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Towards a Theory of State Visibility: Race, Poverty, and Equal Protection

Khiara M. Bridges

TOWARDS A THEORY OF STATE VISIBILITY: RACE, POVERTY, AND EQUAL PROTECTION

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In the state of New York, uninsured pregnant women with incomes falling below 200% of the federal poverty line are eligible to enroll in the Prenatal Care Assistance Program ("PCAP"), a Medicaid program that pays the prenatal healthcare

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expenses of women who meet the program's qualifications.[1] The aims of PCAP/Medicaid are laudable; it was passed in the late 1980's with the goal of lowering the state's high rate of infant mortality as well as the number of infants born with low

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[1] A comprehensive and informative history of PCAP is given in *Hope v. Morales*, a New York case holding that PCAP's denial of coverage for medically necessary abortions did not violate the state Constitution. 83 N.Y.2d. 563, 571 (1994). The majority gives the history of PCAP as follows:

> Medicaid was created by Congress in 1965 to provide Federal reimbursement to participating States for a portion of the cost of all medically necessary services for qualified individuals. Medicaid eligibility is determined by financial need, ultimately assessed by reference to the Federal poverty level . . . .
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> In 1987, Congress created PCAP to afford Federal reimbursement to States providing prenatal care and related services for needy pregnant women with household incomes exceeding the Medicaid eligibility standard. . . . Every State *must* offer PCAP to women with incomes at or below 133% of the poverty level, and *may* extend eligibility up to 185% of the poverty level, without regard to other resources these women may have . . . .
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> Effective January 1, 1990, New York amended its Public Health and Social Services Laws to participate in PCAP, offering the maximum coverage for which Federal reimbursement is authorized. Thus, in New York, a single pregnant woman with annual income between $9,840 and $18,204 is eligible for PCAP, which covers enumerated pregnancy-related services: prenatal risk assessment, prenatal care visits, laboratory services, parental health education, referrals for pediatric care and nutrition services, mental health and related social services, transportation to and from appointments, labor and delivery, postpregnancy services such as family planning, inpatient care, dental services, emergency room services, home care and pharmaceuticals . . . .
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> PCAP coverage continues, without regard to a change in income, for 60 days after the month in which the pregnancy terminates, even if by abortion.
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> While Medicaid eligibility generally depends upon verification of the application, a pregnant woman applying for PCAP is immediately presumed eligible upon a preliminary showing to a qualified provider that her household income falls below 185% of the poverty level. Similarly, Medicaid applicants are required to exhaust certain household resources for eligibility, while PCAP applicants need only satisfy the income requirement. These differences are rooted in the exigencies attendant upon the need for prenatal care.

Id. at 571–73. The income limits have since been expanded from 185% to 200% of the Federal Poverty Line. *See* OFFICE OF MEDICAID MGMT., N.Y. STATE DEP'T OF HEALTH, PRENATAL CARE ASSISTANCE PROGRAM (PCAP): MEDICAID POLICY GUIDELINES 5 (2007), http://www.emedny.org/ProviderManuals/Prenatal/PDFS/Prenatal-Policy_Section.pdf.

birthweight.[2] In order to justify the spending of state and federal monies on the program, legislators looked to studies that "documented the correlation between infant mortality and neurological abnormalities on the one hand, and low birthweight and premature birth on the other—conditions ameliorated by proper care throughout pregnancy, which can be costly."[3] Although the infant mortality rate in New York has decreased more than thirty percent over the last decade,[4] New York State appears to remain committed to "improving the health of underserved women, infants and children through improved access to and enhanced utilization of perinatal and prenatal care and related services."[5] Consequently, it continues to provide generous funding to PCAP.

The Author observed firsthand the PCAP/Medicaid enrollment process during eighteen months of ethnographic fieldwork conducted in the obstetrics clinic of a public hospital in New York City, "Alpha Hospital" (a pseudonym).[6] Over the course of sixteen months, the Author compiled several notebooks of fieldnotes and over 120 hours of in-depth interviews with patients, staff, administrators, and providers who provided colorful narratives about their experiences at Alpha.

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[2] N.Y. State Dep't of Health, "Perinatal Health in New York State, "http://www.health.state.ny.us/nysdoh/perinatal/en/index.htm (last visited Dec. 25, 2009) [hereinafter NYSDOH, Perinatal Health].

[3] *Hope*, 83 N.Y.2d at 573.

[4] NYSDOH, Perinatal Health, *supra* note 2.

[5] *Id.*

[6] The findings of this research have been presented more extensively elsewhere. *See generally* Khiara M. Bridges, *Pregnancy, Medicaid, State Regulation, and the Production of Unruly Bodies*, 3 NW. J.L. & SOC. POL'Y 62 (2008) [hereinafter Bridges, *Unruly Bodies*] (exploring the PCAP/Medicaid enrollment process from a Foucauldian perspective); Khiara M. Bridges, *Quasi-Colonial Bodies: An Analysis of the Reproductive Lives of Poor Black and Racially Subjugated Women*, 18 COLUM. J. GENDER & L. 609 (2009) (analyzing Medicaid & TANF under the lens of subaltern & post-colonial theory) [hereinafter Bridges, *Quasi-Colonial Bodies*]; Khiara M. Bridges, *Wily Patients, Welfare Queens, and the Reiteration of Race in the U.S.*, 17 TEX. J. WOMEN & L. 1 (2007) [hereinafter Bridges, *Wily Patients*] (exploring the racialized meanings that attach to the receipt of state subsidized prenatal care in the hospital at which the research was conducted);.KHIARA M. BRIDGES, REPRODUCING RACE: AN ETHNOGRAPHY OF PREGNANCY AS A SITE OF RACIALIZATION (2011).

Upon enrolling in PCAP, women are required by legislative mandate to divulge a broad swath of information about their lives—an "informational canvassing" that usually occurs at the woman's first visit to her obstetrician for prenatal care.[7] While much of the information gathered as part of PCAP's various "risk assessments" and interviews is information that one would expect all pregnant women to share with their providers upon beginning prenatal care—including facts concerning previous pregnancies and their outcomes, drug allergies, previous hospitalizations and surgeries, etc.—much of the information gathered from PCAP-insured women is not quite standard (that is, a private doctor attending a privately-insured woman would not likely ask such questions).

This Article explores the issues that arise when poor, pregnant women must submit to a state-erected apparatus that requires them to yield personal and, often, private information about themselves in exchange for a welfare benefit. Informed by these issues, this article develops the concept of "state visibility," understood as the consequence of women having ceded to the state informational access to themselves upon enrollment in PCAP/Medicaid. This article argues that state visibility is problematic because it is premised on a profound distrust of poor people and poor mothers, because it violates poor women's right to privacy, and, most importantly, because it makes possible the surveillance of poor, pregnant women by the state. Moreover, state surveillance of poor, pregnant women's lives easily transforms into state *intervention* into poor women's lives—in the form of the removal of children from the home, the regulation of the home by child protective agencies, and the initiation of criminal or other legal proceedings. State visibility, then, helps explain why the poor are more likely than the wealthy to come within the regulatory and punitive arms of the state..

This Article then puts the concept of state visibility in conversation with equal protection jurisprudence and, specifically, Kenji Yoshino's idea of "corporeal visibility"—the principle by which the Supreme Court has granted heightened scrutiny to equal protection claims made by groups with

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[7] See *supra* notes 1, 2, and 4 and accompanying text.

defining characteristics that can be seen on their bodies.[8] Because race has been understood as a visible fact—especially for those inhabiting non-White bodies—racial minorities are understood to be corporeally visible, and paradigmatically so, within equal protection jurisprudence. This Article explores the intersections of and divergences between the concepts of state visibility and corporeal visibility. It argues that corporeal visibility is continuous with the concept of state visibility because, due to the persistent relationship between race and poverty in the United States, the poor, pregnant women who comprise the ranks of the state visible also tend to be racial minorities. Moreover, it argues that corporeal visibility is embedded within the concept of state visibility because racialized notions of the poor inform the legislation that makes poor, pregnant women visible to the state. Because of the complex consistencies between state visibility and corporeal visibility, this article concludes that laws that discriminate against, or produce groups of individuals as, the state visible ought to be reviewed with the same heightened scrutiny as are racially discriminatory laws.

This is more than an academic exercise: In *Maher v. Roe*,[9] the Court upheld a Connecticut law that provided that Medicaid funds would only be used to cover the costs of "medically necessary" abortions. In *Harris v. McRae*,[10] the Court upheld the Hyde Amendment, which prohibits the use of federal Medicaid funds to cover the costs of all abortions, unless the life of the mother is endangered or the pregnancy is a result of rape or incest.[11] In both cases the Court argued that the poor was not a suspect class and declined to use heightened scrutiny when reviewing the equal protection claims; the result was that both

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[8] *See* Kenji Yoshino, *"Assimilationist Bias in Equal Protection: The Visibility Presumption and the Case of "Don't Ask, Don't Tell"*," 108 YALE L.J. 485 (1998).

[9] 432 U.S. 464 (1977)

[10] 448 U.S. 297 (1981).

[11] The version of the Hyde Amendment that passed in 2009 provides that no federal Medicaid funds can be used to "pay for an abortion, except where the life of the mother would be endangered if the fetus were carried to term, or in the case of rape." Omnibus Appropriations Act, 2009, Pub. L. No. 111-8, § 202, 123 Stat 524, 584. (2009).

laws were upheld under rational basis scrutiny.[12] However, if, as this article proposes, the condition within which indigent pregnant women exists is one of state visibility, and if state visibility warrants heightened scrutiny, then restrictive Medicaid funding statutes like the Hyde Amendment must satisfy the demands of a more searching review—a review that may lead to a finding of their unconstitutionality.[13] This is a positive result for those interested in equal rights for all: *Maher* and *Harris* have the effect of dramatically reducing a poor, pregnant woman's ability to exercise her right to abortion and terminate an unwanted pregnancy. For the poor, pregnant woman left without state assistance and without the means to pay for an abortion independently, the right to an abortion is hardly a right at all. Indeed, *Maher* and *Harris* suggest that the abortion right possessed by indigent women is dramatically different than the one possessed by their wealthier counterparts. Heightened review of the equal protection claims of poor, pregnant women, if it led to the reversal of *Maher* and *Harris*, would enable poor, pregnant women to enjoy the same right to abortion as wealthier women.

Part I of this Article describes in detail the informational canvassing to which poor, pregnant women must submit upon enrollment in PCAP/Medicaid. This Part concludes by sketching the outlines of a theory of "state visibility," posited as both the precondition to state surveillance and the condition in

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[12] *Maher*, 432 U.S. at 471 ("This case involves no discrimination against a suspect class [because] [a]n indigent woman desiring an abortion does not come within the limited category of disadvantaged classes so recognized by our cases."); *Harris*, 448 U.S. at 323 (declining to use heightened scrutiny in reviewing the equal protection claim because, although "the principal impact of the Hyde Amendment falls on the indigent[,] . . . that fact does not itself render the funding restriction constitutionally invalid, for this Court has held repeatedly that poverty, standing alone, is not a suspect classification.")

[13] In *Harris,* the government articulated its interest as one of "protecting the potential life of the fetus." *Harris*, 448 U.S. at 324. Because the Court reviewed the Hyde Amendment under rational basis scrutiny, it found that the Hyde Amendment bore a rational relationship to that interest. If restrictive Medicaid funding statutes were subject to heightened review, which would be the result if the proposal contained in this article was accepted, the government would have to demonstrate that it has a compelling interest (or important interest, if intermediate scrutiny were used) in discriminating against poor pregnant women. Whether the current Court will find that the interest in "protecting the potential life of the fetus" is compelling (or important) is an open question.

which poor women are left subsequent to their requisite meetings with the state actors that initiate their prenatal care. Part II describes the concept of "corporeal visibility," explains its role within equal protection law, and compares it to "state visibility." Part III continues the exploration of the ways in which corporeal and state visibility intersect, describing how ideas about the corporeally visible function to validate regimes that produce state visibility. This Part concludes that, in light of the tangled, complex relationship governing corporeal and state visibility, the Court ought to grant heightened scrutiny to the claims of the latter groups. If corporeal visibility is a justification for heightened scrutiny, then state visibility ought to be a justification also. A brief conclusion follows in Part IV.

I. AN INFORMATIONAL CANVASSING

The informational canvassing to which poor, pregnant women must submit upon beginning state-subsidized prenatal care is a product of PCAP providers' statutory obligation to assist women in signing up for Medicaid,[14] as well as their obligation to conduct a nutritional risk assessment[15] and a psychosocial assessment.[16] Each component is described in turn.

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[14] *See* N.Y. COMP. CODES R. & REGS. tit. 10, § 85.40(b)(2) (2009) ("Following the determination of a pregnant woman's presumptive eligibility for Medicaid benefits, the PCAP provider shall act as a pregnant woman's authorized representative in the completion of the Medicaid application process if the woman provides consent for such action.")

[15] *See* tit. 10 § 85.40(f) : ("The PCAP provider shall establish and implement a program of nutrition screening and counseling which includes: [] individual nutrition risk assessment including screening for specific nutritional risk conditions at the initial prenatal care visit and continuing reassessment as needed; . . . [and] documentation of nutrition assessment, risk status and nutrition care plan in the patient medical record . . . ." TIT. 10, § 85.40(f)(1), (f)(3) (2009).

[16] *See* tit. 10, § 85.40(h) ("A psychosocial assessment shall be conducted and shall include: (1) screening for social, economic, psychological and emotional problems; and (2) referral, as appropriate to the needs of the woman or fetus, to the local Department of Social Services, community mental health resources, support groups or social/psychological specialists.").

A. Medicaid Enrollment

A woman seeking PCAP coverage during her pregnancy must formally enroll in Medicaid upon beginning prenatal care. Before enrollment, the woman must meet with a Medicaid financial officer, who interviews her to determine whether or not she will likely qualify for Medicaid coverage and, if so, describes the documents establishing proof of pregnancy, identity, address, and income that she will ultimately need to submit in order to enroll in the program.[17] The financial officer's interview with a prospective PCAP client can be quite lengthy and quite invasive, as the officer culls the information necessary to predict whether the woman will have a successful application. Accordingly, by the end of the interview, the woman would have revealed much information about herself, including information that she may deem "private"—particularly statements about her immigration status (a potentially frightening admission for women residing in the country "illegally,"[18] usually occurring when the woman, faced with her lack of "official" documentation in the form of a driver's license

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[17] Proof of pregnancy is established by an Expected Date of Confinement Letter, which states the woman's estimated delivery date based on the date of her last menstrual period. The woman usually receives this letter after her physical examination by her provider. Proof of identity is established by a state driver's license or ID card, birth certificate, United States or foreign passport, or a permanent resident alien card. Proof of address is established by a postmarked envelope, utility bill, or rent receipt containing the woman's address and a signature from the landlord. Proof of income may be established by two pay stubs, a signed and dated letter from the employer on company letterhead, or a 1040 form with wage statement. If the woman has no income, she must submit a "Letter of Support" signed by the person who is financially supporting her. ALPHA HOSPITAL, "FREQUENTLY ASKED QUESTIONS ABOUT APPLYING FOR PCAP" (on file with author).

