross's expansive list of health care issues confronting African American women highlights a key reason why Black feminists had become disenchanted with the mainstream pro-choice movement. They believed the movement had over-emphasized legal abortion access as the lynchpin of reproductive freedom, when in fact many women of color and poor women

---

[3] For histories of the reproductive justice movement, see: Toni Bond Leonard, "Laying the Foundations for a Reproductive Justice Movement," in *Radical Reproductive Justice: Foundations, Theory, Practice, Critique*, eds. Loretta Ross et al. (New York: Feminist Press, 2017): 39-49; Kimala Price, "What is Reproductive Justice? How Women of Color Activists are Redefining the Pro-Choice Paradigm," in *Meridians* 10.2 (2010): 42-65; Loretta Ross, "Reproductive Justice as Intersectional Feminist Activism," in *Souls* 19.3 (2017): 286-314; Loretta Ross and Rickie Solinger, *Reproductive Justice: An Introduction* (Oakland: University of California Press, 2017;. Rachel Strickler and Monica Simpson, "A Brief Herstory of SisterSong," in *Radical Reproductive Justice*: 50-57.

[4] Ross, "Reproductive Justice as Intersectional Feminist Activism," 290.

confronted a variety of structural impediments not only to accessing birth control and abortion but also to having children and raising these children in materially adequate conditions. Thus, Ross identifies three interrelated human rights at the heart of the vision of reproductive justice: "(1) the right to have a child under the conditions of one's choosing; (2) the right not to have a child using birth control, abortion, or abstinence; and (3) the right to parent children in safe and healthy environments free from violence by individuals or the state."[5]

NOTE FOR WPSA DISCUSSANT/READERS: What follows for the next five pages is a pre-history of the reproductive justice movement highlighting the specific kinds of reproductive burdens that Black women, other women of color, and poor women have confronted. Feel free to skip ahead to p. 10 if you want to save time and jump to the theoretical overview of the reproductive justice movement.

While Ross and her compatriots coined the concept of reproductive justice in 1994, the ideas at its heart had antecedents as far back as the 19th century. Consider, for example, the harrowing autobiography of Harriet Jacobs, *Incidents in the Life of a Slave Girl,* originally published in 1861.[6] Like Frederick Douglass, Jacobs recounts the many horrors and indignities in her life as an enslaved person and her terrifying but ultimately triumphant escape from slavery. But unlike Douglass, she centers the horrors that are unique to her experience as an enslaved *woman*. Specifically, Jacobs recounts the endemic sexual abuse that she and other enslaved women confronted, her desperate struggle to keep and mother her own children, and her master's repeated interference with her efforts to pursue authentic intimate relationships with other men. In short, already in 1861, Jacobs exposed the sexual and reproductive violence and coercion of slavery as one of its cruelest and most inhumane features.

---

[5] Ross, "Reproductive Justice as Intersectional Feminist Activism," 290.
[6] Harriet Jacobs, *Incidents in the Life of a Slave Girl,* 2nd ed. (W.W. Norton & Company, 2018).

The sexual coercion at the heart of slavery had another, exceptionally ugly feature, as Dorothy Roberts explains: "Black procreation helped to sustain slavery, giving slave masters an economic incentive to govern Black women's reproductive lives."[7] If slavery made Black women's fertility valuable to wealthy white slaveholders and their political supporters, this dehumanizing calculation changed dramatically in the wake of emancipation, mass-immigration, Jim Crow, and the Great Depression. White supremacist ideology, influenced by European race science, taught that only "pure" white blood could sustain civilization, and that the "lesser" races were intellectually and morally inferior, criminally inclined, sexually voracious, and likely to become economic drains on the state.[8] This logic motivated efforts to control the reproduction of white women and women of color, but in very different ways. Financially secure white women had a special racial, economic, and social duty to procreate regularly with white men, whereas the reproduction of women of color, poor women, and those deemed "feeble-minded" became a threat to racial purity and civilization itself. The eugenics movement of the early 20th century represented the pinnacle of this logic, culminating in highly restrictive immigration legislation, compulsory sterilization laws in thirty states, and coercive birth control and "family planning" policies aimed at curtailing the fertility of women of color, especially Black women.[9] The dramatic inversion of the social value granted to Black women's fertility illustrates why reproductive freedom must include both the right to have children and the right not to have children.

---

[7] Dorothy Roberts, *Killing the Black Body: Race, Reproduction, and the Meaning of Liberty* (New York: Vintage Books, 1997), 22.

[8] Wendy Kline, *Building a Better Race: Gender, Sexuality, and Eugenics from the Turn of the Century to the Baby Boom* (Berkeley: University of California Press, 2005); Nancy Ordover, *American Eugenics: Race, Queer Anatomy, and the Science of Nationalism* (Minneapolis: University of Minnesota Press, 2003).

[9] Roberts, *Killing the Black Body*, ch. 2.

Women have always fought back against state efforts to control their fertility. For white women advocating "voluntary motherhood" in the nineteenth century, especially those of the middle and upper classes, the right not to have a child took precedence as feminists pushed back against the dominant separate spheres ideology blocking them from the public world of work and politics and confining them to a subordinate role in the home as mothers and caregivers.[10] But this ideology had never been applied to Black women, before or after emancipation. Indeed, after emancipation, their efforts to embody domestic roles as wives and mothers met bitter condemnation from white elites who viewed them as essential (and hyper-exploitable) labor in the fields and in their own homes, to say nothing of the continued plague of white sexual violence against Black women.[11] Thus, the right to have and mother their own children, and to be accorded the same respect in these roles as white women, took on much greater significance in nineteenth-century Black feminism.[12]

This division continued throughout the twentieth century. White feminists increasingly advocated access to artificial contraception and eventually abortion as crucial to their sexual and reproductive autonomy. But they also proved all too willing to accommodate themselves to the negative eugenics movement in pursuit of birth control access.[13] Recognizing the potential to convert eugenicists to the cause of birth control, Margaret Sanger notoriously turned from explicitly feminist arguments about women's sexual and bodily autonomy to advocacy for birth

---

[10] Evelyn Nakano Glenn, *Unequal Freedom: How Race and Gender Shaped American Citizenship and Labor* (Cambridge, MA: Harvard University Press, 2002), 40-48; Linda Gordon, "Voluntary Motherhood: The Beginnings of Feminist Birth Control Ideas in the United States," in *Feminist Studies* 1.3/4 (1973): 5-22; Barbara Welter, "The Cult of True Womanhood: 1820-1860," *American Quarterly* 18.2 (1966): 151-174.

