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The Sexual Regulation Dimension of Contemporary Welfare Law: A Fifty State Overview

Anna Marie Smith
Cornell University

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THE SEXUAL REGULATION DIMENSION
OF CONTEMPORARY WELFARE LAW:
A FIFTY STATE OVERVIEW

*Anna Marie Smith**

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INTRODUCTION

In contemporary American political discourse, welfare reform and sexuality politics are usually treated as separate fields of contestation. Across the political spectrum, sexuality politics is generally conceived in terms of two major issues: women's reproductive rights and lesbian and gay rights. American conservatives, liberals, and progressives alike tend to think about the politics of sexuality as a terrain that consists solely of struggles concerning abortion and homosexuality. While issues such as the legalization of RU-486, sex education curricula, public arts funding, pornography, AIDS policies, and the "marriage tax" are sometimes brought to the fore, the focus remains almost exclusively oriented towards these two centers of concern.¹

Debates about current welfare policies, by contrast, are often conducted without sufficient reference to their sexual regulation dimension.

1. Anna Marie Smith, *Missing Poststructuralism, Missing Foucault: Butler and Fraser on Capitalism and the Regulation of Sexuality*, 19 SOC. TEXT, Summer 2001, at 103, 103-04 [hereinafter Smith, *Missing Poststructuralism*].

Given the magnitude of the recent reforms, it is of course somewhat understandable that a comprehensive analysis of their effects has not yet been achieved. The Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA)² instituted enormously significant changes in the Social Security Act. The PRWORA is one of the most important welfare reform laws in the history of the United States. First and foremost, it replaced the Aid to Families with Dependent Children (AFDC) program with the Temporary Assistance for Needy Families (TANF) program. Public debate on the PRWORA has generally emphasized the ways in which welfare reform has enhanced state powers, imposed strict time limits, and established mandatory “workfare” schemes.³ The fact that the PRWORA constitutes a major initiative in the sexual regulation of poor women is less widely acknowledged. The PRWORA should nevertheless be considered as one moment in a long historical tradition in which welfare policies have served as a vehicle for public measures designed to re-construct the private lives of poor women.⁴

The PRWORA specifically orders each state to compel single mothers who receive welfare benefits to cooperate with state agencies in establishing the paternity of their children and in obtaining child support payments.⁵ Although similar legislation had been in effect since the mid-1970s,⁶ the PRWORA directs the states to sanction clients who do not cooperate,⁷ expands administrative powers, and decreases the level of judicial review.⁸ It also weakens an important exemption: whereas previous federal law and regulations had required states to exempt women subjected to domestic violence from child support cooperation rules,⁹

2. Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (1996).

3. THEODORE J. LOWI & BENJAMIN GINSBERG, *AMERICAN GOVERNMENT: FREEDOM AND POWER*, 289–92, 615–48 (6th ed. 2000).

4. *See infra* text accompanying notes 25–70.

5. *See infra* text accompanying notes 71–121.

6. *See infra* text accompanying note 86.

7. A governmental study conducted in 1999 found that as much as 6.2% of the total number of families who have left the welfare rolls stopped receiving their benefits—even though they still qualified for them on economic grounds—because they had been sanctioned for failing to fulfill some aspect of the TANF program. U.S. DEP’T OF HEALTH & HUMAN SERVS., *CHARACTERISTICS AND FIN. CIRCUMSTANCES OF TANF RECIPIENTS, FISCAL YEAR 1999 (2000)*, available at <http://www.acf.dhhs.gov/programs/opre/characteristics/fy99/analysis.htm#trends> [hereinafter U.S. DEP’T OF HEALTH & HUMAN SERVS., *CHARACTERISTICS*].

8. *See infra* text accompanying notes 90–96, 104–08.

9. *See infra* text accompanying notes 140–41.

the PRWORA has given the states the freedom to define the exemption themselves.¹⁰

This dimension of welfare law is a product of a bi-partisan campaign to address poverty by imposing aggressive child support enforcement policies.¹¹ In practice, these policies have led directly to an intensive, widespread, and arbitrary invasion of poor women's private lives and bodily integrity, especially where contested paternity claims are concerned.¹² Contemporary welfare reform in the United States is also framed by a moral panic about promiscuity among poor women in general—and among poor women of color in particular.¹³ Many policy analysts and legislators have gone so far as to suggest that desperately impoverished single women will deliberately seek out unprotected heterosexual intercourse in the hope that by giving birth to a child, they will profit substantially from increased assistance payments.¹⁴ Despite the fact that the real value of welfare benefits has in fact decreased significantly over the last several years,¹⁵ and that the social science literature indicates that there is no causal relationship between the availability of welfare benefits and the size and structure of poor families,¹⁶ this assumption has been successfully translated into public policy: many states now impose “family caps” on TANF recipient households, thereby banning any increase in benefits where an additional child is born.¹⁷ We are also witnessing an intensification of the states' efforts to promote family planning, contraceptive use, and adoption relinquishment among TANF recipient families.¹⁸ The PRWORA's sexual regulation dimensions are aimed at non-poor citizens as well. On the grounds that direct causal relationships exist between out-of-wedlock childbirth and poverty and between teenage childbirth and poverty¹⁹—assumptions that are also highly discredited by the social science literature²⁰—the federal law orders each state to calculate its out-of-wedlock birth rates for the entire population and to conduct sexual abstinence programs for needy and non-needy teenagers.²¹

10. See *infra* text accompanying notes 142–45.

11. See *infra* text accompanying notes 65, 69.

12. See *infra* text accompanying notes 102–12.

13. See *infra* text accompanying notes 47–52, 60–70.

14. See *infra* text accompanying notes 67, 176.

15. See *infra* text accompanying note 241.

16. See *infra* text accompanying notes 178–84, 224–47.

17. See *infra* text accompanying notes 176, 185–96.

18. See *infra* text accompanying notes 177, 197–220.

19. See *infra* text accompanying notes 69, 221.

20. See *infra* text accompanying notes 224–47, 260–67 and note 182.

21. See *infra* text accompanying notes 272–86.

The PRWORA has been in effect for several years; the states have had an ample opportunity to amend their welfare policies accordingly. In this article, I will attempt to demonstrate that welfare policy has become a prominent site of sexual regulation; that the rights of poor single mothers are at stake in this respect; and that given the precise structure of contemporary American welfare reform, we must pay especially close attention to the laws and regulations adopted at the state level. First, I will place contemporary sexual regulation-oriented welfare law in an historical context by considering its precedents in English and American public policy traditions (Part I). Using original qualitative analyses of the states' statutory codes and administrative regulations, I will then discuss the following measures: the mandatory child support cooperation requirement (Part II); the domestic violence exemption (Part III); the "family cap," family planning, and adoption relinquishment dimensions of welfare programs (Part IV); and the abstinence education curricula in public schools (Part V). Finally, I will conclude with a brief discussion of the broader relevance of this research. The emphasis on the moralistic policing of poor women as a solution to poverty conceals the fact that poverty will only be adequately addressed insofar as the federal and state governments adopt much more egalitarian and democratic macroeconomic policies.

PART I. THE MORALISTIC DIMENSION OF THE "DESERVING POOR"/"UNDESERVING POOR" DISTINCTION

The meaning of the term "welfare" in American public policy is unique. Whereas other Western countries established comprehensive welfare state systems in the mid-twentieth century, the United States created an incomplete and differentiated ensemble of programs that is structured according to a single overarching logic, namely the distinction between the universal, contributory, and non-stigmatizing social security programs (unemployment and old-age insurance) for "deserving" citizens and the means-tested, non-contributory, and stigmatizing poverty assistance programs for the "undeserving" poor.²²

22. THEDA SKOCPOL, *SOCIAL POLICY IN THE UNITED STATES: FUTURE POSSIBILITIES IN HISTORICAL PERSPECTIVE* 211–12 (1995) [hereinafter SKOCPOL, *FUTURE POSSIBILITIES*]. The American welfare state is "incomplete" in comparison with its other Western counterparts first and foremost because it lacks a universal health care program. See also PAUL PIERSON, *DISMANTLING THE WELFARE STATE? REAGAN, THATCHER, AND THE POLITICS OF RETRENCHMENT* 5–6 (1994) (emphasizing the distinctions between different social policies and eschewing generalizations about the impact of the Reaganite and Thatcherite reforms on the entire welfare system).

The “deserving”/“undeserving” distinction can be traced back to the early seventeenth century English poor laws and early colonial practices. In the Elizabethan era and colonial America, the poor were assessed in terms of their membership in the community—local neighbors were eligible for relief while strangers were not—and authentic need—the “impotent” poor were treated differently than able-bodied beggars and vagabonds. As the American economy was transformed into a modern capitalist system and the rising manufacturing interests embraced a laissez-faire approach to poverty that would ensure a ready supply of mobile and eager laborers, poverty was increasingly understood as the effect of individual weakness, intemperance, indolence, deviance, and evil.²³ During the 1800s, “outdoor” relief was provided to the homes of the needy who were considered “worthy,” while the “slothful” and morally deficient had to enter the poorhouse to obtain assistance. The regime of institutionalization was deliberately designed to subject the confined to stigmatized forms of pauper labor, harsh conditions, and moral degradation.²⁴ In practice, the implementation of these moral categories in the context of nineteenth-century poverty assistance affected some women in a particularly harsh manner. The once-married widows whose husbands had been productive members of the work force and the community were viewed as especially deserving recipients where charity was concerned, while deserted or unmarried women were ostracized and condemned.²⁵

Private benevolent societies were active in the late nineteenth and twentieth centuries; they sought to cure poverty not only by addressing economic conditions but also by encouraging the poor to become more virtuous and respectable. Mothers’ pensions were adopted in several states in the early twentieth century after an energetic campaign waged by women reformers and print media.²⁶ Anticipating opposition, the

23. WALTER TRATTNER, FROM POOR LAW TO WELFARE STATE: A HISTORY OF SOCIAL WELFARE IN AMERICA 11–12, 51–52 (1974). See also MICHAEL KATZ, THE UNDESERVING POOR: FROM THE WAR ON POVERTY TO THE WAR ON WELFARE 11–15 (1989) (detailing the distinction between poverty and pauperism); Jacobus tenBroek, *California’s Dual System of Family Law: Its Origin, Development, and Present Status (Pt. I)*, 16 STAN. L. REV. 257, 258–98 (1964).

24. JOEL E. HANDLER & YEHESKEL HASENFELD, THE MORAL CONSTRUCTION OF POVERTY: WELFARE REFORM IN AMERICA 45–48 (1991).

25. See MIMI ABRAMOVITZ, REGULATING THE LIVES OF WOMEN: SOCIAL WELFARE FROM COLONIAL TIMES TO THE PRESENT 3–4 (1996); Linda Gordon, *The New Feminist Scholarship on the Welfare State*, in WOMEN, THE STATE AND WELFARE 9, 18 (Linda Gordon ed., 1990) [hereinafter Gordon, *New Feminist Scholarship*].

26. See THEDA SKOCPOL, PROTECTING SOLDIERS AND MOTHERS: THE POLITICAL ORIGINS OF SOCIAL POLICY IN THE UNITED STATES 424–65 (1992) [hereinafter SKOCPOL, PROTECTING SOLDIERS] (discussing the remarkable mobilization of women’s organi-

latter argued that “worthy” mothers deserved assistance in compensation for their maternal service to society, namely the bearing and rearing of valuable future citizens. They proposed special allowances for widows that would allow them to keep their children at home, rather than relinquishing them to orphanages.²⁷ The reformers aimed to provide widows with enough support such that they would not have to enter the paid labor force or to send their children out to work. Their arguments found favor in part because it was widely believed that the children of working women would become deviants and criminals.²⁸ Where state and local authorities did implement the new program, benefits were only given to those women who, according to the judgment of the largely middle-class, white Anglo-Saxon Protestant social workers, provided a “suitable” home for their children. Through lengthy and intrusive applications, home visits, and legal proceedings, the social workers and local judges not only assessed each family’s economic needs but also scrutinized the mothers’ household budgeting skills, drinking habits, and child-rearing practices. Because recipients were not allowed to cohabit or to have a sexual relationship with a man out-of-wedlock, their social lives were also subjected to investigation. In many urban areas, foreign-born immigrants made up about half of the recipient population. The mothers’ pensions were regarded as an important vehicle for the advancement of “Americanization” and good citizenship among the newcomers. Foreign-born applicants were required to apply for citizenship, encouraged to prepare “American” meals for their children, and penalized for speaking a language other than English in the home or for failing to maintain a “proper” standard of cleanliness and orderliness.²⁹

zations and the media in support of mothers’ pensions several years before women obtained the right to vote).

27. Their proposal was developed as a response to the “child saving” interventions of local social service agencies in urban areas in the later nineteenth and early twentieth centuries. Well-intentioned middle-class home visitors would often remove poor children from their families and place them in orphanages. Impoverished foreign-born immigrants who were deemed by the white middle-class home visitors as failing to adopt “proper” familial and domestic norms were particularly vulnerable to this campaign. Linda Gordon, *Family Violence, Feminism and Social Control*, in *GENDER VIOLENCE: INTERDISCIPLINARY PERSPECTIVES* 314, 319 (Laura L. O’Toole & Jessica Schiffman eds., 1997) [hereinafter Gordon, *Family Violence*].
28. TRATTNER, *supra* note 23, at 222–25; HANDLER & HASENFELD, *supra* note 24, at 67–68.
29. See SKOCPOL, *PROTECTING SOLDIERS*, *supra* note 26, at 469; LINDA GORDON, *PITIED BUT NOT ENTITLED: SINGLE MOTHERS AND THE HISTORY OF WELFARE, 1890–1935* 43–46 (1994) [hereinafter GORDON, *PITIED*]; GWENDOLYN MINK, *THE WAGES OF MOTHERHOOD: INEQUALITY IN THE WELFARE STATE, 1917–1942* 27–52 (1995)

The pensions did improve the conditions of many poor families and did allow some mothers to keep their children where they might otherwise have been legally obliged to place them in orphanages. By the 1930s, however, the eligibility rules for mothers' pensions were so restrictive that unmarried women received virtually no assistance whatsoever, while deserted and divorced women made up a very small proportion of the recipients. The vast majority of aid went to only widows and their children.³⁰ As the programs' budgets remained quite minimal, administrators sought to defend the legitimacy of the mothers' pensions by concentrating the funds among the most "worthy" of the female-headed families, which in turn required a further acceleration of moral policing.³¹ African-American women were especially excluded from the programs. Not only were they subject to the programs' moralistic eligibility rules and their ethnocentric application, but they often lived in geographic regions in which mothers' pensions were not offered. Local governments in rural areas and the South often took advantage of the discretion that had been created for them by the states and decided not to establish the programs.³²

When the states assumed responsibility for the delivery of poverty assistance under the 1935 Social Security Act, they used the moralistic mothers' pension programs from the early twentieth century as their model. Many states denied assistance to poor single mothers on the grounds that they were not providing a "suitable home" for their children, that they were not "morally fit" mothers, that they were associating with an able-bodied man who could act as a "substitute

[hereinafter MINK, MOTHERHOOD]. One can point out the ethnocentric character of the assumptions behind this "Americanization" campaign without losing sight of the fact that women from different racial groups have in fact played different roles in their families throughout American history. See BONNIE THORNTON DILL, CENTER FOR RESEARCH ON WOMEN, *OUR MOTHERS' GRIEF: RACIAL ETHNIC WOMEN AND THE MAINTENANCE OF FAMILIES* (Memphis St. U. Dep't. of Soc., Research Paper No. 4, 1986), for a feminist study of the differences between mothers from white, African-, Chinese-, and Mexican-American families in the nineteenth century that emphasizes the role minority women have played in encouraging resistance against racial oppression. See CAROL STACK, *ALL OUR KIN: STRATEGIES FOR SURVIVAL IN A BLACK COMMUNITY* (1974), for a classic study of the ways in which informal cooperative networks of kin, friends, and neighbors are crucial to poor black families' adaptation to poverty. See Maxine Baca Zinn, *Family, Race and Poverty in the Eighties*, 14 *SIGNS* 856, 858 (1989), for a more general refutation of the argument that African-American families are deviant, dysfunctional, and pathological.

30. SKOCPOL, *PROTECTING SOLDIERS*, *supra* note 26, at 466-67.

31. SKOCPOL, *PROTECTING SOLDIERS*, *supra* note 26, at 475.

32. SKOCPOL, *PROTECTING SOLDIERS*, *supra* note 26, at 471-72. Families headed by African-American women were also commonly excluded from the Children's Bureau programs in the pre-New Deal period. See GORDON, *PITIED*, *supra* note 29, at 272.

father,” or merely that they received “male callers” in their homes.³³ Advocates for poor women who drafted the Aid to Dependent Children program (ADC, which later became AFDC) believed that it would only be needed on a temporary basis. They assumed that the vast majority of mothers would be married to wage-earning men, that working class men’s employment fortunes would improve dramatically after the Depression was brought to an end, and that widows would be able to collect the pensions of their deceased wage-earning husbands. They did not anticipate the rise in women’s economic independence and in the numbers of single, never-married women who would bear and raise children on their own. For their part, the New Deal reformers who oversaw the entire construction of the 1935 Social Security Act believed

33. The most common type of “suitable home” assessment involved an investigation of the recipient’s sexual behavior. Evidence of a cross-racial sexual relationship in and of itself constituted sufficient grounds for disqualification from the program. GORDON, PITIED, *supra* note 29, at 298–99. Because an “absent father” was a condition of eligibility, any adult male present in the home could be considered a “substitute father.” Investigative procedures—which sometimes included night-time raids and police surveillance—were widely adopted to monitor the number of adults living in the assistance unit home. Several states deliberately used the “suitable home” rule to limit the number of families on the welfare rolls. JOEL HANDLER, REFORMING THE POOR: WELFARE POLICY, FEDERALISM AND MORALITY 34–36 (1972) [hereinafter HANDLER, WELFARE POLICY]. For a detailed account of the raids and other policing methods used to investigate AFDC recipient mothers’ sexual conduct within their homes and their “resorting”—allegedly for the purposes of conducting extra-marital relations—in public places, see Jacobus tenBroek, *California’s Dual System of Family Law: Its Origin, Development, and Present Status (Pt. III)*, 17 STAN. L. REV. 614, 663–71 (1965). In some states, poor children could not receive welfare payments if their parents were not “ceremonially married,” single mothers could be criminally prosecuted for bearing children out of wedlock, and women welfare recipients who gave birth to children outside of marriage could be subjected to sterilization. GWENDOLYN MINK, WELFARE’S END 35–36, 47–49, 142 n.8 (1998) [hereinafter MINK, WELFARE’S END].

African-American women were particularly singled out for these forms of sexual policing. See MINK, WELFARE’S END, *supra*, at 48–49. More generally, the exclusion of agricultural workers and domestic servants from old-age insurance and unemployment compensation under the 1935 Social Security Act and other forms of racial discrimination in New Deal programs, had serious implications for the African-American and Hispanic communities. Federal and state legislators from the South and Southwest generally opposed the establishment of welfare programs on the grounds that they would put an upward pressure on the low wages for agricultural and domestic labor. They lobbied successfully against the creation of federal standards for poverty assistance and for state discretionary powers where eligibility was concerned. JILL QUADAGNO, THE COLOR OF WELFARE: HOW RACISM UNDERMINED THE WAR ON POVERTY 17–25 (1994); GORDON, PITIED, *supra* note 29, at 275. In contrast, many women reformers argued that the ban on assistance for “illegitimate” children in the emerging state welfare programs was simply a proxy for racial discrimination; they favored embracing and re-educating unwed mothers over excluding them. MINK, MOTHERHOOD, *supra* note 29, at 144–47.

firmly in the "family wage" principle. They thought that men in the work force ought to be able to earn an income that would support their wives and children. They also implicitly affirmed the view that women ought to provide the unpaid domestic labor required for the reproduction of the patriarchal nuclear family. In this context, ADC, and later AFDC, became a unique part of American public policies; unlike Social Security, these programs' eligibility rules entailed specific and intensive morality tests.³⁴

In the late 1960s and early 1970s, however, the Supreme Court struck down several of the states' welfare eligibility rules.³⁵ Two of the decisions involving the moralistic dimension of the AFDC program allow us to gain some insight into the Court's approach. First, in *King v. Smith*, the Supreme Court struck down Alabama's "substitute father" rule that excluded families from receiving benefits where the mother was "cohabiting" with a man outside of marriage.³⁶ Officials for the state testified that "cohabitation" exists wherever the man and woman in question had "frequent" or "continuing" extra-marital sexual relations.³⁷ Citing a key passage of the contemporary Social Security Act, the decision holds that each state participating in the AFDC program must provide that "'aid to families with dependent children . . . shall be furnished with reasonable promptness to all eligible individuals . . .'"³⁸ Second, in *New Jersey Welfare Rights Organization v. Cahill*, the Supreme Court struck down a New Jersey law that allowed AFDC benefits to be extended only to those families that were comprised of a ceremonially married, opposite sex adult couple and their legitimate children: they decided that this law violated the Equal Protection Clause of the Fourteenth Amendment by discriminating against illegitimate children.³⁹

34. GORDON, PITIED, *supra* note 29, at 298.

35. *New Jersey Welfare Rights Org. v. Cahill*, 411 U.S. 619 (1973) (per curiam) (striking down a New Jersey law that limited benefits to only those families with an opposite sex, ceremonially married adult couple and their legitimate children); *Shapiro v. Thompson*, 394 U.S. 618 (1969) (rejecting welfare laws that required applicants to have established residence in the local jurisdiction for at least one year); *King v. Smith*, 392 U.S. 309 (1968) (striking down Alabama's "substitute father" rule).

36. *King*, 392 U.S. at 312-13.

37. *King*, 392 U.S. at 314. The Court also noted that various officials offered conflicting definitions of the necessary frequency of sexual relations, ranging from once a week to once every six months. The regulation further stipulated that a pregnancy or a baby under six months of age constituted prima facie evidence of a "substitute father." *King*, 392 U.S. at 314.

38. *King*, 392 U.S. at 317 (quoting Social Security Act of 1964 42 U.S.C. § 602(a)(9)).