[18] Probably the most convincing evidence that the state of New York is committed to lowering the incidence of infant mortality and morbidity is that it has made PCAP available to all women within the income limitations, including undocumented immigrant women. *See* N.Y. STATE DEP'T OF HEALTH (NYSDOH), DOCUMENTATION GUIDE TO IMMIGRANT ELIGIBILITY FOR HEALTH COVERAGE IN NEW YORK STATE 5, *available at* http://www.health.state.ny.us/health_care/medicaid/publications/docs/adm/04adm-7attd1.pdf (2004) [hereinafter, NYSDOH, DOCUMENTATION GUIDE] (stating that, while undocumented immigrants are ineligible for any treatment other than emergency medical services, "undocumented pregnant women continue to be eligible for PCAP").

or state ID card, asks how she will be able to establish her identity for the purposes of the Medicaid enrollment process), her work history (including whether she has worked "off the books" or engaged in criminalized activity in order to earn money), and the work history of any persons who help to support her financially (including whether *they* have worked "off the books" or engaged in criminalized activity in order to earn money).[19] It should be noted that women with private insurance or those who can afford to pay for health care out-of-pocket—that is, wealthier women—can escape the necessity of having to reveal information about the sources of their income before receiving prenatal care. The question of how they make their money (and how they arrived in the country) is made irrelevant every time the private insurer is billed for services or every time directly-billed services are paid in full.

B. Nutritional Risk Assessment

In the course of enrolling in PCAP/Medicaid, each woman meets with a nutritionist who is charged with the duties of "educating" the woman about her nutritional needs during her pregnancy and recording information about the woman's current diet; the latter comprises the "nutritional risk assessment" mandated in the PCAP/Medicaid statute.[20] As part of the educational portion of the meeting, the nutritionist provides dietary recommendations for pregnancy and information on how to control weight gain or loss, as needed.[21] The "nutritional risk assessment," however, is the portion of the meeting during which women are required to *give* information. It begins with the woman describing her most recent meals, while the nutritionist records what was eaten and in what amounts.[22] The woman is then given a chart with a list of foods (for example, "milk," "cheese," "vegetables," "candy"); she is asked to circle

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[19] *See* ALPHA HOSPITAL, "FREQUENTLY ASKED QUESTIONS, *supra* note 17.

[20] *See* tit. 10, § 85.40(f).

[21] *Id.*

[22] ALPHA HOSPITAL, INITIAL PRENATAL NUTRITIONAL ASSESSMENT FORM (2006).

the number of times per week or per day she eats each food item.[23] After the woman has completed the required forms—frequently a lengthy process, as women struggle to recall what foods they have consumed and how often—the nutritionist must then determine if the woman is, indeed, at "nutritional risk." If the nutritionist makes a finding in the affirmative, she checks a box labeled "inadequate/unusual dietary habits" on the bottom of the form that the woman completed.[24] The meeting concludes with the nutritionist asking the woman to make a verbal commitment to meeting her nutritional needs and those of her fetus.[25]

The information ascertained by the nutritional risk assessment may seem insignificant in that the data obtained are not usually considered protected, or particularly "private," information. However, it is fair to describe one's dietary habits —the good and the bad ones—as *intimate*. Indeed, a woman gives intimate knowledge when she confesses that she has eaten ice cream twice a day in the past week or, as one woman told

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[23] *Id.*

[24] *Id.*

[25] In another piece, the author has analyzed the direct relationship that the nutritionist's assessment has to the woman's eligibility for the Special Supplemental Food Program for Women, Infants and Children Program ("WIC"). *See* Bridges, *Unruly Bodies*, *supra* note 6, at 73–75. WIC is a federal program, administered by the New York State Department of Health, with the mission of "safeguard[ing] the health of low-income women, infants, and children up to age 5 who are at nutritional risk" by providing food vouchers for foods that are high in the nutrients (like protein, calcium, iron, and vitamins A and C) found lacking in the diets of poor women and their families. U.S. Dep't of Agric. Food and Nutrition Serv., Special Supplemental Food Program for Women, Infants, and Children Program: About WIC, http://www.fns.usda.gov/wic/aboutwic/default.htm (last visited Apr. 4, 2010); *see also* U.S. DEP'T OF AGRIC., WIC FACT SHEET 2 (2006), http://www.fns.usda.gov/wic/WIC-Fact-Sheet.pdf; tit. 10, § 85.40(f)(4) (2009) (stating that the PCAP provider must, as part of its duty to provide "nutrition services" to its patients, make "arrangements for services with funded nutrition programs available in the community including provision for enrollment of all eligible women and infants in the Supplemental Food Program for Women, Infants and Children (WIC) at the initial visit"). The WIC statute provides that the program is only available to women who are at "nutritional risk." 7 C.F.R. § 246.7(e) (2008) (stating that a determination of "nutritional risk . . . may be based on referral data submitted by a competent professional authority"). Accordingly, it is in a woman's interest that her diet be deemed "inadequate/unusual" by the nutritionist if she is interested in receiving WIC vouchers.

me, that she loved to pour Thousand Island salad dressing over cottage cheese and to eat the concoction with a spoon.[26] Moreover, the information might be considered intimate insofar as people are very rarely asked to share their diets with people whom they do not know. Again, this is information that the privately-insured or out-of-pocket payer has the discretion to keep to herself or share with others—maintaining a relative autonomy over whether she will disclose that part of her life and, if so, how much of it she will disclose.

Moreover, even if one chooses not to conceptualize eating habits as "private," considering them more banal than personal, the fact that the state possesses knowledge about poor women's individual diets remains significant; that is, when the state has knowledge about protected and private aspects of a subject's life, as well as knowledge about those aspects more unprotected and mundane, then one can describe the knowledge possessed by the state as *thorough* and *total*.

C. Psychosocial Assessment

During the "psychosocial assessment," patients meet with a social worker who screens them for several "risk factors"—including the unplanned-ness and/or unwanted-ness of the current pregnancy; the woman's intention to give up the infant for adoption or to surrender the infant to foster care; an HIV-positive status; a history of substance abuse; a lack of familial or environmental support; marital or family problems; a history of domestic violence, sexual abuse, or depression; mental disability; a lack of social welfare benefits; a history of contact with the Administration for Children's Services (the bureau responsible for investigating charges of child abuse and neglect); a history of psychiatric treatment or emotional disturbance; and a history of homelessness.[27] If a "risk factor" is present, the social worker gathers more information about it and puts the woman in contact with additional professionals who may be able to assist her.

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[26] Interview with anonymous obstetrics clinic patient (Jan. 2007).

[27] ALPHA HOSPITAL, PSYCHOSOCIAL SCREENING FORM (on file with author).

As one might expect, the interview with a social worker can be quite intrusive, with the social worker asking the woman a series of intimate questions in order to discover the presence of a "risk factor" and, if found, to ask a series of more intimate questions. During a conversation with one of the social workers at the hospital where the Author conducted fieldwork, the social worker provided the Author with an extensive list of the questions that she asks women during their interviews with her:

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

> going to need for the baby? No—try going to this place. Maybe they can help you. You have to be in the best condition that you can be in for your baby. So, maybe you should get counseling. Here are some places that you can go . . . . Do you want to kill yourself? If so, come with me.[28]

Moreover, it should be noted that, even when the woman does not have a "risk factor" that warrants more in-depth questioning, she leaves the interview with the social worker having answered a universe of questions about herself—much of it prosaic, much of it private.

D. Towards a Theory of State Visibility

Compelling beneficiaries of the PCAP program to divulge, in exchange for a welfare benefit, a wealth of information about themselves through the combination of interviews with a financial aid officer, nutritionist, and social worker—acting in combination with the more expected medical history that she will have to give her provider—makes possible state surveillance of poor, pregnant women. Subsequent to disclosing the information required by the various risk assessments, the Medicaid interviews, and the (more ordinary) consultations with physicians, poor, pregnant women have shared a wealth of stories, histories, thoughts, feelings, fears, expectations, and *knowledge*, with state agents that, in turn, may be used to justify a sustained state involvement in poor women's lives. This involvement may take many forms, such as the state's removal of children from the homes of the parent(s) and the placement of them in foster care; the opening of investigations through the Administration for Children's Services;[29] and

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[28] Interview with anonymous social worker, in New York, N.Y. (Jan. 2007) (on file with author).

[29] The New York City Administration for Children's Services ("ACS") is the state agency dedicated to protecting children from abuse, exploitation, or neglect. *See* New York City Administration for Children's Services: "About ACS," http://www.nyc.gov/html/acs/html/about/about.shtml (last visited Apr. 4, 2010). The purpose of the agency is "to help ensure children grow up in safe, permanent homes with strong families." *Id.*

women's subjection to the regulatory accoutrement that accompany an "open case" (i.e., regular home visits with the New York City Administration for Children's Services ("ACS") caseworkers, frequent interviews, conferences, and consultations with state agents, monitoring of the search for employment, compelled enrollment in drug rehabilitative programs or anger management classes, etc.); the initiation of criminal proceedings (for child abuse or neglect, property crimes, prostitution) or other legal proceedings (i.e., deportation, termination of parental rights). This is problematic for three reasons.

The first critique operates on the level of discourse; the state's desire to gain access to the private lives of poor people may be reasonably interpreted as being premised upon a *distrust* of poor people. Accordingly, a legislative apparatus that has the effect of opening up the private lives of poor people reiterates the poor person as an untrustworthy subject deserving of

observation, supervision, and regulation, if need be.[30] Second, if there is a right to privacy that shields certain intimate, personal aspects of our lives from state intervention or general public availability, the privacy rights of poor, pregnant women are

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[30] This was the precise point of Justice Marshall's dissent in *Wyman v. James*, in which a majority of the Court rejected a challenge to a New York regulation that subjected Aid to Families with Dependent Children ("AFDC") beneficiaries to unannounced home visits by caseworkers as a condition of the former's receipt of public assistance. 400 U.S. 309 (1971). The purpose of the home visits, as written in the statute, was to enable the state to provide "treatment or service tending to restore such persons to a condition of self-support and to relieve their distress" for only "as long as necessary." *Id.* at 311 n. 2. Another purpose of the home visits was to ensure that the minor child benefiting from the parent's receipt of AFDC was being raised in a "home situation . . . in which his physical, mental and moral well-being was being safeguarded and his religious faith preserved and protected." *Id.* at 311 n.4. The majority's opinion, stating that the child of the woman who had brought the suit had suffered a "skull fracture, a dent in the head, [and] a possible rat bite," implied that another ostensible purpose of the home visits was to protect children from child abuse. *Id.* at 322 n.9. Writing in dissent, Justice Marshall disputed the claim that poor people's right to privacy in their homes should be trumped by the presumption that they are more likely to abuse their children:

> [I]t 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.

Id. at 341–42 (Marshall, J., dissenting). If Justice Marshall was right and it is unfair and undemocratic to base law on the presupposition that the poor are more likely to abuse and exploit their children, then it is equally unfair and undemocratic to base law on the presupposition that the poor are untrustworthy individuals whom the state is justified in observing, supervising, and regulating. This is a presupposition upon which the PCAP regulations are, arguably, based.

eviscerated by PCAP requirements.[31] Moreover, this is a vacating of the privacy right that is not similarly forced upon wealthier, privately-insured women. The result is that PCAP creates a landscape peopled by more affluent women in possession of robust, protective privacy rights and their poorer counterparts bearing skeletons of nullified rights.[32] Finally, while this Article does not propose that the mere taking of the

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[31] *See also* Austin Sarat, *"The Law is All Over . . .": Power, Resistance and the Legal Consciousness of the Welfare Poor*, 2 YALE J.L. & HUMAN. 343, 344 (1990) ("[B]eing on welfare means having a significant part of one's life organized by a regime of legal rules invoked by officials to claim jurisdiction over choices and decisions which those not on welfare would regard as personal and private.").

[32] The nullification of poor people's privacy rights has been noted in different contexts. Interestingly, one of the most direct statements of the work that poverty does to vacate privacy rights comes from a federal circuit court. In *Sanchez v. County of San Diego*, 464 F.3d 916, 918–19 (9th Cir. 2006), the Ninth Circuit upheld a San Diego County law that allowed unannounced searches of welfare beneficiaries' homes for the purpose of confirming that the beneficiary had claimed the appropriate amount of assets, confirming the presence of a dependent child, and ensuring the actual absence of an "absent parent." The majority found that the law did not violate beneficiaries' Fourth Amendment rights because, *inter alia*, "a person's relationship with the state can reduce the person's expectation of privacy even within the sanctity of the home." *Id.* at 927.

Dissenting judges sitting on the en banc rehearing of *Sanchez*, which also upheld the law, argued that dignity bears a close relationship to privacy; as such, a violation of a person's privacy and privacy rights is, simultaneously, a violation of their sense of dignity. *See* Sanchez v. County of San Diego, 483 F.3d 965, 969 (9th Cir. 2007) (Pregerson, J., dissenting). In an impassioned dissent, Judge Pregerson wrote:

> We do not require similar intrusions into the homes and lives of others who receive government entitlements. The government does not search through the closets and medicine cabinets of farmers receiving subsidies. They do not dig through the laundry baskets and garbage pails of real estate developers or radio broadcasters. The overwhelming majority of recipients of government benefits are not the poor, and yet this is the group we require to sacrifice their dignity and their right to privacy.

Id. at 969. Accordingly, a more complete picture of the landscape that is produced by the voiding of poor people's privacy rights through regimes like the one produced by PCAP reveals that the wealthy possess robust rights to privacy as well as their dignity, while the poor possess skeletons of privacy rights and a justified sense of *indignity*.

information amounts to a surveillance of the women, the informational canvassing required by PCAP certainly enables continuous surveillance of the women if, given the information that was culled, the state deems such monitoring necessary or desirable. The result is that poor persons are likelier than their wealthier counterparts to come within the regulatory and punitive arms of the state.[33] Accordingly, the class-privileged enjoy a "wealth shield" that protects them from being subjectified in this way[34]—a result that many would deem unjust.

