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Re-Defining Reproductive Freedom

Timothy Zick

William & Mary Law School, tzick@wm.edu

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RE-DEFINING REPRODUCTIVE FREEDOM

KILLING THE BLACK BODY: RACE, REPRODUCTION, AND THE MEANING OF LIBERTY. By Dorothy Roberts. New York: Pantheon Books, 1997. 312 pp. \$26.00 (cloth).

Reproductive freedom is at the heart of women's equality. Women who cannot control when they will conceive and how many children they will have cannot be free and equal participants in family, social, political and economic life. Nor can they take advantage of the equal rights women have won in the courts and the legislatures. Without reproductive autonomy, guarantees of equality elsewhere are illusory.

America has a long and deplorable history of oppressing and abusing women's right to control their reproductive destiny. For years, proscription of abortion forced women to rely on dangerous and even life-threatening procedures. While restrictions on abortion forced women to carry pregnancies to term, other practices such as irreversible surgical sterilization, restrictive welfare policies and even criminal punishment have been implemented to ensure that women—especially poor women—do not become pregnant in the first place. Not until *Griswold v. Connecticut* in 1965 did the Supreme Court first protect women's reproductive freedom by invalidating an archaic Connecticut criminal law that prohibited the mere use of birth control.¹ The Court's 1973 decision in *Roe v. Wade*, which provided a constitutional guarantee of a woman's right to choose abortion, emerged from a long and remarkable battle to include a right to sexual privacy among Americans' individual liberties.²

Volumes have been written about women's epic—and ongoing—struggle to carve a sphere of privacy that places bedroom and womb beyond the reach of government.³ By and large, the story is portrayed as one of women's triumph over governmental control of their bodies and their conceptions of morality: women have, after all, “won” the “right” to use contraceptives and to choose abortion (at least within the *Roe* framework).⁴ Of course, from the moment of victory, the “victors” in these

¹ *Griswold v. Connecticut*, 381 U.S. 479 (1965).

² *Roe v. Wade*, 410 U.S. 113 (1973).

³ See, e.g., DAVID J. GARROW, *LIBERTY AND SEXUALITY: THE RIGHT TO PRIVACY AND THE MAKING OF ROE V. WADE* (1994).

⁴ One strand of late 20th-century feminism rejects the idea that the availability of contraception and abortion has contributed to a more liberated female sexuality, arguing rather that heterosexual relations are by definition oppressive in a society where genders are unequal and that legal abortion enhances women's vulnerability to sexual coercion by men. See, e.g., ANDREA DWORKIN, *RIGHT-WING WOMEN* 77–100 (1983); CATHARINE A. MACKINNON, *FEMINISM UNMODIFIED* 93–102 (1987).

battles have been looking over their shoulders, always acutely aware that their victories are hard-fought, narrowly won and constantly in danger of being overturned or denigrated by conservative courts and legislatures.⁵ Nevertheless, most Americans view reproductive autonomy and privacy generally as resting on firm ground now that landmark cases such as *Griswold* and *Roe* are part of our constitutional pantheon.

For Dorothy Roberts, however, the traditional concept of reproductive autonomy that centers on the right to use contraception and choose abortion is far too narrow. In *Killing the Black Body: Race, Reproduction, and the Meaning of Liberty*, Roberts explores what she perceives as a stark racial divide in the struggle for women's reproductive rights, a fault line that was formed early in America's history when slave owners forcibly bred, raped and otherwise exploited their female enslaved persons with the explicit approbation of law. Roberts chides feminists for tacitly adopting a narrow view of reproductive freedom and failing to address the myriad reproductive concerns of Black women. In Roberts's view, the history of the movement for reproductive autonomy has literally been whitewashed. While most middle- and upper-class white women may be content with the sexual and reproductive rights they have won, Roberts charges that Black women, whose use of contraceptives often has been written into law as an affirmative duty, are hardly beneficiaries of the movement for reproductive freedom. Rather, legal, societal and political barriers continue to prevent Black women from fully exercising their reproductive freedom. According to Roberts, Black women in America continue to experience the litany of horrors that the battle for reproductive freedom has eradicated for white women—including such degrading practices as mandatory sterilization.