[11] Shatema Threadcraft, *Intimate Justice: The Black Female Body and the Body Politic* (New York: Oxford University Press, 2018), ch. 3.

[12] See, for example, Anna Julia Cooper, *A Voice from the South* (Dover, 2016 [1892]); Mary Church Terrell, *A Colored Woman in a White World* (Rowman & Littlefield, 2020 [1940]).

[13] Angela Davis, *Women, Race, and Class* (New York: Vintage Books, 1981), ch. 12; Linda Gordon, *Woman's Body, Woman's Right: A Social History of Birth Control in the United States* (New York: Grossman, 1976); Carole McCann, *Birth Control Politics in the United States, 1916-1945* (Ithaca, NY: Cornell University Press, 1994).

control "as the most practical method for reducing the birthrate of the less desirable classes."[14] For the most part, Black women did not respond by simply disavowing birth control, as they recognized its crucial contribution to their capacity to lead autonomous lives. As Dorothy Roberts chronicles, Black women's clubs in the 1930s and 1940s supported the spread of birth control clinics in Black neighborhoods. But birth control meant something very different for them from white feminists who spoke the language of population control:

> For eugenicists and many white birth control advocates, improving the race meant reducing the number of births among people considered genetically or socially defective. But Blacks understood that racial progress was ultimately a question of racial justice: it required a transformation of the unequal economic and political relations between Blacks and whites. Although birth control could aid in this struggle, it could not cure Black people's wretched living conditions by itself.[15]

In short, these women already recognized the crucial importance of the third plank of the modern reproductive justice movement: the right to parent children in safe and healthy environments free from violence by individuals or the State. Indeed, they recognized population control itself as a violent and coercive project involving the State and prominent white doctors and birth control advocates seeking to limit Black fertility for eugenic purposes.

Unfortunately, this project mutated but did not simply disappear in the later part of the twentieth century. Compulsory sterilization laws that disproportionately targeted poor women and women of color in the 1920s and 1930s were eventually repealed, but sterilization abuse continued "at the hands of government-paid doctors" who either sterilized women without their advance knowledge or manipulated them into "consenting" to the procedure.[16] Along with Black women, Native, Mexican-American, and Puerto Rican women were prime targets of this kind of

---

[14] Roberts, *Killing the Black Body*,74.
[15] Roberts, *Killing the Black Body*, 86.
[16] Roberts, *Killing the Black Body*, 89.

abuse.[17] The multi-ethnic Committee to End Sterilization Abuse founded in 1978 successfully campaigned for new federal sterilization guidelines that were in fact opposed by NARAL and Planned Parenthood because of concerns they would make it even harder for middle-class white women to obtain sterilizations.[18] This was an important victory for the nascent movement for reproductive justice. Unfortunately, it did not mark the end of sterilization abuse, and women of color, especially those receiving welfare, would soon be the targets of new forms of coercive fertility limitation policies and practices. Today, many activists who cut their teeth in the anti-compulsory sterilization battles continue to fight against these policies and practices under the explicit banner of reproductive justice.

This very abbreviated pre-history of the reproductive justice movement underscores a stark division between pro-natalist policies and practices aimed at financially secure white women and anti-natalist policies and practices aimed at poor women of color. But the distinction between pro- and anti-natalism over-simplifies the class and racial impact of reproductive politics and may have pernicious ideological effects of its own, as in the case of some Black nationalists opposing all birth control as a form of Black genocide or race suicide.[19] The reproductive justice movement and its antecedents take just as seriously the right *not* to have children, even if they have often viewed white feminist activism on behalf of this right with understandable skepticism. For this reason, feminists of color have opposed the Hyde Amendment, heavily restricting federal funding for abortions under Medicaid, and fought back

---

[17] Laura Briggs, *Reproducing Empire: Race, Sex, Science, and U.S. Imperialism in Puerto Rico* (Berkeley: University of California Press, 2003); Natalie Lira and Alexandra Minna Stern, "Mexican Americans and Eugenic Sterilization: Resisting Reproductive Injustice in California, 1920-1950" in *Aztlán: A Journal of Chicano* Studies 39.2 (2014): 9-34; Brianna Theobald, *Reproduction on the Reservation: Pregnancy, Childbirth, and Colonialism in the Long Twentieth Century* (Durham: University of North Carolina Press, 2019.

[18] Roberts, *Killing the Black Body*, 96.

[19] Loretta Ross, "Reproductive Justice as Intersectional Feminist Activism," 296-298.

against cynical anti-abortion campaigns seeking to appeal to the Black community by presenting themselves as saviors of Black children.[20] There is no contradiction between battles against state efforts to limit fertility and battles for meaningful access to birth control and abortion. Rather, both battles reject the instrumentalization of people's reproductive capacities for public purposes. Instead, the reproductive justice movement seeks to secure meaningful conditions of reproductive self-determination for all.

And herein lies the key to the theoretical critique of the mainstream pro-choice movement articulated by reproductive justice activists. Whether one desires to have children or to avoid having children, overt legal prohibitions are not the only impediments to realizing these aspirations. Lack of material resources, including access to comprehensive reproductive health care, persistent cultural stereotypes denigrating Black, Native, Latina, and poor mothers, coercion and mistreatment by doctors and other members of the medical profession, hyper-incarceration, and various fetal protection laws in many states undermine the necessary conditions of reproductive self-determination even where laws do not prohibit abortion or birth control or compel involuntary sterilization. The problem with the pro-choice movement, then, is not simply a narrow focus on legal abortion access, though that is certainly a problem. Rather, the reproductive justice movement criticizes the very concept of "choice" as radically insufficient, at best, to securing meaningful conditions of reproductive self-determination:

> These examples suggest that the critical issue for feminists is not so much the content of women's choices, or even the 'right to choose,' as it is the social and material conditions under which choices are made. The 'right to choose' means little when women are powerless…. To paraphrase Marx, women make their own reproductive choices, but they do not make them just as

[20] Loretta Ross, "Trust Black Women: Reproductive Justice and Eugenics," in *Radical Reproductive Justice*: 58-85; Rickie Solinger, *Beggars and Choosers: How the Politics of Choice Shapes Adoption, Abortion, and Welfare in the United States* (New York: Hill and Wang, 2001), 8-20.