Although it would overstate the case to claim that PCAP's requirement that women disclose a wide range of information as a condition of receiving state subsidized health care amounts, in itself, to state surveillance of poor, pregnant women, the condition of these women 'is quite accurately described 'as one of *state visibility*. Understood as a condition of possibility, or prerequisite, for state surveillance[35] (via the sustained monitoring of the woman) and state intervention (via the placement of children in foster care, the opening of ACS

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[33] Annette R. Appell has cogently argued this point. *See* Annette R. Appell, *Protecting Children or Punishing Mothers: Gender, Race, and Class in the Child Protective System*, 48 S.C. L. REV. 577 (1998). She writes:

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

Id. at 584.

[34] *Cf.* Sarat, *supra* note 31, at 344 n.2 ("When an individual takes public assistance he or she becomes a legal subject in a rather dramatic and *visible* way.") (emphasis added).

[35] *See* LEO BERSANI, HOMOS 11 (1995) ("Visibility is a precondition of surveillance.").

investigations, etc.),[36] state visibility is both the cause and the effect of poor women's profound vulnerability.

1. Defining Visibility: Foucault and the Panopticon

State visibility means more than the bare fact that when poor women enter into a hospital for the purpose of attaining state-subsidized prenatal care their material bodies can be physically seen by state actors and agents. Rather, the visibility referred to is more comprehensive; state visibility means the ability of the state to ascertain knowledge that may be the precursor of, and justification for, more overt action. French philosopher Michel Foucault's writing about the Panopticon may be instructive here insofar as it illuminates the relationship between visibility and state power.[37] The Panopticon is described as a circular architectural structure with a tower at its center.[38] Prisoners, students, patients, laborers, or any other suitable subjects occupy rooms or cells in the round periphery of the structure; the tower houses a supervisor.[39] The structure of the building permits the supervisor residing in the tower to see into all of the rooms and cells and to view their occupants.[40] More importantly, however, the subject *knows* that she can be seen at

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[36] There might be a certain fluidity between state surveillance and state intervention. A weekly interview with a caseworker, or an unannounced home visit by an ACS caseworker, might be reasonably conceptualized as both "surveillance" and "intervention."

[37] MICHEL FOUCAULT, DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON 195–228 (Alan Sheridan trans., Vintage Books 2d ed. 1995) (1975). Philosopher and jurist Jeremy Bentham should be credited with designing the Panopticon. *Id.* at 200. However, while Bentham understood the Panopticon as desirable, insofar as it represented surveillance and punishment at its most efficient, Foucault understood the Panopticon as a physical representation of modern, disciplinary power in its most perfected form. *Id.* at 215 ("'Discipline' may be identified neither with an institution nor with an apparatus; it is a type of power, a modality for its exercise, comprising a whose set of instruments, techniques, procedures, levels of application, targets; it is a 'physics' or an 'anatomy' of power, a technology.").

[38] *Id.* at 200.

[39] *Id.*

[40] *Id.*

all times; yet, because she cannot reciprocate the gaze and see the supervisor in the tower, she remains radically incapable of verifying that she is, in fact, being watched at any given moment.[41] The result of the subject's constant and unrelenting visibility is that she perfectly conforms to the demands and desires of the supervisor—in the absence of any direct threat or request made by the supervisor.[42] The power of the Panopticon, is therefore derived from its ability to produce the profound visibility of its subject.[43]

2. Panopticism and State Visibility

Foucault does not argue that the modern subject exists in a literal Panopticon, but rather that the Panopticon is a

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[41] FOUCAULT, DISCIPLINE AND PUNISH, *supra* note 37, at 201.

[42] *See id.* at 202–03 ("He who is subjected to a field of visibility, and who knows it, assumes responsibility for the constraints of power; he makes them play spontaneously upon himself; he inscribes in himself the power relation in which he simultaneously plays both roles; he becomes the principle of his own subjection.").

[43] *Id.* at 200 ("Visibility is a trap.").

representation of modern power at its most perfected.[44] Similarly, state visibility ought not be understood as comprised solely of the ability to be literally seen, but also the state's potential to demand information about the subject and the subject's practical (or legal) inability to refuse such demands. State visibility, then, is the condition of possibility for state intervention. When applied to the woman who depends upon the state to subsidize her prenatal care expenses, visibility is the condition of possibility for the state's demand that poor women make themselves, their homes, their children, their histories, and their private lives objects of a more comprehensive state knowledge.[45] When state visibility is understood in this way, the physical visibility of poor women—accomplished by the repeated haling of their physical bodies into the view of institutions or persons who have relationships with the state—

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[44] *See id.* at 205 ("[T]he Panopticon must not be understood as a dream building: it is the diagram of a mechanism of power reduced to its ideal form. . . ."); *see also* ROBYN WIEGMAN, AMERICAN ANATOMIES: THEORIZING RACE AND GENDER 38 (1995) (describing the Panopticon as "an architectural form that demonstrates both materially and metaphorically the new relations of visibility that enmeshed the disciplinary subject"). Foucault argues that the Panopticon and, more generally, the persistent, omnipresent gaze are modern technologies of power that *discipline* subjects. FOUCAULT, DISCIPLINE AND PUNISH, *supra* note 37, at 206. Visibility is effective as a disciplinary mechanism "because it is possible to intervene at any moment and because the constant pressure acts even before the offences, mistakes, or crimes have been committed. Because in these conditions, its strength is that it never intervenes, it is exercised spontaneously and without noise. . . . The panoptic schema . . . assures its efficacity by its preventative character." *Id.* When Foucault's theory is applied to the circumstance of PCAP/Medicaid subsidization of poor women's prenatal care expenses and the visibility that it produces and requires, one could conclude that the pregnant indigent subject is made visible to the state so that the state can discipline her. However, political scientist Anna Marie Smith has quite convincingly argued that perhaps Foucault cannot be productively applied to the situation of the indigent female subject in the neoliberal state. *See* ANNA MARIE SMITH, WELFARE REFORM AND SEXUAL REGULATION 55 (2007) ("The soul craft that Foucault teaches us to search for in disciplinary technologies is largely absent; we are left instead with crude, superficial, and impersonal modes of correction."). Perhaps the welfare state is not interested at all in disciplining the indigent subject, but rather in *punishing* her. The Author explores this argument and, particularly, the limits of Foucauldian theory as a description of the experiences of poor, pregnant women in the United States in KHIARA BRIDGES, REPRODUCING RACE, *supra* NOTE 6.

[45] *See* WIEGMAN, *supra* note 44, at 38 (describing the "compulsory visibility attending surveillance").

becomes understood as solely one aspect of the larger project of state visibility. This larger project of state visibility encompasses the ability of the state not only to ask invasive questions, but also to demand answers that may substantiate the state's insistence upon maintaining a regulatory (and punitive, if necessary) relationship with the subject.[46]

In sum, in the context of PCAP/Medicaid, poor women are made grossly visible to the state after having run a gauntlet of questions about various subjects, including, but not limited to, their immigration status, history of drug use and abuse, sources of income, diet, history of domestic violence, receipt of public assistance, history of investigations by 'ACS, history of sexual abuse, and criminal record.[47] This is a state visibility, moreover, that is not shared with their privately-insured counterparts[48]—women who are not routinely asked such questions and who are free to change providers if confronted with the odd obstetrician or midwife who insists upon such an "irrelevant" inquiry. And although some of the data yielded during the informational canvassing appear trivial—like information about eating habits or ex-boyfriends—the fact that the state culls the data very much speaks to the comprehensiveness of the poor woman's visibility to the state. That is, the poor, pregnant woman's visibility results not simply because the state can see, or has knowledge about, aspects of her life that are consequential and meaningful; rather, her visibility results from the fact that the state can see and has

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[46] *See* Julie A. Nice, *No Scrutiny Whatsoever: Deconstitutionalization of Poverty Law, Dual Rules of Law, and Dialogic Default*, 35 FORDHAM URB. L.J. 629, 631 (2008) (arguing that the "deconstitutionalization" of poverty law results in the state's ability to "monitor[] and invad[e] the lives of the have-nots —comprehensively scrutinizing and regulating both their work and family lives").

[47] *See* discussion *supra* Parts I.A-C.

[48] Interestingly, the poor person's visibility to the state may be experienced by the individual as a visibility *of* the law. Consequently, the wealthier person's invisibility to the state may be experienced by the individual as the invisibility of the law. *See* Sarat, *supra* note 31, at 344 ("The legal consciousness of the welfare poor is . . . substantially different from other groups in society for whom law is a less immediate and visible presence.").

knowledge about all aspects of her life[49]—*even* the seemingly inconsequential or meaningless.[50]

Thus, when the poor, pregnant woman takes the state up on its offer to pay her medical bills during her pregnancy, her condition becomes one of *state visibility*. The next Part analyzes the concept of state visibility in relation to equal protection jurisprudence and, more specifically, the concepts of "corporeal visibility" and "social visibility" developed by Professor Kenji Yoshino.

II. VISIBILITY IN EQUAL PROTECTION DOCTRINE

Through a careful analysis of equal protection doctrine, Yoshino describes what he calls an "assimilationist bias in equal protection," defined as the Supreme Court's withholding of heightened scrutiny to those groups that can assimilate into

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[49] In Austin Sarat's writings about people who receive state welfare assistance and their perceptions of the law, the poor tend to describe the law as an omnipresent field that is impossible to avoid. Sarat, *supra* note 31, at 343 (quoting a thirty-five-year-old man who was receiving public assistance as saying, "For me the law is all over. I am caught."). This feeling of the omnipresence of the law mimics the omnipresence of the panoptic gaze. One might conjecture that the sense that the "law is all over" is a product of the welfare poor's radical visibility—that is, the fact that the state can *see* and has knowledge about many, if not most, aspects of their lives.

[50] One could argue that at least part of the motivation for the challenge to the New York AFDC regulation requiring home visits discussed *supra* note 29 was the plaintiff's sense that the caseworker conducting the interview was attempting to extract information that was both relevant and irrelevant, thereby making total her visibility to the state. *See* Wyman v. James, 400 U.S. 209, 321 (1971) (stating that the plaintiff alleged that "on previous visits and, on information and belief, on visitation at the home of other aid recipients, 'questions concerning personal relationships, beliefs and behavior are raised and pressed which are unnecessary for a determination of continuing eligibility").

society by concealing or changing their defining trait.[51] Yoshino arrives at this conclusion by analyzing the Court's practice of employing rational basis scrutiny to claims by groups seeking relief under the Fourteenth Amendment's guarantee of equal protection of the laws—that is, denying relief unless the problematic law burdens a fundamental right or the burdened group possesses an "immutable" and "visible" trait that, combined with a history of discrimination and political powerlessness, makes it a "suspect class.[52] If a group demonstrates the immutability and visibility of its defining trait, however, the Court will employ a heightened scrutiny to its

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[51] Yoshino, *supra* note 8, at 490. Heightened scrutiny is commonly understood to include both "strict" and "intermediate" scrutiny—although there has been some question as to whether there is really any difference between the two levels. *See* Cass R. Sunstein, *Foreword: Leaving Things Undecided*, 110 HARV. L. REV. 4, 75 (1996) (noting that the intermediate scrutiny standard "has operated quite strictly 'in fact'"). What is clear, however, is that rational basis scrutiny *is not* heightened scrutiny. Moreover, rational basis review tends not to lead to the invalidation of statutes, as all that is required is that the classification have a rational relationship to a legitimate government interest. *See* Cleburne v. Cleburne Living Center, 473 U.S. 432, 440 (1985) ("The general rule is that legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest."). However, *Cleburne* is a bit anomalous insofar as the Court determined that an ordinance requiring the issuance of a permit to construct a home for the "mentally retarded" was unconstitutional while denying that the "mentally retarded" were a "suspect" or "quasi-suspect" class and consequently, using what it called "rational basis scrutiny." *Id.* at 446. *See also* Romer v. Evans, 517 U.S. 620 (1996) (striking down as unconstitutional an amendment to the Colorado state constitution that prohibited laws that protected "homosexual persons" while using what the Court claimed was a rational basis review); Plyer v. Doe, 457 U.S. 202 (1982) (striking down a statute that permitted Texas public schools to refuse to enroll undocumented children as unconstitutional while using "rational basis review").

[52] *See* Bowen v. Gilliard, 483 U.S. 587 (1987) (concluding that the group seeking relief under the Fourteenth Amendment was not a "'suspect' or 'quasi-suspect' class" because "[a]s a historical matter, they have not been subjected to discrimination; *they do not exhibit obvious, immutable, or distinguishing characteristics* that define them as a discrete group; and they are not a minority or politically powerless") (citing Lyng v. Castilo, 477 U.S. 635, 638 (1986)) (emphasis added). Yoshino reads "obvious" and "distinguishing" as synonymous with "visible." Yoshino, *supra* note 8, at 496 ("[T]he words 'obvious' and 'distinguishing' stand as proxies for the concept of visibility.")

claim—increasing the likelihood that the Court will deem the offending statute unconstitutional.[53]

Yoshino turns his attention to the visibility factor, endeavoring to divine what exactly the Court means with its requirement that a group have a "visible" defining characteristic. He distinguishes between "effective corporeal visibility" and "effective social visibility,"[54] explaining that, "[b]y corporeal visibility, [he] means the perceptibility of traits such as skin color that manifest themselves on the physical body in a relatively permanent and recognizable way. Social visibility, on the other hand, designates the perceptibility of nonphysical traits."[55] Because the Court has deemed "visibility" to be a disempowering trait, Yoshino surmises that the Court means "corporeal visibility" when it requires a group to have a "visible" defining characteristic. On the contrary, social visibility—traditionally understood as a "proxy for political power" and commonly indicated by "a group's presence in the 'nation's decisionmaking councils' or its ability 'to attract the attention . . . of lawmakers'"[56]—is *empowering* in precisely the way that corporeal visibility, and the ability to be discriminated against on the basis of one's physical features, is not.

A. Social Visibility v. State Visibility

It is illuminating to put Yoshino's concepts of social visibility and corporeal visibility in conversation with the

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[53] Heightened scrutiny under the guise of strict scrutiny has so often led to the invalidation of statutes that the Court has felt compelled to "dispel the notion that strict scrutiny is 'strict in theory but fatal in fact.'" Adarand Constructors v. Peña, 515 U.S. 200, 237 (1995). That strict scrutiny does not invariably lead to the conclusion that a statute is unconstitutional is verified by *Grutter v. Bollinger*, in which the Court employed strict scrutiny to the University of Michigan Law School's race-conscious admission policy, yet held it constitutional under the theory that the state's interest in "diversity" among student bodies was compelling. 539 U.S. 306, 325 (2003).