Roberts believes that “[w]e are in the midst of an explosion of rhetoric and policies that degrade Black women's reproductive decisions.” (p. 3) In chapters focusing on new birth control methods ushered in by technological advances, welfare proposals conditioning receipt of benefits on a woman's use of contraception, laws prohibiting federal funding for abortions, and criminal prosecutions of drug-addicted mothers for child

⁵The 25 years since *Roe v. Wade* have seen a constant barrage of anti-abortion legislation designed to circumvent Supreme Court rulings. These laws have, for the most part, been struck down, generating a new round of legislation and a new round of litigation. See, e.g., *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52 (1976) (holding that statutes giving third parties veto power over a woman's decision to choose abortion were unconstitutional); *Colautti v. Franklin*, 439 U.S. 379 (1979) (striking down statute proscribing abortions when the fetus is or “may be” viable on void-for-vagueness grounds). In recent decisions, the Supreme Court has upheld significant restrictions on the right to abortion, and a plurality of the Court has indicated that it would abandon the trimester system of *Roe*. See *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989) (upholding bar on state employees performing abortions and bar on the use of public facilities for performing abortions, even when the patient pays for the abortion herself).

abuse, Roberts examines how modern reproductive policies threaten to shackle Black women to the degraded images of Black motherhood that have burdened their exercise of reproductive autonomy since the colonial period.

Roberts sets out to establish and explore the intersection between race and reproduction in order to change our conception of reproductive freedom. She urges us to see reproductive freedom as a matter of social justice, not merely of individual choice. Roberts notes that decisions regarding reproduction are made in a social context characterized by, among other things, substantial economic and educational inequalities. In Roberts's view, the harm from restrictive welfare laws and criminal prosecutions—which, she notes, disproportionately affect Black women—is not simply the incursion on each Black woman's decision-making. Rather, such laws also diminish the value of Black motherhood, which is in turn “a badge of racial inferiority worn by all Black people.” (p. 310) In other words, the personal is political.⁶

According to Roberts, “[r]eproductive politics in America inevitably involves racial politics.” (p. 9) Roberts seeks to link modern racial politics directly to the American historical backdrop of control and manipulation of Black women's bodies by both private individuals and government actors. To explore this bridge to the past, Roberts chooses as her vehicles of instruction several current reproductive policies that have sparked considerable debate. According to Roberts: “Highlighting the racial dimensions of contemporary debates such as welfare reform, the safety of Norplant, public funding of abortion, and the morality of new reproductive technologies is like shaking up a kaleidoscope and taking another look.” (p. 6) By “taking another look” at reproductive freedom through provocative, racially-sensitive lenses, Roberts hopes to re-define the meaning of reproductive freedom to take into account its relationship to racial oppression.

Peeking into Roberts's freshly “shaken” kaleidoscope requires that we re-examine the significance of birth control to women's reproductive freedom. For most white women, access to birth control signifies a significant step toward individual autonomy and self-definition and is an integral aspect of privacy. However, Roberts notes that for Black women, the historical regulation of their childbearing to achieve certain social objectives largely overshadows whatever autonomy they might have gained by their access to birth control. Slavery “marked Black women from the beginning as objects whose decisions about reproduction should be subject to social regulation rather than to their own will.” (p. 23) Roberts contends that the birth control and eugenic movements of the early

⁶ See CATMARINE A. MACKINNON, *TOWARD A FEMINIST THEORY OF THE STATE* 191 (1989).