39. *Cahill*, 411 U.S. at 621.

Although these decisions did constitute recognition of an entitlement to welfare, they were nevertheless limited in several important respects. First, the decisions determined that the states' moralistic exclusionary welfare laws only violated American citizens' statutory rights under the 1935 Social Security Act.⁴⁰ In other decisions, the Supreme Court did strike down various welfare program requirements and procedures on the grounds that they were unconstitutional, but, strictly speaking, the policies in question had nothing to do with a general entitlement to welfare or sexual conduct. For example, residency requirements were rejected because they violated the right to travel⁴¹ and welfare agencies were instructed to provide due process to recipients when terminating benefits.⁴² By contrast, the decisions involving illegitimate children and "substitute fathers" referred not to constitutional rights, but to statutory rights that were secured solely by the Social Security Act. Second, the decision in *Cahill*⁴³ refers to discrimination against illegitimate children. It is silent, however, on the question of discrimination against unmarried cohabiting adults on the basis of their marital status in welfare laws. It deals exclusively with the fact that making legitimacy status a condition of eligibility for a government program imposes a disability on a child when he or she had no responsibility for his/her parents' procreative sexual conduct.⁴⁴ Third, the Court clearly left the door open in *King* not only for state initiatives in the general area of moral reform but for the inclusion of measures aimed at moral correction within each state's AFDC program as well. The problem with Alabama's "substitute father" rule was only that it disqualified needy children from receiving benefits and completely excluded them from the program. The state could in fact take "rehabilitative" measures to "correct" "unsuitable" homes among AFDC recipients; it could encourage recipients to use family planning services to prevent illegitimate births; and it could create paternity identification and child support collection programs for recipient families.⁴⁵ In sum, these decisions established that there was a statutory entitlement, rather than a constitutional entitlement, to welfare: states could not exclude a specific group of persons from their welfare programs unless they were explicitly authorized to do so by Congress. As we will see below, the overall legislative trend since

40. See MINK, WELFARE'S END, *supra* note 33, at 50-51, 53.

41. *Shapiro v. Thompson*, 394 U.S. 618 (1969).

42. *Goldberg v. Kelly*, 397 U.S. 254 (1970).

43. *Cahill*, 411 U.S. at 620.

44. *Cahill*, 411 U.S. at 620 (citing *Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164, 175 (1972)).

45. *King*, 342 U.S. at 325.

these rulings has been towards the re-construction of the federal law such that it gives the states much more authority to impose exclusionary eligibility rules. A narrow reading of these rulings would therefore suggest that they cannot provide any protection for a needy person currently seeking redress for the exclusions that have been specified by Congress. Further, because the Court in its most progressive moment signaled that it would allow the states to integrate “rehabilitative” efforts to promote heterosexual marriage and legitimate childbirth into their AFDC programs, it effectively approved the perpetuation of poverty assistance policies designed to regulate the private lives of poor women.⁴⁶

These Supreme Court decisions, however, only constitute one part of the context in which contemporary poverty programs have been formulated. Welfare debates are always conducted in the context of specific ideological environments; contemporary contestations about poverty assistance programs are no exception. In the 1960s, the concept of the “culture of poverty” was invented to account for that fraction of the population that remained poor throughout economic boom years. It was argued—first by progressives and later by conservatives—that there is a sub-group within the lowest income bracket that is culturally trapped within a self-perpetuating cycle of poverty. According to this model, the poorest of the poor have a distinct and dysfunctional way of life and reproduce passive, resigned, and dependent behavior across generations. They are therefore alienated from mainstream society and permanently locked in destitution.⁴⁷ This socio-cultural approach was extended by Moynihan in his influential report on poor African-American families.⁴⁸ He contended that poverty among African-Americans was caused not only by the lack of well paying jobs for black men but also by the pathological effects of urban ghetto subcultures, the decline of the traditional family, and the rise of female-headed families and illegitimate births. In the 1980s, conservative intellectuals and

46. See also *Bowen v. Gilliard*, 483 U.S. 587 (1987) (upholding federal law that required the states to consider any child receiving support payments as a member of the “household” even where this income results in the household’s disqualification from a welfare program); *Lyng v. Castillo*, 477 U.S. 635 (1986) (upholding a federal food stamp law that defines the composition of the “household” that is eligible for assistance); *Lascaris v. Shirley*, 420 U.S. 730 (1975) (per curiam) (upholding New York AFDC statutes requiring recipients to cooperate in a paternity or child support action against an absent parent as a condition of eligibility); *Wyman v. James*, 400 U.S. 309 (1971) (upholding New York AFDC statutes and regulations requiring recipients to allow a caseworker to perform a home visit without a warrant).

47. See KATZ, *supra* note 23, at 15–23.

48. DANIEL P. MOYNIHAN, U.S. DEP’T OF LABOR, *THE NEGRO FAMILY: THE CASE FOR NATIONAL ACTION* (1965) (colloquially known as “the Moynihan Report”).

“think tanks” developed the “underclass” theory version of the “culture of poverty” approach. They claimed that black female-headed families were socializing young black children into a life of welfare dependency, school failure, addiction, extramarital sexual activity and adolescent pregnancy, crime, and alienation from “mainstream” society.⁴⁹ Charles Murray explicitly argued that the increased prevalence of families headed by young women is one of the most important causes of poverty, and that this is especially the case for African-Americans because their rates of non-marital and teenage births are so much greater than that of whites.⁵⁰ He further claimed that the existing welfare programs caused dependency on governmental assistance and created incentives for anti-social behavior and out-of-wedlock births.⁵¹ African-Americans remained the focus of conservative commentary on poverty assistance programs despite the fact that the numbers of white women and African-American women in AFDC/TANF programs were roughly equal.⁵²

The continuing political campaign for the integration of sexual regulation measures into poverty assistance programs is but one part of a much broader right-wing agenda. Conservatives in the 1980s and 1990s also pressed for and passed into law reforms that reduced total welfare expenditures,⁵³ decreased the size of government bureaucracies, and

49. See KATZ, *supra* note 23, at 195–96. See generally MIMI ABRAMOVITZ, *UNDER ATTACK, FIGHTING BACK: WOMEN AND WELFARE IN THE UNITED STATES* (2000) [hereinafter ABRAMOVITZ, *UNDER ATTACK*]; HERBERT GANS, *THE WAR AGAINST THE POOR: THE UNDERCLASS AND ANTIPOVERTY POLICY* (1995).

50. CHARLES MURRAY, *LOSING GROUND: AMERICAN SOCIAL POLICY, 1950–1980* (10th Anniversary ed. 1994).

51. MURRAY, *supra* note 50. See TRATTNER, *supra* note 23, at 47–48, for the Malthusian precedents for Murray’s argument that poverty assistance programs shelter the poor from the corrective rigors of the capitalist market and cause poverty by encouraging excessive reproduction among the poor. See also LINDA GORDON, *WOMAN’S BODY, WOMAN’S RIGHT: BIRTH CONTROL IN AMERICA* 77 (1990) [hereinafter GORDON, *WOMAN’S BODY*]; THEODORE MARMOR, JERRY MASHAW & PHILIP HARVEY, *AMERICA’S MISUNDERSTOOD WELFARE STATE: PERSISTENT MYTHS, ENDURING REALITIES* 24–25 (1990). See Nancy Fraser & Linda Gordon, *A Genealogy of Dependency: Tracing a Keyword of the U.S. Welfare State*, 19 *SIGNS* 309 (1994) for a critical analysis of the stigmatizing and pathologizing connotations that have been assigned to the concept of dependency in the history of American public policy.

52. See ABRAMOVITZ, *UNDER ATTACK*, *supra* note 49, at 20; Lucie White, *No Exit: Rethinking “Welfare Dependency” From a Different Ground*, 81 *Geo. L.J.* 1961, 1966 (1993).

53. Conservatives argued that a reduction in welfare expenditures was urgently required to eliminate the federal deficit. Total AFDC spending in the mid-1990s, however, amounted to about 1% of the total federal budget. FRANCES FOX PIVEN & RICHARD A. CLOWARD, *THE BREAKING OF THE AMERICAN SOCIAL COMPACT* 61 (1997). AFDC spending peaked at \$23 billion in federal and state spending combined. The budget for Social Security spending, by contrast, is more than \$300 billion, while \$280

increased the role of non-profit organizations, private firms, and religious organizations in the delivery of social services.⁵⁴ They successfully lobbied for greater independence for the states in designing and implementing the AFDC/TANF programs.⁵⁵ They popularized the idea that welfare recipients ought to be obliged to work in return for their benefits⁵⁶ and consequently adopted new “workfare” policies.⁵⁷ Conservatives also argued that religious organizations ought to play a

billion is allotted to Medicare. Joel Handler, *Reforming/Deforming Welfare*, 4 NEW LEFT REV. 114, 117 (2000) [hereinafter Handler, *Reforming/Deforming Welfare*].

54. Reagan effectively legitimated the transfer of social welfare program funding and delivery from government to private foundations, charitable organizations, and religious organizations. TRAITNER, *supra* note 23, at 363–64. Reagan also combined his massive reductions in welfare budgets with a generous tax cut; he argued that the wealthy would provide sufficient charitable contributions and that private charities would in turn replace the withdrawn federal funds. Marc Bendick, *Privatizing the Delivery of Social Welfare Services: An Idea to be Taken Seriously*, in PRIVATIZATION AND THE WELFARE STATE 104–06 (Sheila Kamerman & Alfred Kahn eds., 1989) [hereinafter PRIVATIZATION]; Evelyn Brodtkin & Dennis Young, *Making Sense of Privatization: What Can We Learn from Economic and Political Analysis?* in PRIVATIZATION, *supra* at 148–49; Ronald Thiemann, Samuel Herring, & Betsy Perabo, *Risks and Responsibilities for Faith-Based Organizations*, in WHO WILL PROVIDE? THE CHANGING ROLE OF RELIGION IN AMERICAN SOCIAL WELFARE 54–55 (Mary Jo Bane, Brent Coffin, & Ronald Thiemann eds., 2000). In the end, however, the charitable giving did not offset the government cuts. Thiemann et al., *supra*. The non-profit sector was itself dependent upon government funds and, with the cuts, began to impose fees upon its clients. Thiemann et al., *supra*. At the same time, many non-profits found themselves competing with for-profit corporations in welfare service delivery contract bidding. Thiemann et al., *supra*.
55. The Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105, introduced the most significant decentralizing shift in authority over poverty assistance programs from the federal government to the states in American history.
56. The most important source for this dimension of the welfare debate is LAWRENCE MEAD, *BEYOND ENTITLEMENT: THE SOCIAL OBLIGATIONS OF CITIZENSHIP* (1986).
57. The Family Support Act of 1988, Pub. L. No. 100-485, 102 Stat. 2343, introduced mandatory work schemes for single mothers in the AFDC program. Various states experimented with “workfare” schemes under “waivers” from the federal government in the late 1980s and early 1990s. The federal waivers were required because the imposition of conditions on the eligibility for poverty assistance, such as participation in work schemes or “family caps,” would have otherwise infringed upon the statutory entitlement to welfare benefits. Under the PRWORA, however, it is far easier for the states to impose eligibility conditions. The PRWORA also explicitly requires each state to make participation in a work or vocational training scheme a mandatory part of its TANF program. Temporary Assistance for Needy Families Pub. L. No. 104-193 § 103, 110 Stat. 2105, 2129–34 (1996). It also limits each recipient’s eligibility to two years at one time and to five years over his/her adult lifetime. Temporary Assistance for Needy Families Pub. L. No. 104-193 § 103, 110 Stat. 2105, 2113, 2137 (1996).

larger role in delivering welfare programs⁵⁸ and implemented specific reforms designed to encourage the states to allow religious organizations to participate in the delivery of social services without sacrificing their autonomy.⁵⁹

Moralistic welfare reforms remained a significant aspect of this broader policy discourse through the 1980s and the 1990s. Even though conservatives were generally engaged in an effort to diminish the size of government and to reduce governmental intervention in the economy at this time, the conservative leadership in Congress nevertheless enthusiastically embraced a renewed emphasis on moral reform as a solution to poverty.⁶⁰ Conservatives and communitarians from across the political spectrum argued that welfare programs ought to address poverty by promoting traditional heterosexual marriage and fathers' rights,⁶¹ that the increases in the divorce rate and the incidence of female-headed families constitute the primary causes of poverty,⁶² that parenting that

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58. See MARVIN OLASKY, *THE TRAGEDY OF AMERICAN COMPASSION* (1992); MARVIN OLASKY, *RENEWING AMERICAN COMPASSION* (1996); COUNCIL ON CIVIL SOCIETY, *A CALL TO CIVIL SOCIETY: WHY DEMOCRACY NEEDS MORAL TRUTHS* (1998).
59. The PRWORA specifically allows the states to contract with religious organizations for the delivery of TANF services "without impairing the religious character of such organizations" and provides that where such a contract is established, the religious organization "shall retain its independence from Federal, State, and local governments, including such organization's control over the definition, development, practice, and expression of its religious beliefs." Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105, 2162 (1996). In one of his first acts in office, Bush created a new liaison authority, the White House Office of Faith-Based and Community Initiatives, as well as new centers in the Departments of Justice, Education, Labor, Health and Human Services, and Housing and Urban Development, to promote cooperation with religious organizations in the delivery of social services. Bush appointed John DiIulio as head of the White House Office. Laurie Goodstein, *Nudging Church-State Line, Bush Invites Religious Groups to Seek Federal Aid*, N.Y. TIMES, January 30, 2001, at A18. DiIulio is one of the authors of *A CALL TO CIVIL SOCIETY*, *supra* note 58.
60. GARY BRYNER, *POLITICS AND PUBLIC MORALITY: THE GREAT AMERICAN WELFARE REFORM DEBATE* 164 (1998) (stating that "[o]ne of the most interesting aspects of the welfare reform debate was the willingness of conservatives to engage in some social engineering, in trying to use government programs to shape sexual behavior, marriage decisions, family formation, and other social/cultural characteristics of Americans, particularly poor ones").
61. David Blankenhorn, *The State of the Family and the Family Policy Debate*, 36 SANTA CLARA L. REV. 431, 437 (1996).
62. William Galston, *The Re-institutionalization of Marriage: Political Theory and Public Policy*, in *PROMISES TO KEEP: DECLINE AND RENEWAL OF MARRIAGE IN AMERICA* 271, 275 (David Popenoe, Jean Bethke Elstain, & David Blankenhorn, eds., 1996). ("These data suggest that the best anti-poverty program for America's children is a stable, intact family . . . Family structure differences between whites and African Americans are responsible for a large, and increasing, share of racial disparities").

deviates from the married heterosexual couple model is deficient,⁶³ and that low-income families headed by married couples ought to be given priority in the distribution of poverty assistance.⁶⁴ Measures designed to intensify child support enforcement policies as a solution to poverty gained bi-partisan support.⁶⁵ Some states even encouraged marriage among welfare recipients by disregarding the income of a new spouse when calculating total family resources for the purposes of assessing AFDC eligibility.⁶⁶

Further, the once-controversial "family cap" has become a common feature of welfare programs.⁶⁷ It is widely believed in American public policy circles that poor women approach reproductive sex in a purely entrepreneurial manner. It is alleged that they engage in unprotected heterosexual intercourse in the hope that should they become pregnant and bear a newborn child, they would profit handsomely in the form of either public assistance eligibility or—where they are already participating in a welfare program—increased cash payments and relief from the mandatory work requirements. The fact that the additional payments are often miniscule,⁶⁸ and that no reasonable woman would believe that pregnancy, childbirth, and caring for a newborn amount to a carefree vacation, is disregarded.

Galston, like many other conservatives, simply turns the coincidence of female-headed families and poverty into a causal relationship and fails to consider the fact that the low level of women's wages and the poor job opportunities available for women with modest educational achievements are the primary factors behind the over-representation of single mother families among the impoverished. Former Republican Vice-President Dan Quayle stated that "marriage is probably the best anti-poverty program there is [sic]." White, *supra* note 52, at 1986.

63. DAVID POPENOE, *LIFE WITHOUT FATHER: COMPELLING NEW EVIDENCE THAT FATHERHOOD AND MARRIAGE ARE INDISPENSABLE FOR THE GOOD OF CHILDREN AND SOCIETY* (1996); Council on Families in America, *Marriage in America: A Report to the Nation, in PROMISES TO KEEP: THE DECLINE AND RENEWAL OF MARRIAGE IN AMERICA* 293, 294–98 (David Popenoe, Jean Bethke Elstain, & David Blankenhorn, eds., 1996).
64. COUNCIL ON CIVIL SOCIETY, *supra* note 58, at 20; Council on Families in America, *supra* note 63, at 314.
65. BRYNER, *supra* note 60, at 74.
66. In 1996, when the PRWORA was passed, eight states had such a measure in effect: Florida, Mississippi, New York, North Dakota, Pennsylvania, South Carolina, Virginia, and Wisconsin. BRYNER, *supra* note 60, at 250.
67. *See infra* text accompanying notes 181–92.
68. In 1994, the average extra monthly AFDC benefit that was paid due to the birth of a child was about \$70. Nancy Wright, *Welfare Reform Under the Personal Responsibility Act: Ending Welfare As We Know It or Governmental Child Abuse?* 25 HASTINGS CONST. L.Q. 357, 381 (1993). In 1999, the average monthly TANF benefit paid to recipient households was \$357. U.S. DEP'T OF HEALTH & HUMAN SERVS., CHARACTERISTICS, *supra* note 7.

Indeed, the idea that a decrease in out-of-wedlock births and teenage sexual activity would lead to a reduction in poverty is widely embraced by Republicans and Democrats alike.⁶⁹ As we will see below, this claim has been widely disputed in the social science literature. There is also substantial evidence that the entire social panic about the sexual conduct of poor women and the structure of their households is thoroughly intertwined with racist beliefs about the biological and socio-cultural inferiority of African-Americans.⁷⁰ The measures that were

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69. Before the passage of the PRWORA in 1996, President Clinton gave several prominent speeches on welfare policy in which he promoted stronger child support enforcement measures, criticized teenage pregnancy and single parenting, and extolled the virtues of the traditional nuclear family. He also approved several waivers that allowed states to experiment with “family caps” in their AFDC programs and proposed his own version of a family values-oriented welfare reform bill that included a “family cap.” In 1996, he signed the PRWORA into law. BRYNER, *supra* note 60, at 78, 84, 112; JUDITH STACEY, *IN THE NAME OF THE FAMILY: RETHINKING FAMILY VALUES IN THE POSTMODERN AGE* 4, 62 (1996); TRATTNER, *supra* note 23, at 396; Paul K. Legler, *The Coming Revolution in Child Support Policy: Implications of the 1996 Welfare Act*, 30 *FAM. L.Q.* 519, 524, 537, 541 (1996).
70. GORDON, *WOMAN’S BODY*, *supra* note 51, at 448–57; PIVEN & CLOWARD, *supra* note 53, at 73–76; Catherine Albiston & Laura Beth Nelson, *Welfare Queens and Other Fairy Tales: Welfare Reform and Unconstitutional Reproductive Controls*, 38 *HOW. L.J.* 473, 474–86 (1995); Fraser & Gordon, *supra* note 51, at 27; Lucy Williams, *The Ideology of Division: Behavior Modification Welfare Reform Proposals*, 102 *YALE L.J.* 719, 742–46 (1992) [hereinafter Williams, *Ideology*]. Martin Gilens presents data that suggests that there is a strong tendency among whites who hold negative views about welfare policies to assume that blacks are “lazy” and that black mothers on welfare will probably have more children to obtain an increase in their benefits. He estimates that assumptions about blacks are the most important factor that influences whites’ opinions about welfare. See Martin Gilens, “Race Coding” and White Opposition to Welfare, 90 *AM. POL. SCI. REV.* 593 (1996). It should be noted that Richard Herrnstein and Charles Murray integrate their “family values” proposals—for the promotion of family planning and the relinquishment of non-abused children for adoption among poor families, for conservative welfare reforms, and for the promotion of the heterosexual nuclear family and marriage among the poor—into their general arguments about the inferior intelligence of African-Americans and the poor. See RICHARD HERRNSTEIN & CHARLES MURRAY, *THE BELL CURVE: INTELLIGENCE AND CLASS STRUCTURE IN AMERICAN LIFE* (1994). See DOROTHY ROBERTS, *KILLING THE BLACK BODY: RACE, REPRODUCTION AND THE MEANING OF LIBERTY* (1997) [hereinafter ROBERTS, *KILLING THE BLACK BODY*] for a comprehensive analysis of the association of African-American motherhood with dysgenic forms of racial degeneracy, from slavery to contemporary welfare debates. Marion Wright Edelman, head of the Children’s Defense Fund commented in 1992, “[w]hile it is no longer acceptable in most polite circles to race-bait explicitly, bashing welfare has become the next best resort for politicians. [Welfare has become] a fourth-generation code phrase, perhaps more powerful than busing, quotas or Willie Horton.” White, *supra* note 52, at 1966 n.22. See also Regina Austin, “Sapphire Bound!” 1989 *WIS. L. REV.* 539, 549–78 (1989) (arguing that hostile ideas about young black single women who are pregnant played a determining role in a specific employment dispute and that rhetoric about

generated out of this fatally flawed campaign have nevertheless been widely adopted by the states. Because the PRWORA greatly enhanced state autonomy in the design and delivery of the TANF program, we can only grasp the implications of these policy developments by studying each state's laws and regulations. I will now turn to a fifty-state overview of these reforms, beginning with the paternity identification and child support enforcement laws.