[54] By "effective visibility," Yoshino means that the trait must be visible on most, but not all, of the physical bodies of group members; further, while it may be possible to make the trait invisible in some cases, such hiding is difficult. Yoshino, *supra* note 8, at 494, 497.

[55] *Id.*

[56] *Id.* at 498–99.

concept of state visibility described above. To begin, it appears that social visibility and state visibility exist in an inverse relationship. That is, if social visibility has been conceptualized as empowering, state visibility and the ability of the state to violate privacy rights by demanding answers to personal, intimate questions—possibly as a precursor to a more radical invasion into the subject's private sphere—is radically disempowering. Moreover, it is difficult to imagine that the poor, pregnant women who must depend upon state subsidized prenatal health care would make laws that compel their state visibility if they possessed the social visibility that the Court describes and, as a consequence, sat on the "nation's decisionmaking councils."[57] It is unlikely that such women would pass a law that requires them to surrender access to their private lives—a sphere that has been highly protected throughout our history and whose violation has a close relationship with the concept of human dignity[58]—in exchange for state assistance. Furthermore, while the state visible, poor, pregnant woman has certainly "attracted the attention of lawmakers," (a fact that the Court reads as indicative of social

[57] Yoshino, *supra* note 8, at 499.

[58] *Id.*

visibility),[59] the recent attention that she has received has not been advantageous, as governments react to budget crises by

[59] This was the argument made in *Cleburne v. Cleburne Living Center*, in which a majority argued that the "mentally retarded" could not be considered politically powerless, or socially invisible, because they had been the subjects of legislation designed to address their needs. 473 U.S. 432, 445 (1985) ("[T]he legislative response, which could hardly have occurred and survived without public support, negates any claim that the mentally retarded are politically powerless in the sense that they have no ability to attract the attention of the lawmakers."). Analogously, some may dispute the claim that the women who receive PCAP/Medicaid coverage of their healthcare expenses during their pregnancies have little social visibility, arguing that the PCAP/Medicaid program is *made possible* by lawmakers having given their attention to this group. Accordingly, to argue that the group is socially invisible denies the fact that they are the beneficiaries of legislation designed to address their specific needs. However, this argument is unconvincing because it does not distinguish between the *types* of attention that groups can receive from lawmakers. In essence, simply because a group has "attracted the attention of lawmakers" and is the subject of legislation does not mean that the legislation is purely designed to benefit them. As poverty law scholar Stephen Loffredo has written, "Indeed, history documents that superficially 'favorable' treatment of the poor often reflects a politics of subordination." Stephen Loffredo, *Poverty, Democracy and Constitutional Law*, 141 U. PA. L. REV. 1277, 1320 (1993). *See also* FRANCIS F. PIVEN & RICHARD A. CLOWARD, REGULATING THE POOR: THE FUNCTIONS OF PUBLIC WELFARE 17–23 (1971) (arguing that social welfare programs are a social control measure that regulate the poor); Derrick Bell, *The Civil Rights Chronicles*, 99 HARV. L. REV. 4, 18–19 (1985) (describing social welfare programs as "crumbs" that prevent "true reform"). Moreover, the fact that a group has been the beneficiary of legislation may simply indicate that they are, in fact, politically powerless, vulnerable, and in need of protection. *See* Darren Lenard Hutchinson, *"Unexplainable on Grounds Other than Race": The Inversion of Privilege and Subordination in Equal Protection Jurisprudence*, 2003 U. ILL. L. REV. 615, 656 (2003) ("Rather than indicating political power, these protective measures actually demonstrate the vulnerability of the class and a growing recognition that lawmakers and courts should remedy the harm inflicted upon the class.").

cutting funding to services that assist her.[60] In this way, one could reasonably conclude that state visibility indicates the social invisibility of the group; and, inversely, a group's social visibility likely denotes its state invisibility.

B. Corporeal Visibility v. State Visibility

The question of the relationship between state visibility and corporeal visibility also merits consideration. To begin an exploration of this relationship, one might consider that the Court's refusal to give heightened scrutiny to the claims of groups who lack a corporeally visible defining trait is a byproduct of the Court's conceptualization of race (and sex) as a visible mark upon the body. Race, within equal protection doctrine, is something that you can *see*. Differently stated, racial and sexual truths are not found somewhere *beneath* or *beyond* the skin; rather, they reside *on* the skin and can be seen by any observing eye. In some exciting recent scholarship, this commonsensical racial ontology, which has been accepted by the Court for years, has been disputed by race theorists. Americanist Robyn Wiegman has described race as a construct in the United States that has been thought to be visible on the skin at some historical moments, yet at other periods in history has been conceptualized as an invisible truth locatable *beneath* the surface of the skin.[61] She explores the work of natural historian François Bernier, who was one of the first to eschew "the prevailing geographical classificatory system of human beings by locating skin as the single characteristic on which human organization

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[60] Recently, New York Governor David Paterson proposed to cut close to $1.6 billion in Medicaid and other health care funding over the course of two years in order to correct the state's budget deficit. *See* Danny Hakim, *Paterson Calls for $5.2 Billion in Budget Saving*, N.Y. TIMES, Nov. 13, 2008, at A1. While the proposed cuts to Medicaid would not have affected poor pregnant women *exclusively*, it would have certainly affected them greatly. President Obama's stimulus package, passed in early 2009, staved off the dramatic cuts in Medicaid funding that were proposed, as the federal package gave more than $11 billion in Medicaid financing to New York over twenty-seven months. See Ray Rivera, *At 24.6 Billion, State's Stimulus Aid Exceeds Expectations*, N.Y. TIMES, Feb. 15, 2009, at A34.

[61] WIEGMAN, *supra* note 44, at 21 ("[T]he visible has a long, contested, and highly contradictory role as the primary vehicle for making race 'real' in the United States.").

would depend."[62] In the evolution of racial sciences, natural history eventually gave way to comparative anatomy and racial biology, which, Wiegman argues, threatened the confidence that one could have in race as a *visible* category.[63] If the truth of race was found in the biology of individuals, then the naked eye was woefully incapable of assessing an individual's race.[64] She writes:

> While the visible must be understood as giving way to the authority of the invisible recesses of the body, to organs and functions, the full force of this production of racial discourse was nonetheless contingent on the status of the observer, whose relation to the object under investigation was mediated and deepened by newly developed technologies for rendering the invisible visible. To a great degree, the inauguration of biology rested on the inadequacy of the eye to penetrate surfaces, requiring instead the enhancement of apparatuses that perfected its limitations and enabled it to exceed the boundaries of its own physicality.[65]

When racial truths are locatable in the body but beneath the skin, one might argue that race is corporeal. But inasmuch as the "visible" in the phrase "corporeally visible" references an eye unaided by the "calipers, cephalometers, craniometers, craniophores, craniostats, and pariel goniometers" . . . that overcame the limited specificity of the 'naked' eye'[66]—inasmuch as the "visible" refers to the actor who would discriminate against a person based on what the actor, without

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[62] *Id.* at 27.

[63] *Id.* at 30.

[64] *Id.* at 31.

[65] *Id.* at 31–32.

[66] *Id.* at 32.

the assistance of technologies, *sees*—it is inaccurate to refer to race as a corporeally visible trait.

Saidiya Hartman complements Wiegman's analysis by looking to legally-enforced segregation, the institution of Jim Crow, and anti-miscegenation statutes as attempts to address the failure of the naked eye to assess racial truth.[67] She writes that lawmakers' efforts to control the contact that White people would have with Black people were due, in part, to the anxiety produced by the realization that, after decades of interracial sex and procreation, Blackness (defined as the presence of Black ancestry within a person's family history) was no longer always discernible on the skin.[68] Laws forbidding interracial proximity were products of the fact that, frequently, "race exceeded the realm of the visually verifiable."[69] Laws that regulated if, when, and how Black and White persons would come into contact with one another enabled everyone to know, in the face of the inability of the eye to accurately see race, the racial truth of the person with whom they interacted.[70] She writes, "[b]lood functioned as the metaphysical title to racial property. Yet, as there was no actual way to measure blood, the tangled lines of genealogy and association—more accurately, the prohibition of association—thus determined racial identity."[71] Accordingly, one *knew* the Blackness of a woman because, although the eye counseled that her fair skin, aquiline nose, and straight hair indicated Whiteness, the fact that she rode in the Black section of the bus, lived in the Black neighborhood, married a Black man, and kept nothing but Black company revealed her to be, quite definitively, a Black woman.

Although comparative anatomy and *de jure* segregation have been relegated to the lamentable past, the interventions of Wiegman and Hartman are applicable to the contemporary period because not only do we live in a period of *de facto*

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[67] SAIDIYA V. HARTMAN, SCENES OF SUBJECTION: TERROR, SLAVERY, AND SELF-MAKING IN NINETEENTH-CENTURY AMERICA (1997).

[68] *Id.* at 195.

[69] *Id.*

[70] *Id.*

[71] *Id.*

segregation, which enables us to know the race of persons with reference to their residences, romantic partnerships, and friendships, but also because it remains true that our ability to *know* the race of the person we see still depends on our training in the "proper" modes of seeing race and not on some notion of the naked eye. On this point, and building off of the sociology of Erving Goffman, Yoshino writes, "There is no such thing as a purely biological visible trait. . . . Whether a trait is visible will thus depend not only on the trait but also on the 'decoding capacity of the audience,' which in turn will depend on the social context."[72] And so, we know that we are seeing a Black person when she tells us that she lives in the Overtown section of Miami, Florida or that she went to a historically Black college or university. We know to look for wide noses, thick lips, and kinky hair for evidence of Blackness,[73] and we know that even in the absence of wide noses, thick lips, or kinky hair, we still may be "seeing" a Black person.

While there has been much convincing scholarship suggesting that race ought to be understood not as some truth that is, visibly or invisibly, lodged somewhere in the body, but

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[72] Yoshino, *supra* note 8, at 498.

[73] WIEGMAN, *supra* note 44, at 21 (quoting NELLA LARSEN, PASSING 40–41 (1929)).

rather as a construct that is constituted by *social practices*,[74] the Court steadfastly persists in offering "corporeal visibility" as a description of race. And although this is a problematic formulation—saying that race is corporeally visible naturalizes the constructedness of that visibility while eliding the processes that frequently make race a visible phenomenon—it may prove insightful to accept the Court's formulation of race for the moment. If we appreciate race as something that, at the end of the very long day, is a fact that is visible on the skin, we can then observe that the *corporeally visible* are also those that comprise the ranks of the *state visible*. That is, while this Article has posited that there is an indirect relationship between social visibility and state visibility, there appears to be a direct relationship between state visibility and corporeal visibility.

While there are no statistics readily available that show the enrollment in PCAP/Medicaid by race, it is reasonable to assume that racial minorities are overrepresented among those enrolled in the program. A report written by the United States General Accounting Office supports this assumption, documenting that racial minorities are more likely to be

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[74] In a different vein, socio-cultural anthropologist Kamala Visweswaran has convincingly argued that social practices of violence and subordination have coalesced various peoples—expressing varying phenotypes and possessing divergent cultural histories—into races. She writes:

> The middle passage, slavery and the experience of racial terror produce a race of African Americans out of subjects drawn from different cultures. Genocide, forced removal to reservations, and the experience of racial terror make Native Americans subjects drawn from different linguistic and tribal affiliations: a race. War relocation camps, legal exclusion, and the experience of discrimination make Asian American subjects drawn from different cultural and linguistic backgrounds: a race. The process of forming the southwestern states of the United States through conquest and subjugation and the continued subordination of Puerto Rico constitute Chicanos and Puerto Ricans as races.

Kamala Visweswaran, *Race and the Culture of Anthropology*, 100 AM. ANTHROPOLOGIST 70, 78 (1998).

uninsured than their White counterparts.[75] One third of Latinos and one fifth of Black persons residing in the United States were uninsured, compared to one eighth of White persons.[76] The severe overrepresentation of Latinos among the uninsured is explained by the fact that many Latinos are undocumented laborers and, consequently, are not eligible to receive health

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[75] GEN. ACCOUNTING OFFICE, HEALTH INSURANCE: CHARACTERISTICS AND TRENDS IN THE UNINSURED POPULATION 13 (2001). The report deems as "uninsured" all those who lack any type of health insurance—whether through private employer-based insurance or public insurance like Medicaid and SCHIP. *Id.* at 7. Accordingly, women who receive PCAP/Medicaid health insurance during their pregnancies are not counted among the uninsured in the General Accounting Office ("GAO") report.

Racial minorities are disproportionately represented among the uninsured in the United States because persons with low incomes are most likely to be uninsured. *Id.* at 2. When this datum is considered together with the statistics describing Black people and other racial minorities as poorer than their White counterparts, then one can trace how racial minorities come to preponderate in the sphere of the uninsured. *See* CARMEN DENAVAS-WALT ET AL., U.S. DEP'T OF COMMERCE, INCOME, POVERTY, AND HEALTH INSURANCE COVERAGE IN THE UNITED STATES: 2006, at 11–12, *available at* http://www.census.gov/prod/2007pubs/p60-233.pdf (showing that 8.2% of White persons live in poverty, while 24.3% and 20.6% of Black and Hispanic persons live in poverty, respectively). Moreover, the GAO report notes:

> Those working in certain industries are less likely to be offered health insurance and face a greater risk of being uninsured. In 1999, more than 30 percent of workers in the construction, agriculture, and natural resources (for example, mining, forestry, and fisheries) industries were uninsured. In contrast, 10 percent or less of workers in the finance, insurance, real estate, and public employment sectors were uninsured.

GEN. ACCOUNTING OFFICE, *supra*, at 9. Other data show that White persons tend to be quite numerous in the latter industries, while Black and Hispanic persons tend to be represented more frequently in the former industries. *See* PEW HISPANIC CENTER, STATISTICAL PORTRAIT OF HISPANICS IN THE UNITED STATES: 2006, *available at* http://pewhispanic.org/files/factsheets/hispanics2006/Table-25.pdf (showing in TABLE 25 that White persons dramatically outnumber Black and Hispanic persons in the "management" and "business operations" industries, while being significantly less represented in the "farming, fishing, and forestry" and "construction trades" industries).