1900s picked up where slavery left off, with some advocates in those movements calling for the reduction, if not the complete elimination, of certain races and ethnicities in order to improve society. Since the early 1900s, contraception and its more sinister cousin, surgical sterilization, have been used not to free Black women to pursue their goals and dreams, but deliberately to limit their procreation.⁷

According to Roberts, the false assumption underlying the often inhumane regulation of Black women's reproduction is that procreation, and not political, social and economic forces, is the cause of Blacks' condition in this country. She states: "America's recent eugenic past should serve as a warning of the dangerous potential inherent in the notion that social problems are caused by reproduction and can be cured by population control." (p. 59) Roberts explains that white myths and stereotypes concerning Black motherhood have long been used to justify white control of Black women's reproductive decisions. Images of Black women as unwed mothers, welfare queens, mammies and Jezebels, manufactured in popular culture and academic circles, have branded Black women as unfit for motherhood in whites' eyes and have been used by whites to justify the regulation of every aspect of Black women's fertility. In Roberts's opinion, today's lawmakers continue to craft reproductive policies with these stereotypes in mind. They have, in Roberts's view, utterly failed to heed the lessons of the past.

Roberts correctly notes the fallacy that Black reproduction is the sole cause of Blacks' social problems and that population control can miraculously cure those problems. Policies designed to reduce the number of babies born to welfare mothers, for example, may ultimately reduce the strain on the public budget to some degree, but pinning the blame for Blacks' social condition on Black fertility rates alone demonstrates a short-sighted and pernicious penchant for scapegoating and a failure to appreciate the magnitude and complexity of the problems that must be solved if Blacks are to experience equality in the exercise of reproductive and other freedoms.

It is equality, not liberty, with which Roberts is ultimately concerned. Roberts finds the traditional view of liberty—that individuals should be able to make choices free from governmental interference⁸—entirely wanting when it comes to reproductive freedom, particularly for Black women. According to Roberts, this construct of liberty as a "negative right" (p. 309) masks social prejudices and the maldistribution of wealth

⁷ Roberts places Margaret Sanger, the strongest feminist advocate for birth control in the early part of the century, under fire for her eventual alliance with certain eugenic interests. However, Roberts ultimately dismisses the charge that Sanger was a racist: "It appears that Sanger was motivated by a genuine concern to improve the health of the poor mothers she served rather than a desire to eliminate their stock." (p. 81)

⁸ See, e.g., ISAIAH BERLIN, *FOUR ESSAYS ON LIBERTY* 121-31 (1969).

and education. It allows, and may even encourage, the coercion of Black women in their reproductive decision-making by concealing the racist origins of social practices that, while not overtly discriminatory on the basis of race, disproportionately deny Black women's reproductive freedom. Roberts advocates a group identity approach to reproductive freedom that is concerned with social harms as well as individual choice. She does not wish to abandon negative liberty altogether; it does, after all, protect against the abuse of government power and stress the value of self-definition, which are both critical to overcoming a history of denigration of Black women. However, Roberts clearly supports the primacy of equality over liberty. Roberts's ultimate goal is to "ensure the equal distribution of procreative resources in society." (p. 296)

Roberts advances "a notion of reproductive freedom that combines the values captured by both liberty and equality." (p. 305) Like other feminist scholars, she prefers a notion of positive liberty to the negative liberty that has allowed inequalities to flourish. She defines positive liberty rather loosely as "the affirmative duty of government to protect the individual's personhood from degradation and to facilitate the processes of choice and self-determination."⁹ (p. 309) For example, instead of prosecuting poor Black women for drug and child abuse, Roberts argues that the government should provide them with subsistence benefits, drug treatment and medical care. This assistance, in Roberts's view, is the minimum required for "reproductive justice." (p. 311) Thus, reproductive justice, as Roberts sees it, is achievable only through the pursuit of reproductive and sexual rights that are grounded not in a negative right of privacy, but in a positive concept of self-determination, rooted in equal justice and requiring social and economic support. Roberts would not lay the duty of supporting positive liberty solely at the doorstep of the government; she deems private actors equally responsible for distributing—or redistributing—the wealth of reproductive resources.