> they please; they do not make them under conditions they create but under conditions and constraints they, as mere individuals, are powerless to change.[21]

Rosalind Petchesky penned these words in 1984 from a socialist feminist perspective, before the concept of "reproductive justice" was coined. Her key point was that "choice" zeroes in on the immediate decision whether or not to seek an abortion provider, while failing to consider those conditions that pre-determine or heavily influence that decision. Reproductive justice activists have embraced and expanded this critique of choice.

While Petchesky highlights the radical insufficiency of choice, some feminist critics of pro-choice rhetoric and policy go even further, suggesting that choice can actually be detrimental to the reproductive freedom of marginalized people. Rickie Solinger argues that the language of choice, particularly when invoked in the context of growing neoliberal hegemony, necessarily subjects choice-makers to scrutiny for the content of their ostensible choices. When the dominant culture impugns their choices, and ultimately their very selves, as irrational, irresponsible, and costly to the public, it becomes easy to justify restricting or at least intervening in these choices to effect putatively more responsible behavior:

> In theory, choice refers to individual preference and wants to protect all women from reproductive coercion. In practice, though, choice has two faces. The contemporary language of choice promises dignity and reproductive autonomy to women with resources. For women without, the language of choice is a taunt and a threat. When the language of choice is applied to the question of poor women and motherhood, it begins to sound a lot like the language of eugenics: women who cannot afford to make choices are not fit to be mothers. This mutable quality of choice reminds us that sex and reproduction—motherhood—provide a rich site for controlling women, based on their race and class 'value.'[22]

The most obvious contemporary example, and one that occupies a chapter of Solinger's book, is welfare reform. Even as many social conservatives lamented the rise of two-wage families and

---

[21] Rosalind Petchesky, *Abortion and Woman's Choice: The State, Sexuality, and Reproductive Freedom*, 2nd ed. (Boston: Northeastern University Press, 1990), 11.
[22] Solinger, *Beggars and Choosers*, 223.

the absence of middle-class white mothers from the home, they demanded (and ultimately achieved) work requirements and family caps for women on welfare. Ultimately, Solinger concludes that "choice" underpins "the very popular (though much denied) idea that motherhood should be a class privilege in the United States—a privilege appropriate only for women who can afford it."[23]

Of course, both Petchesky and Solinger recognize that class and race are heavily co-imbricated in the United States. Policies that penalize poor women for being mothers, or seek to constrain their reproductive decision-making, disproportionately affect women of color. Simultaneously, stereotypes that degrade Black, Native, and Latina sexuality and motherhood generate policies and practices that diminish the reproductive freedom of all poor women, especially as neoconservatives and neoliberals alike search for putatively colorblind rationales for such policies. Accordingly, the reproductive justice movement analyzes the limits of choice from an explicitly intersectional perspective that centers the voices and needs of women of color. But the standard intersectional triumvirate of race, class, and gender are not the only categories important to the movement. It has also underscored how age, disability, sexual orientation, gender identity, and immigration status may contribute to reproductive injustice. Consider, for example, how Kimala Price describes the various voices and perspectives that animate the SisterSong Women of Color Reproductive Health Collective, founded in 1997:

> In keeping with its mission of creating and maintaining a multicultural movement that acknowledges, respects, and supports a diversity of voices and perspectives, the collective is organized into five principal caucuses representing ethnic and indigenous groups in the United States: 1) African American/Caribbean/African, 2) Arab American/Middle Eastern/North African, 3) Asian/Pacific Islander, 4) Latina, and 5) Native American/Indigenous. Over the years, other caucuses have formed, including ones for the LGBTI/queer community, young women under the age of twenty-four, and women of color who work in majority-white, reproductive rights organizations. Last, the member organizations also represent specific issue niches….including,

[23] Solinger, *Beggars and Choosers*, 7.

> but not limited to, HIV/AIDS, anti-poverty policy, violence against women, disability rights, gay and lesbian rights, environmental rights, biotechnology, and immigration rights.[24]

Connecting issues like violence against women, anti-poverty policy, and environmental rights to reproductive justice does the essential work of revealing and ultimately redressing those social and material conditions that limit the reproductive options of marginalized people.

Finally, this abbreviated look at the reproductive justice movement helps to show why equality is such a fundamental normative commitment for its adherents. Equality responds to three distinct but related problems in the pursuit of reproductive self-determination. First is the basic problem of patriarchy. Control of women's reproductive lives has been one of the principal ways that men have enforced women's subordinate status. For example, Reva Siegel shows how doctors in the nineteenth century saw the criminalization of abortion as one weapon in a broader battle "to preserve traditional gender roles in matters of sexuality and motherhood, education and work, and affairs of suffrage and state."[25] Once we recognize abortion and contraception bans as a tool of patriarchy, genuine access to abortion and contraception become crucial elements of gender equality, itself a core commitment of the reproductive justice movement. Second, equality requires not only the dismantling of patriarchy but also the dismantling of other entrenched hierarchies. Since race has played such an outsized role in determining the reproductive experiences of women in the United States, racial equality looms especially large for reproductive justice advocates. After tracing the overtly racialized contours of reproductive policy in the United States, Dorothy Roberts concludes that "[we] need a way of rethinking the meaning of liberty so that it protects all citizens equally. I propose that focusing

---

[24] Kimala Price, "What is Reproductive Justice? How Women of Color are Redefining the Pro-Choice Paradigm," in *Meridians* 10.2 (2010): 48-49.

[25] Siegel, "Abortion as a Sex Equality Right," 52.

on the connection between reproductive rights and racial equality is the place to start."[26] Third and finally, equality offers an especially useful way to understand and respond to those social and material conditions constraining choice that reproductive justice activists have done so much to highlight. A commitment to substantive equality would require not only legal access to abortion but also significant social and economic transformations to enable the most marginalized people, especially poor women of color, to make relatively unconstrained choices about pregnancy and motherhood.