PART II. MANDATORY PATERNITY IDENTIFICATION AND CHILD SUPPORT ENFORCEMENT COOPERATION

A. Child Support Enforcement as a Solution to Poverty: The Implications for Poor Women and Their Children

Many policy experts—feminists and non-feminists alike—would agree with the following abstract principle: where a custodial parent and his/her children have become poor because they have been abandoned by a relatively prosperous second parent who had voluntarily agreed to share child-rearing costs, the absent parent should make a good faith effort to support the children in question until they reach the age of majority. The actual implementation of concrete child support enforcement policies in the context of welfare programs, however, raises serious difficulties. What measures should the state be able to take to

black teenage pregnant women is generally shaped by racist, misogynist, and patriarchal stereotypes); Pamela Bridgewater, *Connectedness and Closeted Questions: The Use of History in Developing Feminist Legal Theory*, 11 WIS. WOMEN'S L.J. 351, 361–63 (1997) (arguing that popular concerns about single mothers on welfare having too many children are deeply intertwined with racist views about black women); Tonya Brito, *From Madonna to Proletariat: Constructing a New Ideology of Motherhood in Welfare Discourse*, 44 VILL. L. REV. 415 (1999) (arguing that official discourse on welfare is deeply shaped by the enduring influence of racial and patriarchal ideology); Naomi Cahn, *Representing Race Outside of Explicitly Racialized Contexts*, 95 MICH. L. REV. 965 (1997) (arguing that welfare programs—and especially the child support enforcement requirement of AFDC/TANF law—are implicitly supported and surrounded by racial rhetoric and negative stereotypes about blacks); Lucy Williams, *Race, Rat Bites and Unfit Mothers: How Media Discourse Informs Welfare Legislation Debate*, 22 FORDHAM URB. L.J. 1159 (1995) (arguing that the media has symbolically constructed the typical welfare recipient as a poor black single mother who is irresponsible, sexually excessive, lazy, socially deviant and dysfunctional, and an unfit parent).

identify the absent biological father⁷¹ when he has not already acknowledged paternity and when the mother does not want to cooperate in paternity identification and child support enforcement measures?⁷² Should the state be able to pressure a poor single mother to cooperate by making her cooperation a condition of eligibility for a public good that she desperately needs, such as a poverty assistance benefit?

One way to illustrate the issues at stake here is to consider a limited case that has the following features: one biological parent plays an absolutely minimal role; both parents act voluntarily in a deliberate manner; and neither parent is subject to any form of coercion or deception. What if, for example, a woman conceived a child using sperm donated by a male friend and artificial insemination techniques, but then had nothing to do with him after conception took place and began to raise the newborn child on her own? Should we consider the male donor as the father for the purposes of assessing child support obligations, regardless of the fact that he did not assist the woman at the time of her pregnancy and childbirth and did not take part in the child-rearing experience? What if the mother had in fact entered into an agreement with him that he would not interfere with her relationship with the child in any way, and he in turn had secured an understanding with her that he would not have to support the household? Should the biological definition of the obliged parent suffice, even where the custodial mother does not consider the absent man in question a co-parent and does not want to accept support from him? What should we do if this mother then turns, because of her modest circumstances, to a social service agency for welfare benefits? If a woman bears a child who was fathered by a voluntary sperm donor on an informal basis and that man did not want to have any further involvement with her family, she would not be obliged to reveal his identity in the context of any interaction with a private or

71. In 1991, 90% of all child support orders named men, rather than women, as the payers. The vast majority of custodial parents owed support are mothers. David L. Chambers, *Fathers, the Welfare System, and the Virtues and Perils of Child Support Enforcement*, 81 VA. L. REV. 2575, 2576 n.6 (1995).

72. One survey that was conducted in 1986 found that of the custodial mothers without support orders who had never been married to their children's father, 43% stated that they did not want to establish an order. Chambers, *supra* note 71, at 2601-02. Other research has confirmed the finding that a high proportion of single mothers do not want to receive child support payments from the absent fathers. Chambers, *supra* note 71, at 2605. Of the nearly 10 million mothers raising children whose fathers are absent and yet alive, only slightly more than half had an order of support in place for their children in the early 1990s. Chambers, *supra* note 71, at 2589. Paternity is established only for about one third of the children who are born to unmarried women. Chambers, *supra* note 71, at 2589. Over 50% of all children with an absent parent receive no child support. Chambers, *supra* note 71, at 2588.

public agency unless she applies for poverty assistance. Where any non-poor unmarried woman chooses to give birth to a child, she is not forced to identify, marry, live with, seek support from, or interact with the biological father.⁷³ In essence, every mother who wishes to freely determine the structure of her childbearing and household must not only secure the cooperation of the biological father; she must also be wealthy enough to purchase, in effect, governmental respect for her autonomy.⁷⁴

Contemporary welfare laws and regulations dictate that any man who is the biological father of a child in the AFDC/TANF program is obliged to pay support for that child, regardless of the custodial mother's views on the matter, the nature of the father's relationship with the child and the custodial mother, his income, and his employment status. Where poverty assistance might be treated as a responsibility that ought to be borne collectively by society as a whole, it is now regarded as a private familial obligation that is imposed—by virtue of mere biological ties—upon absent fathers. Further, the dominant bi-partisan approach to welfare policy treats child support payments not as one small element within a comprehensive ensemble of anti-poverty policies that would bring about structural economic transformation, job creation, and the redistribution of wealth, but as a “silver bullet.” Paternity identification and child support enforcement measures are widely regarded in the United States today as the single most important initiative that we can take to address poverty. A 1994 Department of Health and Human Services report did in fact find that non-custodial parents of children receiving welfare benefits made child support payments in only 12.5 percent of the total number of welfare cases involving single parent households.⁷⁵ These numbers do not, however, indicate whether or not the absent fathers held positions in the labor market that would have allowed them to earn enough income to support their children in the first place. Although some of the absent fathers of children on

73. Chambers, *supra* note 71, at 2603. Where a married woman separates and divorces from her husband, the state does not require her to seek child support from him unless she enters the AFDC/TANF program. Chambers, *supra* note 71, at 2603. Single mothers who are not on welfare are not obliged by any governmental agency to establish or to enforce child support agreements. See Tonya Brito, *The Welfarization of Family Law*, 48 U. KAN. L. REV. 229, 265–66 (2000) [hereinafter Brito, *Welfarization*].

74. tenBroek and Brito note that two distinct bodies of family law have developed in the United States such that poor families have been uniquely singled out for special familial regulation that has entailed the imposition of behavioral norms and moral standards and the invasion of privacy. Brito, *Welfarization*, *supra* note 73, at 229–83; tenBroek, *supra* note 23, at 257–58.

75. Ann Marie Rotondo, Comment, *Helping Families Help Themselves: Using Child Support Enforcement to Reform Our Welfare System*, 33 CAL. W. L. REV. 281, 281 (1997).

AFDC/TANF are wealthy, many are poor themselves.⁷⁶ One study suggests that the economic resources of the absent parents of children in welfare programs are so meager that even if support orders were established and enforced for every child with a living but absent parent, the TANF caseload would only be reduced by eleven percent.⁷⁷ A 1995 Census Bureau report estimated that if all child support orders had been fully enforced, the proportion of American families living in poverty would not have changed significantly.⁷⁸ Another study conducted in 1992 found that sixty-six percent of custodial mothers with support orders who did not receive any payment cited the father's economic inability to pay as the primary reason for his delinquency.⁷⁹ Research also suggests that the absent father's employment stability is the best predictor of his payment of child support, and that stricter child support enforcement procedures cannot compensate for the fact that many absent fathers do not have access to jobs that pay a sufficient income.⁸⁰

Under the current system, the custodial parent must also assign his/her right to the support payments to the state. Because the support payments are assigned to the states, and typically allow the custodial parents to receive no part of the payments themselves or only a small portion—often as little as fifty dollars—the state enjoys the greatest

76. Chambers, *supra* note 71, at 2594–95. In 1994, the mean gross weekly wage for men with no more than a high school diploma was approximately \$523 (in 1995 dollars). It declined about 12% between 1970 and 1994. In 1994, the mean gross weekly wage for black men with no more than a high school diploma was 82% of the wage for similar white men. This racial gap has declined, but it has done so largely because the real value of white men's wages has decreased. U.S. DEP'T OF HEALTH & HUMAN SERVS., INDICATORS OF WELFARE DEPENDENCE: ANNUAL REPORT TO CONGRESS III-24 (2000) [hereinafter U.S. DEP'T OF HEALTH AND HUMAN SERVS., INDICATORS].

77. Legler, *supra* note 69, at 562, n.22. Many states have adopted criminal penalties for failing to pay child support, but almost all of them provide the affirmative defense of inability to pay. The inability to pay defense can be strictly limited with respect to the payer's employability, assets, and potential sources of loans. Pamela Roper, Note, *Hitting Deadbeat Parents Where It Hurts: "Punitive" Mechanisms in Child Support Enforcement*, 14 ALASKA L. REV. 41, 57–58 (1997). Even where the state has established criminal penalties for nonpayment, prosecution and incarceration in delinquent child support cases are quite rare. Roper, *supra*, at 51–52. See also Mark S. Coven, *Welfare Reform, Contempt and Child Support Enforcement*, 30 SUFFOLK U. L. REV. 1067 (1997) (arguing that although the courts may enter a civil contempt order against a delinquent payer and impose a fine or imprisonment, the payer's access to economic resources should be considered and incarceration should be regarded by the judiciary as a remedy of last resort).

78. Chambers, *supra* note 71, at 2594 n.84.

79. Roger Levesque, *Targeting "Deadbeat" Dads: The Problem With the Direction of Welfare Reform*, 15 HAMLIN J. PUB. L. & POL'Y 1, 32 (1994) [hereinafter Levesque, *Targeting "Deadbeat" Dads*].

80. Levesque, *supra* note 79, at 32, 34.

benefit from the successful collection of child support as it recoups welfare expenditures. The child support enforcement system is therefore using the private funds of absent parents to replace public expenditures in poverty programs; it is, in short, diminishing public responsibility and expanding private responsibilities that are assessed according to traditional patriarchal norms.

Many classic texts in the democratic theory tradition suggest that the entitlement to poverty assistance and the collective obligation to support the impoverished as a whole—and impoverished families in particular—are integral elements of citizenship rights.⁸¹ This perspective could be mobilized to argue that the current child support enforcement system is illegitimate. Each nation-state has a duty to ensure—through macroeconomic policies, taxation, and the provision of publicly funded programs—that its poorest citizens have access to the resources necessary for a minimally decent standard of living. Under this alternative ap-

81. See T.H. MARSHALL, *CLASS, CITIZENSHIP AND SOCIAL DEVELOPMENT* (1964) (arguing that democratic nation-states should uphold the civil, political, and social rights of its citizens and that social rights include an entitlement to poverty assistance); James Foster & Amartya Sen, *Annexe to AMARTYA SEN, ON ECONOMIC INEQUALITY* 210-11 (2d ed. 1997) (arguing that poverty should be defined not simply in terms of income but also with respect to “capability deprivation”—the inability of a person to avoid hunger, undernourishment and homelessness, to appear in public without shame, and to take part in the life of his/her community in a meaningful way due to his/her lack of material resources—and that welfare economics ought to take the special needs of custodial parents into account when measuring poverty); *United Nations Universal Declaration of Human Rights* 6.A. Res. 217A(III) U.N. GAOR (1948) (“Everyone, as a member of society, has the right to social security and is entitled to realization, through national effort and international co-operation and in accordance with the organization and resources of each State, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality.”); Art. 25 (“(1) Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control. (2) Motherhood and childhood are entitled to special care and assistance. All children, whether born in or out of wedlock, shall enjoy the same protection.”); Arts. 1, 2, 7 (on the right to equal protection of the law); Art. 12 (on the right to privacy). See also President Franklin D. Roosevelt’s 1941 Annual Message to Congress, in which he stated that an ideal social order would be founded upon both civil liberties principles and the “freedom from want” principle. Franklin D. Roosevelt, Annual Message to Congress (Jan. 4, 1941) in 9 *THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT: WAR AND AID TO DEMOCRACIES* 672 (Samuel I. Rosenman ed., 1941) [hereinafter Roosevelt]. He further stated that “security for those who need it,” equal opportunity, jobs for the able bodied, and the “ending of special privilege for the few” were essential elements in the “foundations of a healthy and strong democracy.” Roosevelt, *supra*, at 671.

proach, the government would also not be allowed to exclude a specific group from poverty assistance on moral grounds.

Significant traces of this sort of progressive and expansive thinking about citizenship rights can be found in the American legal tradition. For example, the official discourse supporting mothers' pensions in the early twentieth century symbolically recognized that every active parent performs a valuable service to the nation by bearing and rearing future citizens. The reformers believed that when a mother is separated from her male partner and falls into destitute conditions, society as a whole ought to provide her with a minimal income such that she can continue to raise her children in her own household, precisely because society values her maternal contribution to the country.⁸² And for all its limitations, *King* did recognize that Americans enjoyed a statutory entitlement to welfare benefits under the 1935 Social Security Act.⁸³

The child support enforcement system therefore raises serious questions about the general trend towards the reduction of citizenship rights and the sphere of collective responsibility in American public policy. The system is also problematic where the actual well-being of the children in question is concerned. By focusing the most aggressive governmental efforts to obtain child support payments on TANF-recipient cases, the current child support enforcement system neglects the very group of Americans who need assistance the most, namely the single-parent families who qualify economically for welfare benefits and yet are excluded from the program for failing to meet its requirements or for exceeding its time limits.⁸⁴ It could be argued that the children of a single mother enjoy a psychological benefit when they learn that their absent fathers have made support payments for them. Some studies do suggest that there is a positive correlation between the receipt of child support payments and improvements in the child's quality of life, but the existing studies do not point conclusively to a causal relationship between the two phenomena.⁸⁵

The legislative trend towards the incorporation of child support enforcement cooperation within welfare eligibility rules began in 1974 when the Child Support Act was passed.⁸⁶ This law ordered each state that participated in the AFDC program to make maternal cooperation

82. See *supra* text accompanying notes 26–32.

83. *King v. Smith*, 392 U.S. 309, 309 (1968).

84. See Chambers, *supra* note 71, at 2585.

85. See Chambers, *supra* note 71, at 2591–92, 2592 n.77.

86. Child Support Enforcement Act, Pub. L. No. 93-647, 88 Stat. 2337 (1974). The measures became known as the IV-D program because they are established in Title IV, Part D of the Social Security Act (current version at 42 U.S.C. §§ 651-69(b)(Supp. 2001)).

with child support efforts a condition of welfare eligibility. Each state was also directed to set up its own child support enforcement agency and to pursue efforts, in cooperation with federal agencies, to locate absent parents, establish support orders, and ensure the collection of payments. The states' responsibilities were further clarified and expanded by subsequent federal legislation passed in 1984,⁸⁷ 1988,⁸⁸ and 1993.⁸⁹

The PRWORA orders the states to make maternal cooperation a condition of welfare eligibility, to assess each single mother's cooperation, to punish those women who do not appear to be doing all that they can to identify the absent fathers, and to assist in the collection of support from them by reducing or eliminating their benefits.⁹⁰ It also combines incentives—bonuses are offered to the states that have good records of welfare case-related child support payment collection—with sanctions. Any state that fails to enforce the paternity identification and child support enforcement cooperation requirement will lose up to five percent of its total block grant.⁹¹ The PRWORA also lays out specific procedures that the states must follow to resolve contested paternity

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87. Child Support Amendments of 1984, Pub. L. No. 93-378, 98 Stat. 1305 (1984) (requiring employers to withhold wages when payments are delinquent for more than one month, and making child support enforcement laws applicable to all families, regardless of their participation in the AFDC program).
 88. Family Support Act of 1988, Pub. L. No. 100-485, 102 Stat. 2343 (1988) (ordering states to ensure the establishment of paternity in a minimum proportion of AFDC cases, to establish a parent-locating data base to monitor child support enforcement, and to make federal data on wages and employment available to the state data bases).
 89. Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, 107 Stat. 312 (1993) (requiring states to set up in-hospital paternity establishment programs).
 90. Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (1996). The PRWORA's paternity establishment requirement is a burden that is uniquely borne by unmarried women: a married woman's husband is treated as if he were the father of her children, regardless of his actual biological relationship to them. *See* Michael H. v. Gerald D. 491 U.S. 110 (1989) (finding that the California statute which defines the child of a married woman who is cohabiting with her husband as a child of the marriage, unless the husband is impotent or sterile, does not violate the due process rights of unwed biological fathers). If the child support enforcement agency determines "that an individual is not cooperating with the State in establishing paternity or in establishing, modifying or enforcing a support order with respect to a child of the individual, and the individual does not qualify for any good cause or other exception established by the State pursuant to section 454(29)," then the state must reduce the cash benefits or deny assistance altogether. Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, § 103, 110 Stat. 2105, 2135 (1996). I will return to the "good cause" exception below.
 91. *See* Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, § 103, 110 Stat. 2105, 2143 (1996).

cases. Unless otherwise barred by state law or unless the state has opted to create a "good cause" exemption and it has been found that the parties have a "good cause" reason not to cooperate (I will return to the issue of "good cause" exceptions below), the state must "require the child and all other parties . . . to submit to genetic tests upon the request of any such party, if the request is supported by a sworn statement by the party."⁹² The situation that would give rise to such compulsory genetic testing is explicitly defined. The mother would sign a sworn statement "alleging paternity, and setting forth facts establishing a reasonable possibility of the requisite sexual contact between the parties," while the father would respond with his own sworn statement "denying paternity, and setting forth facts establishing a reasonable possibility of the non-existence of sexual contact between the parties."⁹³ The conflict between their sworn statements would then trigger judicial or administrative orders to submit to genetic testing. Once an order is issued, custodial parents in the TANF program must make themselves and their children available for genetic testing to remain eligible for benefits.⁹⁴ Where paternity is successfully established or voluntarily acknowledged, the single mother must also assist the appropriate agencies in drawing up and enforcing a child support order "by providing the State agency with the name of, and such other information as the State agency may require with respect to, the non-custodial parent of the child."⁹⁵ She must "supply additional necessary information and appear at interviews, hearings and legal proceedings."⁹⁶

B. The Findings and Analysis

In order to satisfy federal law, each state must have legislation in effect that makes cooperation with paternity identification and child support enforcement, defined in the terms detailed above, a condition of eligibility for TANF.⁹⁷ The TANF laws for all fifty states were

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92. Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, § 331, 110 Stat. 2105, 2227 (1996).
 93. Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, § 331, 110 Stat. 2105, 2227 (1996).
 94. Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, § 333, 110 Stat. 2105, 2231 (1996).
 95. Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, § 333, 110 Stat. 2105, 2231 (1996).
 96. Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, § 333, 110 Stat. 2105, 2231 (1996).
 97. Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, § 103, 110 Stat. 2105, 2135 (1996).

studied⁹⁸ to verify each state's incorporation of appropriate paternity identification and child support collection measures. A thorough search revealed that every one of the fifty states has in fact adopted the mandatory paternity identification and child support enforcement rule. A governmental study has also found that the compliance rate is quite high: the majority of TANF clients are cooperating with the states' child support enforcement agencies.⁹⁹

A state legislature can actually refuse to implement this part of the TANF program. Under the PRWORA and subsequent federal legislation, the federal government can only withhold a maximum of five percent of the total TANF funds from a state that fails to impose the child support cooperation and paternity identification rules.¹⁰⁰ In any event, the federal government has rarely imposed sanctions on the states where they failed to meet quality control standards throughout the entire history of modern American welfare programs.¹⁰¹ State legislators could argue that these child support enforcement measures should not be adopted precisely because they effectively coerce poor single mothers into remaining of economically dependent on the absent fathers solely by virtue of their biological ties.

Where paternity is contested and the single mother is obliged to produce a comprehensive sexual history, the mandatory investigative procedures seriously violate her right to privacy. Because a mother and her child are obliged to provide a physical sample for genetic testing where paternity is disputed, they are essentially being asked to sacrifice their right to be free from unreasonable search and seizure in exchange for poverty assistance. It should also be noted that wherever a DNA test has not already been conducted, the putative father may contest paternity at any point during the child's dependency. An abusive man could, for example, voluntarily acknowledge paternity at the time of the birth, and then call his biological relationship to the child into question several

98. The official published version of each state's statutory code was consulted between September 15 and October 15, 2000. Where the statutes concerning the TANF program were too vague to allow verification, the internet version of the state's administrative code was also consulted with the assistance of the LEXIS database and state-specific web-sites.

99. OFF. OF INSPECTOR GEN., U.S. DEP'T OF HEALTH AND HUMAN SERVS., CLIENT COOPERATION WITH CHILD SUPPORT ENFORCEMENT: CHALLENGES AND STRATEGIES TO IMPROVEMENT (2000).

100. Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, § 409, 110 Stat. 2105, 2143 (1996). Balanced Budget Act of 1997, Pub. L. No. 105-33, § 5506, 111 Stat. 251, 614-15.

101. Joel Handler, *Welfare Reform: Is It for Real?* 1997 LOY. POVERTY L.J., 135, 158 (1997) [hereinafter Handler, *Is It for Real*].

years later to punish the mother. Because it has biological ties at its core, the welfare system effectively assists abusive men in subjecting poor women to charges of adultery and in “disestablishing” their relationship with the children in question.¹⁰² There is also the possibility that some men might face false allegations as putative fathers.

Given the fact that the custodial parent’s cooperation is vaguely defined as a “good faith” effort, the caseworkers are given an enormous amount of discretion and the burden is placed upon the client to satisfy this vague standard.¹⁰³ Feminists have long argued that men should shoulder more of the burden where child-rearing is concerned, but the coercive mechanisms currently in place under the Social Security Act cannot be reconciled with the feminist principle of self-determination.