Much can be gained from Roberts's approach. Roberts's exploration of reproductive oppression during slavery and the eugenic movement of the early 1900s certainly provides ample reason to view with skepticism any public policies that seek to incorporate birth control as a stick to force compliance with government mandates. As Roberts convincingly demonstrates, poor women, who have little choice in the matter, have been beaten with such sticks for years. Roberts opens our eyes to a world in which access to contraception does not necessarily enhance reproduc-

⁹ Other scholars have espoused the concept of positive liberty. See, e.g., Rhonda Copelon, *Losing the Negative Right of Privacy: Building Sexual and Reproductive Freedom*, 18 N.Y.U. REV. L. & SOC. CHANGE 15 (1990). It gained substantial momentum as a result of the post-*Roe* attacks on abortion rights and *Bowers v. Hardwick*, 478 U.S. 186 (1986) (upholding, at least as to homosexual sodomy, a Georgia statute making all sodomy criminal).

tive freedom. In fact, for women dependent upon public assistance who "choose" to use contraception under the threat of loss of benefits or imprisonment, reproductive freedom is only an elusive dream. Roberts is surely correct that the lives of these women, who are disproportionately Black, are shaped by a constellation of factors: psychological, sociological, physiological and economic. Until they gain access to education, improved medical care and some level of subsistence benefits, equality will undoubtedly remain illusory.¹⁰

While these truths are incontestable, other aspects of Roberts's approach are not. She claims to be shaking up a kaleidoscope to offer a fresh look at reproductive freedom. Kaleidoscopes are, of course, characterized by endlessly changing colors and patterns. Roberts, on the other hand, sees only black and white and a single unceasing pattern—the use by whites of myths and stereotypes to justify their control over Black women's reproductive decisions. Roberts decries the use by some lawmakers of rhetoric to advance their views and policies. Unfortunately, Roberts sometimes falls victim to her own criticism, unleashing her own "explosion of rhetoric" (p. 3) and recognizable catch-phrases in an attempt to shock us into seeing her point.¹¹ Roberts invokes the dark specter of Nazism and "racial genocide"¹² (p. 21) as lurking behind coercive welfare policies and criminal punishment of crack-abusing mothers. She wants us to see "how the denial of Black reproductive autonomy serves the interests of white supremacy." (p. 5) She speaks of the "torture" (p. 122) of Black women's bodies and characterizes restrictive American welfare policies and proposals to encourage poor women to use advances in birth control technology as schemes in a "worldwide effort to reduce dark-skinned populations." (p. 143) Placed in Roberts's newly "shaken" but rather deliberately arranged kaleidoscope, birth control itself appears not as a positive step toward women's autonomy, but rather as a weapon being used in a race war with world-wide implications.

¹⁰ See ROSALIND PETCHESKY, *ABORTION AND WOMAN'S CHOICE: THE STATE, SEXUALITY AND REPRODUCTIVE FREEDOM* 390 (2d ed. 1990).

¹¹ Roberts does not shy away from stereotypes either. She appears to believe that the beliefs of "most" white Americans' concerning welfare were formed by reading conservative scholars such as Charles Murray (p. 113), that Meg Ryan's performance in the movie *When a Man Loves a Woman* helped to establish white Americans' vision of drug- and alcohol-abusing white mothers (p. 179), and that the popularity among whites of surrogate parenting soared after an episode of the *Phil Donahue Show* featured a blond-haired, blue-eyed baby (pp. 270–71). While these stereotypes do not begin to replicate the cruelty or harm of the stereotypes historically created by popular culture and fastened to Black women, they tend to undermine Roberts's arguments and her credibility.