Whither Privacy?

Despite the power of equality for a reproductive justice agenda, major Supreme Court decisions establishing constitutional protections for reproductive freedom did not appeal to the Fourteenth Amendment equal protection clause as the basis for these decisions. Instead, *Griswold v. Connecticut* (1965) located an implicit right to privacy covering access to contraception for married couples in the "emanations and penumbras" of an array of constitutional provisions, and this right to privacy was later expanded to include an individual right to seek contraception in *Eisenstadt v. Baird* (1972) and an individual right to seek an abortion in *Roe v. Wade* (1973). The decision to ground abortion rights in the right of privacy has generated persistent criticism and controversy, not only from anti-abortion activists but also from many defenders of abortion rights who would have preferred an equality rationale. In this section, I summarize well-known feminist critiques of the privacy rationale for abortion and then examine how these critiques have influenced the reproductive justice movement.

[26] Roberts, *Killing the Black Body*, 294.

Griswold, *Eisenstadt*, and *Roe* contain surprisingly vague accounts of what privacy actually means and why it covers the reproductive liberty at stake in these cases. This vagueness has enabled critics of the privacy rationale for abortion to hold the very concept of privacy itself accountable for the Court's subsequent weakening (and ultimate overruling) of abortion rights in a series of decisions. For example, Drucilla Cornell interprets the right to privacy defended in *Roe* as a "right to be left alone"—a direct quote from Samuel Warren and Louis Brandeis's classic 1890 article, "The Right to Privacy," analyzing the common law right to privacy and cited by many future lawyers and legal scholars investigating the nature of this right.[27] Such a right establishes only negative state obligations not to interfere, but no positive state obligations to enable or support. Indeed, such positive state actions can be read as their own form of interference in the private sphere. But as we've seen above, equal access to abortion and to full reproductive self-determination sometimes requires precisely the form of interference that a "right to be left alone" either fails to secure or actively rules out. It follows, as Catherine Mackinnon argues, that the privacy analysis in *Roe* "makes *Harris v. McRae*, in which public funding for abortions was held not to be required, appear consistent with the larger meaning of *Roe*."[28] For Mackinnon, any appeal to privacy necessarily replicates false, ideologically pernicious assumptions that the so-called private sphere, or the sphere free of government intervention, is a sphere of freedom for all, including women, and that freedom therefore requires the absence of government regulation. This ideology culminates in *Harris v. McRae*'s effective exclusion of poor women reliant on Medicaid from meaningful access to abortion.

---

[27] Drucilla Cornell, *The Imaginary Domain* (New York: Routledge, 1995), 33; Samuel Warren and Louis Brandeis, "The Right to Privacy," *Harvard Law Review* 4 (1890): 193-220.

[28] Catherine Mackinnon, "Privacy v. Equality: Beyond *Roe v. Wade*," in *Feminism Unmodified: Discourses on Life and Law* (Cambridge, MA: Harvard University Press, 1987): 93.

Even worse, assumptions about the private sphere as a sphere of freedom obscure the many ways in which women do not exercise meaningful control over their sexual and reproductive lives to begin with. It is not merely explicit state restrictions on women's sexual and reproductive choices, but a patriarchal structure permeating social and economic relations, that deprive women of meaningful sexual and reproductive autonomy: "the libertarian rhetoric of the opinion [*Roe*] has indeed focused attention on pernicious state intermeddling in women's lives, rather than either the private sphere appropriation of women's sexuality caused by male sexual aggression, or the appropriation of women's reproductive and parenting labor in that sphere, as the primary limit on women's equality and liberty."[29] Privacy ultimately serves to protect this patriarchal structure by relegating it to an invisible realm screened off from state intervention: "It is probably not coincidence that the very things feminism regards as central to the subjection of women—the very place, the body; the very relations, heterosexual; the very activities, intercourse and reproduction; and the very feelings, intimate—form the core of what is covered by privacy doctrine."[30] On this account, the privacy rationale in *Roe* not only fails to secure meaningful abortion access for many pregnant women, but actively conspires in the subordination of women by shielding from state scrutiny and intervention the very social domains in which their subordination is secured.

Clearly, feminist critiques of privacy point to many of the same concerns as the reproductive justice movement. And sure enough, we find similar critiques offered by some of the leading thinkers of this movement. In many cases, reproductive justice activists equate choice and privacy so as to attach their critique of the limits of choice to the privacy rationale for

---

[29] Robin West, "From Choice to Reproductive Justice: De-Constitutionalizing Abortion Rights," in *Yale Law Journal* 118.7 (2009): 1415-1416.

[30] Mackinnon, "Privacy v. Equality," 101.

abortion. Marlene Gerber Fried, for example, slides from choice to privacy in her critique of mainstream abortion rights activism after *Roe*: "Mainstream abortion rights organizations dedicated themselves to defending *Roe v. Wade* under the rubric of 'choice.' They appealed to the right to privacy that was at the core of the Supreme Court decision."[31] Loretta Ross performs the same slide in her discussion of the Hyde Amendment. Echoing Mackinnon, she alleges that "the language of choice based on the concept of privacy reinforced the subordination of poor women through the Hyde Amendment that prohibits using federal funds for abortion."[32] Ross and Rickie Solinger together justify the equation of privacy and choice by pointing to the logic of *Roe* itself: "*Roe* closely associated the concept of choice with a 'zone of privacy' within which women could make reproductive decisions. Women of color activists began to point out in the 1970s and 1980s that only women who could afford to enter the marketplaces of choices—motherhood, abortion, and adoption, for example—had access to this zone."[33] Yet it is not immediately obvious why we should surrender the definition of privacy (or choice, for that matter) to the most libertarian elements of *Roe*. Nor is it obvious that we must knit privacy and choice together into a single, dangerously limited conceptual framework.