The PRWORA has also removed various avenues of judicial scrutiny from paternity establishment and child support enforcement procedures in a general effort to promote “streamlining.” It specifically allows the states to vest their child support collection agencies with the administrative power to impose the following without judicial review: orders on employers to divulge extensive information about their employees; orders on employers, financial institutions and governmental agencies to withhold a payer’s income or to seize his/her assets; orders on the putative biological parents and their alleged children to submit to genetic tests; and orders on single mothers to provide the name, address, Social Security number, driver’s license number, employer, and any other necessary identification information for the alleged father.¹⁰⁴

102. My thanks to Vicki Turetsky for bringing the problem of “disestablishment” to my attention during a conversation.

103. Kindra L. Gromelski, Note, *You Made Your Bed . . . Now You are Going to Have to Pay For It: An Analysis of the Effects Virginia’s Mandatory Paternal Identification in AFDC Cases Will Have on the Rights of Unwed Fathers*, 5 WM. & MARY J. WOMEN & L. 383 (1999). Gromelski’s 1998 study of the Virginia Department of Social Services AFDC manual found that the cooperation of the single custodial mother in Virginia is defined as follows: the mother is asked to identify the father of her children. Gromelski, *supra*, at 396. If she does not know his identity, she must list the putative fathers. If the men named on her list are subsequently found not to be the biological fathers, she is considered to have failed the cooperation requirement. Gromelski, *supra*, at 396 n.67. When identifying a man as the putative father, the mother must provide at least three of the following pieces of information about him: (1) social security number; (2) race; (3) date of birth; (4) place of birth; (5) telephone number; (6) address; (7) schools attended; (8) occupation; (9) employer; (10) driver’s license number; (11) make or model of motor vehicle; (12) motor vehicle license plate number; (13) places of social contact; (14) banking institutions utilized; (15) names, addresses, or telephone numbers of parents, friends, or relatives; and (16) other information that the agency determines is necessary. Gromelski, *supra*, at 396.

104. Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, § 325, 110 Stat. 2105, 2224–26 (1996). For a more detailed

Governmental studies have found that most of the states are taking advantage of these “streamlining” provisions. The states are generally increasing the role of administrative procedures in paternity establishment cases and diminishing judicial oversight.¹⁰⁵ States are also using genetic tests in a substantial proportion of paternity cases.¹⁰⁶ Forty-three states have given their child support enforcement agencies the authority to issue administrative orders for genetic testing to the parties in contested paternity cases.¹⁰⁷ Genetic testing raises questions relating to due process, search and seizure, the invasion of an individual’s bodily integrity, and, by its very nature, the treatment of the sample material itself. We may see, for example, incidents in which private companies collect large numbers of test samples, retain the samples after paternity has been established, and generate data from them for purposes that extend far beyond the narrow goal of paternity identification. By the same token, the creation and maintenance of federal-state databases for child support enforcement raises right to privacy concerns, especially now that the system has taken an automated, mass-case processing and administratively-enforced dimension, and now that individuals considered delinquent payers can be denied, for example, professional licenses and passports based on their failure to pay support.¹⁰⁸

The popularity of genetic testing and information technology may also introduce new actors into the welfare reform debate. Private genetic testing and database systems companies may begin to weigh in on policy

discussion of the PRWORA’s elimination of judicial review in the area of child support enforcement see Legler, *supra* note 69, at 533–35.

105. OFF. OF INSPECTOR GEN., U.S. DEP’T OF HEALTH AND HUMAN SERVS., PATERNITY ESTABLISHMENT: ADMINISTRATIVE AND JUDICIAL METHODS i (2000).
106. OFF. OF INSPECTOR GEN., U.S. DEP’T OF HEALTH AND HUMAN SERVS., PATERNITY ESTABLISHMENT: STATE USE OF GENETIC TESTING i (1999).
107. For additional information on paternity acknowledgement and child support enforcement within the context of TANF programs, see OFF. OF INSPECTOR GEN., U.S. DEP’T OF HEALTH AND HUMAN SERVS., PATERNITY ESTABLISHMENT: USE OF VOLUNTARY PATERNITY ACKNOWLEDGEMENTS (2000) and OFF. OF INSPECTOR GEN., U.S. DEP’T OF HEALTH AND HUMAN SERVS., CLIENT COOPERATION WITH CHILD SUPPORT ENFORCEMENT: POLICIES AND PRACTICES (2000).
108. Brito, *Welfarization*, *supra* note 73, at 261–63; Samuel V. Schoonmaker IV, *Consequences and Validity of Family Law Provisions in the “Welfare Reform Act.”* 14 J. AM. ACAD. MATRIM. LAW. 1, 46–61 (1997). The fact that child support enforcement law could have serious implications with respect to privacy rights was dramatically brought to the fore in *State v. Oakley*, No. 99-3328-CR, 2000 Wisc. App. LEXIS *894 (Wisc. Ct. App. Sept. 13, 2000) (upholding a probation order requiring a man convicted of intentional failure to pay child support not to father another child during his probation term unless he demonstrates that he can support both the newborn and his current children).

discussions, since TANF-related expenditures could become a significant source of revenue for them. Indeed, the current child support enforcement regime could not exist without these two areas of technology. In other governmental contexts, such as defense spending or pollution regulation, it is entirely plausible that networks of scientific experts promoting new forms of technology have helped to shape important policy decisions.¹⁰⁹ We need to consider the possibility that welfare policymakers have been attracted to the current version of the child support enforcement regime in part because interested groups of experts have successfully constructed genetic testing and information technology as “state-of-the-art” applied science that can play a desirable role in public policies. This question is particularly appropriate given the fact that the current child support enforcement regime only improves the economic conditions of poor women and children where the absent fathers are relatively well-off. The vast majority of TANF families that are affected by its invasive procedures do not subsequently enjoy any improvement in their standard of living, and the regime absolutely fails to address the underlying causes of poverty among the custodial and absent parents alike. Genetic testing is appealing insofar as it is supposed to offer better accuracy than other testing procedures,¹¹⁰ therefore allowing us to trace biological parentage and to comprehensively map the reproductive sexual relations within the poor population according to contemporary scientific standards.

These achievements, however, cannot compensate for the fact that paternity testing fails even the narrowest and most conservative public policy test, the cost-benefit analysis: paternity tests are relatively expensive, and the successful collection of support payments is least likely in the cases in which paternity was contested before a support order was established.¹¹¹ To what extent has the modern interest in population data management¹¹²—which, in this regime, is taking the form of the

109. For an analysis of the role of scientific experts in constructing public policy and the law, see SHEILA JASANOFF, *SCIENCE AT THE BAR: LAW, SCIENCE AND TECHNOLOGY IN AMERICA* (1995); SHEILA JASANOFF, *THE FIFTH BRANCH: SCIENCE ADVISORS AS POLICYMAKERS* (1990).

110. Where the certainty of excluding a man who is falsely accused of being a given child's father is almost ninety percent for blood tests, and somewhat greater for the Human Leukocyte Antigen (HLA) test, DNA tests can achieve a certainty rate of ninety-nine percent, and repeated testing for genetic markers can yield a 99.99 percent certainty rate. Legler, *supra* note 69, at 531 n.58.

111. See Levesque, *Targeting “Deadbeat” Dads*, *supra* note 79, at 33, n.170.

112. For a theoretical account of the rise of modern population management technologies, see MICHEL FOUCAULT, *DISCIPLINE AND PUNISH* (Alan Sheridan trans., Vintage Books 1979) (1975).

mapping of the reproductive sexual relations among the poor—overshadowed the democratic interest in addressing the economic needs of the poor and in empowering the disadvantaged?

In sum, the success of child support enforcement measures as a solution to poverty has been uneven at best. Even where total collections have increased, inflation, decreases in the real wages of poor men, and an increase in the numbers of eligible children have tended to cancel out any gains that have been made.¹¹³ The effects of the child support enforcement regime may very well be felt far beyond the TANF client population. Some commentators are suggesting that it is contradictory for the government to require absent biological fathers to pay child support when these men generally cannot determine whether conception will take place, whether the fetus will be brought to term, and how the child in question ought to be raised.¹¹⁴ According to this perspective, an intensification of the obligations of biological fathers ought to be combined with an expansion of their reproductive and child-rearing rights. Women's rights advocates may find that the normalization of strict child support enforcement policies will ultimately strengthen the ground for fathers' rights demands, both within and beyond the terrain of poverty assistance programs.

Many of the laws and procedures that have been implemented as part of the child support enforcement regime may impact non-poor families in other ways as well. States have traditionally allowed the biological parents of children themselves to settle the issue of paternity establishment. Generally, paternity has been established for about one third of the children born to unmarried women each year. Under the new TANF regime, hospitals and state birth record agencies must take steps to encourage men to voluntarily acknowledge paternity. TANF-related measures have also been established barring any man from entering his name as a child's father on a birth certificate unless he has voluntarily acknowledged paternity, making a signed acknowledgement by a man of paternity a legal finding after it has stood without challenge for sixty days, and blocking states from providing judicial or administrative review of an unchallenged acknowledgement of paternity. These "streamlining" measures may encroach upon the discretion that biological parents have previously enjoyed where paternity acknowledgement is concerned.¹¹⁵

113. Chambers, *supra* note 71, at 2590.

114. Gromelski, *supra* note 103, at 396–405; Michael Jackson, *Fatherhood and the Law: Reproductive Rights and the Responsibilities of Men*, 9 TEX. J. WOMEN & L. 53, 93–94 (1999).

115. Brito, *Welfarization*, *supra* note 73, at 257–60.

Finally, the child support enforcement regime is expanding at an enormous rate without adequate public discussion. State child support enforcement (IV-D) agencies must attempt to establish and to enforce child support orders for the children of all single custodial parents who receive TANF benefits. However, the IV-D agencies are also assisting the custodial parents who earn too much income to qualify for poverty assistance as well.¹¹⁶ The non-TANF parents simply opt into the system by making a voluntary request for the child support enforcement services.¹¹⁷ While the poverty assistance programs have seen across-the-board cutbacks, there has been a substantial increase in public expenditures on IV-D programs.¹¹⁸ The federal government is assuming the greatest share of this burden. Although non-TANF IV-D clients typically pay a small fee for the child support enforcement services, over two-thirds of the states' IV-D agencies' operating budgets come from federal funds.¹¹⁹ Even with the full deployment of the TANF policies that are explicitly designed to ensure that the states recoup welfare benefits by collecting child support payments from the absent parents of impoverished children, the IV-D agencies are generally much more successful in collecting payments in their non-TANF cases.¹²⁰ The vast majority of the child support payments that are collected through the IV-D agencies flow to families who do not receive TANF benefits.¹²¹ A system that was originally designed as a key element within the welfare regime is therefore being transformed into a universal program. The IV-D services are obviously attractive for the non-TANF clients, for they are opting into the system in large numbers. It is also very clear that low-income mothers who have children with biological fathers who earn more than a minimum wage particularly benefit from the system's

116. "In 1990, there were 8.0 million AFDC cases and 4.8 million non-AFDC Title IV-D cases. Four years later [in 1994], there were 10.4 million AFDC and 8.2 million Title IV-D cases." Schoonmaker, *supra* note 108, at 69. "[A]pproximately sixty percent of all child support cases are brought through the IV-D programs." Barbara Glesner Fines, *From Representing "Clients" to Serving "Recipients": Transforming the Role of the IV-D Child Support Enforcement Attorney*, 67 *FORDHAM L. REV.* 2155, 2161 (1999).

117. Legler, *supra* note 69, at 522.

118. Fines, *supra* note 116, at 2155.

119. Fines, *supra* note 116, at 2160.

120. Legler, *supra* note 69, at 562 n.221.

121. U.S. DEP'T OF HEALTH & HUMAN SERVS., *INDICATORS*, *supra* note 76, at III-13. In 1998, the IV-D agencies collected a total of \$2.65 billion in child support payments for AFDC/TANF families and \$11.698 billion for non-AFDC/TANF families. The total cost of operating these agencies was \$3.589 billion. In 1997, the average child support payment was \$1,361 for AFDC/TANF families and \$2,315 for non-AFDC/TANF families. U.S. DEP'T OF HEALTH AND HUMAN SERVS., *INDICATORS*, *supra* note 76, at III-15.

expansion. And IV-D services might be the only governmental assistance that a poor mother receives after she leaves—or is expelled from—the TANF program. But what is the precise character of the non-TANF single mother's decision to opt in? Can we say that she is freely giving up her autonomy and privacy? What if we lived in a world in which better-paying jobs were plentiful and universal health-care and child-care programs were fully established? Would single mothers continue to opt into this child support enforcement program? In other words, are the non-TANF single mothers signing up for IV-D services because they are desperate or because they actually prefer to participate in a government-run patriarchal dependency network? These questions deserve further discussion.

PART III. DOMESTIC VIOLENCE AND THE “GOOD CAUSE” EXEMPTION

A. TANF/AFDC Programs and Domestic Violence

Many poor single mothers may well prefer to raise their children without the assistance of absent fathers. In some cases, a single mother on welfare may quite reasonably fear that the absent father would retaliate in a violent manner against herself and her children if she disclosed his identity to governmental agencies and assisted them in enforcing a support order against him. The current child support enforcement regime therefore also raises questions about the treatment of single mothers on welfare who are fleeing from battering and abusive men.

Domestic violence is pervasive in American society.¹²² Intimate partner abuse is also a cross-class phenomenon. In a 1998 national crime

122. Experts estimate that spousal and partner abuse occurs in approximately 25–30% of all couples. Albert Roberts, *Spousal and Partner Abuse*, in *VIOLENCE IN AMERICA: AN ENCYCLOPEDIA* 207, 209 (Ronald Gottesman & Richard Brown eds., 1999). “8.7 million women are victimized by partner abuse in their homes each year.” Roberts, *supra*, at 209. The data suggest that the number of women who sustain injuries in domestic violence incidents each year is greater than the numbers of women involved in accidents, victimized by muggings, and killed by cancer diseases combined. Roberts, *supra*, at 209. A 2000 survey found that approximately 1.5 percent of the 100 million women respondents were raped or physically assaulted by an intimate partner in the previous 12 months. BEVERLY FORD, *VIOLENT RELATIONSHIPS: BATTERING AND ABUSE AMONG ADULTS* 8 (2001). The data therefore suggest that 4.8 million women are sexually or physically assaulted by an intimate partner each year. FORD, *supra*, at 8. The study also found that 25.5 percent of the women surveyed had been victimized in the form of rape, physical assault, and stalking by an intimate partner at least once over their adult lifetime. FORD, *supra*, at 9.

survey, respondents were asked whether they had ever been physically abused by their spouse or companion. There is a remarkably small degree of variation in the survey data when they are organized according to the respondents' level of educational achievement. The proportion of respondents who answered "yes" to this question was sixteen percent for those who had no college education, as compared to sixteen percent for those who had some college education, twelve percent for college graduates, and ten percent for post-graduate degree holders. An income-based analysis does yield a somewhat greater degree of variation. Among those earning more than \$75,000, eight percent answered "yes," while, at the other end of the scale, twenty-three percent of those earning less than \$20,000 answered "yes."¹²³ Another study found that class is a determining factor not in the incidence of domestic violence but in the victim's ability to leave an abusive situation. Men from different class backgrounds were equally likely to attack their female partners in a violent manner. Once attacked, however, the responses of women differed along class lines. Professional women were much more likely to leave violent relationships than their less wealthy counterparts. Among the women who did eventually leave an abusive situation, professional women also tended to leave much earlier than women from lower economic classes. It could therefore be argued that class is a key factor in domestic violence, but that it exerts a much stronger influence on the female victim's mobility than it does on the male assailant's propensity to perpetrate the crime.¹²⁴

When discussing domestic violence in the context of TANF policies, then, we ought to bear in mind that battering men can be found in all classes, and that TANF clients are especially vulnerable not because poor men are pathological but because poor women can become trapped in abusive situations by virtue of their economic circumstances. Furthermore, many women become impoverished precisely because they had to leave an abusive partner, and then turn to poverty assistance programs such as TANF for economic support.¹²⁵ We should therefore

123. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES: 1999, 193 (1999) [hereinafter CENSUS BUREAU]. It should also be noted that the trauma associated with domestic abuse is such that many victims would not volunteer information about their experiences in the context of an official poll. See JAYNE MOONEY, GENDER, VIOLENCE AND THE SOCIAL ORDER (2000) (identifying the chronic problem of underrepresentation in domestic violence data and arguing that feminist research techniques must be incorporated into domestic violence survey design, implementation, and analysis).

124. See MOONEY, *supra* note 123.

125. Wendy Pollack, *Twice Victimized: Domestic Violence and Welfare "Reform"* 30 CLEARINGHOUSE REV. 329, 329-30 (1996).

expect to find an over-representation of battered women within low-income groups and within the TANF client population in particular. Four studies of very low-income women, with sample sizes ranging from 436 to 846, found that between fifteen and thirty percent were currently being subjected to physical abuse or serious emotional abuse consisting of credible threats to their lives. They also found that approximately sixty percent of these women experienced these forms of abuse at some point in their lives.¹²⁶ Other studies have found that between fifty and eighty percent of welfare recipients have experienced some form of abuse.¹²⁷ In yet another set of surveys, between fifteen and fifty-six percent of welfare recipients reported that they had been subjected to domestic violence within the preceding twelve months.¹²⁸

All women who are currently in, or who are fleeing from, an abusive relationship have a reasonable fear that their assailant will attack them or harm and kidnap their children. Because of the program's character, battered women receiving TANF benefits have additional grounds for fearing their assailants. Some of the women in the TANF programs currently have male partners who are abusive. In a typical battering situation, the male assailant will go to great lengths to isolate their victims, to stop them from gaining access to resources that would empower them, and to trap them in their homes.¹²⁹ Because the TANF program imposes requirements upon the recipient to attend several meetings at social services offices and to participate in employment or job training activities outside the home, and these forms of mobilization and empowerment often trigger further violence on the part of an abusive male partner, the program is effectively obliging the client who is currently in a battering relationship to assume the risk of further abuse.¹³⁰ In other cases, an abusive male partner of a TANF client who had not previously attacked her might actually begin to do so because he feels threatened by her as she gains increased independence through her participation in the program and wants to sabotage her efforts.¹³¹ The TANF clients who are survivors of domestic violence and no longer live or associate with their

126. Jody Raphael, *Welfare Reform: Prescription for Abuse? A Report on New Research Studies Documenting the Relationship of Domestic Violence and Welfare*, 19 LAW & POL'Y 123, 125-31 (1997) [hereinafter Raphael, *Prescription*].

127. ABRAMOVITZ, UNDER ATTACK, *supra* note 49, at 48; Alice Bussiere & Roslyn Powell, *Welfare Reform and Child Care: The Needs of Families Living with Domestic Violence*, 32 CLEARINGHOUSE REV. 385, 385-86 (1999); Pollack, *supra* note 125, at 329-30.

128. Anne Menard & Vicki Turetsky, *Child Support Enforcement and Domestic Violence*, 50 JUV. & FAM. CT. J. 27, 27 (1999).

129. Bussiere & Powell, *supra* note 127, at 386-87.

130. Raphael, *Prescription*, *supra* note 126, at 123-24.

131. Jody Raphael, *Symposium Introduction*, 19 LAW & POL'Y 117 (1997).

assailants may be assuming even greater risks of assault, battery, and retaliation against themselves and their children, for when women flee, their abusive partners actually become more likely to attack them. Indeed, divorced or separated women comprise only ten percent of all women in the United States, but three out of four battered women are divorced or separated.¹³² Divorced and separated women report being battered by a former partner fourteen times as often as women in relationships do so with respect to their current partners.¹³³ According to the U.S. Department of Justice, one out of four women who were killed by their male partners were separated or divorced from them at the time, and almost one out of three were attempting to end the relationship altogether.¹³⁴ Other social science research has found that seventy percent of the reported injuries arising from domestic violence incidents occurred after the separation of the couple.¹³⁵

For these reasons, special provisions ought to be made to identify domestic violence victims and survivors within the TANF applicant population and to assist them by giving them access to safe housing, by ensuring strict confidentiality about their home address, and by providing referrals to counseling and appropriate medical and legal services.¹³⁶ The needs of battered TANF clients fleeing the abusive biological fathers of their children are especially acute where child support enforcement requirements are concerned: some of these women do want to pursue their former assailants for child support.¹³⁷ However, many do not want to do so out of fear that their assailants will become angered by the imposition of economic obligations, track the mothers down through their participation in the collection process, and retaliate against them and the children.¹³⁸ Researchers have also found that where an absent father does pay child support, he is much more likely to demand an increased role in child-rearing decision-making. Some needy children will undoubtedly benefit where the men in question become more active fathers, work with the mothers in a constructive manner, and offer appropriate parenting to the children. Other needy children, however, will be harmed as the fathers who are unfit for parenting abusively demand more control over their children purely as a *quid pro quo*

132. Michelle Fine & Lois Weis, *Disappearing Acts: The State and Violence Against Women in the Twentieth Century*, 25 SIGNS 1139, 1140 (2000); Raphael, *Prescription*, *supra* note 126, at 124.

133. Raphael, *Prescription*, *supra* note 126, at 124.

134. Fine & Weis, *supra* note 132, at 1140.

135. Fine & Weis, *supra* note 132, at 1140.

136. Menard & Turetsky, *supra* note 128, at 30-35.

137. Menard & Turetsky, *supra* note 128, at 27.

138. Menard & Turetsky, *supra* note 128, at 27.

once they begin to make support payments. The research indicates that the absent fathers who make child support payments are much more likely to increase the level of conflict in their relationships with their children's mother than those who do not make payments.¹³⁹

In 1975, Congress passed a law that created an exception to the Child Support Act. It directed state agencies to exempt single mothers on welfare from the paternity identification and child support enforcement requirements where her cooperation contradicted the "best interests" of the child or children in question.¹⁴⁰ From 1978 to 1996, the Federal Department of Health and Human Services maintained an administrative regulation that defined this exemption in specific terms. According to the final version of the regulation, the state agency had to grant an exemption where it was "reasonably anticipated" that the single parent's cooperation would result in either physical or emotional harm to the child for whom support was sought, or physical or emotional harm to the child's caregiver such that she or he could not adequately care for the child. The regulation also directed state agencies to provide the exemption in those cases in which the child in question was conceived as a result of "incest or forcible [as opposed to statutory] rape," and where adoption proceedings were already in progress. It defined the anticipated harm quite narrowly as an "impairment that substantially affects the individual's functioning." The state agencies also had to take into account the potential victim's present emotional state, her emotional history, the intensity and probable duration of the anticipated impairment, the degree of cooperation required, and the extent of in-

139. Judith Seltzer, Sona McLanahan, & Thomas Hanson, *Will Child Support Enforcement Increase Father-Child Contact and Parental Conflict After Separation?*, in *FATHERS UNDER FIRE: THE REVOLUTION IN CHILD SUPPORT ENFORCEMENT* 157, 180-82 (Irwin Garfinkel et. al. eds., 1998). The authors' study found that the degree of increased conflict that was introduced into the father-mother relationship once the payments began varied in direct relationship to the proportional amount paid by the father. Absent fathers who were obliged to make payments that represented a relatively large proportion of their income were more likely to increase the level of conflict in their relationships with their children's custodial mother than the other men with support orders. Seltzer, McLanahan, & Thomas, *supra*, at 180-82. The study's authors caution against the imposition of excessive child support orders, especially where low-income absent fathers are concerned. Seltzer, McLanahan, & Thomas, *supra*, at 180-82. The authors also point out that European countries tend to impose and to enforce child support obligations on a strict basis, but that they also tend to set the payment amounts in the support orders at relatively low levels. Seltzer, McLanahan, & Thomas, *supra*, at 181.

