

KHIARA M. BRIDGES

# THE POVERTY OF PRIVACY RIGHTS

Khiara M. Bridges

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# THE POVERTY OF PRIVACY RIGHTS

This book is dedicated to the late E. Allan Farnsworth, who called me "the cat's pajamas" on more than one occasion.

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# THE POVERTY OF PRIVACY RIGHTS

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#### Introduction

"More and more often, we all make silent calculations about who is entitled to what rights, and who is not. It's not as simple as saying everyone is the same under the law anymore. We all know there's another layer to it now."

Matt Taibbi, The Divide: American Injustice in the Age of the Wealth Gap, p. xvii

A cursory glance at the California Code of Regulations hardly excites. Because it appears to be nothing but chapters upon chapters of rules upon rules that concern the banalities of bureaucracies, one might be tempted to describe the code as boring. Sure, there are moments of titillation: Title 17 regulates the Office of Problem and Pathological Gambling. (It includes a provision that requires casinos to make payments to the Gambling Addition Program Fund.) And then there is Title 26, which concerns "Toxics." (It contains a subtitle that governs the Board of Barbering and Cosmetology and includes a rule that, in no uncertain terms, prohibits an establishment or school from "knowingly permit[ting] a person afflicted with an infection or parasitic infestation capable of being transmitted to a patron to serve patrons or train in the establishment or school.") But, besides these brief flashes of the ironic and the foul, the California Code of Regulations seems utterly mundane and quite dull.

Yet, nestled within it is Title 22, which itemizes rules and regulations for the provision of social services in California. And nestled within that title is Section 51179.10, which delineates the services that pregnant women will receive when they, lacking both private health insurance and the means to pay for prenatal care out-of-pocket, look to the state's Medicaid program for assistance in acquiring medical care. The provision requires that, alongside the expected examinations designed to assess and manage a pregnant woman's physical health, prenatal care services administered in line with it must include assessments of women's "nutritional status," "health education status," and "psychosocial

status." Notably, the health education assessment requires that a professional evaluate a woman's "formal education and reading level . . . , religious/cultural influences that impact upon perinatal health; and client and family or support person's motivation to participate in the educational plan." Additionally, the psychosocial assessment requires that a professional review a woman's "social support system; personal adjustment to pregnancy; history of previous pregnancies; patient's goals for herself in this pregnancy; general emotional status and history; wanted or unwanted pregnancy, acceptance of the pregnancy; substance use and abuse; housing/household; education/employment; and financial/material resources" (22 C.C.R. § 51348(e)(1)(A)).

New York's Medicaid prenatal care program mirrors California's insofar as it requires various assessments of poor pregnant women that exceed evaluations of their physical health (Bridges 2011a, 2011b). During eighteen months of ethnographic fieldwork in the obstetrics clinic of New York City's "Alpha Hospital," a large public hospital that serves the city's poor, I had the chance to observe a psychosocial assessment that a social worker, "Tina," administered to a patient, "Erica," as required by law. I had asked Tina to ask Erica, who was pregnant with her fourth child, if I could sit in during her consultation. Erica consented and allowed me to tape-record her session:

Tina ("T"): Are you working?

Erica ("E"): No—I'm in college still.

- T: How are you supporting yourself?
- E: [long pause] How could I forget what it's called.... Welfare! [laughs]
- T: You receive public assistance?
- E: Yes.
- T: How much?
- E: Um, 354....
- T: And does that include what they give you for your rent?
- E: Yes. Well, I don't pay rent.
- T: You don't pay rent?
- E: I live in a shelter.
- T: What shelter do you live in?
- E: Beta Houses.
- T: Who's your caseworker?
- E: Ms. C.
- T: Do you have the number?
- E: Yeah—I have the number: 1-212-555-1212. She has an extension: 1212.

- T: And how long have you been there?
- E: Almost four months.
- T: And can you tell me what the circumstances were that put you in shelter?
- E: Domestic violence.
- T: And how long did the domestic violence last?
- E: Two months.
- T: So, you were in a domestic violence relationship for about two months, and then you moved to a shelter.
- E: Uh-huh.
- T: And how long was your relationship?
- E: It wasn't really a relationship. It was, like, I would say—three months.
- T: I'm sorry?
- E: Three months—it was, like, a three-month relationship.
- T: It was a three-month relationship. And do you have a police report and an order of protection?
- E: The police report, yes. Not the order of protection—still didn't get it.
- T: Would you like to talk to someone about the domestic violence?
- E: No....
- T: Who's the father of the baby?
- E: Nathanial Thompson. [pseudonym]
- T: Is the father of the baby living with you?
- E: No.
- T: How long have you been in a relationship with the father?
- E: Ten years.
- T: The father of the baby?
- E: Uh-huh. Same father as all the rest of them.
- T: How old is he?
- E: How old? 34.
- T: Can you identify the father?
- E: Yes....
- T: What's his name?
- E: Nathanial Thompson.
- T: And how would you describe your relationship with the father?
- E: Fine-now.
- T: "Fine now"?
- E: Uh-huh.
- T: Does he intend to help when the baby comes?