Other reproductive justice scholars point to distinctive failings of privacy. Suzanne Enck, for example, highlights the troubling connections between privacy, shame, and secrecy: "In a socio-political landscape that bluntly contrasts public with private, that which is considered private slides too quickly and easily into that which is shamed, stigmatized, and held as secret."[34] On this account, protecting abortion rights under the cover of privacy implies that the decision to

---

[31] Marlene Gerber Fried, "Reproductive Rights Activism after *Roe*," in *Radical Reproductive Justice*, 142.
[32] Ross, "Conceptualizing Reproductive Justice Theory," 179.
[33] Ross and Solinger, *Reproductive Justice: An Introduction*, 47.
[34] Suzanne Marie Enck, "Privacy, precarity, and political change: Connecting gendered violence to reproductive injustice," in *Quarterly Journal of Speech* 108 (2022): 434.

have an abortion must be hidden from view because it is shameful. In a different register, reproductive justice activists have connected both privacy and choice to "liberal perspectives that rely on separation rather than interconnectedness for definitions of selfhood, science, and social relations."[35] Accordingly, privacy effectively isolates the pregnant person contemplating abortion from meaningful social relations and wrongly relegates the decision, and the very experience of pregnancy and eventual parenthood, to a purely individual one. Much like the equation of choice with privacy, these critiques of privacy assume a very specific conception of privacy and do not consider the possibility of a more positive, relational conception.

Of course, these critics are undeniably right that the language of privacy and choice can be and have been interpreted in narrow ways to serve neoliberal and libertarian purposes. Indeed, Mary Ziegler notes that, in the wake of *Roe*, Americans United For Life filed an amicus brief in *Poelker v. Doe* (1977), one of several cases addressing restrictions on public funding for abortion, foreshadowing Cornell's and Mackinnon's exact critique of the privacy framework: "If the abortion decision is so private . . . it follows that government shall not itself be compelled to respond to the demand of that right."[36] Therefore, Loretta Ross contends, the reproductive justice movement "learned from our sisters internationally who used the human rights framework to make stronger, more positive claims for women's full human rights that moved far beyond the limits of the US Constitution and the restrictive privacy framework."[37] Rosalind Petchesky

---

[35] Greta Gaard, "Reproductive Technology, or Reproductive Justice? An Ecofeminist, Environmental Justice Perspective on the Rhetoric of Choice," in *Ethics and the Environment* 15.2 (2010): 107.

[36] Motion and Brief as Amicus Curiae for Americans United for Life, *Poelker v. Doe*, quoted in Mary Ziegler, *After Roe: The Lost History of the Abortion Debate* (Cambridge, MA: Harvard University Press, 2015), 67. It should also be noted, however, that Justice Blackmun, the author of the majority opinion in *Roe* and thus the man most responsible for the privacy rationale for abortion, dissented in all cases upholding restrictions on public funding of abortion. If a privacy rationale for abortion inexorably leads to a failure to protect public funding of abortions, then we would expect Blackmun to join the majority opinions in these cases.

[37] Ross, "Conceptualizing Reproductive Justice Theory," 173.

rightly counsels that any such restrictive conception of privacy must be rejected entirely: "Until privacy or autonomy is redefined in reference to the social justice provisions that can give it substance for the poorest women, it will remain not only a class-biased and racist concept but an antifeminist one, insofar as it is premised on a denial of social responsibility to improve the conditions of women as a whole."[38] But Petchesky's warnings about privacy can be read in a very different way. Instead of throwing out the entire concept of privacy, we could take up the invitation to "redefine" it in a way that seriously considers and aims to rectify the constraints on poor women's capacity to make choices.

After all, privacy is hardly the only concept that can be and has been interpreted in a neoliberal or libertarian manner. Human rights and equality, the preferred language of many reproductive justice activists, suffer from the very same problem. Samuel Moyn and Jessica Whyte have shown how human rights were effectively narrowed to exclude substantive social and economic rights and bolster formal negative liberty and property rights in a way especially friendly to neoliberal political projects.[39] Similarly, conservative Justices on the Supreme Court have themselves eviscerated the potential of equality by reading the equal protection clause to enshrine a "colorblind" Constitution that rules out policies explicitly aiming to combat racial subordination, including affirmative action and school integration.[40] With respect to abortion specifically, the Court in *Dobbs* did briefly consider an equal protection argument against prohibitions on abortion—and dismissed it out of hand. Justice Alito glibly proclaims that abortion regulations are not "sex-based classifications" and deems it mere coincidence that "only

---

[38] Petchesky, *Abortion and Woman's Choice*, xxv-xxvi.
[39] Samuel Moyn, *Not Enough: Human Rights in an Unequal World* (Cambridge, MA: Harvard University Press, 2019); Jessica Whyte, *The Morals of the Market: Human Rights and the Rise of Neoliberalism* (Verso, 2019).
[40] See *Parents Involved in Community Schools v. Seattle School District No. 1* (2007) and *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College* (2023).

one sex can undergo" the procedure.[41] If we need not simply surrender the meaning of human rights and equality to these narrow libertarian interpretations, why must we do so with privacy?

Not all advocates of reproductive justice advise such a surrender. Dorothy Roberts, for example, has criticized the feminist critique of privacy for "neglect[ing] many of the concerns of poor women of color."[42] Of course, poor women of color are the principal constituency of the reproductive justice movement, and Roberts identifies two reasons that privacy rights have special resonance for them. First, because Black women have had to struggle throughout U.S. history to construct their own, positive identities against the stigmatized identities imposed upon them, "the concept of personhood embodied in the right of privacy can be used to affirm the role of will and creativity in Black women's construction of their own identities."[43] And, second, because Black women, unlike white feminists, often viewed family and intimate relationships as a refuge from the punitive power of a hostile state, "the protection from government interference that privacy doctrine affords may have a different significance for women of color."[44] Yet Roberts undermines her own powerful defense of privacy in a footnote that acquiesces to constructions of privacy as a purely negative right, à la Mackinnon and Cornell, and proposes liberty as a better alternative to capture these important protections:

> The word 'privacy' may be too imbued with limiting liberal interpretation to be a useful descriptive term. 'Privacy' connotes shielding from intrusion and thus may be suitable to describe solely the negative proscription against government action. Moreover, the word conjures up the public-private dichotomy. 'Liberty,' on the other hand, has more potential to include the affirmative duty of government to ensure the conditions necessary for autonomy and self-

[41] *Dobbs v. Jackson Women's Health Organization*, 597 U.S. 215 (2022). Of course, Justice Alito not only remains willfully blind to the gender-specific motivation and impact of abortion restrictions, but also to the capacity of nonbinary people and transmen to become pregnant.
[42] Roberts, "Punishing Drug Addicts Who Have Babies," 1424.
[43] Roberts, "Punishing Drug Addicts Who Have Babies," 1469.
[44] Roberts, "Punishing Drug Addicts Who Have Babies," 1471.