140. Amendments Relating to Security Act, Pub. L. No. 94-88, § 208, 89 Stat. 433, 436 (1975).

volverment that she would have to undertake in assisting the state in paternity identification and support enforcement.¹⁴¹

This exemption created—on a formal basis, at least—a route through which the single mothers who were fleeing abusive partners while receiving welfare benefits could be relieved of the paternity identification and support cooperation burden. The PRWORA, however, weakens this exemption. It specifically establishes that the states can choose to implement a general domestic violence component within their TANF program, but that they are not required to do so.¹⁴² Under this voluntary exemption, the state may waive various program requirements, but only where it determines that there is a “good cause” reason for doing so and only where the program requirements would “make it more difficult for individuals receiving [TANF] assistance . . . to escape domestic violence or unfairly penalize such individuals who are or have been victimized by such violence, or individuals who are at risk of further domestic violence.”¹⁴³ The PRWORA also explicitly orders the state agencies to ensure that TANF recipients are cooperating with paternity identification and child support enforcement procedures.¹⁴⁴ With specific reference to the paternity identification and child support enforcement program requirement, the PRWORA gives the state only vague guidelines for an exemption. It establishes that the states should offer a good cause exception for this requirement that would take “the best interests of the child” into account, but it gives each state the authority to define the exemption in explicit terms.¹⁴⁵

In 1997, the aforementioned federal administrative regulation that defined the “good cause” exemption from the paternity identification and child support enforcement requirements was rescinded, since the states are now free to set the terms of the exemption themselves.¹⁴⁶ Current federal regulations on the treatment of domestic violence victims in the TANF population focus on accounting issues. The states are all compelled to undergo quality control assessments for the purposes of measuring their success in moving welfare recipients off the public rolls and into the workforce. The federal regulations define a

141. 45 C.F.R. § 232.42 (1996).

142. Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, § 103, 110 Stat. 2105, 2115 (1996).

143. Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, § 103, 110 Stat. 2105, 2115 (1996).

144. Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, § 333, 110 Stat. 2105, 2230-31 (1996).

145. Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, Sec. 654, § 333, 110 Stat. 2105, 2231 (1996).

146. 62 Fed. Reg. 64,301 (Dec. 5, 1997).

federally recognized domestic violence waiver for the purpose of allowing the states that do choose to create a domestic violence exemption to isolate waiver holders from the rest of the TANF population in their program compliance reports.¹⁴⁷ For this specific accounting question, then, federal regulations define a victim of domestic violence as “an individual who is battered or subject to extreme cruelty.”¹⁴⁸ Recipients of a federally recognized domestic violence waiver can, at the discretion of the state, be exempted from the TANF program requirements “for so long as necessary in cases where compliance would make it more difficult for such individuals to escape domestic violence or unfairly penalize those who are or have been victimized by such violence or who are at risk of further domestic violence.”¹⁴⁹ Federal recognition of a domestic violence waiver is granted when the exemption holder is directed to follow a social service plan that “is designed to lead to work.”¹⁵⁰

B. The Findings and Analysis

An examination of the states’ welfare policies¹⁵¹ reveals that there is a tremendous variation among them where the domestic violence exemption is concerned, and that only a very few states have developed adequate policies. Each state’s domestic violence exemption was rated as “moderate,” “weak,” “very weak,” or “none.”¹⁵² In the programs ranked

147. 45 C.F.R. § 260.54 (2000).

148. 45 C.F.R. § 260.54 (2000).

149. 45 C.F.R. § 260.52 (2000).

150. 45 C.F.R. § 260.55 (2000).

151. The published “hard copy” version of each state’s statutory code was consulted between September 15 and October 15, 2000. The internet versions of the states’ administrative codes were consulted according to the method specified in the text with the assistance of the LEXIS database and state-specific web-sites during the same period. The findings reported here refer to legislation and administrative regulations relating to the child support enforcement cooperation requirement in the TANF program for each state. They do not include references to “good cause” exceptions in other parts of the TANF programs or in other means-tested social service programs. For a detailed analysis of the PRWORA’s provision of a state option to waive time limits in the TANF program for victims of domestic violence, see Jennifer M. Mason, Note, *Buying Time for Survivors of Domestic Violence: A Proposal for Implementing an Exception to Welfare Time Limits*, 73 N.Y.U. L. REV. 621 (1998).

152. This qualitative assessment reflects the ideal approach to domestic violence in poverty assistance law developed by legal and social work experts. See *infra* text accompanying note 174. Because no state has actually implemented a comprehensive approach to domestic violence that would ensure the adequate funding of appropriate support services, and the delivery of programs that would secure the safety and recovery of the

as “moderate,” a “good cause” exemption is established in the appropriate section of the TANF law. Domestic violence is explicitly cited as adequate grounds for such an exemption. Either the child or the caregiver adult may be the victim or potential victim. In addition, states with a “moderate” ranking are taking further steps to reduce the incidence of domestic violence among TANF recipients. They are either earmarking special funds for appropriate support services, conducting training programs for TANF caseworkers to assist them in identifying and supporting domestic violence victims, or bringing several government agencies together with community service organizations to establish TANF policies relating to domestic violence. Typically, a sworn affidavit by the TANF recipient alleging domestic violence or the threat of domestic violence is accepted in these states as an adequate standard of proof (in the absence of evidence that would indicate that the recipient is not a credible witness). The TANF recipient’s affidavit usually does not have to be corroborated by a police record or conviction.¹⁵³ When TANF recipients qualify for the domestic violence exemption in these states, they are encouraged to utilize appropriate governmental services; they are specifically referred to relevant community organizations for counseling and support.

These states do not, however, deserve a “strong” rating. A “strong” exemption program would have all of these features and much more. A system would be established that would ensure that the TANF client would in fact be promptly and fully informed about the exemption by her caseworker and that the caseworkers would have the time and training necessary to complete an accurate and comprehensive safety assessment of each family’s condition. Once a domestic violence victim

victim and her children, none of the states merited inclusion in the “strong” good cause exemption category.

153. Many police forces adopted pro-arrest policies for domestic violence calls in the late 1980s and early 1990s. FORD, *supra* note 122, at 73–74, 76. However, several recent studies suggest that only one out of ten domestic battering incidents are reported to the police. FORD, *supra* note 122, at 69. A 1998 study found that only 23 percent of all domestic assault calls to the police resulted in an arrest. FORD, *supra* note 122, at 72. Research based on field observation suggests that the police are less likely to make arrests in domestic violence cases where the parties are members of low-income and minority communities. FORD, *supra* note 122, at 72. A 2000 governmental study estimates that only one fifth of all rapes, one quarter of all physical assaults, and one half of all stalkings perpetrated against women by their intimate partners are reported to the police. PATRICIA TJADEN & NANCY THOENNES, U.S. DEP’T. OF JUSTICE, EX-TENT, NATURE AND CONSEQUENCES OF INTIMATE PARTNER VIOLENCE v (2000). Under these circumstances, an effective domestic violence exemption would not require clients to provide the relevant records relating to orders of protection, arrests, and convictions.

was identified, she would immediately be encouraged to enter a well-funded program. The latter would provide coordinated legal assistance, counseling, safe housing, and medical care services uniquely tailored to meet the needs of the victim and her children. Further, the eligibility requirements of the poverty assistance programs would be made as flexible as possible for these clients since some domestic violence victims are deeply traumatized and require a great deal of sensitive support. None of the states met the criteria of a "strong" rating.

The states with domestic violence exemptions that are rated as "weak" also specifically create a "good cause" waiver in the TANF law and define the latter with explicit reference to domestic violence, physical abuse, and/or psychological abuse. These states, however, do not situate the exemption within a broader program. Special funds for support services are not provided, TANF caseworkers are not given special training, and community organizations are not consulted in the development of TANF policy. TANF recipients who do qualify for the exemption may or may not be given referrals to existing services and organizations. The standard of proof may also be somewhat stricter than the "moderate" programs; in some cases, the recipient's allegations must be supported by police records and court documents. In some of the states rated as "weak," recipients who qualify for "good cause" exemptions are only excused from the mandatory child support enforcement and paternity identification requirements for a limited period of time. Texas, for example, only extends this exemption for a maximum period of one year.¹⁵⁴ The "weak" rating is also used to identify the states that have created an exemption in the terms specified by the defunct federal regulation,¹⁵⁵ but have failed to adopt further measures to assist survivors within the TANF program by funding support services, training caseworkers, and reviewing their TANF policies with the assistance of community agencies.

In the states coded as "very weak," an exemption is specifically created, but it is defined in an extremely vague manner with reference to "good cause" grounds. The terms "domestic violence," "physical harm," "emotional harm," "credible threats to life," and so on, are not used. Where an analysis of the TANF law in a state's published statutory code yielded a "very weak" ranking, the administrative code for that state was checked and reported as a second entry. This second check allowed for a more complete analysis of TANF policies in the states in which the statutes are relatively brief and key details are set out in the administrative

154. TEX. HUM. RES. CODE ANN. § 31.0322 (1999).

155. 45 C.F.R. § 232.42 (1995).

code. It also brought the relationship between the statutes and the regulations into view. In some states, the statutes make very little or no provision for domestic violence survivors in the TANF program where the child support requirement is concerned, while the administrative code establishes specific measures.

"None" indicates that there is no domestic violence related exemption in effect in the statutes of the state in question. Again, where the statute was coded as "none," the regulations were checked and reported in a second entry. "No data" indicates that the appropriate documents were not available.

TABLE I.
STATE TANF POLICIES ACCORDING TO THE STRENGTH OF THE
DOMESTIC VIOLENCE EXEMPTION FOR THE PATERNITY
IDENTIFICATION AND CHILD SUPPORT ENFORCEMENT
COOPERATION REQUIREMENT
(AS OF SEPTEMBER 15 TO OCTOBER 15, 2000).

EXEMPTION TYPE (AUTHORITY IN PARENTHESES)	STATES	TOTAL NUMBER OF STATES
Moderate (Statute)	CA, CT, MN, NY ¹⁵⁶	4
Weak (Statute)	AZ, CO, FL, GA, IA, LA, ME, NV, NH, OK, RI, TN, TX, VA, WI ¹⁵⁷	15

156. CAL. WELF. & INST. CODE §§ 11477.04, 11495.1, 11495.12, 11495.25 (West 2000); CONN. GEN. STAT. ANN. §§ 17b-77, 17b-112(a), 17b-112(c) (West 2000); MINN. STAT. ANN. § 256.741 (West 2000); N.Y. SOC. SERV. LAW § 349-a (McKinney 2000).

157. ARIZ. REV. STAT. ANN. §§ 46-244, 292(E)(1), (F)(1) [after-292] (West Supp. 2000); COLO. REV. STAT. ANN. § 26-2-708 (5) (Bradford 2000); FLA. STAT. ANN. ch. 414.095 (15)(d) (Harrison Supp. 2000); GA. CODE ANN. § 49-4-191 (3) (1998); IOWA CODE ANN. §§ 239B(6).2, .8(2)(i) (West 2000); LA. REV. STAT. ANN. § 46:460.9 (West 1999); ME. REV. STAT. ANN. tit. 22, § 3762 (4), (10) (West Supp. 2000); NEV. REV. STAT. ANN. §§ 422.29318, .3754 (Michie 2000); N.H. REV. STAT. ANN. §§ 167:79 (VI)(a), :82 (III)(b) (Supp. 2000); OKLA. STAT. ANN. tit. 56, § 230.60 (B)(2) (West 2000); R.I. GEN. LAWS §§ 40-5.1-8 (g)(2), 40-5.1-46 (a) (Supp. 1997); TENN. CODE ANN. § 71-3-124 (e) (Supp. 2000); TEX. HUM. RES. CODE ANN. § 31.0322 (Vernon 2001); VA. CODE ANN. § 63.1-105.1 (3), .1-105.1 (4) (Michie Supp. 2001); WIS. STAT. ANN. § 49.145 (2)(f)1.a, 19 (4)(h)1.a (West 2000).

EXEMPTION TYPE (AUTHORITY IN PARENTHESES)	STATES	TOTAL NUMBER OF STATES
Very Weak (Statute), Weak (Admin. Code)	AK, IL, MI, MO, MT, NJ, ND, OH, PA, WY ¹⁵⁸	10
Very Weak (Statute), Very Weak (Admin. Code)	NM, SC ¹⁵⁹	2
Very Weak (Statute), No Data (Admin. Code)	AR ¹⁶⁰	1
None (Statute), Weak (Admin. Code)	DE, HI, ID, IN, KY, MD, MA, MS, OR, SD, VT, WA ¹⁶¹	12
None (Statute), Very Weak (Admin. Code)	KS, NE, NC ¹⁶²	3
None (Statute), None (Admin. Code)	UT	1
None (Statute), No Data (Admin. Code)	AL, WV	2

158. ALASKA STAT. § 47.27.040 (Michie 2000); ALASKA ADMIN. CODE tit. 15, § 125.216 (2000); 305 ILL. COMP. STAT. 5/4-21 (2000); ILL ADMIN. CODE tit. 89, § 160.35, .40 (2000); MICH. COMP. LAWS ANN. § 400.57g (West 2000); MICH. ADMIN. CODE r. 400.3124 (2000); MO. ANN. STAT. § 208.040 (West 2001); MO. CODE REGS. ANN. tit. 13, § 40-2.330 (2000); MONT. CODE ANN. § 53-4-606 (2000); MONT. ADMIN. R. 46.18.114 (2000); N.J. STAT. ANN. § 44: 10-45 (West 2001); N.J. ADMIN. CODE tit. 10, § 90-16.5 (2000); N.D. CENT. CODE § 50-09-29 (2001); N.D. ADMIN CODE § 75-02-01.1-29, .2-34 (1999); OHIO REV. CODE ANN. § 5107.22 (Anderson 2000); OHIO ADMIN. CODE § 5101:1-29-962 (2001); 23 PA. CONS. STAT. ANN. § 4379 (West 2000); 55 PA. CODE § 187.23 (2001); WYO. STAT. ANN. § 42-2-103(e)(vii) (Michie 2001); WYO. ADMIN. CODE § 049-187-001 3 (2000).
159. N.M. STAT. ANN. § 27-2B-11 (12) (Michie 2000); N.M. ADMIN. CODE tit. 8, ch. 50 §107.8B (2001); S.C. CODE ANN. § 43-5-65(a)(2) (Law Co-op. 2000); S.C. CODE ANN. REGS. § 114-1130(N)(1)(a), (c)-(d) (West Supp. 1991-2000).
160. ARK. CODE ANN. § 20-76-410(f)(1)(A)(i)-(f) (Michie Supp. 2000).
161. DEL. CODE REGS. § 40-800-005:3005 (2000); HAW. CODE REGS. § 5-31-3(b),(c) (2000); ID. ADMIN. CODE § 16.03.08.148, 16.03.08.149 (1999); IND. ADMIN. CODE tit. 470, r. 14-3-10 (b) (2000); 921 KY. ADMIN. REGS. 2:006 (2000); MD. REGS. CODE § 07.03.03.08 (2000); MASS. REGS. CODE tit. 106, § 203.700, 203.745 (2000); MISS. REGS. CODE § 11-030-001 (2000); OR. ADMIN. R. 461-195-0050 (2000); S.D. ADMIN. R. 67:10:01:30, 67:12:01:66.02, 67:18:01:56 (2000); VT. CODE R. 13-170-003,2331.32, 13-170-003,2331.33 (2000); WASH. ADMIN. CODE § 388-14-201(1), 388-422-0010(1), 388-422-0020 (2000).
162. KAN. ADMIN. REGS. 30-4-55(d)(1) (1999); NEB. ADMIN. CODE 466-5-002 (2000); N.C. ADMIN. CODE tit. 10, r.49B.0202 (1999).

Considered in these terms,¹⁶³ only four states—California, Connecticut, Minnesota and New York—have “moderate” exemptions in place. It should also be noted that their efforts to reduce domestic violence depend heavily upon the availability of adequate community resources, and the latter depend in turn on the federal and state funding decisions.¹⁶⁴ Fifteen states have “weak” statutes in effect and thirteen

163. The terms of the present study differ from those of a previous one conducted in 1997 by the National Organization for Women’s Legal Defense and Education Fund, *quoted in* Mason, *supra* note 151, at 653 n.176. The 1997 study considered the PRWORA’s provision of an option for the states to create domestic violence exemptions from the TANF program requirements. Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, § 103, 110 Stat. 2105, 2115 (1996). This state option is known colloquially as the “Family Violence Option.” The 1997 study assessed the welfare plans that the states had submitted to the U.S. Department of Health and Human Services. It found that the following twenty-seven states had adopted or enabled the Family Violence Option provisions in their welfare plans: Alabama, Alaska, Arizona, California, Colorado, Delaware, Georgia, Hawaii, Kentucky, Louisiana, Maryland, Massachusetts, Minnesota, Mississippi, Missouri, Montana, Nevada, New Hampshire, New Jersey, New York, North Dakota, Pennsylvania, Rhode Island, Utah, Washington, West Virginia, and Wyoming. Mason, *supra* note 147, at 653, n.176. Another seventeen states included “some domestic violence language or provisions in their welfare plans,” but had not adopted the Family Violence Option: Arkansas, Connecticut, Florida, Idaho, Illinois, Indiana, Iowa, Maine, New Mexico, North Carolina, Oregon, South Carolina, South Dakota, Tennessee, Texas, Virginia, and Wisconsin. Mason, *supra* note 151, at 653 n.177. Six states had not included any domestic violence provisions in their welfare plans: Kansas, Michigan, Nebraska, Ohio, Oklahoma, and Vermont. Mason, *supra* note 151, at 653 n.178. Two states, however, had relevant legislation pending: Michigan and Vermont. Mason, *supra* note 151, at 653 n.179. In some cases, the differences between this study and the present one are striking. According to the 1997 study, for example, Utah had included the Family Violence Option provisions in its state plan, but had not adopted any appropriate legislation or regulations by the fall of 2000. Six states that also included the provisions in their 1997 state plans—Delaware, Hawaii, Kentucky, Maryland, Massachusetts, and Mississippi—did not have any related legislation in effect in 2000 and had only adopted regulations that were rated as “weak.” Where the 1997 study assessed the states’ welfare plans, the present study interprets legislation and regulations. The 1997 study considers the states’ plans to provide domestic violence exemptions to any part of the TANF program requirements, while the present one is concerned solely with the exemption from the paternity identification and child support enforcement rule. In addition, the present study qualitatively assesses the exemptions, while the 1997 study does not. Finally, the two studies were conducted at significantly different points in time.

164. For example, the federal Violence Against Women Act (VAWA)(Violent Crime Control Act, Pub. L. No. 103-322, §§ 40001-40703, 108 Stat. 1796, 1902-56 (1994)) provides: federal funds for domestic violence shelters; training programs for police, prosecutors, and judges; community education programs; a national hotline; legal services; research studies; and appropriate databases. Libery Aldrich, *Sneak Attack on VAWA*, THE NATION, Oct. 2, 2000, at 6. The law also strengthens the inter-state enforcement of protection orders, makes acts of domestic violence that

others have "very weak" laws. Eighteen states have no statutory provisions for a domestic violence exemption in their statutes where the paternity identification and child support enforcement cooperation requirement of their TANF programs is concerned. It is somewhat reassuring to see that the government agencies in some of these states have taken steps to address the problem: twelve of the states without an exemption in the law nevertheless have "weak" exemptions in their administrative codes, while three others without an exemption in the law have "very weak" exemption regulations. In ten states, the statutes establish "very weak" exemptions, while the administrative codes create "weak" exemptions.

In sum, twenty-five states have administrative codes that go further than the statutes in providing some form of exemption for battered women where the TANF child support cooperation requirement is concerned. Because these administrative measures are not supported by explicit and detailed legislation, however, they remain quite vulnerable. Regulations adopted in these conditions can be easily rescinded, especially where new appointments to senior civil service posts are made. These regulations could very well be weakened further or even eliminated in the near future. Finally, one state stands out as an especially problematic case: a thorough search of the TANF statutes and relevant parts of the state administrative code reveals that Utah makes absolutely no provision whatsoever for victims of domestic violence in this respect.

On its own, the formal inclusion of a minimal domestic violence exemption in TANF laws will do very little to address the needs of survivors on welfare. Less than one percent of AFDC recipients applied for and received "good cause" exemptions from the paternity establishment and child support enforcement cooperation requirements in the period before 1996.¹⁶⁵ It is probably true that some battered women in the

involve inter-state travel a federal offense, and heightens protections for immigrant women who are domestic violence victims. About \$1.6 billion was allocated for domestic violence programs under this law. Aldrich, *supra* at 6. Reauthorization of VAWA was delayed by Congressional Republicans when it came up for renewal in 2000, but it was finally approved late in the session. Victims of Trafficking and Violence Protection Act of 2000. Pub. L. No. 106-386, §§ 1001-1512, 114 Stat. 1464 (2000).