- E: Yes—he's my fiancé. I just didn't get my ring yet. He better hurry up.
- T: Is he working?
- E: Yes. No, he doesn't work. Sorry. He's in college.
- T: How does he support himself?
- E: I know that he's on public assistance, but I don't know what he gets or anything like that.
- T: But, he's going to able to support you and your child?
- E: Yes, he's going to get a job by the time—he's about to be done with college.
- T: You feel that when he's done with school, he's going to be financially able to support the child?
- E: He's going to be making 43,000 [dollars] a year.
- T: You know that already?
- E: Yes. His job is already set up.
- T: What does he do?
- E: He's a computer technician. I don't know how he does it. I hate computers.
- T: You are in a better situation than a lot of our patients.
- E: I just have to get up out this dag-gone shelter. Then, I'll be fine.1

Thus, a state actor engaged Erica in a conversation that touched on many highly sensitive topics, including her previous romantic relationship, which tragically involved violence severe enough to land her in a shelter; the healthiness of her relationship with the father of her children; her earnings capacity; and the earnings capacity of the father of her children. Tina went on to ask Erica about her history, if any, with tobacco and alcohol products, controlled substances, mental illness, sexual abuse and violence, and a host of other intimate issues.

It is paramount to recognize that the sole reason Erica was compelled to have this conversation with a state actor was because *she was pregnant and had presented herself to a public hospital with the hope of receiving state-assisted prenatal care.* It is also important to observe that this is a painfully personal conversation that privately insured pregnant women can and, absent unique circumstances, usually do avoid.

It is not hyperbole to describe the inquiries required by the Medicaid programs in California and New York as *extensive*. Because of the all-encompassing nature of the interrogation, many persons might find the bureaucratic appara-

tus that has been constructed and reserved for women without private health insurance to be troubling. And many of those persons might describe their disquietude in the language of *privacy*.<sup>2</sup> That is, the programs of public health-care in California and New York do not leave the women that it serves with much privacy.

If we conceptualize the family as a private entity that the government ought not to regulate (absent evidence of abuse or neglect of one of its members), then these programs invade poor women's privacy inasmuch as they allow the government to monitor and regulate the family unit for the duration of the pregnancy and possibly after. If we understand certain information about ourselves as private—like details about our marriages or romantic relationships, the healthiness of our eating habits, the frequency with which we exercise (or not), and our success at remaining gainfully employed (or not)—then these programs invade poor women's privacy inasmuch as they require women to divulge that information and inasmuch as they share that information, once collected, with third parties. And if we understand a woman's decision about whether or not to become a mother to be a private matter, then most states' Medicaid programs violate poor women's privacy in that they implicate themselves in this decision by using government largesse to direct poor women toward or away from motherhood.

The Medicaid programs for pregnant women seeking prenatal care in California and New York—which are typical of other states' Medicaid programs in their demands—demonstrate a simple reality: To be poor is to be subject to invasions of privacy that we might understand as demonstrations of the danger of government power without limits. Indeed, one would expect that if the Constitution contains individual rights and liberties that restrict state power, it would prevent precisely what poor women endure with respect to state intrusions into their private lives.

Moreover, if the state treated other persons who receive government benefits the same way that the state treats poor mothers who receive government benefits, there would be a general sense of outrage; people would claim, loudly and frequently, that the government was violating citizens' privacy. Imagine what would happen if the government required farmers to divulge information about their sexual, occupational, and social histories when they applied for farm subsidies, or if it gave them larger subsidies if they promised not to terminate any future pregnancies. After much outcry, these laws would likely be struck down as a violation of farmers' privacy rights.

Indeed, if a state or the federal government compelled *all* pregnant women—poor and non-poor alike—to be counseled about smoking and drinking alcohol, to undergo "treatment and intervention directed toward helping [them] understand the importance of ... good nutrition during pregnancy," and to discuss with a state actor their "goals for [themselves] in this pregnancy" and their "general emotional status," one would expect an uproar about the privacy invasions visited upon pregnant women by a paternalistic and overreaching state. Nevertheless, courts have routinely upheld the constitutionality of the privacy invasions that Medicaid programs force upon poor women.

#### The Government Interest in Protecting Children

Some will not be disquieted at all by poor mothers' experiences with the state. They will insist that a poor mother's privacy may justifiably be invaded when the state seeks to ensure that a woman's child will be born into a healthful environment and that the woman will properly parent the child once born. Proponents of this view will assert that it is pursuant to this state interest that the state gathers and shares private information about the woman, monitors her and her existing family unit, and constrains her reproductive decisions. It is important to take this claim seriously.