[76] GEN. ACCOUNTING OFFICE, *supra* note 75, at 12.

insurance under public programs like Medicaid.[77] When one considers that the PCAP/Medicaid program is designed to offer health insurance to uninsured persons during their pregnancies, and when one further considers that PCAP/Medicaid dismantles the legal barriers that function to preclude undocumented laborers' access to Medicaid by allowing all low-income persons to enroll in the program without regard to immigration status,[78] one can reasonably conclude that the ranks of PCAP/Medicaid are filled with the racial minorities that disproportionately comprise the ranks of the uninsured in the United States.[79]

The racial minorities that are overrepresented in the PCAP/Medicaid program are those same persons whose racial truths are thought to be visible on their physical bodies—in the color of their skin, the texture of their hair, the features of their faces. In other words, the racial minorities of PCAP/Medicaid are the corporeally visible of Supreme Court equal protection

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[77] *Id.* at 14.

[78] *See* NYSDOH, DOCUMENTATION GUIDE, *supra* note 18, at 5 (stating that "undocumented pregnant women continue to be eligible for PCAP").

[79] Furthermore, the Author's ethnographic fieldwork in the Alpha obstetrics clinic supports the conclusion that PCAP/Medicaid enrollees tend to be racial minorities. The overwhelming majority of patients who received their prenatal care from Alpha relied upon PCAP/Medicaid to cover the costs of their prenatal healthcare. Moreover, the vast majority of patients served by this particular clinic were racial minorities.

jurisprudence.[80] Moreover, when one considers the earlier discussion exploring the extent to which the informational canvassing of women accomplished by PCAP/Medicaid upon their enrollment can be understood as producing their state

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[80] This statement implies that White people do not have a race that is corporeally visible. Much ink has been spilled in exploring the dangers accompanying the conceptualization of Whiteness as a *lack* of racial specificity. *See, e.g.*, DAVID R. ROEDIGER, TOWARDS THE ABOLITION OF WHITENESS: ESSAYS ON RACE, POLITICS, AND WORKING CLASS HISTORY 13 (1994) ("Whiteness describes, from Little Big Horn to Simi Valley, not a culture but precisely the absence of culture. It is the empty and therefore terrifying attempt to build an identity based on what one isn't and whom one can hold back."). The Author does not wish to replicate this error here. However, in order to make the present analysis speak to the Court's doctrine, the Author uses corporeally visible here in the manner in which it has been deployed in equal protection jurisprudence—that is, to refer to racial minorities.

Interestingly, one could argue that, in its move from using heightened scrutiny on laws that discriminate against certain classes to using heightened scrutiny on laws that employ certain classifications, and in its consequent move to grant heightened scrutiny to the equal protection claims made by White persons, the Court has accepted a nuanced, progressive understanding of race. *See* Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 224 (1995) ("[T]he standard of review under the Equal Protection Clause is not dependent on the race of those burdened or benefited by a particular classification") (quoting City of Richmond v. J.A. Croson Co., 488 U.S. 469, 494 (1989)) (plurality opinion). *See also* Hutchinson, *supra* note 59, at 638–39 ("[O]nce a subordinate class successfully established that the discrimination it faces warrants exacting judicial scrutiny, the Court applies heightened scrutiny and extends judicial solicitude to any individual who encounters discrimination based on the 'same' trait as members of a subordinate class. The Court's doctrine shifts from one that protects suspect 'classes' to one that presumes the unconstitutionality of certain suspect 'classifications.'"); Yoshino, *supra* note 8, at 563 ("The class-based view of equal protection states that the courts should focus on disempowered classes, like blacks, women, or gays. The classification-based view states that courts should focus not on classes but on the classifications that create the classes—such as race, sex, or sexual orientation."). That is, recent Supreme Court equal protection jurisprudence may counsel that "corporeal visibility" no longer refers to racial minorities, but also *White* people—who are as visibly racially marked as Black people. While the Court's suggestion that Whiteness possesses as much visible racial specificity as Blackness is laudable, in practice, of course, the conceptualization of White and Black as equivalent racial categories denies the history of those categories. The former was a privileged position, while the latter was the position of unprivilege. Accordingly, the Court's acceptance of a progressive understanding of race must not be divorced from social context. Unfortunately, this is what the Court's present jurisprudence and its insistence upon using heightened scrutiny to all race-conscious legislation—including those laws attempting to address the effects of this country's history of racial subordination—accomplish.

visibility, then we can see how state visibility and corporeal visibility relate. PCAP/Medicaid functions to make subjects' corporeal visibility intersect with their state visibility. The result is that the poor, pregnant women who are members of racial minority groups, and who depend upon the state for health insurance during their pregnancies, are *radically* visible—on a multiplicity of levels.

Moreover, when we understand race to be the product of social practices that, among other things, help us make sense of the visual cues that we see on a person's skin, state visibility appears to be a social practice that constitutes race. If a person's avowed history of having lived in the Overtown section of Miami, Florida or having attended a historically Black college or university helps us to interpret her corporeal body as exhibiting "signs of Blackness," then a person's history of having her right to privacy nullified and having been exposed to the possibility of state surveillance similarly helps us to "see" her corporeal visibility. State visibility is a social practice constitutive of race.

This Part has explored the status of the corporeally visible in equal protection jurisprudence. The next Part shifts to an analysis of poverty and the poor in equal protection jurisprudence in order to continue to explore the relationship between the concepts of corporeal visibility and state visibility. State visibility, it is important to reiterate, is an effect of *poverty*. Because the poor have not been found to be a suspect class within equal protection doctrine, and because wealth has not been found to be a suspect classification, laws that discriminate against the poor who comprise the state visible are not subject to heightened scrutiny. However, when corporeal visibility is revealed to inform state visibility, and fundamentally so, as the next Part argues, it leads to the conclusion that the state visibility of a group, like corporeal visibility, is a justification for applying heightened scrutiny to their equal protection claims.

III. THE CONSTITUTION, POVERTY, AND STATE VISIBILITY

The above discussion regarding corporeal visibility and state visibility yields some insights that may be productively applied to equal protection doctrine. Specifically, it raises the question of whether heightened scrutiny should be limited to groups that are corporeally visible. Or, perhaps, are the state

visible similarly deserving of heightened scrutiny? Because that which unites all of the state visible is a low income (that is, the ability to come within the income limitations of PCAP/Medicaid eligibility),[81] it is instructive to review the current status of the poor and poverty within equal protection jurisprudence before embarking on an exploration of state visibility as a justification for heightened scrutiny.

A. Brief History of the Status of the Poor within Constitutional Law

In all equal protection cases, the Court employs a two-step analytical approach. The Court will ask whether the interest affected by the legislation or action is specifically protected in the Constitution, and is therefore "fundamental," or whether the legislation applies to a "suspect" class or uses a "suspect" classification.[82] If either of those two conditions is found, the Court will employ a heightened scrutiny in its analysis. It should be noted that there are levels of scrutiny within the "heightened scrutiny" rubric—including both strict and intermediate

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[81] Pregnancy also unites all of the state visible inasmuch as PCAP/Medicaid is only available to those who are presently pregnant. However, the Author brackets an exploration of the relationship between pregnancy and corporeal visibility for the moment and will take up the topic at a later time.

[82] Plyler v. Doe, 457 U.S. 202, 216–17 (1982) ("[W]e have treated as presumptively invidious those classifications that disadvantage a 'suspect class,' or that impinge upon the exercise of a 'fundamental right.' With respect to such classifications, it is appropriate to enforce the mandate of equal protection by requiring the State to demonstrate that is classification has been precisely tailored to serve a compelling governmental interest.").

scrutiny.[83] When the Court employs intermediate scrutiny, it requires that the legislation be aimed at achieving an "important governmental interest."[84] Alternatively, when the Court employs strict scrutiny, it requires that the legislation be aimed at achieving a "compelling governmental interest."[85] If, however, the legislation neither affects a fundamental interest nor applies to a "suspect" class or uses a "suspect" classification, then the Court will employ a deferential rational basis review of the law, requiring only that the legislation has a rational relationship to some legitimate governmental purpose.[86] As discussed earlier, the Court's use of strict scrutiny tends to lead to the invalidation

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[83] Strict scrutiny is used in cases involving discrimination based on race, national origin, and, subject to several exceptions, citizenship status. Intermediate scrutiny is used in cases involving gender discrimination and discrimination against nonmarital children. See Erwin Chemerinsky, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 671 (3d ed. 2006). The Court has not always been very clear regarding which level of scrutiny it is using and how the scrutiny is being used. *See supra* note 13 and accompanying text; *see also* Chemerinsky, CONSTITUTIONAL LAW, *supra*, at 673 ("The claim is that in some cases where the Court says that it is using rational basis review, it is actually employing a test with more 'bite' than the customarily deferential rational basis review. Similarly, it is argued that in some cases intermediate scrutiny is applied in a very deferential manner that is essentially rational basis review, while in other cases intermediate scrutiny seems indistinguishable from strict scrutiny.").

[84] Craig v. Boren, 429 U.S. 190, 197 (1976) (noting that in order for a piece of legislation to withstand intermediate scrutiny, it "must serve important governmental objectives and must be substantially related to those objectives").

[85] Grutter v. Bollinger, 539 U.S. 306, 326 (2003) ("We have held that all racial classifications imposed by government must be analyzed by a reviewing court under strict scrutiny. This means that such classifications are constitutional only if they are narrowly tailored to further compelling governmental interests.") (citations and internal quotation marks omitted).

[86] M.L.B. v. S.L.J., 519 U.S. 102, 115–16 (1996) ("Absent a fundamental interest or classification attracting heightened scrutiny . . . the applicable equal protection standard is that of rational justification.") (quoting Ortwein v. Schwab, 410 U.S. 656, 660 (1973))); Heller v. Doe, 509 U.S. 312, 319–20 (1993) ("[A] classification neither involving fundamental rights nor proceeding along suspect lines is accorded a strong presumption of validity. Such a classification cannot run afoul of the Equal Protection Clause if there is a rational relationship between the disparity of treatment and some legitimate governmental purpose.").

of the legislation, while its use of rational review tends to lead to a finding of constitutionality.[87]

The Court has come to use rational basis review when hearing equal protection challenges to legislation that adversely impacts the poor.[88] This is because there are no social or economic rights specifically provided in the text of the Constitution;[89] accordingly, laws that deny the poor basic subsistence—like food, clothing, or shelter—do not affect

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[87] *See supra* notes 45–46 and accompanying text.

[88] *See* Harris v. McRae, 448 U.S. 297, 323 (1980) ("[T]his Court has held repeatedly that poverty, standing alone, is not a suspect classification.")

[89] Nice, *supra* note 46, at 629 (noting the "lack of social welfare rights in the United States Constitution").

"fundamental" interests or rights.[90] Moreover, the Court has refused to find "the poor" to be a suspect class; similarly, it has refused to find that wealth (or lack thereof) is a suspect classification.[91] The result is that laws that negatively affect the

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[90] Interestingly, *Goldberg v. Kelley*, which held that beneficiaries of public assistance were entitled to a fair hearing prior to the termination of their benefits, contained language which could be interpreted to argue that the very text of the Preamble to the Constitution implied the existence of social welfare rights. 397 U.S. 254 (1970). The Court argued, "Welfare, by meeting the basic demands of subsistence, can help bring within the reach of the poor the same opportunities that are available to others to participate meaningfully in the life of the community. At the same time, welfare guards against the societal malaise that may flow from a widespread sense of unjustified frustration and insecurity. Public assistance, then, is not mere charity, but a means to 'promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity.'" *Id.* at 264–65.

Robin West has made an interesting argument that the Fourteenth Amendment may also imply social welfare rights, consequently making laws that deny basic subsistence to the poor violations of "fundamental" rights. She provocatively asks "whether the Fourteenth Amendment's various guarantees, but particularly the guarantee of 'equal protection of the laws,' imply the existence of Constitutionally protected social or economic welfare rights, such as to guarantee to poor people a minimally decent life." Robin West, *Katrina, the Constitution, and the Legal Question Doctrine*, 81 CHI.-KENT L. REV. 1127, 1134 (2006). *But see id.* at 1140 (noting that, although the history of the equal protection clause suggests that it empowered the states to protect its citizens against private wrongs, "this does not logically entail an argument for positive welfare rights"). She writes that the intention of the Equal Protection clause may be perverted when it is interpreted to mean solely that states must protect its subjects from discriminatory laws. *Id.* at 1137. She argues that such an interpretation ignores the plain language of the amendment: "What has gone relatively unnoticed . . . is the fate of the two-letter preposition of, in the phrase 'equal protection of law.' The 'of' in the phrase 'of law,' in the Court's reading of the Amendment, has been effectively replaced by the preposition 'against.'" *Id. at 1137.* When the "of" is not replaced by "against," the law becomes a tool with which the state can guarantee some level of substantive equality to its subjects, rather than merely an evil against which subjects must be protected. *Id.* at 1136.

[91] *See Harris*, 448 U.S. at 323.

poor are reviewed under the highly deferential standard and, consequently, are almost invariably found to be constitutional.[92]

The status of the poor as a non-suspect class begins at *Dandridge v. Williams*, which involved a challenge to Maryland's administration of the Aid to Families with Dependent Children ("AFDC") program.[93] The state provided grants to families based on a statutorily defined "standard of need," which increased in incremental amounts as the size of the family increased.[94] However, the state also imposed a ceiling on the size of the grant any one family unit could receive.[95] The outcome was that families consisting of seven persons or more were given grants that did not cover their "standard of need."[96] The Court found the state's program constitutional under a rational basis review.[97] It justified its use of the deferential standard by asserting, "[H]ere[,] we deal with state regulation in the social and economic field, not affecting freedoms guaranteed by the Bill of Rights, and claimed to violate the Fourteenth Amendment only because the regulation results in some disparity in grants of welfare payments to the largest AFDC families."[98] The Court found that the statute's classification of families in terms of size—large (more than six members)

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[92] Nice has argued that the use of rational basis scrutiny when reviewing laws that negatively impact the poor need not necessarily lead to a finding of their constitutionality. She argues that the Court might apply a rationality review "with bite"—as it has done for "hippies," U.S. Dep't of Agric. v. Moreno, 413 U.S. 528, 534–35 (1973); mentally disabled people, City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 435 (1985); and gay people, Romer v. Evans, 517 U.S. 620, 626–27 (1996)—in order to invalidate laws that burden the poor. Nice, *supra* note 46, at 636, 649. Instead, she argues, the Court has applied rationality review "reflexively, that is mechanically, and routinely has upheld governmental actions that burden those living in poverty." *Id.*

[93] 397 U.S. 471 (1970).