165. Judith Lennett, *Like Ships That Pass in the Night: AFDC Policy and Battered Women*, 19 LAW & POL'Y 183, 193 (1997). In 1993, the Department of Health and Human Services reported that of the five million AFDC cases nationwide, only 6,585 cases included a custodial parent who had requested a "good cause" exemption, and exemptions were granted in only 4,230 of these cases. Pollack, *supra* note 125, at 337. Although the state agencies were supposed to inform the AFDC recipients about the exemption, many failed to do so. Pollack, *supra* note 125, at 337. A 1983 governmental study found that a total of 4,690 "good cause" exemption applications were

AFDC program were fully aware of the exemption but voluntarily chose not to pursue it because they thought that their assailants should be forced to pay for child support by governmental agencies. Even if we make this assumption, however, a huge contradiction between the data on the incidence of domestic violence among low-income women and the numbers of AFDC clients who applied for and received an exemption would still exist. Perhaps case-workers under the AFDC regime were not providing adequate notice about the exemption; perhaps the domestic violence victims who did know about the exemption were so ashamed and fearful that they chose not to report their condition; or perhaps the emphasis on case-load reduction in social service agencies was such that supervisors and department heads were discouraging case-workers from extending the exemption to their clients.

The TANF data is also striking. A recent governmental study conducted in six states found that a very low number of TANF clients are applying for "good cause" exemptions under the current system.¹⁶⁶ TANF program managers and caseworkers reported that the clients who had been subjected to domestic violence did not apply for the exemption but simply maintained that they had no information about the absent parent.¹⁶⁷ If a domestic violence victim actually does take this route, however, the TANF system will ultimately force her to give up her TANF benefits on the grounds that she has failed to cooperate fully in identifying and locating the absent father. The managers and

made in forty-five states (data for Alaska, Colorado, Delaware, Massachusetts, and Utah not available) over a six-month period in 1981, and that 2871 were granted. *AFDC: Good Cause Claims for Refusing to Cooperate in Establishing Paternity or Securing Child Support*, SOC. SEC. BULLETIN, May 1983, 7 [hereinafter *AFDC*]. Because the exemptions that are granted on the grounds that the client is engaged in activities related to the relinquishment of her children for adoption are included in the "good cause" claims data, the totals cited above have to be discounted in order to isolate the exemptions that were granted on the grounds of domestic violence, rape, and incest. In 1981, 10.7 percent of the "good cause" claims were granted on pre-adoption grounds, while 43.6 percent and 22.3 percent were granted on physical harm to parent and physical harm to child grounds respectively. *AFDC, supra*, at 9. A majority of the "good cause" claims were granted on pre-adoption grounds in three states: Louisiana, Minnesota, and Nebraska. *AFDC, supra*, at 7. Almost thirty percent of all the "good cause" applications were generated in three states—California, Minnesota, and Ohio—while one in four of the states processed twenty claims or less. *AFDC, supra*, at 7.

166. OFF. OF INSPECTOR GEN., U.S. DEP'T OF HEALTH AND HUMAN SERVS., CLIENT COOPERATION WITH CHILD SUPPORT ENFORCEMENT: USE OF GOOD CAUSE EXCEPTIONS i (2000) [hereinafter *INSPECTOR GEN., GOOD CAUSE EXCEPTIONS*]. The six states covered by this study were California, Georgia, Illinois, New Jersey, Texas, and Virginia.

167. *INSPECTOR GEN., GOOD CAUSE EXCEPTIONS, supra* note 166, at 18–19, 21.

caseworkers also stated that the clients sometimes find the exemption application process embarrassing and intimidating, and that the clients avoid the exemption because they fear that their assailants would retaliate.¹⁶⁸ The majority of caseworkers contacted in the course of the study stated that they had provided “at least minimal notification” of the “good cause” exemption.¹⁶⁹ The report notes, however, that “few [caseworkers] attempt to assess whether the client’s circumstances support an exception.”¹⁷⁰ Where the clients did apply for the exemption, the caseworkers usually granted it to them.¹⁷¹ There was, however, a strong bias in favor of police records, protective orders, hospital records, and statements issued by domestic violence shelters where corroborating evidence in support of applications for the TANF exemption was concerned.¹⁷² By the same token, there was a strong bias against verbal statements by a friend of the client, verbal and written statements by the client, and verbal and written statements by mental health professionals, members of the clergy, medical professionals, court officials, and social service caseworkers.¹⁷³

Welfare benefits and poverty assistance programs are, in themselves, important tools for combating domestic violence. We have seen that women are more likely to leave an abusive relationship when they have access to the material resources that they need to support themselves and their children. It is therefore entirely possible that the availability of welfare benefits is a factor that positively influences the decision of domestic violence victims to flee from their attackers. Because the TANF population includes such a significant number of women who are either fleeing from an abusive partner or still enduring domestic violence, it is incumbent upon the federal and state governments to adopt comprehensive measures to address this phenomenon.

The federal law’s treatment of domestic violence in the context of the TANF program should be completely transformed. Its almost exclusive focus on narrow accounting questions is deeply problematic. A few state governments, such as California, Connecticut, Minnesota and New York, are already making a good effort in this area; they deserve more federal funds and more freedom to relax the strict TANF rules on

168. INSPECTOR GEN., GOOD CAUSE EXCEPTIONS, *supra* note 166, at 14.

169. INSPECTOR GEN., GOOD CAUSE EXCEPTIONS, *supra* note 166, at ii.

170. INSPECTOR GEN., GOOD CAUSE EXCEPTIONS, *supra* note 166, at ii.

171. INSPECTOR GEN., GOOD CAUSE EXCEPTIONS, *supra* note 166, at 9–10. In a remark that might have been aimed at conservative critics of the exception, the report notes that caseworkers did not suspect that it was being used by recipients to commit fraud.

INSPECTOR GEN., GOOD CAUSE EXCEPTIONS, *supra* note 166, at 4.

172. INSPECTOR GEN., GOOD CAUSE EXCEPTIONS, *supra* note 166, at 6–7.

173. INSPECTOR GEN., GOOD CAUSE EXCEPTIONS, *supra* note 166, at 6–7.

eligibility, client compliance with child support cooperation and work requirements, and time limits. Other states, however, are lagging far behind these leaders; they require both funding and legislative direction. Federal laws should be passed that would compel all of the states to introduce comprehensive measures that would adequately address domestic violence through the TANF program. State governments ought to be obliged to do the following: to review and to reconstruct welfare programs, with the assistance of community agencies, so that programs would better serve these clients' needs; to take effective measures to reduce and prevent domestic violence, including the allocation of generous funds for domestic violence programs; to create cross-agency systems that would coordinate economic, legal, housing, medical, and counseling services for these clients and their children; to make the welfare program eligibility requirements as flexible as possible to accommodate these clients' traumatized condition; to prioritize these clients' safety at all times and to foster their recovery and empowerment through their participation in the welfare programs; to adopt evidentiary standards that appropriately reflect the specific nature of domestic violence victimization; to provide extensive training for welfare caseworkers to assist them in the difficult work of identifying these specific clients; and to ensure that all welfare clients are provided with comprehensive and accessible information that facilitates informed decision-making.¹⁷⁴

174. In 1997, Senator Wellstone introduced a bill, the Wellstone/Murray Family Violence Provisions, that would have allowed the states that had created a domestic violence exemption in their TANF program to exclude the TANF clients who received the exemption from their annual quality control assessments. S. 671, 105th Cong. (1997). Quality control measurements are designed to ensure that each state is successfully enrolling a fixed quota of TANF clients in the mandatory program requirements involving child support cooperation, time limits, "family cap" provisions, work programs, and so on. States can receive large bonuses for moving a significant proportion of their TANF clients off the welfare rolls, and they can also be penalized for failing to do so. The thinking behind Wellstone's bill is clearly that more states would create a TANF domestic violence exemption if they were reassured that the qualifying clients would not be included in the state's performance assessment data. The bill was read twice and then allowed to expire in the Senate Committee on Finance. Although any positive reform to the current system is certainly preferable to none at all, the measure would have failed to re-construct the pre-1996 status quo and certainly would not have constituted a sufficient response to the entire range of policy issues at stake. See also Wendy Pollack & Martha Davis, *The Family Violence Option of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996: Interpretation and Implementation*, 30 CLEARINGHOUSE REV. 1079 (1997) (detailing the PRWORA's Family Violence Option and proposing a model implementation procedure).

PART IV. THE "FAMILY CAP," FAMILY PLANNING, AND THE
PROMOTION OF ADOPTION COMPONENTS

A. TANF/AFDC Benefit Limits as
Reproductive "Disincentives"

TANF benefits usually reflect household size; when a household increases in number, benefits increase accordingly by a small amount.¹⁷⁵ Under the "family cap" laws and regulations that many states have adopted, however, no additional benefits are paid due solely to the birth of a child if he/she was conceived during a period in which the family was eligible for public assistance.¹⁷⁶ Where the states had to seek special

175. In 1994, the average extra AFDC benefit that was paid due to the birth of a child was about \$70 per month. Wright, *supra* note 68, at 381.

176. The "family cap" was adopted first by New Jersey and then by Georgia, Arkansas, and Wisconsin in the early 1990s. The precise wording of these measures refers to the period in which the applicant was eligible for AFDC or TANF benefits. Caseworkers presumably develop a financial history for each applicant to establish her eligibility period, and do not take into account whether or not the applicant actually did receive poverty assistance at that time. By 1996, twenty states had established "family cap" measures under waivers received from the federal government. ROBERTS, KILLING THE BLACK BODY, *supra* note 70, at 210. No provision in "family cap" laws is made for multiple births. ROBERTS, KILLING THE BLACK BODY, *supra* note 70, at 212. A legal challenge against the "family cap" did not succeed. C.K. v. Shalala, 883 F. Supp. 991 (D.N.J. 1995). See also Susan Frelich Appleton, *When Welfare Reforms Promote Abortion: "Personal Responsibility," "Family Values," and the Right to Choose*, 85 G. L.J. 155, 189-90 (1996) (conceding that the unconstitutional conditions doctrine, as it was developed in abortion funding cases, also validates "family caps," but maintaining that the legitimacy of the "family cap" policy is best addressed by legislatures); Yvette Marie Barksdale, *And the Poor Have Children: A Harm-Based Analysis of Family Caps and the Hollow Procreative Rights of Welfare Beneficiaries*, 14 L. & INEQUALITY 1, 6-10 (1995) (arguing that even though the Supreme Court has held in abortion funding cases that the states may refuse to subsidize the exercise of a right without violating that right, governmental policies that reward individuals for not exercising a right, or withdraw, withhold, or reduce public funds from those who exercise a right, effectively infringe upon that right, and ought to be held unconstitutional); Melynda G. Broomfield, Note, *Controlling the Reproductive Rights of Impoverished Women: Is This the Way to "Reform" Welfare?* 16 B.C. THIRD WORLD L.J. 217, 236 (1996) (arguing that the constitutional framework developed in abortion funding cases has been applied unevenly); Broomfield, *supra*, at 240 (arguing that the states should not be able to defend the family cap laws since they are not "substantially" related to the governmental interest in question, and the states could have pursued their public policy goals through less intrusive means); Broomfield, *supra*, at 242 (arguing that the "family cap" should also fail on equal protection grounds since it singles out a specific class of persons for inequitable treatment and punishes children for the behavior of their parents); Laura Friedman, Comment, *Family Cap and the Unconstitutional Conditions Doctrine: Scrutinizing a Welfare Woman's Right to Bear Children*, 56 OHIO ST. L.J.

waivers from the federal government for the "family cap" before 1996, the PRWORA's block grant system allows them to impose this benefit limit without federal approval. In addition, many states are systematically initiating unsolicited family planning counseling for TANF recipients, or exposing them to un-requested materials that promote the use of family planning resources.¹⁷⁷ While it is of course

637, 643-44 (1995) (arguing that the "family cap" measures fail to pass the rational basis and strict scrutiny tests and that the Supreme Court therefore ought to find that they infringe upon the fundamental right to reproductive freedom); Dorothy Roberts, *The Only Good Poor Woman: Unconstitutional Conditions and Welfare*, 72 DENV. U. L. REV. 931 (1995) [hereinafter Roberts, *Unconstitutional Conditions*] (arguing that even if the unconstitutional conditions doctrine could be mobilized to protect welfare recipients' right to reproductive autonomy, the doctrine's fundamentally negative-rights-oriented structure is such that it would offer only an impaired defense, and that the poor would be better served by a constitutional regime that combined privacy rights with an entitlement to poverty assistance).

177. Programs to promote the use of Norplant, a long-acting female contraceptive implant, among welfare recipients have attracted the most attention in this respect. See Kristin Connelly McAdams, Note, *On Requiring Responsibility: The Constitutionality of Conditioning AFDC Benefits Upon the Insertion of the Norplant Contraceptive Device*, 19 OKLA. CITY U. L. REV. 309 (1994) (arguing that the laws requiring or rewarding welfare recipients to use Norplant should withstand constitutional challenges); See also Stuart Taylor, *How Norplant Can End Welfare As We Know It*, N. J. LAW JOURNAL, Aug. 19, 1996, at 24 (arguing that policies designed to award women on welfare cash benefits for using Norplant are "humane" and "effective"); Stuart Taylor, *Give Norplant A Chance*, AMERICAN LAWYER, Oct. 1996, at 34 (proposing a Norplant-incentive program that would offer women on welfare a \$1,000 bonus for using the drug and an additional payment for each month that they continued to carry the implant). But see Albiston & Nelson, *supra* note 70, at 503-19 (arguing that the Norplant welfare laws infringe upon the constitutional right to procreative freedom and the right to equal protection since they reinforce and perpetuate negative stereotypes about women through their use of gender classification); Gretchen Long, *Norplant: A Victory, Not a Panacea for Poverty*, 50 NAT'L LAW. GUILD PRAC. 11, 12 (1993) (arguing that the government should not interfere or unduly regulate the personal decision of when and whether to have children, regardless of a woman's age, race, or income); Jeanne Vance, Note, *Womb for Rent: Norplant and the Undoing of Poor Women*, 21 HASTINGS CONST. L.Q. 827, 855 (1994) (arguing that the laws that create bonuses for women on welfare who use Norplant should be held unconstitutional on the grounds that they violate the rights to privacy and equal protection, and that the state should protect civil rights and has no place in "purchasing" a person's right to exercise them). Norplant was approved by the Federal Drug Administration in 1990. Subsequently, all fifty states approved Norplant expenditures, in whole or in part, under their Medicaid programs. Broomfield, Note, *supra* note 176, at 232. Norplant-related welfare programs that required women on AFDC to use the implant or offered them a bonus if they did so, were proposed, introduced as bills, or passed into law in Kansas, Louisiana, Mississippi, South Carolina, and Tennessee during the early 1990s. Roger Levesque, *Looking to Unwed Dads to Fill the Public Purse: A Disturbing Wave in Welfare Reform*, 32 U. LOUISVILLE J. FAM. L. 1, 3 n.4 (1993-94) [hereinafter, Levesque *Looking to Unwed Dads*]. A bill was proposed in

entirely appropriate that governmental agencies provide family planning information, services, and supplies to all adults upon request, it is troubling that these TANF-related family planning programs are targeted exclusively at poor adults and are initiated by the government rather than the clients. Some states are even encouraging TANF recipients to relinquish their children for adoption, even where there is no evidence that those children are in any danger of abuse or neglect.

The ebb and flow of childbirth rates among the poor is shaped by an infinite number of factors; “family cap” rules, family planning schemes, and pro-adoption programs will probably play only a very minor role in shaping demographic trends. Indeed, the moral panic about excessive reproduction among welfare recipients has no basis in empirical fact. The size of the average welfare family is decreasing steadily.¹⁷⁸

Washington during the same period that would have provided a \$10,000 grant to mothers on welfare who consented to a tubal ligation. Levesque, *supra* note 79, at 18–19, n.95. A bill that would have paid welfare mothers for using Norplant was rejected by the House in Connecticut in May, 1994. Larry Williams & Stan Simpson, *Bill Rejected by House*, HARTFORD COURANT, April 27, 1994, at A9. In Ohio, a Republican-sponsored bill was proposed in 1993 that would have offered bonuses for welfare recipients who used contraceptives. *Welfare Reform Update*, STATE CAPITOLS REPORT, April 1, 1993, available at <http://web.lexis-nexis.com>. In 1993, Arizona and Maryland considered bills that would have increased welfare benefits for women who used Norplant, and Oklahoma debated a measure that would have created a \$2,000 grant for welfare recipients who submitted to voluntary sterilization. *Issue Spotlight: Welfare Reform*, STATE CAPITOLS REPORT, Feb. 25, 1993, available at <http://web.lexis-nexis.com>. A Kansas state legislator introduced a bill that would have granted women on welfare an extra \$500 cash bonus and an annual payment of \$50 if they used Norplant. Tamar Lewin, *Five-Year Contraceptive Implant Seems Headed for Wide Use*, N.Y. TIMES, Nov. 29, 1991, at A1. David Duke, a State Representative and a gubernatorial candidate in Louisiana, proposed legislation offering \$100 a year to women on welfare using Norplant. Lewin, *supra*. In 1991 and 1992 alone, about 20 bills were introduced in 13 legislatures that would have compelled women on welfare to use Norplant; although none of these bills were passed into law, some of them were almost adopted. *Birth-Control Implant Gains Among Poor Under Medicaid*, N.Y. TIMES, Dec. 17, 1992, at A1. Norplant bonus programs became less popular among conservative lawmakers towards the later 1990s. The cost effectiveness of Norplant programs has been questioned. The drug’s side effects are quite serious and the manufacturer has faced several lawsuits. The drug itself and the implantation process, patient monitoring, and removal are relatively expensive. Some patients have also attempted to remove the implants on their own, thereby weakening the argument that Norplant is “foolproof.” The promotion of contraception among the poor also contradicts the moralistic pro-abstinence position of powerful right-wing religious organizations in the United States. As we will see below, sexual abstinence programs are becoming a much more common means for discouraging reproduction, especially among poor teenagers.

178. Laura Beth Nielsen, *What’s Not So New About Welfare Reform*, 10 BERKELEY WOMEN’S L.J. 163, 167 (1995).

The average number of children in welfare families is roughly equivalent to the national average: in 1999, the average number of persons in TANF households was 2.8; the approximate average number of children receiving benefits in these households was two; two in five TANF families had only one child; and only one in ten of the TANF families had more than three children,¹⁷⁹ while the average number of children under the age of eighteen in each American family was 1.85 in 1998.¹⁸⁰ The evidence also does not support the argument that TANF-recipient families tend to be large in size because welfare families in the United States are typically headed by single women, and single mothers tend to have more children than married couples. Across the population as a whole, married couples tended to have the largest families in 1998, as they had 1.9 children on average, while the families headed by a single woman and a single man had 1.78 and 1.52 children on average respectively.¹⁸¹ The empirical evidence also suggests that the availability of welfare benefits does not cause poor women to have more children.¹⁸² Studies

179. U.S. DEP'T OF HEALTH AND HUMAN SERVS., CHARACTERISTICS, *supra* note 7.

180. OFF. OF EDUC. RES. & IMPROVEMENT, DEP'T OF EDUC., DIGEST OF EDUCATION STATISTICS, 1999, at 26 (2000) [hereinafter DEP'T OF EDUC, DIGEST].

181. DEP'T OF EDUC., DIGEST, *supra* note 180, at 26.

182. ROBERTS, KILLING THE BLACK BODY, *supra* note 70, at 218–19; Rebecca Blank et al., *A Primer on Welfare Reform*, in LOOKING BEFORE WE LEAP: SOCIAL SCIENCE AND WELFARE REFORM 27, 30–31 (Kent Weaver & William Dickens eds., 1975). See also Levesque, *supra* note 177, at 24 (citing studies that show that “the longer a woman remains on welfare, the less likely she is to give birth”); T. Paul Schultz, *Marital Status and Fertility in the United States: Welfare and Labor Market Effects*, 29 J. HUM. RESOURCES 637, 659 (1994) (finding that although AFDC does have a statistically significant effect on fertility behavior, “the estimated effects are modest in size,” and that the “relative improvement in wage opportunities of women compared to men is clearly the dominant factor that could explain changes in the prevalence of marriage and the level of fertility in the United States”); Note, *Dethroning the Welfare Queen: The Rhetoric of Reform*, 107 HARV. L. REV. 2013, 2020 (1994) (citing studies that demonstrate that the AFDC families in the states with more generous welfare benefits are not larger in average size than their counterparts in other states); *Dethroning the Welfare Queen*, *supra*, at 2020 (citing studies that show that fertility rates for women AFDC recipients were equal to, or in some cases, lower than, those for non-AFDC recipient women). The very hypothesis that an economic incentive might function as the determining cause of a social practice—that welfare benefits might cause a poor single woman and a man to engage in unprotected reproductive intercourse together—remains contested in the social sciences. The concept of determining causation was originally developed within the natural science disciplines. Critics argue that because humans are not inert things or instinct-driven animals, but are instead rational, self-reflecting subjects who are engaged in culturally and historically specific social dialogues with one another, we ought to use interpretative approaches to describe social relations, rather than natural science methodologies. See, e.g., PETER L. BERGER & THOMAS LUCKMANN, THE SOCIAL CONSTRUCTION OF REALITY: A TREATISE IN THE SOCIOLOGY OF KNOWLEDGE (1966); HUBERT L. DREYFUS, PAUL

that have attempted to measure the effect of the "family cap" on fertility rates among AFDC recipients are inconclusive; they only suggest that the "family cap" may produce an increase in abortion rates and a minor decrease, at most, in birthrates.¹⁸³ The laws designed to encourage welfare recipients to relinquish their children for adoption also cannot be defended with reference to the empirical data on child abuse. The vast majority of welfare recipients do not subject their children to child abuse and neglect and are never brought under the investigative scrutiny of the child welfare services.¹⁸⁴ These measures nevertheless deserve our attention, for they reveal the extent to which the idea that welfare laws ought to penetrate the private lives of poor women has become a standard principle in American public policy circles.