For example, consider California's Medicaid program and its requirement that, during the assessment of a woman's psychosocial status, a social worker inquires into a woman's "housing/household" situation. Arguably, the idea is that, if the woman reveals that she is cohabiting with a man to whom she is not married, the state has an interest in continuing to monitor the woman and her family because statistics reveal that children living in unmarried-couple households are at higher risk for physical and sexual abuse (Sedlak et al. 2010). Similar arguments can be made about inquiries that, for example, confirm that a woman smokes cigarettes, drinks alcohol, or does not go to all of her scheduled prenatal care appointments.

Some will argue that this information may index a woman's neglect of her fetus—revealing that she is likely to be a neglectful parent. They will claim that if the encyclopedic inquisitive net that the state casts indicates a risk that a particular individual will fail her child, the state is justified in maintaining her within its regulatory apparatus in order to protect the child once it is born. Proponents of this view will argue that the exhaustiveness of the state's inquest—and the fact that it touches on information and areas of life that the woman, and society generally, consider private—is necessary because the

goal is the protection of the child. The means to this end, the invasion of poor women's privacy, is argued to be an unfortunate, yet inevitable, consequence of pursuing this goal.

But, why is the state convinced that the children born (or to be born) to poor women are in need of protection? Why is the state so persuaded of this fact that it has erected an elaborate bureaucratic apparatus that meticulously and methodically audits the pregnant poor? Indeed, we must ask, Why does the state presume that poor mothers are at risk of abusing and/or neglecting their children?

The most salient characteristic shared by all women receiving Medicaid benefits during their pregnancies is their poverty. And we might conclude that it is this characteristic that casts suspicion over poor mothers' ability to adequately care for their children. That is, if we are feeling charitable, we may conclude that the state presumes that poor mothers are at risk of abusing and/or neglecting their children because a mother's poverty makes it more likely that she will be unable to meet the material needs of her child. This charitable interpretation posits that the state invades a poor woman's privacy and impinges on her privacy rights because the state assumes that she may not be able to provide the basics for her child: food, clothing, shelter, and healthcare.

However, if this benign interpretation were true, the questions asked of poor women throughout their prenatal care would concern, specifically, their ability to provide their children with food, clothing, shelter, and healthcare. If this interpretation were true, the ambit of the state's inquisition would focus on whether the woman's financial condition could support an expanded family. Instead, inquiries about women's sexual histories, experiences with substance use and abuse, histories of sexual and domestic violence, and strategies for preventing the conception and birth of more children far exceed the purview of concern about the material conditions in which newborn children will be placed.

Indeed, we need to adopt a less benign interpretation: The state presumes that the risk of poor mothers abusing and neglecting their children is high, and this presumption of high risk has very little to do with the fear that poor mothers will not be able to provide for their children's basic needs. Instead, in this book I argue that the presumption of high risk has everything to do with the *moral construction of poverty*—the idea that people are poor because they are lazy, irresponsible, averse to work, promiscuous, and so on. This individualist explanation of poverty is the simple idea that people are poor because there is something wrong with them. If personal failures are the presumptive cause

of poverty, then poor *mothers* ought to be supervised closely, as their personal failures necessarily implicate children.

It is worth noting, early and often, that wealthier women engage in the same behaviors in which poor women engage. Wealthier women cohabit with men to whom they are not married. Wealthier women have had many sexual partners. Wealthier women have used and abused illicit drugs. They, too, miss prenatal care appointments. They, too, have histories of sexual and domestic violence. They, too, have unplanned pregnancies. They, too, find themselves pregnant after being in relatively short relationships with the fathers of their babies. They, too, ought to contemplate strategies for preventing the conception and birth of more children if they want to limit the size of their families.

Yet, no state has erected an extravagant bureaucratic tool with which it can take an accounting of every non-poor pregnant woman. This is telling. It suggests that the state is not really interested in protecting children from abuse and neglect. Instead, it is only interested in protecting *some* children from abuse and neglect. That is, the state assumes that only some children need to be protected from their mothers. And those children are the ones that are born to poor women.

Why does the state make this assumption about poor women? It cannot be because poor women uniquely engage in problematic behaviors and have problematic histories; wealthier women do, too. It has to be because of something else. The thrust of this book is that this "something else" is the individualist, moralizing explanation for poverty accepted by society, the architects of these laws, and the jurists that interpret these laws as consistent with the Constitution.

Justice Marshall articulated this argument in his dissent in *Wyman v. James* (400 U.S. 309 (1971)), in which the Court upheld suspicionless searches of the homes of poor mothers receiving welfare assistance:

It is argued that the home visit is justified to protect dependent children from "abuse" and "exploitation." These are heinous crimes, but they are not confined to indigent households. Would the majority sanction, in the absence of probable cause, compulsory visits to all American homes for the purpose of discovering child abuse? Or is this Court prepared to hold as a matter of constitutional law that a mother, merely because she is poor, is substantially more likely to injure or exploit her children? Such a categorical approach to an entire class of citizens would be dangerously at odds with the tenets of our democracy. (341–42)