[94] *Id.* at 473–74.

[95] *Id.* at 473.

[96] *Id.* at 490 (Douglas, J., dissenting).

[97] *Id.* at 487.

[98] *Id.* at 484.

indigent families versus small indigent families—was not constitutionally infirm because:

> In the area of economics and social welfare, a State does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect. If the classification has some "reasonable basis," it does not offend the Constitution simply because the classification is not made with mathematical nicety or because in practice it results in some inequality.[99]

The Court concluded that it was "reasonable" for the state of Maryland to impose a ceiling on AFDC grants because of its "legitimate interest in encouraging employment [and] in

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[99] Dandridge v. Williams, 397 U.S. 471, 485 (1970) (internal quotations omitted). While *Dandridge* concerned a regulation that discriminated among groups of poor persons, a year after *Dandridge* was decided the Court in *James v. Valtierra*, used rational review to uphold a piece of legislation that discriminated against poor people *as a group*. 402 U.S. 137 (1971). The case concerned a California law that required that, prior to the construction of low rent housing—defined as "any development composed of urban or rural dwellings, apartments or other living accommodations for persons of low income"—the project must be subjected to a referendum and approved by a majority of those voting. *Id.* at 139. And although the classification used in the legislation explicitly affected the poor—indeed, the law defined the "low income" persons affected by the statute as those "who lack the amount of income which is necessary . . . to enable them, without financial assistance, to live in decent, safe and sanitary dwellings, without overcrowding," *id.* at 139—the Court declined to use heightened scrutiny under the theory that "the poor" were a "suspect" class when reviewing the statute. *Id.* at 141. *But see id.* at 144–45 (Marshall, J., dissenting) ("[The California law] is neither a law of general applicability that may affect the poor more harshly than it does the rich, nor an effort to redress economic imbalances. It is rather an explicit classification on the basis of poverty—a suspect classification which demands exacting judicial scrutiny." (quoting Douglas v. California, 372 U.S. 353, 361 (1963)) (citations omitted)). Instead, the Court found that the law was constitutional on the theory that "a lawmaking procedure that 'disadvantages' a particular group does not always deny equal protection." *Id.* at 142 (majority opinion).

avoiding discrimination between welfare families and the families of the working poor."[100]

Concluding that the Maryland law that capped the size of an AFDC grant could be described as "state regulation in the social and economic field,"[101] *Dandridge* enabled legislation that impacted the social welfare of the poor to be analogized to laws

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[100] *Dandridge*, 397 U.S. at 486. *Dandridge* represents an about-face from the direction in which the Court's poverty law jurisprudence was heading in the prior term. In *Harper v. Virginia Board of Elections*, in which the Court held that a state poll tax was unconstitutional, the Court said, in dictum, "Lines drawn on the basis of wealth or property, like those of race, are traditionally disfavored." 383 U.S. 663, 668 (1966). More cogently, in *McDonald v. Board of Election Commissioners of Chicago*, in which the Court struck down a law that prevented incarcerated persons who were incapable of posting bail from voting, the Court said, in dictum, "[A] careful examination on our part is especially warranted where lines are drawn on the basis of wealth or race, two factors which would independently render a classification highly suspect and thereby demand a more exacting judicial scrutiny." 394 U.S. 802, 807 (1969). And then there was the expansive language in *Goldberg v. Kelley*, conceivably arguing that the Constitution implied the existence of social welfare rights.[100] *See* discussion *supra* note 90 and accompanying text. The Court appeared to be on a path to the conclusion that classifications on the basis of wealth or poverty were suspect, or that legislation which functioned to deny the poor basic social or economic needs infringed upon "fundamental" rights—a finding of either of which would warrant heightened scrutiny from the reviewing Court. Accordingly, *Dandridge* clearly did not follow the path suggested by *Harper*, *McDonald*, and *Goldberg*.

[101] *Dandridge*, 397 U.S. at 484.

that regulated business.[102] Once the analogy was made, the Court could raise the specter of *Lochner* in arguing that it ought to defer to the wisdom of the legislature when reviewing such

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[102] This was an analogy that Justice Marshall passionately resisted. *See, e.g., id.* at 529–30 (Marshall, J., dissenting) ("Appellees are not a gas company or an optical dispenser; they are needy dependent children and families who are discriminated against by the state."); *see also* Richardson v. Belcher, 404 U.S. 78, 90 (1971) (Marshall, J., dissenting) (arguing that while deferential review of "business regulations" was appropriate, it "has no place when the Court reviews legislation providing fundamental services or distributing government funds to provide for basic human needs"; "Judges should not ignore what everyone knows, namely that legislation regulating business cannot be equated with legislation dealing with destitute, disabled, or elderly individuals.").

It should be noted that while Justice Marshall frequently argued that laws discriminating against the poor ought to be reviewed with a more exacting scrutiny than rational basis review, he did not argue that this was because the poor were a "suspect" class or because such laws infringed upon "fundamental" rights. As a former Marshall clerk, Gary Gelhorn, has noted, Justice Marshall refused to use such categories because "he rejected the utility of labels as a means of applying the Equal Protection Clause. . . . His realist point was: 'All interests not "fundamental"' and 'all classes not "suspect"' are not the same." Gary Gelhorn, *Justice Marshall's Jurisprudence of Equal Protection of the Laws and the Poor*, 26 ARIZ. ST. L.J. 429, 436 (1994).

laws.[103] Since *Dandridge*, most legislation affecting the poor, as a class, has been reviewed under rational basis review.[104]

B. On the Discreteness and Insularity of the Poor

Many scholars have argued that the Court ought to reconsider its poverty law jurisprudence and begin to review laws that discriminate against the poor as a class with a heightened scrutiny. Of the persuasive arguments that have been made which urge the position, the ones most relevant to the

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[103] *Dandridge*, 397 U.S. at 484 ("For this Court to approve the invalidation of state economic or social regulation as 'overreaching' would be far too reminiscent of an era when the Court thought that the Fourteenth Amendment gave it power to strike down laws 'because they may be unwise, improvident, or out of harmony with a particular school of thought.' That era has long ago passed into history."). *See also* Loffredo, *supra* note 59, at 1291 (noting that, when the Court upholds laws that adversely impact the poor, it tends to "conclude by solemnly raising the *Lochner* bogey and forswearing any backslide toward the anti-democratic judicial adventurism of that era.").

[104] *See, e.g.*, Harris v. McRae, 448 U.S. 297, 323 (1980) ("[T]his Court has held repeatedly that poverty, standing alone, is not a suspect classification."); Maher v. Roe, 432 U.S. 464, 471 (1977) ("An indigent woman desiring an abortion does not come within the limited category of disadvantaged classes so recognized by our cases. . . . [T]his Court has never held that financial need alone identifies a suspect class for purposes of equal protection analysis."); San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 29 (1973) (noting, in dictum, "the fact that this Court has never heretofore held that wealth discrimination alone provides an adequate basis for invoking strict scrutiny").

Nice makes a convincing argument that while the Court continues to deny that the poor compose a suspect class, it has never explicitly answered *why* that is so. She argues that once the Court analogized social welfare regulation to business regulation, it felt free to avoid the question of whether the poor satisfied the criteria that the Court has used to determine whether a group should be considered suspect. Nice, *supra* note 46, at 648. She writes, "The Court has not given actual consideration to whether poor people meet the suspect class criteria or whether they need judicial protection because they have suffered historical discrimination, are unable to protect themselves in the political process, and find it difficult or sometimes impossible to reduce their poverty." *Id.*; *see also* Loffredo, *supra* note 59, at 1309 ("The Court [in *Dandridge*] did not pause to consider whether the poor are a politically subordinated out-group that might require special judicial protection."); *id.* at 1313 (arguing that "while the Court has made clear its refusal to extend special judicial protection to poor people, it has never adequately defended this position nor addressed the constitutional implications of a political system that functionally excludes a large segment of the nation's citizenry on account of poverty").

present discussion are those contending that legislation that discriminates against the poor may reveal a failure of the political processes that would, otherwise, ensure the repeal of laws that unfairly impact a group.[105] In other words, although the poor may not be a "discrete and insular" minority group that the famous footnote in *Carolene Products*[106] suggested might require special judicial solicitude when courts review legislation affecting them,[107] they nevertheless are sufficiently disenfranchised to justify heightened judicial scrutiny of laws that negatively affect them. As Bruce Ackerman has offered, "[T]he groups most disadvantaged by pluralism in the future will be different from those excluded under the old regime. The victims of sexual discrimination or poverty, rather than racial or religious minorities, will increasingly constitute the groups with the greatest claim upon *Carolene*'s concern for the fairness of pluralist process."[108]

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[105] Loffredo, *supra* note 59, at 1305. Loffredo articulates a "simple syllogism" that would yield the conclusion that legislation that discriminates against the poor ought to be subjected to some form of heightened scrutiny:

> (i) Courts need not defer to political outcomes where the 'democratic legitimacy' of the underlying political process has been called into question;
>
> (ii) Significant wealth-based inequalities of political access, influence, or representation seriously undermine the 'democratic legitimacy' of a political process;
>
> (iii) Courts need not defer to political outcomes traceable to significant wealth-based inequalities of political access, influence, or representation.

Id.

[106] United States v. Carolene Prods. Co., 304 U.S. 144 (1938).

[107] The relevant portion of footnote four reads: "Nor need we enquire whether similar considerations enter into the review of statutes directed at particular religious, or national, or racial minorities: whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry." *Id.* at 152 n.4 (internal citations omitted).

[108] Bruce A. Ackerman, *Beyond Carolene Products*, 98 HARV. L. REV. 713, 718 (1985).

Ackerman's position that the poor are excluded from the "discrete and insular" formulation is premised on the supposition that "discrete" means "visible."[109] To Ackerman, the poor are "invisible"—"anonymous" citizens hidden within the

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[109] *Id.* at 729 ("I propose to define a minority as 'discrete' when its members are marked out in ways that make it relatively easy for others to identify them.") Ackerman goes on to describe the "ease" of the "marks" possessed by his understanding of discrete minorities in terms of visibility. He writes, "For instance, there is nothing a black woman may plausibly do to *hide* that she is black or female. . . . [S]he will have to deal with the social expectations and stereotypes generated by her *evident* group characteristics." *Id.* (emphasis added). *But see* Loffredo, *supra* note 59, at 1348 ("Why Ackerman believes that a member of a group must be *visually* distinct under *Carolene* is not clear. . . . *Carolene* indisputably embraced religious minorities in its concept of discrete and insular groups, and while certain religious groups are 'marked out'—the Amish, for example, or Hasidic Jews—by and large it is no easier to discern the religious beliefs of passersby than their sexual orientation or economic status.").

Yoshino offers evidence that "discrete," as used in Justice Stone's *Carolene Products* footnote, might not have been intended to mean "visible." Yoshino, *supra* note 8, at 560 n.322. He looks to a dissent in which Justice Stone argued that Jehovah's Witnesses were a "discrete and insular minority," *Minersville School Dist. v. Gobitis*, 310 U.S. 586, 606 (1940) (Stone, J., dissenting), an argument that would seriously jeopardize the theory that he intended "discrete" to mean "corporeally visible" in the *Carolene* footnote. Interestingly, Justice Stone's clerk during the term in which *Carolene Products* was decided, Louis Lusky, disagrees with his Justice's subsequent use of "discrete," arguing that the Court erred in *Graham v. Richardson*, 403 U.S. 365 (1971), when it held that aliens constituted a "discrete and insular minority. For Lusky, aliens were *not* discrete, as many are "anglophones" who "pass unnoticed." Louis Lusky, *Footnote Redux: A Carolene Products Reminiscence*, 82 COLUM. L. REV. 1093, 1105 n.72 (1982). Yoshino suggests that the debate as to what was intended by "discrete" may be irrelevant, as most jurists and commentators now assume that "discrete" means "visible." Yoshino *supra* note 8, at 560 n.322 ("Nonetheless, it may be fairly contended that the word 'discrete' may have been interpreted to mean 'visible' by various courts that ignored, misunderstood, or rejected Justice Stone's subsequent use of the word in a dissenting opinion and relied instead on the text of Carolene Products.").

body politic.[110] However, does this "invisibility" and "anonymity" accurately describe the poor? Poverty frequently results in the marking of the body such that the "poor" person is as visible as the "Black" person. The poor frequently carry the badges of their poverty corporeally—with the asthma that has come to be the hallmark of residence in low-income neighborhoods,[111] with the obesity that comes consequent to "cheap" diets that are high in fats, carbohydrates, and sugars,[112] with the eyes that squint in the absence of corrective glasses or lenses, with the stained and/or missing teeth that do not have the

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[110] Ackerman, *supra* note 108, at 729 ("Blacks, for example, are both discrete and insular, whereas women are discrete yet diffuse; homosexuals are anonymous but may be somewhat insular, whereas the poor are both relatively anonymous and diffuse."). While this paper disputes the claim that the poor are "anonymous," Loffredo disputes the claim that the poor are "diffuse." He writes about the "spatial stigma" that the poor possess, resulting in their geographical segregation from the non-poor. Loffredo, *supra* note 59, at 1349. The segregation of poor from non-poor is also social: "[T]he poor are disconnected from the more affluent and suffer the social isolation that Ackerman points to as a defining characteristic of a discrete and insular minority. The absence of kinship between the haves and have-nots is manifest in the exit of the upper and middle classes from a shared community life and in ongoing assault on the notion of social welfare programs and receipts." *Id.* at 1350.

[111] One recent study reaffirms that persons living in poverty suffer from asthma at disproportionate rates. *See* SUSAN H. BABEY ET. AL, UCLA CENTER FOR HEALTH POLICY RESEARCH, LOW-INCOME CALIFORNIANS BEAR UNEQUAL BURDEN OF ASTHMA, 1 (2007) (reporting findings that "low-income families in California disproportionately experience negative consequences of asthma, such as frequent asthma symptoms, [emergency room] visits for asthma, school absenteeism and poor health status").