RABINOW, & MICHEL FOUCAULT: BEYOND STRUCTURALISM AND HERMENEUTICS (1982); CLIFFORD GEERTZ, THE INTERPRETATION OF CULTURES: SELECTED ESSAYS (1973); MAX HORKHEIMER, CRITICAL THEORY: SELECTED ESSAYS (1972); EDMUND HUSSERL, THE CRISIS OF EUROPEAN SCIENCES AND TRANSCENDENTAL PHENOMENOLOGY: AN INTRODUCTION TO PHENOMENOLOGICAL PHILOSOPHY (David Carr trans., Northwestern Univ. Press 1970); HERBERT MARCUSE, REASON AND REVOLUTION: HEGEL AND THE RISE OF SOCIAL THEORY (1934); Charles Taylor, *Interpretation and the Sciences of Man*, 25 REV. OF METAPHYSICS 3 (1971).

183. Blank et al., *supra* note 182, at 51–52. See also ROBERTS, KILLING THE BLACK BODY, *supra* note 70, at 211–12 (noting that there was virtually no decrease in childbirth rates for women on AFDC in New Jersey as a result of the "family cap" law, but that the abortion rate increased, and that some women on AFDC who had abortions reported that the "family cap" had influenced their decision); ROBERTS, KILLING THE BLACK BODY, *supra* note 70, at 211–12 (estimating that the law typically eliminated an increase of \$64 in monthly benefits for a family that already had two children before the new infant was born).
184. Jill Duerr Berrick, *From Mother's Duty to Personal Responsibility: The Evolution of AFDC*, 7 HASTINGS WOMEN'S L.J. 257, 267 (1996). For a study that brings to light the ways in which poor families are heavily over-represented among the population that comes under the scrutiny of the child welfare system by virtue of their economic circumstances rather than their parenting practices, see Dorothy Roberts, *Poverty, Race and New Directions in Child Welfare Policy*, 1 WASH. U. J.L. & POL'Y (1999). For a more general critique of the child welfare system, see MICHAEL SHAPIRO, SOLOMON'S SWORD: TWO FAMILIES AND THE CHILDREN THE STATE TOOK AWAY (1999) and LOUISE ARMSTRONG, OF "SLUTS" AND "BASTARDS": A FEMINIST DECODES THE CHILD WELFARE DEBATE (1995).

B. The Findings and Analysis

1. The "Family Cap"

In this phase of the study, the state TANF laws and regulations were read¹⁸⁵ to ascertain whether or not each state had adopted a "family cap." It was found that a total of twenty-two states had such a measure in place.

185. The published "hard copy" version of each state's statutory code was consulted between September 15 and October 15, 2000. Where the welfare statutes did not include a "family cap," each state's administrative code was consulted with the assistance of the LEXIS data-base and state-specific web-sites during the same time period. It was found that twenty states had statutes and/or administrative codes with a "family cap" measure. These initial findings were then compared to the results listed in NOW LEGAL DEF. & EDUC. FUND, *WHAT CONGRESS DIDN'T TELL YOU: A STATE-BY-STATE GUIDE TO THE WELFARE LAW'S HIDDEN REPRODUCTIVE RIGHTS AGENDA* 5 (1999). The NOW LDEF study lists a total of twenty-two states that had a "family cap" measure in place in February 1999. It primarily relied upon the descriptions of the TANF programs that were produced by state agencies and sent to the federal Department of Health and Human Services. The results from the two studies are identical with only two exceptions. The NOW LDEF results include Arkansas and North Carolina, while the initial findings for this study did not. The State of Arkansas' TANF program, the Transitional Employment Assistance Program (TEA), is difficult to assess for the purposes of this study because it does not issue administrative regulations for its TANF policies in the same manner as the other states. However, the TEA Program Manual is available on-line and the Arkansas Department of Human Services refers to the Program Manual as its official policy document. The TEA Program Manual does include a "family cap" provision. ARK. DEP'T OF HUMAN SERVS., *TRANSITIONAL EMPLOYMENT ASSISTANCE PROGRAM MANUAL* § 2150.1 (1999), available at http://www.state.ar.us/dhs/webpolicy/TEA%20Policy/TEA_TOC.htm. A search of the North Carolina administrative code did not reveal a "family cap" measure. North Carolina's TANF State Plan does nevertheless include a "family cap." N.C. DEPT. OF HEALTH & HUMAN SERVS., *NORTH CAROLINA'S TEMPORARY ASSISTANCE FOR NEEDY FAMILIES STATE PLAN*, Appendix C at 27 (1999), available at <http://www.dhhs.state.nc.us/dss/docs/wfplan.pdf>.) The following table indicates the authority for each "family cap" in the twenty states in question.

TABLE 2.
THE "FAMILY CAP" PROVISIONS IN STATE TANF
PROGRAMS, BY AUTHORITY
(AS OF SEPTEMBER 15 TO OCTOBER 15, 2000)

FAMILY CAP POLICY AND AUTHORITY	STATES	TOTAL NUMBER OF STATES
Family Cap: Statute	AZ, CA, CT, FL, GA, IL, MD, MA, MS, NE, NJ, ND, OK, SC, TN, VA, WI, WY ¹⁸⁶	18
Family Cap: Administrative Code	DE, IN ¹⁸⁷	2
Family Cap: Other Authority	AR, NC ¹⁸⁸	2
No Family Cap in Effect	AL, AK, CO, HI, ID, IA, KS, KY, LA, ME, MI, MN, MO, MT, NV, NH, NM, NY, OH, OR, PA, RI, SD, TX, UT, VT, WA, WV	28

The wording of specific "family cap" laws brings to light the legislators' assumption that poor women make reproductive decisions in an entrepreneurial profit-seeking manner, and that negative financial incentives constitute the best remedies. In Illinois, for example, a family

186. ARIZ. REV. STAT. ANN. § 46-292 (West 2000); CAL. WELF. & INST. CODE § 11450.04 (West 2001); CONN. GEN. STAT. ANN. § 17b-112 (West 2001); FLA. STAT. CH. 414.115 (2000); GA. CODE ANN. § 49-4-186 (2000); 305 ILL. COMP. STAT. 5/4-2 (2000); MD. ANN. CODE art. 88A § 50 (2001); MASS. ANN. LAWS ch. 118, § 1 (Lexis Supp. 2001); MISS. CODE ANN. § 43-17-5 (1) (2000); NEB. REV. STAT. § 68-1724 (2)(b) (2000); N.J. STAT. ANN. § 44:10-61 (West 2001); N.D. CENT. CODE § 50-09-29 (2001); OKLA. STAT. tit. 56, § 230.58 (2000); S.C. CODE ANN. § 43-5-1175 (Law. Co-op. 2000); TENN. CODE ANN. § 71-3-154 (i) (2000); VA. CODE ANN. § 63.1-105.7 (Michie 2000); WIS. STAT. ANN. § 49.19 (11s)(b) (West 2001); WYO. STAT. ANN. § 42-2-103 (e)(iii) (Michie 2001).

187. DEL. CODE REGS. § 8000, 8205.2, 8301.3; § 3008 (Delaware Social Services Manual § 40-800-005 (2000)) (2000); IND. ADMIN. CODE tit. 470, r. 14-2-2 (2000).

188. ARK. DEP'T OF HUMAN SERVS., TRANSITIONAL EMPLOYMENT ASSISTANCE PROGRAM MANUAL, § 2150.1 (1999), available at http://www.state.ar.us/dhs/webpolicy/TEA%20Policy/TEA_TOC.html; N.C. DEPT. OF HEALTH & HUMAN SERVS., NORTH CAROLINA'S TANF STATE PLAN, Appendix C at 27 (1999), available at <http://www.dhhs.state.nc.us/docs/wfplan.pdf>.

that is already receiving TANF benefits cannot receive additional aid due solely to the birth of a child except when the birth is "(i) of a child of a pregnant woman who became eligible for [TANF] aid . . . during the pregnancy, or (ii) of a child born within ten months after the date of the implementation of this section, or (iii) of a child conceived after a family became ineligible for assistance due to income or marriage and at least three months of ineligibility expired before reapplication for assistance."¹⁸⁹ In Massachusetts, the TANF program designates the youngest child in the family at the time of application for assistance as the "child of record." Where a woman is already pregnant when she applies for TANF, the child born as a result of that pregnancy is also considered the "child of record." If a child is born into a TANF family after the "child of record," he/she may not be included in the household for the purpose of benefit calculation.¹⁹⁰

These terms suggest that the legislators are not seeking to punish TANF women for virtually every sort of sexual practice. They are attempting instead to single out fertile women—married and unmarried alike—who participate in reproductive heterosexual intercourse, and who do not obtain an abortion where conception takes place, during a specifically defined period of poverty. If a relatively prosperous mother conceives a child, undergoes an unanticipated trauma—such as divorce, serious illness, unemployment, or business failure—during her pregnancy that makes her so poor that she qualifies for TANF, and then gives birth to the child, the calculation of her benefits would not be affected by the "family cap." In another scenario, a woman with children may be poor enough to qualify for TANF. She subsequently lifts her family out of poverty either by obtaining a well-paying job or by establishing a partnership with an adult who earns a good income. She then conceives a child during the period in which her family's increased income makes her ineligible for poverty assistance. During the pregnancy, however, she either loses the new job or separates from her partner and becomes eligible once again for TANF. The "family cap" would not apply to her case either. It exempts, for example, middle class women who suddenly qualify for TANF benefits as a result of abandonment, separation, or divorce and it exempts working class women who decide not to use birth control at a moment in which they might reasonably expect that they would have access to adequate economic resources to care for a newborn. Moreover, the "family cap" constitutes a penalty for child-bearing that is imposed solely upon the poor. Welfare recipients are the

189. 305 ILL. COMP. STAT. 5/4-2 (2000).

190. MASS. ANN. LAWS ch. 118, § 1 (110)(a),(c) (Law. Co-op. 2001).

only citizens who are penalized by the government on the basis of the number of their children and the timing of their conception and birth. In other programs and taxation schemes, either the size and structure of the family is ignored altogether—as it is in the Social Security program—or parents are given additional benefits—such as taxation credits and tuition assistance packages—when they have more children.¹⁹¹

It is also evident from the terms of several “family cap” provisions that the legislators assumed that welfare benefits in the specific form of cash payments should not be given to TANF mothers who give birth to a child. Oklahoma, for example, replaces the additional cash benefit for a TANF household with a newborn child with a voucher that is only valid for the purchase of clothing, food, and other articles of necessity for an infant or toddler.¹⁹² In South Carolina, by contrast, a similar voucher may be provided in replacement of additional benefits, but it can only be redeemed for goods and services that are “needed for the child’s mother to participate in education training and employment related activities.”¹⁹³ Vouchers are much more restrictive than cash payments and are therefore often not flexible enough to meet the complex needs of poor mothers. Further, the provision of vouchers, rather than cash payments, when a child is born into a poor family symbolically suggests that the state government considers poor mothers with newborns as untrustworthy clients who need to be placed in an especially strict support regime. The vouchers become tokens of suspicion and shame.

New Jersey bans the payment of additional benefits where a child is born into a TANF household. A child counts as a member of the family only for the purposes of weighting the family’s earned income disregard—the amount of wages the family may keep without losing any of its TANF benefits.¹⁹⁴ Assuming, for example, that a TANF-recipient mother gives birth to a newborn child, she will not receive any increase in her cash benefits. If she finds paid work outside the home after the birth, however, New Jersey will allow her to keep more of her wages without losing her cash benefits than it would have done before the birth. It is not clear, however, that the mother of a newborn would be in a good position to take advantage of New Jersey’s modification of the “family cap.” Caring for a newborn is extremely time-consuming and infant-oriented childcare is both rare and expensive. Even where high quality childcare for infants is available, most infants do best when they

191. Brito, *Welfarization*, *supra* note 73, at 243–44.

192. OKLA. STAT. tit. 56, § 230.58 (2000).

193. S.C. CODE ANN. § 43-5-1175 (West Supp. 2000).

194. N.J. STAT. ANN. § 44:10-61 (West 2000).

are placed in care for short periods of time and the care arrangements are flexible enough to respond to their day-to-day needs. It is very difficult for many children who are less than one year of age to be placed in regular full-time care. It is therefore unlikely that a poor mother caring for an infant would be able to hold a job and earn wages such that she could take advantage of the additional earned income disregard.

Several of the states with a "family cap" do provide an exemption in those cases in which the newborn child was conceived as a result of incest or rape. In Florida, however, this exemption only applies if the mother filed a police report about the incestuous intercourse or sexual assault within thirty days of the incident or if the child support enforcement agency confirms that the child was conceived as a result of rape, incest, or sexual exploitation and the mother qualifies for the waiver from the paternity identification and child support enforcement requirement on these grounds.¹⁹⁵ California also exempts children born as a result of incest and rape, and—in a gesture that was clearly intended to reward women using the most invasive forms of birth control—California also exempts children who were conceived even though at least one parent had been sterilized or the mother had been using an intrauterine device or Norplant at the time of conception.¹⁹⁶

2. The Promotion of Family Planning and the Relinquishment of Children for Adoption Within the TANF Program

Several states have also introduced by statute measures that ensure that each adult TANF recipient—or, in some cases, each teen TANF recipient—is systematically exposed to counseling and publications that promote family planning and the relinquishment of children for adoption.¹⁹⁷ In some states, caseworkers are directed to initiate a family

195. FLA. STAT. CH. 414.115 (2000).

196. CAL. WELF. & INST. CODE § 11450.04 (West 2000).

197. The published "hard copy" version of each state's statutory code was consulted between September 15 and October 15, 2000. The data reported here refers exclusively to the statutorily authorized provision of family planning information, counseling, and referrals to TANF recipients as an integral dimension of the states' TANF programs. It does not include any reference to the family planning component of Medicaid programs, any other public health programs, or abstinence education programs funded in whole or in part by TANF grants that are directed at both poor and non-poor teens alike. It also does not include administrative regulations. Arkansas, for example, does not include family planning promotion provisions in its statutes. The TANF caseworker's manual, however, directs the caseworker to initiate a discussion about a pamphlet containing information about the availability of publicly funded family planning services "so that the client has a clear understanding of the

planning counseling session or to refer the client to an appropriate counselor or pregnancy prevention class. In others, pamphlets outlining family planning options and extolling the virtues of contraception are sent to TANF beneficiaries by mail; sometimes they are enclosed with the cash benefit check. No state includes information and referrals relating to abortion in their TANF program and they typically indicate that recipients of poverty assistance cannot be punished if they choose not to use the family planning resources. It is nevertheless remarkable that these informational and counseling initiatives are systematically integrated into the TANF program and that the promotion of family planning and adoption relinquishment is in every case initiated by the state agency rather than the client.

TABLE 3.

STATES WITH TANF STATUTES THAT PROMOTE FAMILY PLANNING THROUGH THE SYSTEMATIC INITIATION OF COUNSELING AND SYSTEMATIC PROVISION OF UN-REQUESTED INFORMATION AND PROMOTE THE RELINQUISHMENT OF NON-ABUSED CHILDREN FOR ADOPTION

TYPE OF TANF STATUTE	STATES	TOTAL NUMBER OF STATES
Promoting Family Planning	IA, LA, ME, MD, MA, NE, NV, NY, OH, SC, TN, VT, VA, WA, WV, WI ¹⁹⁸	16
Promoting Relinquishment	UT, VA, WA ¹⁹⁹	3

importance of family planning." ARK. DEP'T OF HUMAN SERVS., TRANSITIONAL EMPLOYMENT ASSISTANCE PROGRAM MANUAL, § 2150.2 (2000), *available at* <http://www.state.ar.us/dhs/webpolicy/TEA%20Policy/TEA2000.htm>.

198. IOWA CODE ANN. § 239B.10 (6) (West 2000); LA. REV. STAT. ANN. § 46:447.1 (West 2000); ME. REV. STAT. ANN. tit. 22, § 3788 (14) (West 2000); MD. CODE ANN. art. 88A: § 49(a)(4)(ii) (2000); MASS. GEN. LAWS ch. 118 § 1 (110)(i)(4)(iv) (2000); NEB. REV. STAT. § 68-1722 (2000); NEV. REV. STAT. 422.284 (2000); N.Y. SOC. SERV. § 350, 409-i (McKinney 2000); OHIO REV. CODE ANN. § 5107.72 (West 2000); S.C. CODE ANN. § 43-5-24, 43-5-1120 (D) (Law. Co-op. 2000); TENN. CODE ANN. § 71-3-701 (2000); VT. STAT. ANN. tit. 33, § 1106(7) (2000); VA. CODE ANN. § 63.1-133.45 (Michie 2000); WASH. REV. CODE § 74.12.400(4) (2000); W. VA. CODE § 9-9-9 (a) (4) (2000); WIS. STAT. ANN. § 49.159, 49.19 (11s)(d) (West 2000).
199. UTAH CODE ANN. § 35A-3-308, 35A-3-308(4) (1997); VA. CODE ANN. § 63.1-133.45 (Michie 1995); WASH. REV. CODE § 74.12.255(4), 74.04.005 (2001).

The extent to which state agencies themselves provide family planning information varies by state. Iowa's Department of Social Services, for example, must discuss, orally and in writing, the financial implications of newly born children and the availability of family planning resources with all TANF-recipient parents.²⁰⁰ Family planning counseling must be included as an optional component of the participant's Job Opportunity and Basic Skills program, and the participant's own family planning objectives must be listed in the participant's family investment agreement.²⁰¹ In Ohio, TANF adult recipients who are the parents of at least one minor child are systematically referred to private or public providers of family planning services, "which can advise the parent on methods of controlling the size and spacing of the parent's family, consistent with the parent's religious and moral views."²⁰² The caseworkers in West Virginia are allowed, at their own discretion, to order TANF recipients to attend family planning classes as a program requirement.²⁰³

In New York, TANF caseworkers must offer family planning services and supplies to TANF clients who are "of childbearing age, including children who can be considered sexually active."²⁰⁴ The statutes also establish an adolescent pregnancy program that is designed to reduce welfare dependency among teenage parent TANF clients by providing them with specialized case management, counseling, and referral services.²⁰⁵ New York also operates an adolescent pregnancy prevention

200. IOWA CODE ANN. § 239B.10 (6) (West 2000).

201. IOWA CODE ANN. § 239B.10 (6) (West 2000).

202. OHIO REV. CODE ANN. § 5107.72 (West 2000).

203. W. VA. CODE § 9-9-9 (a) (4) (2000).

204. N.Y. SOC. SERV. § 350 (McKinney 2000).

205. N.Y. SOC. SERV. § 409-i (McKinney 2000). New York's administrative code has dramatically expanded the statutes' original definition of the program's target population. Where the statute establishes that the program should be aimed at teenage parent TANF clients, the regulations refer to an "at risk" youth population that is defined as a public assistance recipient who is between eighteen and twenty-one years of age and is considered to be at risk of pregnancy or parenthood because he/she meets at least one of the following criteria: "(i) receives public assistance in his or her own right; (ii) is homeless or at imminent risk of becoming homeless; (iii) has had an abortion or miscarriage; (iv) has had a pregnancy test, even if the outcome was negative; (v) is sexually active; (vi) is the noncustodial mother or father of a child; (vii) is the younger sibling of an individual who was or is a teenage parent; (viii) is a rape or incest victim; (ix) has dropped out of high school without graduating; (x) is having academic and/or disciplinary problems in school; or (xi) requests case management activities, or his or her authorized representative requests such activities on behalf of the adolescent." N.Y. COMP. CODES R. & REGS. tit. 18, § 361.4 (2000). In the program, each case manager must conduct an assessment that includes consideration of "the adolescent's knowledge of, and attitudes toward, family planning, parenting, sexual activities and reproduction." N.Y. COMP. CODES R. & REGS. tit. 18

program for young adults from all economic groups who are age eighteen or under and are pregnant, a parent, or who are deemed to be “at risk” of becoming a parent.²⁰⁶ The Department of Social Services is directed to solicit and accept proposals for “community service project plans”²⁰⁷ that would, among other things, promote the use of family planning among the participants.²⁰⁸ Although this program is ostensibly aimed at the entire youth population, low-income areas are explicitly targeted. The Department must give priority to the proposed plans that will “serve a geographic area where the incidence of infant mortality and the prevalence of low-income families are high and where the availability or accessibility of services for eligible adolescents is low.”²⁰⁹

It is of course quite possible that the quality of life for a poor person, or a poor teenager in particular, would be improved if he/she utilized family planning resources, and that the quality of life for children would be improved if more parents used family planning as well. It is also certainly appropriate that publicly-funded family planning counseling and contraceptives are made available on request for anyone who is engaging in sexual activity. The systematic integration of the promotion of family planning in the TANF program, however, reinforces a pathologizing stereotype about welfare recipients that has no basis in reality. This measure effectively constructs the clients as a group that is peculiarly predisposed to irresponsible reproductive sexual activity such that they cannot be trusted to seek out family planning on their own initiative. It also conceals the fact that many poor teens and poor adults would already prefer to use contraceptives but cannot do so because of their cost and limited availability.²¹⁰ Where family planning promotion

§ 361.9(b)(iv) (2000). Case management staff must be skilled in the area of adolescent sexuality. N.Y. COMP. CODES R. & REGS. tit. 18 § 361.2(c) (2000). After the assessment, the case manager must compose a personal plan for the client; the plan outlines the steps that the client ought to take with respect to the following set of goals: “to maintain and strengthen family life and to attain or retain the capacity for maximum self-support and personal independence.” N.Y. COMP. CODES R. & REGS. tit. 18 § 361.9(d) (2000). It follows from the character of the assessment, and the nature of the skills that the case manager brings to this task, that family planning advice may be included in the client’s “personal plan.”

206. N.Y. SOC. SERV. § 465 (McKinney 2000).

207. N.Y. SOC. SERV. § 465-a. (McKinney 2000).

208. N.Y. SOC. SERV. § 465(3) (McKinney 2000).

209. N.Y. SOC. SERV. § 465-a(2)(c) (McKinney 2000).

210. For a more detailed discussion of effective family planning programs that respect the dignity of the target audience, see *infra* text accompanying notes 210–301 and 340–44. It will also be pointed out below that young women’s socio-economic expectations play an important role in their reproductive decision-making. See *infra* text accompanying notes 263 and 343.