¹² Roberts notes "a deep suspicion in the minds of many Black Americans that white-dominated family-planning programs are a form of racial genocide." (p. 21)

The evidence Roberts presents to demonstrate such overt racism often falls far short of her rhetorical charges. Take Norplant, the contraceptive device that consists of five matchstick-sized capsules implanted in a woman's arm that deliver contraceptive hormones continuously over a five-year period. According to Roberts, racial politics created Norplant, which she calls the "latest threat to reproductive autonomy." (p. 105) Roberts's evidence of eugenic and racist motivations for the creation and distribution of Norplant is exceedingly thin. Relying principally on allegations made by plaintiffs in class action complaints, Roberts pronounces that "Norplant may be hazardous to your health," and she claims that Norplant amounts to "torture" of Black women because it pumps "dangerous hormones" into their bodies. (p. 122) Yet Roberts herself points out that Norplant utilizes "the same type of progestin used in some birth control pills" (p. 105) and "can cause the same long list of bodily disruptions as the pill." (p. 122) Is the pill, therefore, also a form of torture? Roberts also brands the Population Council, which developed Norplant, a racist organization because, according to Roberts, it is "closely linked" (p. 141) with the eugenic movement. What is Roberts's basis for suggesting that the Population Council and the eugenic movement are closely linked? Forty-five years ago, the Population Council's president supported eugenics. What has occurred, and who has presided, at the Population Council since the 1950s seem not to concern Roberts at all.

Consider also Roberts's evidence concerning the following issues: restrictive policies aimed at public health clinics, coercive welfare proposals that seek to encourage or even mandate the implantation of Norplant, and criminal child-abuse prosecutions that condition a woman's freedom on the use of contraceptives. In 1988, the Department of Health and Human Services issued regulations prohibiting federally funded family planning clinics from advising patients that abortion is one of their options. Roberts charges that this so-called "Gag Rule" violates the autonomy of patients who rely on public clinics, patients who are disproportionately Black women. But as Roberts correctly notes, in 1993 President Clinton revoked the Gag Rule by executive order. Roberts also concedes that, to date, no proposed legislation offering bonuses to welfare mothers for the use of Norplant or mandating Norplant implantation or other birth control as a condition of receiving benefits has generated sufficient support to be enacted into law. While some women who abuse drugs during their pregnancies have been ordered as a condition of probation in criminal cases to have Norplant inserted, courts of appeals uniformly have rejected this form of punishment.¹³ Roberts also admits that she cannot determine from any available data the number of women—

¹³ Roberts notes: "No appellate court has ever upheld the imposition of any form of birth control as a condition of probation." (p. 195)

or, presumably, the number of Black, Hispanic or white women—who have been forced as a condition of probation to have Norplant inserted. The available data indicates only that, “[o]f four defendants ordered to use Norplant within its first year on the U.S. market, all were on welfare and three were nonwhite.” (p. 196) This statistically irrelevant sample is not convincing proof of an overtly racist motivation behind forced Norplant implantation. Indeed, it tells us only that women who are poor have suffered the indignity of being told that they must not conceive any children for five years on pain of incarceration.

Roberts’s historical and anecdotal evidence concerning the application of restrictive welfare and reproductive policies generally supports the notion that poor women of all races have been victimized.¹⁴ As Roberts points out throughout the book, what makes such policies and punishments politically palatable is not only the race of the women affected, but also their poverty and marital status. For example, Roberts claims that crack mothers are penalized “because the combination of their poverty, race, and marital status is seen to make them unworthy of procreating.” (p. 305) Thus, the larger threat is not only to poor Black women, but also to all poor and marginalized women who live under a regime that uses coercion and inducements to secure their “choice” not to procreate. In sum, if an agenda of racial genocide lurks behind modern reproductive policies, Roberts has failed to uncover it.