[112] Another recent study reaffirms that low income persons have greater rates of obesity. *See* Marilyn S. Townsend, *Obesity in Low Income Communities: Prevalence, Effects, a Place to Begin*, 106 J. AM. DIETETIC ASSOC. 34, 34 (2006) (stating that "overweight and obesity disproportionately affect people living in low-income communities" and looking to research that hypothesizes that the potential causes of this are the larger amounts of "higher-energy-dense foods eaten by low-income consumers" and that low-income persons are more likely to have "food insecurity," which is "positively associated with overweight among women").

benefit of regular dental check-ups,[113] with the bodies that die

[113] *See* JENNIFER HALEY ET AL., THE HENRY J. KAISER FAMILY FOUNDATION, ACCESS TO AFFORDABLE DENTAL CARE: GAPS FOR LOW-INCOME ADULTS 1 (2008) (stating that "over half of low income adults lack dental coverage and most go without routine dental care" and noting that this is especially problematic because "[u]ntreated oral health conditions can cause disfiguring tooth loss and decay").

earlier in the absence of preventative healthcare.[114]

Moreover, if "discrete" means visible, then why limit the visibility to corporeal visibility, as does Ackerman? As argued above, the pregnant poor receiving health insurance

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[114] *See* CONGRESSIONAL BUDGET OFFICE, GROWING DISPARITIES IN LIFE EXPECTANCY, ECONOMIC AND BUDGET ISSUE BRIEF (2008) (discussing the widening of the life expectancy gap across socioeconomic groups).

Sociologist Pierre Boudieu offers another theory for conceptualizing the corporeal visibility of poverty: the *habitus*. *See* PIERRE BOURDIEU, THE LOGIC OF PRACTICE 52–65 (Richard Nice trans., 1990). The *habitus* is history, cultural knowledge, and social institutions (like the economy, as well as race and gender) that have become embodied; accordingly, the socialized individual carries the past and present of her society in her body. *Id.* at 54. In one of his many definitions of the *habitus*, Bourdieu says, "The habitus—embodied history, internalized as a second nature and so forgotten as history—is the active presence of the whole past of which it is the product." *Id.* at 56. The important point here is that the accoutrements of being a social being—including disparities produced by the society—are inscribed in and on the socialized individual's *body*:

> [T]he purely social and quasi-magical process of socialization, which is inaugurated by the act of marking that institutes an individual as an eldest son, an heir, a successor, a Christian, or simply as a man (as opposed to a woman) . . . and which is prolonged, strengthened and confirmed by social treatments that tend to transform instituted difference into natural distinction, produces quite real effects durably inscribed in the body and in belief. An institution, even an economy, is complete and fully viable only if it is durably objectified not only in things . . . but also in bodies, in durable dispositions.

Id. at 58. Social distinctions are realized in the deportment of bodies. Informed by ethnographic research, Bourdieu focuses on the different body carriages exhibited by Kabyle men and women: "The opposition between male and female is realized in posture, in the gestures and movements of the body, in the form of the opposition between the straight and the bent." *Id.* at 70. Differently stated, male and female difference is enacted, not entirely consciously, through postures of the body: "In short, the specifically feminine virtue, *lah'ia*, modesty, restraint, reserve, orients the whole female body downwards, towards the ground, the inside, the house, whereas male excellence, *nif*, is asserted in movement upwards, outwards, towards other men." *Id.* While Bourdieu does not explore the question of socioeconomic class specifically, his theory is easily applied to questions of economic disparity. When so applied, one can see how, if gender differences are demonstrated in the manner in which the body is carried, then disparities in *class* are likely also demonstrated in the manner in which the body is carried. Accordingly, the classed body—and more specifically, the poor body—could be understood to be *marked* by the *habitus* that it carries and the bearing of the body that the habitus demands. That is, poverty may be corporeally visible.

through the government are highly visible to the state; they are the *state* visible. They are *seen* by the state in much the same way that Ackerman posits that the paradigmatic "discrete" group —"blacks"[115]—are seen by the random observer. After the informational canvassing accomplished upon enrollment into PCAP/Medicaid, the individual, poor woman is denied the opportunity to be *anonymous* to the state, in much the same way that corporeally visible racial minorities are denied anonymity in a society disciplined to see race in terms of phenotype. Not only is basic, anonymity-compromising information extracted from the poor, pregnant woman, but also information—like sexual histories, histories with substance abuse and sexual abuse, previous contact with the regulatory or disciplinary state, histories of mental illness or depression—that far exceeds common understandings of the basic is extracted: information that is usually conceptualized as being "private" and "intimate" and, consequently, tends to be preciously guarded. And while corporeal visibility is thought to be a relevant factor within the "discrete and insular" justification for heightened equal protection scrutiny (because the corporeally visible are thought to be more politically vulnerable than the corporeally

[115] Ackerman, *supra* note 108, at 729 (describing "homosexuals and groups like them" as "anonymous" and "contrast[ing] them with 'discrete' minorities of the kind paradigmatically exemplified by blacks").

invisible),[116] state visibility may also indicate political vulnerability. Indeed, if the state visible pregnant poor had the political power and wherewithal to form coalitions with other minority blocs, then it is highly likely that legislation that requires the nullification of their privacy rights in exchange for state assistance would never become law (or would be repealed shortly after becoming law). Essentially, while a failure in the political process is presupposed for *corporeally* visible groups, a failure in the political process may actually be demonstrated by a group's *state* visibility.

C. State Visibility as a Justification for Heightened Scrutiny (or How Corporeal Visibility Informs State Visibility)

This Section explores how the concepts of corporeal visibility and state visibility might not be as distinct as they have been described thus far, investigating the ways that corporeal visibility informs rationalizations for state visibility. Differently stated, this Section explores how myths about race and racial stereotypes provide justifications for the regimes of state

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[116] The political process theory of heightened scrutiny for "discrete and insular" groups posits that minority groups should be expected to lose in a democracy. They will not lose, however, when they form coalitions with other minority groups, thereby forming a majority that enables it to pass legislation that protects or furthers their interests. Unfair prejudice, however, may prevent some minority groups from being able to form coalitions with others, consequently causing the stigmatized group to lose all the time. At that point, the judiciary is justified in intervening into the political process—by giving close scrutiny to legislation, as opposed to rational basis review—as the political process no longer functions properly when prejudice corrupts the "wheeling and dealing" that characterizes the political sphere. *See* Yoshino, *supra* note 8, at 507 ("The only time the judiciary may intervene [into the democratic process] is when the process has broken down. In cases where a minority bloc is consistently unable to form coalitions with other blocs because of the prejudice those blocs harbor towards it, the legislative process itself suffers from a legitimacy deficit."); *see also* Loffredo, *supra* note 59, at 1293 ("[J]udicial deference to political outcomes is contingent . . . upon some baseline characteristic of the political process that will here be referred to as 'democratic legitimacy.' Where the political order deviates from the structural norm, the Court may closely scrutinize governmental decisions for unconstitutionality, and impose a higher burden of justification on the state."). Racism, understood as discrimination against a group because of their corporeally visible marks, is one such phenomenon that is thought to corrupt the political process by preventing the corporeally visible from forming coalitions with other minority groups.

visibility and surveillance to which the pregnant poor are subjected.

There may be a continuity in the legislative and lay mind between the pregnant, poor women who turn to the state for help in paying for their prenatal care by enrolling in PCAP/Medicaid and the women who turn to the state for help in supporting the families that they have created by enrolling in Temporary Aid for Needy Families ("TANF"). Moreover, it is no revelation that the latter group of women has been vigorously vilified in political and popular discourse. The most salient figure of this vilification is the "welfare queen"—she who has children for the sole purpose of living extravagantly off of the welfare benefits that enable her to avoid the workforce.[117] Consider former President Ronald Reagan's oft-cited, hyperbolic fantasy of the welfare queen: "One of Reagan's favorite . . . anecdotes was the story of a Chicago 'welfare queen' with '80 names, 30 addresses, 12 Social Security cards . . . [and] tax-free income over $150,000.'"[118] Most descriptions of the welfare queen underscore the lavishness and abundance that she enjoys at the expense of taxpayers: "At worst, the conjured image is one of a gold-clad, cadillac-driving [sic], welfare queen who buys steak and beer with food stamps."[119] Even when the luxury that characterizes the welfare queen's lifestyle is not emphasized, she is nevertheless described as a *parasitic* woman who preys on the

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[117] The Author has explored the figure of the "welfare queen" and its contemporary manifestations elsewhere. *See generally* Bridges, *Wily Patients*, *supra* note 6.

[118] THOMAS BYRNE EDSALL & MARY D. EDSALL, CHAIN REACTION: THE IMPACT OF RACE, RIGHTS AND TAXES ON AMERICAN POLITICS 148 (1991) (citation omitted).

[119] Note, *Dethroning the Welfare Queen: The Rhetoric of Reform*, 107 HARV. L. REV. 2013, 2019 (1994).

body politic.[120] Consider statements made by former New Jersey Republican Senator Marge Roukema about the Family Support Act, a 1987 bill that would have modified the Aid to Families with Dependent Children program if enacted:

> Imagine this: A welfare mother could actually continue to have a child every 2 years and never have to work at all. That's wrong. And not only will that mother not have to work, but her children, born into impoverishment, will have little hope for their own futures. And the cycle of poverty and dependency continues. I

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[120] One can make a convincing argument that the specter of the welfare queen haunts the majority opinion in *Dandridge* and could have informed the Court's decision to uphold the Maryland law capping the AFDC grant. *See* discussion *supra* note 93 and accompanying text. The Maryland law providing that only families that include six people or less would receive grants large enough to cover their statutorily-defined level of need discriminated against large families. One could say that the law acted as a reproductive disincentive for the woman who would have (more than five) children for the sole purpose of increasing the size of her welfare grant. Indeed, the state of Maryland justified the law on that ground: "The regulation can be clearly justified, Maryland argues, in terms of legitimate state interest in . . . providing incentives for family planning." *Dandridge*, 397 U.S. 471, 483–84 (1970). Although the majority did not uphold the law on the grounds that it served the state's legitimate interest in providing an "incentive[] for family planning"—instead finding that the state had a legitimate interest in "encouraging employment and in avoiding discrimination between welfare families and the families of the working poor," *id.* at 486—one could conjecture that the judges joining in the majority opinion were familiar with the discourses about the welfare queen who would procreate for purposes of increasing her welfare grant. *See also* Thomas Ross, *The Rhetoric of Poverty: Their Immorality, Our Helplessness*, 79 GEO. L.J. 1499, 1520 ("The family planning argument . . . takes its rhetorical punch from the stereotypical image of the welfare mother procreating irresponsibly. For these women, becoming pregnant is an act of moral weakness."). The Court's refusal to invalidate the regulation, then, might be understood as a reflection of their dislike and distrust of the women that the figure of the welfare queen purports to describe. Accordingly, Justice Marshall's warning in his dissent in *United States v. Kras*, 409 U.S. 434, 446 (1973), in which the Court declined to invalidate a law that required the payment of a fee before a person could file for bankruptcy, becomes relevant: "It is perfectly proper for judges to disagree about what the Constitution requires. But it is disgraceful for an interpretation of the Constitution to be premised upon unfounded assumptions about how people live." *Id.* at 460 (Marshall, J., dissenting). Similarly, it may be disgraceful for an interpretation of the Constitution to be premised upon a mythical figure that is, at best, a disturbing caricature of the women upon whom it is based.

> ask: How much longer do you think the two worker couple will tolerate the welfare state and its cost to them in taxes to support that welfare mother? . . . The answer is that they should not have to.[121]

Fear, distrust, and dislike of the welfare queen who would live off of welfare *forever* likely informed the provisions in TANF that impose time limits on a family's receipt of

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[121] 133 Cong. Rec. H11513-04 (1987) (statement by R. Roukema). Martha Fineman also quotes statements made by a columnist for a California newspaper, who argued that welfare benefits should be denied to mothers who "deliberately give birth to and raise a fatherless child." Martha L. Fineman, *Images of Mothers in Poverty Discourses*, 1991 DUKE L.J. 274, 286 (1991) (quoting Joanne Jacobs, *Illegitimacy Biggest Killer of Our Babies*, WIS. ST. J., Feb. 9, 1990, at 11A). The intention behind the fact of becoming pregnant and becoming a mother—that is, the "deliberateness" behind giving birth to a "fatherless child"—is, perhaps, the single most damning evidence that a single mother is a "welfare queen."

benefits[122] as well as requirements that a woman labor outside

[122] 42 U.S.C.S. § 608(a)(7) (LexisNexis 2009) (prohibiting states from giving TANF funds to an adult for more than sixty months, "whether or not consecutive").

the home while receiving benefits.[123]

While the "welfare queen" is the most damning conceptualization of the TANF beneficiary, more benign conceptualizations of her do not absolve her of her dependency. More benignly, the TANF beneficiary is a woman who insists upon being a mother despite her knowledge that she does not

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[123] The statute provides that by 2000, persons receiving TANF funds are expected to work an average of thirty hours per week. 42 U.S.C.S. § 607(c)(1)(A) (LexisNexis 2009). "Work activities" are defined as:

> (1) unsubsidized employment;
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> (2) subsidized private sector employment;
>
> (3) subsidized public sector employment;
>
> (4) work experience (including work associated with the refurbishing of publicly assisted housing) if sufficient private sector employment is not available;
>
> (5) on-the-job training;
>
> (6) job search and job readiness assistance;
>
> (7) community service programs;
>
> (8) vocational educational training (not to exceed 12 months with respect to any individual);
>
> (9) job skills training directly related to employment;
>
> (10) education directly related to employment, in the case of a recipient who has not received a high school diploma or a certificate of high school equivalency;
>
> (11) satisfactory attendance at secondary school or in a course of study leading to a certificate of general equivalence, in the case of a recipient who has not completed secondary school or received such a certificate; and
>
> (12) the provision of child care services to an individual who is participating in a community service program.

§ 607(d). Thus, "work" consists of many different activities; however, notably, the work of raising a child is not one of them. Per the statute, the unmarried mother who cares for an infant under the age of 12 months is not "working" within the letter of the law. *See* § 607(b)(5) (allowing states the option of not requiring single parents with an infant under 12 months old to "engage in work"). While she may be "exempted" from the work requirements, she is not understood to have *fulfilled* them by caring for an infant on her own. *Id.* The TANF work requirements have been criticized by many scholars, including myself. *See, e.g.*, Bridges, *Quasi-Colonial Bodies*, *supra* note 6; Craig. L. Briskin & Kimberly A. Thomas, *The Waging of Welfare: All Work and No Pay?*, 33 HARV. C.R.-C.L. L. REV. 559, 591 (1998) (arguing that TANF beneficiaries who are compelled to work outside of their homes in satisfaction of the mandatory work requirements set out in the legislation should be protected under the Fair Labor Standards Act and the National Labor Relations Act); Andrew S. Gruber, *Promoting Long-Term Self-Sufficiency for Welfare Recipients: Post-Secondary Education and the Welfare Work Requirement*, 93 NW. U. L. REV. 247, 299 (1998) (concluding that "federal welfare law should be amended to include participation in a four-year post-secondary education program as a work activity"); Shruti Rana, *Restricting the Rights of Poor Mothers: An International Human Rights Critique of 'Workfare,'* "33 COLUM. J.L. & SOC. PROBS. 393, 394 (2000) (examining TANF mandatory work requirements through the lens of international human rights and arguing that they violate "the human rights of poor single mothers through [their] attempt to define and restrict their roles as mothers, workers, and citizens"); Dorothy E. Roberts, *Low Income Mothers' Decisions about Work at Home and in the Market*, 44 SANTA CLARA L. REV. 1029, 1031 (2004) (arguing that TANF's incentives "devalue and penalize poor mothers' care work").

possess the financial means to support her family.[124] This latter woman remains a woman who produces a family that she cannot pay for and so, by definition, procreates irresponsibly.