> definition. In reconstructing the constitutional guarantees I have been discussing, it may be more appropriate to rely on the broader concept of 'liberty.'[45]

In a different article published four years after writing this footnote, Roberts fully embraces its logic and joins other reproductive justice activists in rejecting privacy rights: "[W]e must replace the concept of privacy as a purely negative right with the concept of liberty as human flourishing that affirmatively guarantees the needs of human personhood."[46] *Contra* Roberts, I propose that privacy offers something more specific than liberty to women of color seeking reproductive freedom and justice. In this paper's next section, then, I turn to a distinctive model of privacy that is especially suited to the struggle for reproductive justice, while also demonstrating that this model of privacy functions best alongside equality in a combined rationale for reproductive freedom.

Privacy, Equality, and Reproductive Justice

Privacy has never had a clear, settled definition in law or philosophy. Rather, its scope and boundaries have consistently evolved, sometimes in ways that call into question whether we are truly dealing with a coherent concept at all.[47] The Fourteenth Amendment privacy cases culminating in *Roe* ultimately describe a form of decisional autonomy in particular domains of life that may seem only distantly related to previous legal invocations of privacy, including informational privacy rights and Fourth Amendment protections against unreasonable searches

---

[45] Roberts, "Punishing Drug Addicts Who Have Babies," 1480, footnote 304.
[46] Dorothy Roberts, "The Only Good Poor Woman: Unconstitutional Conditions and Welfare," *Denver Law Review* 72.4 (1995), 947.
[47] Judith DeCew, *In Pursuit of Privacy: Law, Ethics, and the Rise of Technology* (Ithaca, NY: Cornell University Press, 1997); Sarah Igo, *The Known Citizen: A History of Privacy in the United States* (Cambridge, MA: Harvard University Press, 2018); Daniel Solove, *Understanding Privacy* (Cambridge, MA: Harvard University Press, 2008).

and seizures. For critics of *Roe* like John Hart Ely, this tenuous connection to earlier privacy protections renders privacy suspect as the appropriate rationale for the decision.[48] Indeed, Justice Rehnquist raised this issue in his *Roe* dissent, charging the majority opinion with conflating privacy and liberty, and correctly noting that the Court has never held liberty inviolable in all cases:

> I have difficulty in concluding, as the Court does, that the right to 'privacy' is involved in this case. Texas, by the statute here challenged, bars the performance of a medical abortion by a licensed physician on a plaintiff such as Roe. A transaction resulting in an operation such as this is not 'private' in the ordinary usage of the word. Nor is the 'privacy' that the Court finds here even a distant relative of the freedom from searches and seizures protected by the Fourth Amendment….
>
> If the Court means by 'privacy' no more than that the claim of a person to be free from unwanted state regulation of consensual transactions may be a form of 'liberty' protected by the Fourteenth Amendment, there is no doubt that similar claims have been upheld in our earlier decisions on the basis of that liberty….But that liberty is not absolutely guaranteed against deprivation, only against deprivation without due process of law….[49]

We need not agree with Justice Rehnquist about where to draw the line between constitutional and unconstitutional regulations of "consensual transactions" to accept the basic premise that invocations of privacy as decisional autonomy really just substitute another word for liberty. Indeed, agreeing with Justice Rehnquist on this point would enable us to counter his narrow vision of liberty with Dorothy Roberts' positive liberty as human flourishing.

So why appeal to privacy rather than simply liberty? **(NOTE FOR MY WPSA READERS: MY ANSWER TO THIS QUESTION REALLY APPEARS AT LENGTH IN A PREVIOUS CHAPTER OF THIS BOOK MANUSCRIPT. WHAT FOLLOWS IS A HIGHLY ABBREVIATED VERSION!)** While I do not dispute the substantial overlap

---

[48] John Hart Ely, "The Wages of Crying Wolf: A Comment on Roe v. Wade," in *The Yale Law Journal* 82.5 (1973): 920-949.

[49] *Roe v. Wade* (Rehnquist J. dissenting).

between privacy as decisional autonomy and liberty, privacy underscores two crucial elements of reproductive decision-making that the broader concept of liberty does not. First, echoing Dorothy Roberts' argument for privacy's importance to Black women, philosophical accounts of privacy have long identified its connection to personhood and identity. On such accounts, the right of privacy protects our capacity as individuals to forge our own self-identities and protect those self-identities from unwanted intrusion and interference by other parties.[50] Not all liberty rights so heavily implicate that domain of the self where a person's sense of a coherent identity under their own control resides. For this reason, Jean Cohen accuses feminist critics of privacy of missing "the moral importance of rights guaranteeing decisional autonomy and ascribing ethical competence and a sense of control over one's identity needs in the domain of intimacy to socialized, solidary, individuals—a complex of rights for which *privacy* has increasingly become the umbrella term."[51] It is not difficult to see why this understanding of privacy applies powerfully to reproductive decision-making. Our sense of self is heavily implicated in our relationship to our own bodies, such that the experience of an unwanted pregnancy or the loss of a wanted pregnancy may be felt as a painful rupturing of identity. Similarly, our feelings and practices regarding sexuality, intimate relationships, and family-building simultaneously emerge from and further influence the most profound sense of personal identity. It is important to note that these domains of life, especially those that concern processes inside of our bodies, are not only private in the sense that we may not wish to share them with others, but also in the sense

[50] Jean Cohen, "Rethinking Privacy: Autonomy, Identity, and the Abortion Controversy," in *Public and Private in Thought and Practice: Perspectives on a Grand Dichotomy*, eds. Jeff Weintraub and Krishan Kumar (Chicago, IL: University of Chicago Press, 1997): 133-165; Jeffrey Reiman, "Privacy, Intimacy, and Personhood," in *Philosophy & Public Affairs* 6.1 (1976): 26-44.