While Roberts is no doubt sympathetic to the plight of poor women in general, she is convinced that, when it comes to reproductive policies, class and race are “inextricably linked.” (p. 110) Her theory is that by focusing myopically on the problem of Black welfare mothers, the media have created a powerful image that drives decisions concerning reproductive policies. She states: “The American public associates welfare payments to single mothers with the mythical Black ‘welfare queen,’ who deliberately becomes pregnant in order to increase the amount of her monthly check. The welfare queen represents laziness, chicanery, and economic burden all wrapped up in one powerful image.” (p. 111) As a result, according to Roberts, “[w]hen Americans debate welfare reform, most have single Black mothers in mind.” (p. 110) The link between race and welfare is firmly implanted in the American mind. More importantly, as Roberts also notes, welfare policies will always disproportionately affect Black women, since as a percentage of the population more Black women than white women rely on public assistance. Whether or not restrictive laws and proposals concerning welfare

¹⁴ On several occasions, Roberts references Carrie Buck, the “feeble-minded” white girl whose forced sterilization spawned the now-infamous declaration by Justice Oliver Wendell Holmes that “[t]hree generations of imbeciles are enough.” *Buck v. Bell*, 274 U.S. 200, 207 (1927).

and reproduction are overtly or covertly targeted at Black women, these women will disproportionately bear the burdens and suffer the consequences of their enactment.

Roberts is correct that these pernicious images have affected our country's debates concerning welfare, reproduction and criminal justice. On a more tangible level, some evidence exists that these images also affect the solutions that are proposed for perceived problems. Unfortunately, Roberts does not allow her evidence simply to speak for itself. Roberts possesses the evidence to show convincingly that certain facially neutral proposals and laws do not have neutral effects.¹⁵ Admittedly, an approach that focuses on disproportionate impact rather than intentional bias turns a dimmer spotlight on the plight of Black women. Nevertheless, sufficient evidence exists to alert us to racial bias.

Roberts's chapter on criminal justice and reproduction, which is the most provocative chapter in her book, is a good example. Roberts notes that growing numbers of women have been indicted after giving birth to babies who test positive for drugs, particularly crack cocaine. Roberts charges that prosecutors have indicted these women not to protect their fetuses, but "as a way of punishing Black women for having babies." (p. 154) After all, Roberts points out, the crime hinges not on the use of drugs but rather on the decision to have a baby. A woman who chooses to have an abortion in such circumstances can avoid prosecution altogether. According to Roberts, media sensationalism in the late 1980s and early 1990s of a "crack baby" epidemic "indelibly etched in the American psyche" (p. 159) the image of a Black mother incapable of caring for her child.¹⁶ Roberts states that "[t]he monstrous crack-smoking mother was added to the iconography of depraved Black maternity, alongside the matriarch and the welfare queen. Crack gave society one more reason to curb Black women's fertility." (p. 157) Roberts charges that white prosecutors and judges, swept up in this media hype, launched an assault that has resulted in the "punishment of poor Black women who fail to meet the middle-class ideal of motherhood." (p. 179) Roberts believes that these prosecutors and judges literally "invented the crime of prenatal drug use in the 1980s in order to castigate poor Black mothers who smoke crack." (p. 187)

It is true that the wealth of evidence regarding maternal and child health conditions in the United States has been ignored in favor of a bizarre and inappropriate obsession with drug use by pregnant women. The focus on pregnant drug users seems quite hypocritical considering

¹⁵ See Ruth Colker, *An Equal Protection Analysis of United States Reproductive Health Policy: Gender, Race, Age, and Class*, 1991 DUKE L.J. 324, 329, 362.

¹⁶ In Roberts's view, the media exaggerated the harmful effect of crack use on children. She states: "The data on the extent and severity of crack's impact on babies are highly controversial, to say the least." (p. 157)

the fact that many women use tobacco and alcohol during pregnancy, substances that can be just as harmful to the fetus. Yet society apparently accepts this maternal behavior much more readily. There have been two responses to the issue of maternal drug abuse, both punitive. The overtly punitive response, and the one that Roberts focuses on in her book, is seen in the criminal prosecution of pregnant substance abusers on charges ranging from delivering drugs to a minor to manslaughter or assault with a deadly weapon.¹⁷ The second response to this problem, to which Roberts pays scant attention but which affects many more lives than will ever be reached through criminal prosecution, has been increased vigilance in the enforcement of civil child abuse and neglect laws against pregnant users of controlled substances.