1. The Racialization of the Welfare Recipient

One completes the description of the welfare queen or, less polemically, the welfare recipient, by describing her race: she is always, if only implicitly, a Black woman. The discursive racialization of the welfare recipient has been widely noted throughout the literature. Angela Onwuachi-Willig writes, "By the 1990s, the image of the welfare queen had fully developed, and visual images in the media routinely displayed her as a *black* woman."[125] Martha Fineman has similarly noted:

> In poverty discourses, however, the single-mother family under consideration is not typically presented as the once-married, formerly middle-class housewife and mom, who, with her children, now finds herself upon hard times as the result of divorce. The single mother constructed and located within poverty

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[124] Fineman, applying concepts first articulated by historian Michael Katz, discusses the way that poor, single mothers become conceptualized as members of the "undeserving poor" because of their insistence upon having children despite their ability to financially support their family. *See* Fineman, *supra* note 121, at 280–84. *See generally* MICHAEL KATZ, THE UNDESERVING POOR: FROM THE WAR ON POVERTY TO THE WAR ON WELFARE (1989). Fineman writes that a person is thought to be undeservingly poor when "the impoverished individual is poor because of her personal choices and actions, not as a result of forces beyond her control." Fineman, *supra* note 121, at 282. Accordingly, when a mother is poor because her husband died, she is a "sympathetic widow," poor "as a result of forces beyond her control," and is consequently thought to be a member of the "deserving poor." *Id.* at 280, 282. However, "the parsimonious treatment of poor women who chose to become mothers without marrying, or those whose choices are limited because of circumstances that grow out of poverty" is justified because they can be considered undeserving poor," as their poverty is due to "their lack of relationship to the work force (either through their own jobs or through their attachment to a male breadwinner)." *Id.* at 283.

[125] Angela Onwuachi-Willig, *The Return of the Ring: Welfare Reform's Marriage Cure as the Revival of Post-Bellum Control*, 93 CAL. L. REV. 1648, 1671 (2005).

> discourses is *differentiated by race and class* from her divorced sister.[126]

Thomas Ross has also noted that in the cultural imaginary, social programs like AFDC and now TANF are programs "for *black* welfare mothers, who, in the harshest of the stereotypical imageries, procreate irresponsibly and have no aspirations beyond maximizing their take from the public trough."[127] Analogously, another scholar has argued, "If one takes a serious moment to envisage what the 'typical' welfare recipient looks like, perhaps the image is one of an urban, *black* teenage mother, who continually has children to increase her benefits and who just lies around all day in public housing waiting for her check to come."[128] Activist Marion Wright Edelman has likewise noted the racialization of the welfare recipient, arguing that "'welfare' . . . has become a 'fourth generation code word for race.'"[129] And so, despite the fact that non-Black persons outstrip the number of Black women receiving TANF

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[126] Fineman, *supra* note 121, at 275 (emphasis added); *see also id.* at 287–88 ("[I]n the public's mind, and despite overwhelming evidence to the contrary, the face of poverty has increasingly become that of a single mother, particularly the African-American single mother.").

[127] Ross, *supra* note 120, at 1518 (emphasis added).

[128] *Dethroning the Welfare Queen*, *supra* note 119, at 2019 (emphasis added).

[129] *Id.* (quoting Marion Wright Edelman).

benefits,[130] the TANF beneficiary is discursively constructed as an injudicious *Black* woman.[131]

The racialized figure of the irresponsible, calculating, lazy, uneducated, negligent welfare beneficiary informs the requirement that PCAP/Medicaid enrollees be subjected to an informational canvassing upon seeking benefits. The legislators and policymakers that formulated the PCAP/Medicaid program imagine that it is this woman—an always already racialized social *danger*—who will find herself pregnant, uninsured and, consequently, turning to the state and federal government for

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[130] Data reveal that Black women do not comprise the majority of welfare recipients. According to statistics compiled by the Department of Health and Human Services and released in 2006, Black women accounted for 35.7% of persons receiving welfare in the form of TANF; the percentage accounted for by White, Latina, Asian, and Native American women were 33.4%, 26.5%, 1.8% and 1.4%, respectively. U.S. DEP'T. OF HEALTH & HUMAN SERVS. ADMIN. FOR CHILDREN & FAMILIES, TABLE 8: TEMPORARY ASSISTANCE FOR NEEDY FAMILIES–ACTIVE CASES, PERCENT DISTRIBUTION OF TANF FAMILIES BY ETHNICITY/RACE OCTOBER 2005–SEPTEMBER 2006, *available at* http://www.acf.hhs.gov/programs/ofa/character/FY2006/tab08.htm. While the statistics show that Black women are *disproportionately* represented among TANF recipients, they do not show that the welfare recipient ought to be conceptualized as a Black woman, as only four of every ten welfare recipients is Black. *Id.* Nevertheless, despite the fact that Black women only represent a *preponderance* of welfare recipients, and despite the frequency of White and Latina recipients of welfare, Black women have come to represent the "average" beneficiary of TANF.

[131] *See also* Joel F. Handler, *The Transformation of Aid to Families with Dependent Children: The Family Support Act in Historical Context*, 16 N.Y.U. REV. L. & SOC. CHANGE 457 (1987–88). Handler writes:

> As the social characteristics of the AFDC population changed from white widows to divorced and never-marrieds, the AFDC stereotype became the unmarried, black female-headed household. As poverty became feminized, more particularly, as the specter of the black, unwed female-headed household became fixated in the public consciousness, the current welfare reform consensus has emerged.

Id. at 460

assistance with her healthcare bills.[132] It is important to keep in mind just how damningly the implicitly racialized welfare beneficiary is described. In official fora, she and her insistence upon procreating are imagined as the cause of most social problems and the potential downfall of the nation.[133] Consider the legislative findings that preceded the codification of the Personal Responsibility and Work Opportunity Reconciliation Act, which reformed welfare by replacing the Aid to Families with Dependent Children program with TANF. Congress "found" that children born to welfare mothers are "3 times more likely to be on welfare when they reach adulthood than children not born into families receiving welfare," as having compromised "school performance and peer adjustment," as having "lower cognitive scores, lower educational aspirations, and a greater likelihood of becoming teenage parents themselves," as being "3 times more likely to fail and repeat a year in grade school than are children from intact 2-parent families," as being "4 times more likely to be expelled or suspended from school," as living in

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[132] Accordingly, I disagree with John Hart Ely, who believes that stereotypes about the poor do not inform decisions to pass legislation that will benefit (or burden) them. JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 162 (1980). He writes:

> [F]ailures to provide the poor with one or another good or service, insensitive as they may often seem to some of us, do not generally result from a sadistic desire to keep the miserable in their state of misery, or a stereotypical generalization about their characteristics, but rather from a reluctance to raise the taxes needed to support such expenditures.

Id. It may be overly optimistic to hope that ideas about the poor do not enter into the minds of legislators as they determine whether or not they will vote for or against any particular law. Instead, I have argued that less than flattering ideas about the poor—particularly, implicitly racialized poor, pregnant women—held the imagination of the lawmakers who formulated the PCAP regulators and formed the justification for the requirements that produce their state visibility.

[133] *See* Loffredo, *supra* note 59, at 1338 ("Poor children have become America's untouchables, and poor mothers are 'lumped together with drug addicts, criminal, and other socially-defined 'degenerates' in the newly-coined category of 'underclass'.").

neighborhoods with "higher rates of violent crime," and as overpopulating the "State juvenile justice system."[134]

2. The Welfare Beneficiary and the Marriage Between Corporeal Visibility and State Visibility

When the welfare recipient is understood as a *peril* to the body politic within which she exists and off of which she preys, then it should come as no surprise that the state would want to bring the pregnant poor woman within its gaze—to extract enough information out of her such that it could bring her within its regulatory and disciplinary power, if need be. The pregnant poor woman attempting to sign up for PCAP/Medicaid might be the welfare beneficiary who would raise a criminal and a national problem if left to her own devices; accordingly, the cautious state is justified in making all pregnant poor women *visible*—in order to screen those who deserve further surveillance from those who can be left alone.

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[134] *See Personal Responsibility and Work Opportunity Reconcilliation Act of 1996* Pub. L. No. 104-193, 110 Stat. 2110 (1997). In unofficial fora, the welfare beneficiary is described much more harshly. As Black historian Robin D. G. Kelley has poignantly noted:

> You would think that as a kid growing up . . . I could handle any insult, or at least be prepared for any slander tossed in the direction of my mom—or, for that matter, my whole family, my friends, or my friends' families. . . . In all my years of playing the dozens, I have rarely heard vitriol as vicious as the words spouted by Riverside (California) county welfare director Lawrence Townsend: "Every time I see a bag lady on the street, I wonder 'Was that an A.F.D.C. mother who hit the menopause wall—who can no longer reproduce and get money to support herself?'" I have had kids tell me that my hair was so nappy it looked like a thousand Africans giving the Black Power salute, but never has anyone said to my face that my whole family—especially my mama—was a "tangle of pathology." Senator Daniel Patrick Moynihan has been saying it since 1965 and, like the one about your mama tying a mattress to her back and offering "roadside service," Moynihan's "snap" has been repeated by legions of analysts and politicians.

ROBIN D. G. KELLEY, YO' MAMA'S DISFUNKTIONAL!: FIGHTING THE CULTURE WARS IN URBAN AMERICA 2 (1997).

Therefore, ideas about the racialized figure of the welfare queen or generally problematized welfare beneficiary likely inform the PCAP/Medicaid requirements that produce state visibility. That is, race informs discourses about the poor pregnant woman. Accordingly, it may be unwise to conceptualize corporeal visibility as entirely distinct from and unrelated to state visibility. Rather, stereotypes about corporeal visibility are embedded in the laws that produce state visibility. As such, it would appear that if equal protection is attentive to and highly suspicious of discrimination against the corporeally visible, then it ought to be equally attentive to and highly suspicious of laws that produce individuals as state visible. Damaging generalizations and assumptions about race and the raced operate in both instances.

IV. CONCLUSION

This Article has hoped to elaborate the concept of "state visibility" and the ways in which it intersects with, is continuous with, and is embedded within the concept of corporeal visibility. In so doing, it has made an argument that the Supreme Court ought to review laws that discriminate against or produce groups of individuals as the "state visible" with the same heightened scrutiny with which racially discriminatory laws are reviewed. The immediate effect of this proposal would be the possible reversal of *Maher v. Roe* and *Harris v. McRae*, as the government would have to articulate a compelling or important interest for discriminating against poor, pregnant women qua the state visible—a suspect class.[135]

It should be noted that while this paper has argued that the pregnant poor who rely upon state assistance in the form of PCAP/Medicaid during their pregnancies are saddled with state visibility and, as a result, might be a "suspect" class within equal protection jurisprudence, it has not argued that the poor, as a class, should enjoy "suspect" class status. This is not to say that there is no basis for granting the poor, in their entirety, "suspect" status; rather, it is to say that my argument about state visibility as a justification for heightened scrutiny does not necessarily

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[135] See supra note 13 and accompanying text for an explanation of why there is only a chance of a "possible reversal" of *Maher v. Roe* and *Harris v. McRae*.

apply to all groups that comprise the poor. That is, the Author does not know that there are similar regimes of state visibility erected for other collections of persons within the larger group of "the poor."[136] Likewise, the Author does not know that other subgroups within the poor are racialized in a way that is analogous to the pregnant poor.[137] Nevertheless, it is very likely that other groups of poor persons are discursively racialized as are the pregnant poor. And it is very likely that other groups of poor persons—like people living in public housing, those who rely on the public family court system, and incarcerated men and women—can be described as state visible and thereby deserving of heightened scrutiny. However, it is for others to make that argument, as the present discussion has been limited to the class of poor, pregnant women.

In essence, poor, pregnant women who do not have health insurance and must turn to the state for assistance in having healthy pregnancies and infants are vulnerable

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[136] For example, an argument for heightened scrutiny of laws that discriminate against the homeless cannot be made under my theory of state visibility, for it appears that this group of the poor is not situated in the same relationship to the state as is the pregnant poor. That is, while the vulnerability of the pregnant poor is revealed by, and produced by, their state visibility, it would appear that the vulnerability of the homeless is revealed and produced by their dramatic state *invisibility*. This is not to argue that there are no justifications for affording heightened equal protection scrutiny to the homeless as a class. *See, e.g.*, Jennifer E. Watson, Note, *When No Place is Home: Why the Homeless Deserve Suspect Classification*, 88 IOWA L. REV. 501 (2003) (arguing that the homeless meet the definition of a "discrete and insular" minority). Rather, this is just to point out that such justifications can not be made under a theory of state visibility.

[137] Ross discusses how assumptions about the poor—who they are and why they are poor—have changed over the course of history. *See* Ross, *supra* note 120, at 1504; *id.* at 1514 ("Cultural assumptions [about the poor] do not remain static.") Moreover, the group with which the Author concerned in this Article–poor mothers and pregnant women—has also experienced a transformation in the cultural assumptions that are made about them. *Id.* at 1515 ("The cultural stereotype of the female-headed household receiving public assistance has evolved from the image of the white widow to the image of the black welfare mother."). Accordingly, this Author's argument must caution that while the interrelationship of state visibility with discourses relating to corporeal visibility may justify heightened scrutiny for poor mothers in our present historical moment, "poor mothers" may not always be implicitly racialized in the same manner in which they are currently. For that reason, the argument made herein may not be applicable in the future, given a changed cultural circumstance.

individuals. When they desire to terminate their pregnancies, their ability to receive state assistance to cover the cost of abortion is limited. When they desire to carry their pregnancies to term, the state exacerbates that vulnerability by, ironically, making the women vulnerable to the *state*. There is something unjust in this. The proposal contained within is a method for confronting the irony and remedying the injustice.