[51] Cohen, *Regulating Intimacy: A New Legal Paradigm* (Princeton, NJ: Princeton University Press, 2002), 26.

that we may not be capable of fully sharing our experiences in these domains with others because they often transcend words and rational descriptions.

Second and relatedly, because of its connection to personhood, privacy rights require more of the state and of other individuals than simply not preventing the individual from acting upon their final decision in intimate matters. Even if we ultimately retain that capacity to act in the final instance, we may still experience efforts to intrude upon and sway our decision-making process as painful and demeaning violations of the highly personal and sometimes incommunicable process through which we elaborate and wrestle with our own sense of self. This second point sheds light on the development of abortion rights in particular (before they were dismantled in *Dobbs*). Drawing on the work of Linda McClain, Jean Cohen analyzes the Court's retreat in *Planned Parenthood v. Casey* (1992) from the trimester system established in *Roe*. In *Casey*, the Court reaffirmed "the essential holding" of *Roe* but "reduced the concept of privacy to the narrow dimension of decisional autonomy or liberty in order to permit the state and third parties to try to influence the pregnant woman's reasoning process and ultimately her decision, by exposing it to public pressure and scrutiny while leaving her the liberty to make the ultimate decision."[52] Specifically, the Court upheld provisions of a Pennsylvania abortion law requiring that women give their "informed consent" to the abortion procedure and wait 24 hours before receiving the abortion. These provisions, the Court ruled, do not place an "undue burden" on the woman's choice to seek an abortion, because she can still choose to undergo the procedure a mere 24 hours after hearing the required information about the nature of the procedure, its potential health risks, and the fetal development process. From a privacy perspective, however, these provisions clearly impute a lack of ethical competence to the

[52] Cohen, *Regulating Intimacy*, 63. See also Linda McClain, "The Poverty of Privacy?" in *Columbia Journal of Gender and Law* 3 (1992): 119-174.

woman, as they presume she may choose abortion "out of ignorance or without due attention to arguments against abortion," and permit the state to try to sway her decision based on its own assessment of the most relevant facts.[53] Notably, Justice Blackmun, who authored the original *Roe* decision and its privacy rationale, dissented in *Casey* with respect to these provisions of the law.

This conception of privacy escapes many of the feminist critiques we have encountered. It does not presume a pre-political private sphere where freedom necessarily reigns so long as the state does not intrude. It clearly recognizes that other parties and institutions can intrude on a person's privacy (and other important rights) in the absence of state intervention. But it also does not depict people as isolated nomads. Their decision-making process in intimate matters should be protected from *unwanted* intrusion, but we can still grant that our sense of self materializes at least in part through socialization processes, or that we may wish to seek the counsel of others in making difficult personal decisions. Indeed, privacy on this account is perfectly consistent with recent feminist theories of relational autonomy, which emphasize how the social embeddedness of the self actually promotes autonomy in the right circumstances.[54] Further, privacy understood as decisional autonomy in deeply personal matters does not imply that these matters are necessarily shameful and must be shrouded in secrecy. Part of one person's decision-making process may well be to broadcast their decision to the whole world, while another may wish to shield that decision from scrutiny:

> Privacy is valued for what it provides to those who choose it: a decision taken for privacy is credited as reflecting a person's will; it is an exercise of autonomy. There may be reasons to keep quiet just as there may be good reasons to speak, but however things are sized up, a decision for

[53] McClain, "The Poverty of Privacy?," 142.
[54] Catriona Mackenzie and Natalie Soljar, eds., *Relational Autonomy: Feminist Perspectives on Autonomy* (New York: Oxford University Press, 2000).

> privacy means that he person herself has done the sizing. She alone chooses to divulge or not and for whatever set of reasons she finds appealing or convincing.[55]

We might say that privacy therefore secures a kind of meta-liberty. Not only do we have the liberty to act in accordance with our desires, but we also have the liberty to publicize that action and our reasons for it, or not, without having to justify this secondary choice to anyone.

But what of feminist concerns that the right of privacy is purely negative and rules out state assistance to secure the necessary conditions of self-determination? Does the right of privacy as the capacity to forge our own self-identity necessarily preclude such interventions? I argue that it does not. Privacy rights do prevent the state and other parties from intervening so as to undermine this capacity. At the very least, though, they do not prevent the state from enabling this capacity. And if we heed Dorothy Roberts' call to envision positive privacy rights, then we may even interpret them so as to require the state to furnish the necessary conditions that guarantee that all persons, regardless of class, race, and other potentially limiting factors, can forge their own identities in the domains typically associated with the private sphere: family, parenthood, sexuality, etc. Certainly, such a positive conception of privacy runs contrary to the narrow, formal liberalism embraced by the Supreme Court and other mainstream political actors, but as we've seen, the same is true of more substantive conceptions of equality and liberty.

Even if this account of privacy escapes conventional feminist critiques, we may still wonder what privacy offers to the reproductive justice movement specifically. We can begin by noting, following Rosalind Petchesky, that an equality rationale alone cannot secure full protections for reproductive freedom, as it would permit the regulation of reproductive decision-

[55] Carol Sanger, *About Abortion: Terminating Pregnancy in Twenty-First-Century America* (Cambridge, MA: Belknap Press of Harvard University Press, 2017), 61.

making in a hypothetical socialist feminist society in which substantive social and material equality, including across gender lines, had finally been achieved:

> Can we really imagine the social conditions in which we would be ready to renounce control over our bodies and reproductive lives—to give over the decision as to whether, when, and with whom we will bear children to the 'community as whole'? The reality behind this nagging question is that control over reproductive decisions, particularly abortion, has to do not only with 'the welfare of mothers and children' but very fundamentally with sexuality and with women's bodies as such. The analysis emphasizing the social relations of reproduction tends to ignore, or deny, the level of reality most immediate for individual women: that it is their bodies in which pregnancies occur…In order to make this connection, a theory of reproductive freedom has to have recourse to other conceptual frameworks, particularly one that is more commonly associated with a feminist tradition and asserts women's right to and need for bodily self-determination.[56]