These punitive responses demonstrate the validity of two important points that Roberts raises. The first point is that an approach to the problems of infant morbidity and mortality that focuses on maternal drug abuse will result in a disproportionate number of Black women being prosecuted for child abuse. Whether intended or not, the number of Black mothers who will be reported to authorities for suspected drug abuse will be substantially higher than the number of white mothers. Black women's disproportionate use of public hospitals and their more frequent contacts with government agencies will ensure that authorities are notified of their crimes, as will a myopic focus on crack abuse as opposed to other harmful drugs.¹⁸ Indeed, as Roberts notes, the evidence shows that despite relatively equal rates of drug use, Black women are nearly ten times more likely than white women to be reported to state agencies for substance abuse during pregnancy.¹⁹ (p. 175) Since none of the reporting laws passed in response to the problem of maternal drug abuse differentiate among the various illicit substances, marijuana users should not be treated differently than cocaine users. The relatively equal extent of drug use among Black and white women should generate equal numbers of reports to state agencies. The fact that the numbers are nowhere close to equal is evidence of race bias in reporting.

The punitive response to maternal drug abuse also demonstrates the validity of a second point Roberts makes—that negative liberty simply

¹⁷ This practice has been criticized on both legal and policy grounds as being unconstitutionally discriminatory and unlikely to deter substance abuse by pregnant users. See, e.g., Kary Moss, *Substance Abuse During Pregnancy*, 13 HARV. WOMEN'S L.J. 278 (1990).

¹⁸ Roberts charges that "targeting crack use during pregnancy unfairly singles out Black women for punishment." (p. 178)

¹⁹ See also Ira J. Chasnoff et al., *The Prevalence of Illicit-Drug or Alcohol Use During Pregnancy and Discrepancies in Mandatory Reporting in Pinellas County, Florida*, 322 NEW ENG. J. MED. 1204 (1990) (stating that in Pinellas County a black woman is 9.6 times more likely than a white woman to be reported for substance abuse during pregnancy).

is not a sufficient response to the inequality that poor Black women continue to experience. Randall Kennedy, among others, has argued that criminal prosecutions of mothers who abuse drugs are a positive step toward achieving protection of Black children in the criminal justice system.²⁰ Kennedy agrees that Black women are prosecuted in such cases in disproportionately high numbers, but notes that if white mothers were disproportionately prosecuted for such crimes, it would be taken as proof that prosecutors care more about white babies than Black babies. Roberts disagrees that this prosecutorial focus is a positive development for Black mothers and children. Roberts has difficulty accepting that prosecutors and judges are acting in the best interest of Black children, given the historical use of criminal laws to subjugate Blacks. Women faced with the prospect that their disclosure of drug abuse to a physician will trigger a state child abuse and neglect reporting statute will hide their addictions or, worse, fail to seek prenatal treatment at all. Roberts correctly challenges the notion that putting mothers in jail will somehow lead to healthy children. Rather than punishing these women, Roberts believes that resources should be devoted to ending women's drug abuse before they become pregnant. That is a proposal that can be readily supported regardless of racial predicate or evidence of invidious discrimination.

Like criminal penalties, family cap laws that deny benefits to women who have a threshold number of children and proposals for coercing women to use contraception by limiting or denying subsistence benefits altogether are poor solutions to such social problems. These laws, which affect all poor women but affect Black women disproportionately, are a desperate response to a seemingly unending cycle of dependence. In their desperation, however, lawmakers have opted for a quick fix rather than a long-term solution. Autonomy requires a wide array of social supports that guarantee preconditions for self-realization such as shelter, food, day care, health care and education. Autonomy presumes the availability to each person of meaningful work and relationships as well as the opportunity for political, social and cultural engagement. In short, autonomy requires the equality promised by positive liberty.