Of course, Petchesky's position on privacy is ambivalent at best, given her concerns about the concept's potentially reactionary deployment in the 1980s. But the account of privacy we've developed above neatly fits her diagnosis that reproductive freedom is "social and individual at the same time" and captures the need for bodily self-determination without bringing on board the reactionary baggage she wants to resist.[57]

Whereas Petchesky shows us why we need both equality and bodily self-determination as normative foundations of reproductive freedom, my claim about the utility of a combined privacy-equality rationale goes beyond a both/and approach. The stronger claim is that the two rationales buttress and strengthen each other. This is true for several reasons. First, the concept of privacy we have developed illuminates one of the crucial ways in which gender subordination works: via a denial of privacy to women, and an instrumentalization of their bodies and their reproductive capacities for public purposes. Indeed, part of Mackinnon's critique of the privacy rationale for abortion is precisely that women have never truly had access to it: "It [privacy] is, in

[56] Rosalind Petchesky, *Abortion and Women's Choice*, 13.
[57] Petchesky, *Abortion and Women's Choice*, 4.

short, defined by everything that feminism reveals women have never been allowed to be or to have…"[58] *Contra* Mackinnon, however, we may well take the historical and empirical fact of the denial of privacy to women as a crucial reason why feminism ought to fight for meaningful privacy for women. And sure enough, the feminist movement has successfully fought to shrink the scope of this instrumentalization and expand the ambit of privacy for women, thus moving us towards a more equal society along gender lines. But this brings us to a second reason why privacy and equality strengthen each other, and why the combined rationale has special utility for the reproductive justice movement. Feminist successes in this battle have not been complete and, most importantly, have not been equally distributed. As we have seen, poor women and women of color have always suffered the greatest deprivations of privacy in the intimate domain, and the greatest affronts against their decisional autonomy regarding sex, reproduction, family formation, and motherhood. This is because, as Sarah Igo has documented extensively, privacy has long served as a measure of standing in the polity—some persons have been entitled to it, while others have not: "Because privacy could both foster intimacy and nurture vice, it came packed with assumptions about the kind of person entitled to it."[59] The deprivations of privacy suffered by poor women and women of color reflect our longstanding cultural denigration and stigmatization of their sexual and maternal practices.

Furthermore, when we link privacy and equality in this way to ground reproductive justice, we start to see the connective thread that binds apparently distinct definitions of privacy. Khiara Bridges' work on the status of privacy rights for poor mothers is especially illuminating in this regard. In *The Poverty of Privacy Rights*, she explores three types of state invasions of privacy routinely experienced by poor mothers: familial, informational, and reproductive.

---

[58] Mackinnon, "Privacy v. Equality," 99.
[59] Igo, *The Known Citizen*, 3.

Indeed, these invasions of privacy are so pervasive and legally uncontested that Bridges concludes that poor mothers simply do not possess privacy rights to begin with. She shows how state efforts to oversee, scrutinize, and regulate the family and procreative lives of poor women implicate all three forms of privacy for consistent reasons stemming from the moralization of poverty, or "the idea that people are poor because they are lazy, irresponsible, averse to work, promiscuous, and so on."[60] This means that poor mothers cannot be trusted to use privacy rights to any positive ends. Therefore, the state is fully justified and authorized to subject their intimate lives to constant surveillance, regulation, manipulation, and outright coercion, depriving them of "the full set of legal rights that the government bestows to citizens" and relegating them to second-class or semi-citizenship—once again underscoring the effective connection between privacy and equality.[61]

Contra Justice Rehnquist and John Hart Ely, then, informational privacy rights are not some special, authentic domain of privacy rights entirely distinct from decisional autonomy, at least not in the realm of reproduction. State programs that monitor, surveil, and interrogate poor mothers stem from and communicate the same suspicion of their intimate decision-making and the same desire to control their wombs for ostensible public benefit as overt barriers to reproductive decisional autonomy such as coerced sterilization and bans on public funding of abortion. Insofar as these policies impugn poor women based on a shared set of presumptions about their moral pathologies as mothers, it is useful for the reproductive justice movement to have recourse to a single, overarching concept that captures this common denominator. Privacy accomplishes this task. Consider, for example, Bridges' examination of the compulsory interviews that Medicaid recipients in New York's Prenatal Care Assistance Program (PCAP)

[60] Bridges, *The Poverty of Privacy Rights*, 7.
[61] Bridges, *The Poverty of Privacy Rights*, 55.

must undergo. The interviews force pregnant women to share details of their sex lives, relationships with intimate partners and family members, financial circumstances, immigration status, and nutritional habits, all in order to establish potential "risk factors" to their ability to parent effectively. Wealthier pregnant women who do not rely on Medicaid are rarely compelled to respond to similar invasive questions. Furthermore, nurses routinely visit the women before and after childbirth to give them "information" about contraception that includes recommending long-term and potentially more dangerous forms of birth control, such as Depo-Provera.[62] Bridges describes these interviews, and similar ones routinely extracted from poor mothers on welfare, as "serv[ing] to demonstrate that the person being interrogated is an undesired and undesirable member of the body politic."[63] This judgment, in turn, justifies the kind of explicit invasions of reproductive decision-making that the concept of privacy-as-decisional-autonomy is intended to address.

In conclusion, the reproductive justice movement should not dispense with the right of privacy. Rather, privacy and equality together provide a powerful rationale for a broad set of reproductive freedoms, especially for the most marginalized members of the polity. This is because the state and powerful non-state actors have viewed the sexual and reproductive lives of precisely these individuals as threats to the public good, requiring persistent regimes of surveillance and coercion. Privacy clearly establishes how and why these regimes constitute extreme violations of personal self-determination, and equality underscores how these violations have always disproportionately harmed poor women of color. As *Dobbs* now makes possible even greater violations of self-determination affecting even more members of the polity, it is all the more crucial that we draw the lines connecting new state prohibitions on abortion to other,

---

[62] Bridges, *The Poverty of Privacy Rights*, 2-6.
[63] Bridges, *The Poverty of Privacy Rights*, 134,

enduring forms of reproductive unfreedom. These connections will help to knit together a broad, diverse political coalition aiming for a horizon beyond the mere restoration of abortion rights as they existed prior to *Dobbs*. The ultimate goal of reproductive self-determination benefits from a normative foundation in privacy and equality together.