While Roberts's notion of positive liberty generally portends well for poor women of all races, in a sense the concept of liberty as Roberts has constructed it may ultimately curtail reproductive freedom for some women. This negative aspect of Roberts's positive liberty comes through in her chapter entitled "Race and the New Reproduction," which examines new reproductive technologies, including surrogacy and in vitro fertilization. This chapter is a rather curious exception to the other

²⁰ See Randall Kennedy, *The State, Criminal Law, and Racial Discrimination: A Comment*, 107 HARV. L. REV. 1255 (1994).

chapters of the book. Here there is no forcible contraception, no degrading formal sterilization or any other sort of government-mandated or privately supported curtailment of Black fertility. The new technology is not being used to restrict the liberty of Black women; in fact, its sole purpose is to expand the reproductive options available to women.

Roberts's interest in these new technologies and practices is driven not by her interest in reproduction in general, but rather by her "interest in the devaluation of Black reproduction." (p. 246) According to Roberts, just as policies that prevent births are shaped by race, so too are policies that assist births. That is so, according to Roberts, because these new technologies are "used almost exclusively by white people." (p. 251) Roberts worries that "[b]y strengthening the ideology that white people deserve to procreate while Black people do not, the new reproduction may worsen racial inequality." (p. 283) She sees in these scientific advances the ghost of "positive eugenics"—the notion that by increasing the number of births from "superior" parents, one can somehow improve society. (p. 283) Roberts readily acknowledges that the racial disparity in the use of new technologies "will hardly alter the demographic composition of the country." (p. 283) She also acknowledges that the market (infertile couples pay \$8,000 to \$20,000 for each pregnancy attempt, p. 253) and cultural differences (Roberts notes that even wealthy Black couples generally eschew these technologies, p. 259), not any overt or covert racism, appear to drive the availability and use of the new technology. The harm she sees is ideological in nature—the disproportionate use of new technologies by whites, according to Roberts, sends the message that the relative value of Blacks is less than the relative value of whites in America.

Apparently, not every woman's personhood and choice and self-determination merit protection and facilitation under Roberts's view of "reproductive justice." (p. 311) Indeed, Roberts seems untroubled by the conclusion that balancing the scales of "social justice" might require that the government restrict the availability of certain new reproductive technologies to white (and other) couples who can afford them. (p. 297) In other words, if some women stand to lose access to reproductive technologies that advance their autonomy, so be it. As she sees it, the value in these technologies lies in their "subversive potential" (p. 248)—their ability to help single women, lesbians and gay men circumvent legal barriers to parenthood. Roberts is disappointed that "[m]ost often they complete a traditional nuclear family by providing a married couple with a child." (p. 248) Whatever her view of the value of the new technologies, Roberts does not say how depriving some women of an aspect of their reproductive freedom advances the cause of poor Black women.

Are they likely to feel that their children are somehow more valued if a more affluent couple is prohibited from conceiving a child?²¹

In the end, Roberts wants race to take "center stage" in our deliberations about reproductive health policy. (p. 311) Her "new race consciousness" (p. 311) highlights the radically different experiences of the races where reproductive freedom is concerned and heightens our awareness of what it truly means to have reproductive choices. Roberts convincingly demonstrates that Black women have disproportionately suffered the effects of restrictive reproductive policies. Race surely has a place on the stage along with poverty and marital status, but as our history so ably demonstrates, making it the centerpiece of a concept of "reproductive justice" (p. 311) can be dangerous. The numerous injustices Black women have suffered should not be used to justify the subordination of other women's reproductive autonomy. The true test for Roberts's notion of positive liberty is whether it is strong enough to lift poor women of all races to autonomy without sacrificing other women's reproductive freedom.

—Timothy Zick

²¹ Roberts dismisses barriers to transracial adoptions by claiming that white couples only seek to adopt as a "second-best alternative." (p. 272) Even when they do adopt, Roberts claims that they prefer white children. (p. 273)