It is remarkable that these TANF laws are explicitly encouraging the separation of parents and children in poor families since this dimension of the states' TANF programs contradicts the spirit of federal child welfare law. The Adoption and Safe Families Act of 1997 (ASFA)²¹⁷ directs the states' child welfare agencies to make a reasonable effort to keep families intact unless it can be proven before a family court judge that the maintenance of a united family clearly contradicts the best interests of the child. The presumption behind ASFA is that the state should not violate the right to privacy of a family—as defined by the Supreme Court²¹⁸—by commencing an investigation unless an allega-

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217. The Adoption and Safe Families Act of 1997 orders state child welfare agencies to make a "reasonable effort" to preserve and to reunify families in which abuse or neglect have taken place, unless that effort contradicts the best interest of the child. Pub. L. No. 105-89, § 101, 111 Stat. 2115 (1997). State child welfare agencies typically implement this policy by offering abusive or neglectful parents services that will assist them in improving their parenting skills. For example, parents might be referred to alcoholism programs or anger management classes; they might have to learn, under the supervision of social workers, how to discipline their children appropriately; or they might be given specific training related to their children's special needs and disabilities. These parents are therefore given a significant opportunity to provide a safe home for their children before their parental rights are terminated. Only the parents who have committed the most severe forms of neglect and abuse are not given a chance to remedy the situation. The Adoption and Safe Families Act, Pub. L. No. 105-89, § 101, 111 Stat. 2116 (1997).
218. *Moore v. City of Cleveland*, 431 U.S. 494 (1977) (deciding that a local ordinance, limiting occupancy of a dwelling unit to members of a single family, violates due process by defining family to include only parents and their children); *Id.* at 503 ("Our decisions establish that the Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation's history and tradition."); *Wisconsin v. Yoder*, 406 U.S. 205, 213-14 (1972) (holding that the State may not unreasonably interfere with parents' traditional interest in directing the religious upbringing and education of their children); *Stanley v. Illinois*, 405 U.S. 645 (1972) (stating that an Illinois statute that excluded unwed fathers from the category of parents, and therefore allowed the state to presume that unwed fathers are unfit parents, violates the due process and equal protection clauses of the Constitution); *Id.* at 652 (deciding that the interest of a biological father who has taken an active part in the rearing of his children in retaining custody of his children is "cognizable and substantial"); *Ginsberg v. New York*, 390 U.S. 629, 639 (1968) ("[C]onstitutional interpretation has consistently recognized that the parents' claim to authority in their own household to direct the rearing of their children is basic in the structure of our society."); *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965) ("[s]pecific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance . . . Various guarantees create zones of privacy."); *Poe v. Ullman*, 367 U.S. 497, 551-52 (1961) (Harlan, J., dissenting) ("The home derives its pre-eminence as the seat of family life. And the integrity of that life is something so fundamental that it has been found to draw to its protection the principles of more than one explicitly granted Constitutional right."). See also MARTHA A. FINEMAN, *THE NEUTERED MOTHER, THE SEXUAL FAMILY, AND*

statutes are in effect, it is highly likely that although the benefit recipient cannot be disciplined for not using contraceptives, the institutional culture of the welfare social service agency nevertheless disposes the caseworker towards intensive interventions in the recipient's private life. Caseworkers who are trained to promote family planning may pursue extremely personal lines of inquiry when they assess the "job readiness" of each participant. Caseworkers might include their own advice about family planning in the participant's "contract" that he/she is then asked to fulfill. It is also possible that when caseworkers compile a dossier about the participant, they will include details about his/her private life as well as more general information about education and job training.

In addition to these TANF components that require the promotion of family planning, three states' welfare programs also encourage welfare recipients to relinquish their children for adoption. Virginia's Secretary of Health and Human Resources, for example, is directed by law to work with community providers to develop "adoption, education, family planning, marriage, parenting and training options for [Virginia Independence] Program participants."²¹¹ Washington trains its caseworkers to provide family planning information to TANF clients²¹² and ensures that TANF clients who are unmarried and unemployed minor parents receive "positive information" about giving up their children for adoption.²¹³ It also provides a "post-adoption" benefit: TANF recipients who become ineligible solely because they relinquish a newborn child for adoption may receive benefits for six weeks following the birth of the child.²¹⁴ Although Utah does not promote family planning through its TANF program, it does "inform the [TANF] client of free counseling about adoption from licensed child placement agencies and licensed attorneys." Its caseworkers are directed to "offer the [TANF] client the adoption information packet." The adoption promotion packet is described as an "easy-to-understand" guide to adoption relinquishment that features comprehensive and indexed lists of adoption services and organizations.²¹⁵ The Utah adoption program also includes a cash incentive: pregnant recipients of TANF benefits who subsequently relinquish their newborns for adoption remain eligible for TANF benefits for twelve months after the relinquishment date.²¹⁶

211. VA. CODE ANN. § 63.1-133.45 (Michie 2000).

212. WASH. REV. CODE § 74.12.400(4)(2000).

213. WASH. REV. CODE § 74.12.255 (2000).

214. WASH. REV. CODE § 74.04.005 (2000).

215. UTAH CODE ANN. § 35A-3-308 (2000).

216. UTAH CODE ANN. § 35A-3-308(4) (2000).

tion of abuse or neglect has been made. Even if the state does prove that the parents in question have actually committed these wrongs, the state can only permanently separate them from their children if it further demonstrates either that the very worst forms of abuse and neglect have occurred—such that the parents do not deserve a second chance—or that every effort has been made to assist the parents, but that the parents continue to pose a danger to the children.²¹⁹ Even in the very worst cases, the state must give the respondent an opportunity to defend himself/herself in a court of law.²²⁰ The state cannot encourage the parents in child abuse and neglect cases to relinquish their children for adoption by offering them cash incentives, counseling, or pamphlets; such an adoption-promotion program would violate their rights to privacy and due process. It is assumed that a parent is a fit custodian of his/her child—even where it has been established that he/she has committed acts of abuse or neglect—unless and until it is proven otherwise. The same assumption is not, however, made for the parents in Virginia, Washington, and Utah who receive welfare benefits. These states therefore do much more to respect the privacy and due process rights of abusive and neglectful parent respondents in the child welfare system than they do where the rights of TANF-recipient parents are concerned.

OTHER TWENTIETH CENTURY TRAGEDIES 186–89 (1995) (arguing that the right to privacy for the family as a collective entity is recognized in common law and Supreme Court decisions, and that the family privacy doctrine shields the family unit from arbitrary state interference) [hereinafter FINEMAN, *THE NEUTERED MOTHER*].

219. *See, e.g.*, N.Y. SOC. SERV. LAW § 384-b(1)(a)(ii)–(iii) (McKinney 2001) which establishes that “it is generally desirable for the child to remain with or be returned to the natural parent because the child’s need for a normal family life will usually best be met in the natural home, and that parents are entitled to bring up their own children unless the best interests of the child would be thereby endangered [and] the state’s first obligation is to help the family with services to prevent its break-up or to reunite it if the child has already left home.”
220. *See, e.g.*, N.Y. JUD. CT. ACTS § 1028 (McKinney 2001) which states that even when a child has been temporarily removed from his/her parent’s or guardian’s care because the child faced an imminent risk to his/her life or health, the parent or guardian is nevertheless entitled to a court hearing, which must be held within seventy-two hours of the removal. At the hearing, the court must order the child protective agency to return the child to the parent or guardian unless the return presents imminent risk to the child’s life or health. N.Y. JUD. CT. ACTS § 1028(a) (McKinney 2001). Section 1028 further stipulates that the court shall determine whether the services should be provided to the child and to the child’s family that would make it possible for the child to return safely home. N.Y. JUD. CT. ACTS § 1028(b) (McKinney 2001). If the court does decide that the provision of services would be appropriate for this purpose, it will include in its order a directive issued to the child protective agency to provide, or to arrange for the provision of, these services. N.Y. JUD. CT. ACTS § 1028(a) (McKinney 2001).

Further, ASFA does not grant a license to the state to engage in economic class “profiling” when it investigates allegations of abuse and neglect. Families from different economic backgrounds are treated equally by ASFA’s provisions; no specific economic group is singled out as deserving heightened suspicion. The pro-adoption TANF laws, by contrast, assume that every child in a poor family would, by virtue of the parent’s economic circumstances alone, be better off if he/she were separated from the parent and placed in an adoptive family. All parents receiving TANF benefits are included in the pro-adoption programs where they are in effect; the parents are not selected by a child abuse and neglect screening process before they are exposed to the adoption promotion discourse. Given the fact that TANF clients only become eligible for benefits after they pass a strict means test, and that single mothers in Virginia, Washington, and Utah who do not receive benefits are not systematically exposed to pro-adoption discourse by the state, the TANF adoption promotion programs are effectively calling into question the parental fitness of the TANF clients simply because they are poor. The TANF laws of Virginia, Washington, and Utah that promote the relinquishment of children in welfare benefit-receiving families for adoption therefore contradict the spirit of ASFA. Furthermore, it is entirely possible that if these pro-adoption relinquishment laws were subjected to a legal challenge, the courts would decide that they violated the Constitutional right to privacy, the right to due process, and the right to equal protection.

PART V. THE PROMOTION OF MARITAL BIRTHS AND SEXUAL
ABSTINENCE FOR THE POPULATION AT LARGE:
PUBLIC SCHOOL CURRICULA

*A. The TANF “Family Values” Agenda and the
Broadening of the Target Population*

The “family cap,” family planning, and adoption measures constitute an attempt to limit the number of children in TANF households. Contemporary welfare policies are also seeking to transform the structure of the American family by discouraging out-of-wedlock childbirth and teenage parenting throughout the population as a whole. The PRWORA is based, in part, on the assumption that out-of-wedlock childbirth and teenage parenting in the population as a whole cause poverty. Indeed, the PRWORA explicitly establishes the promotion of the two-parent family and heterosexual marriage, and the discouragement-

ment of out-of-wedlock births—initiatives that are aimed at the entire population—as integral parts of the government’s overall welfare policy objectives.²²¹ It therefore requires states to discourage childbearing outside of marriage for all Americans, and provides federal funds for abstinence education in the public schools—regardless of the economic conditions of the students in question.²²² This shift towards a cross-class type of sexual regulation project is not accidental. As we saw above, the predominant conservative view holds that single motherhood and teenage pregnancy, in and of themselves, are two of the most important causes of poverty and welfare dependency. Moral conservatives also claim that welfare programs have weakened marriage and promoted fatherless families among the poor.²²³

The moral conservatives’ empirical claims have been widely challenged, disputed, and rejected by social scientists. Female-headed and single parent families have become more common throughout Western countries since the 1960s.²²⁴ However, these specific alternative family forms are not always associated with poverty. The rates of female-headed and single parent families are highest in Sweden—thirty-two percent of all Swedish families are headed by a single parent—and yet Sweden is widely recognized for its excellent record vis-à-vis child-rearing, child health, child poverty rates, education, and egalitarian employment outcomes.²²⁵ In the United States, married couples are having fewer children, while single motherhood is expanding—especially among white women.²²⁶ Single motherhood has also increased much

221. Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, § 103, 110 Stat. 2105, 2113 (1996).

222. See Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, § 103, 110 Stat. 2105, 2113 (1996); see also *infra* text accompanying notes 272–86.

223. See, e.g., POPENOE, *supra* note 63, at 221.

224. Lynn C. Burbridge, *Policy Implications of a Decline in Marriage Among African Americans*, in *THE DECLINE IN MARRIAGE AMONG AFRICAN AMERICANS: CAUSES, CONSEQUENCES AND POLICY IMPLICATIONS* 323, 326 (M. Belinda Tucker & Claudia Mitchell-Kernan, eds., 1995).

225. Burbridge, *supra* note 224, at 326.

226. MINK, *MOTHERHOOD*, *supra* note 29, at 185–86. According to the Census Bureau, there were 44,160,000 American families with children under the age of 18 in 1999. Of these families, approximately 77.9% were headed by a cohabiting heterosexual couple, 17.8% by a single female householder, and 3.9% by a single male householder. Lesbian and gay couples who are parenting children are not counted in this study. It should be noted that the families with children headed by heterosexual couples tended to have the largest number of children; they had 1.86 children on average, as compared to 1.78 and 1.54 for the female- and male-headed households respectively. CENSUS BUREAU, *supra* note 123, at 57. Using slightly different family structure definitions, the Federal Interagency Forum on Child and Family Statistics

more among female college graduates, professionals, and managers from all races and ethnic groups than it has among women from other class fractions.²²⁷ The non-marital birth rate is increasing in part because there are more single women in the population—women are tending to marry later, divorce sooner, or remain unmarried for life.²²⁸ Many women deliberately choose to raise children on their own. The women who successfully flee from abusive male partners enjoy an improvement in their quality of life—in terms of their safety and psychological well-

estimates that 68% of families with children were headed by heterosexual parents living as a married couple in 1999, while 23 and 4% were headed by a single mother and a single father respectively, and 4% had no parent present. Changes over time between 1980 and 1999 are not as striking as the differences between racial/ethnic communities at the same point in time. In 1999, the two-parent family structure was somewhat more prevalent for white non-Hispanics, and somewhat less prevalent for Hispanics, than for the population as a whole. The data on African-American families, however, differed sharply from the population averages. Within the black community, 35% of families with children were headed by two parents, 52% by a single mother, 4% by a single father, and 10% had no parent present. FED. INTER-AGENCY FORUM ON CHILD & FAMILY STATISTICS, AMERICA'S CHILDREN: KEY NATIONAL INDICATORS OF WELL-BEING: 2000 1 (2000). While some initial studies do suggest that there has been a small shift among poor single mothers in general, and among poor black single mothers in particular, towards cohabiting with male partners since 1996 and that the pressures of the PRWORA regime on them may have contributed to this pattern, experts remain deeply concerned about the relatively unstable character of these new households and estimate that the quality of life of the children in question has not improved. See Blaine Harden, *Two-Parent Families Rise After Change in Welfare Laws*, N.Y. TIMES, Aug. 12, 2001, at A1 (summarizing the findings of the studies and reporting the concerns of a counselor, a social psychologist, a director of a fatherhood initiative, and welfare recipients). See also ALLEN DUPREE & WENDELL PRIMUS, CTR. ON BUDGET & POLICY PRIORITIES, DECLINING SHARE OF CHILDREN LIVED WITH SINGLE MOTHERS IN LATE 1990s (2001) (finding that poor children are more than five times more likely than their higher income counterparts to live with a single mother, and that the proportion of children under eighteen years of age living with a single mother declined between 1995 and 2000 from 19.9% to 18.4% while the proportion of children living with married parents remained 70% throughout the period, and that the proportion of black children living with two married parents increased from 34.8% to 38.9% between 1995 and 2000) available at <http://www.centeronbudget.org/6-15-01wel.htm>; GREGORY ACS AND SANDI NELSON, URBAN INST., "HONEY, I'M HOME": CHANGES IN LIVING ARRANGEMENTS IN THE LATE 1990s, (2001), (finding that the general shift to unmarried cohabitation among single mothers was particularly pronounced among low-income and less-educated families; suggesting that welfare policies may have influenced this shift, but also noting the importance of the economic boom; and citing research that suggests that the children of single mothers who do cohabit with a male partner may be worse off than before in terms of their overall quality of life) available at http://newfederalism.urban.org/html/series_b/b38/b38.htm#n10.

227. MINK, MOTHERHOOD, *supra* note 29, at 185–86.

228. Blank et al., *supra* note 182, at 30.

being—when they become single. Single motherhood has also become more common because more women have obtained economic independence and because the social stigma attached to female-headed households has weakened.²²⁹ Women who become pregnant are now much less likely to get married before the birth of the child and much less likely to remain in the homes of their parents, while more married mothers are becoming separated or divorced than before.²³⁰ The dramatic increase in childbirth and adoption among lesbians also contributes to the overall rise in female-headed families and non-marital births.²³¹ It is undoubtedly true that many poor single mothers would prefer to marry, but find that their male partners are reluctant to do so because they do not have access to permanent well-paying jobs.²³² Male unemployment appears to be an especially important factor in the family formation patterns among African-Americans in particular.²³³ Female-headed families are much more likely to be impoverished than the families headed by men or by married couples,²³⁴ but racial differences are significant. Many white single mothers on welfare became poor enough to qualify for benefits assistance because they divorced

229. Blank et al., *supra* note 182, at 33.

230. WILLIAM JULIUS WILSON, *THE TRULY DISADVANTAGED: THE INNER CITY, THE UNDERCLASS, AND PUBLIC POLICY* 66–71 (1987) [hereinafter WILSON, *TRULY DISADVANTAGED*].

231. See LAURA BENKOV, *REINVENTING THE FAMILY: THE EMERGING STORY OF LESBIAN AND GAY PARENTS* (1994) (documenting the increase in child-bearing and child-rearing among lesbians and gay men). See also Judith Stacey & Timothy Biblarz, (*How*) *Does the Sexual Orientation of Parents Matter?*, 66 AM. SOC. REV. 159, 164 (2001) (reporting that sociological surveys have found that there are between one and nine million dependent children who have lesbian, bisexual, or gay parents in the United States and that the number range reflects the different results that are generated when various definitions of sexual orientation are used).

232. WILLIAM JULIUS WILSON, *WHEN WORK DISAPPEARS: THE WORLD OF THE NEW URBAN POOR* 95–110 (1996) [hereinafter WILSON, *WORK DISAPPEARS*].

233. M. Belinda Tucker & Claudia Mitchell-Kernan, *African American Marital Trends in Context: Toward a Synthesis*, in *THE DECLINE IN MARRIAGE AMONG AFRICAN AMERICANS: CAUSES, CONSEQUENCES, AND POLICY IMPLICATIONS* 345, 347–48 (M. Belinda Tucker & Claudia Mitchell-Kernan eds., 1995). Cf. Robert Joseph Taylor et al., *Recent Demographic Trends in African-American Family Structure*, in *FAMILY LIFE IN BLACK AMERICA* 14, 59 (Robert Joseph Taylor et al. eds., 1997) (suggesting that although black male unemployment does seem to be a factor behind African-Americans' relatively lower marriage rate, the shift towards a greater tolerance of non-marital cohabitation and non-traditional families may also be important).

234. In 1998, the proportion of families with children headed by women that fell below the poverty line was 33.6%, as compared to 6.6% for families headed by a married couple and 9.7% for male-headed families. THOMAS M. BEERS, U.S. DEP'T OF LABOR, *PROFILE OF THE WORKING POOR: 1998*, at 9 (2000).

their wage-earning husbands.²³⁵ Black single mothers in poverty assistance programs who have left their male partners were typically destitute before the break-down of their relationships, precisely because the men in question did not earn a living wage.²³⁶ The best policy response to these situations is not to promote marriage but to create well-paying employment opportunities and to establish adequate social services, including childcare, for poor men and poor women. Governments should take an active role in ensuring that their citizens have access to the material resources that they require to achieve a minimally decent standard of living. By the same token, they should never arbitrarily interfere with their citizens' private lives.

The social science research findings also suggest that the availability of welfare benefits does not cause illegitimate births,²³⁷ female-headed families,²³⁸ and teenage pregnancies.²³⁹ The percentage of children born to unmarried women in the United States increased from eleven to

235. Zinn, *supra* note 29, at 862.

236. The term "living wage" is used to describe the wage rate that a full-time, year-round worker must earn in order to lift his/her family above the poverty line. In 2000, the living wage rate was \$8.20; however the federal minimum wage rate was only \$5.15, placing a full-time, year-round worker with two dependents earning the federal minimum wage household at 20% below the poverty line. AFL-CIO DEP'T OF PUB. POLICY, LIVING WAGE LAWS: ANSWERS TO FREQUENTLY ASKED QUESTIONS 3-4 (2000), available at http://www.aflcio.org/articles/minimum_wage/living.pdf. See also *infra* text accompanying note 266. Zinn cites research that suggests that the black children from two-parent families are often less well off economically than the non-black children in single mother families, precisely because the black men in the two-parent families often earn very low incomes. Zinn, *supra* note 29, at 862.

237. WILSON, TRULY DISADVANTAGED, *supra* note 230, at 94-95. For a critique of the very idea that a social practice is determined by an economic cause and for references to interpretative approaches in the social sciences that eschew natural science methodologies, see discussion *supra* note 182.

238. Dorothy E. Roberts, *Irrationality and Sacrifice in the Welfare Reform Consensus*, 81 VA. L. R. 2607, 2609 n.8 (1995); Taylor et al., *supra* note 233, at 44; William Julius Wilson, *The Underclass: Issues, Perspectives, and Public Policy*, in THE GHETTO UNDERCLASS: SOCIAL SCIENCE PERSPECTIVES 1, 6-7 (William Julius Wilson ed., 1993) [hereinafter Wilson, *Underclass*]. There is, in particular, no relationship between the mean public assistance benefit level and black female-headed families. Tucker & Mitchell-Kernan, *supra* note 233, at 350-51; Zinn, *supra* note 29, at 863-64. The largest growth in female-headed families in recent years has been among college-educated black women. Burbridge, *supra* note 224, at 331. While white women are twice as likely as black women to be married, this racial difference is equally valid for mothers and non-mothers alike. Taylor et al., *supra* note 233, at 48. This racial difference cannot, therefore, be explained in terms of the policies that deliver benefits to poor families with dependent children.

239. Lisa Garfinkle, Comment, *Two Generations At Risk: The Implications of Welfare Reform for Teen Parents and Their Children*, 32 WAKE FOREST L. REV. 1233, 1241 (1997).

thirty-three percent between 1970 and 1994,²⁴⁰ but the real value of AFDC benefits declined as much as forty-six percent during the same period.²⁴¹ The states with the lowest welfare expenditures tend to have the greatest increases in the divorce rate.²⁴² Some researchers argue that family structure decisions do not appear to depend on financial incentives.²⁴³ Others point to the enormous complexity of sexual and emotional decisions and the high degree of diversity among poor women vis-à-vis the degree of control they exercise in reproductive decision-making.²⁴⁴ And yet others indicate that employment opportunities and wage levels are the most important factors that shape heterosexual men and women's decisions to marry and to have children.²⁴⁵ The predominant scholarly view is that single-parenting often arises as a result of poverty and unemployment—since economic pressures do contribute to the breakdown of family and kinship ties—but that single-parenting in and of itself does not cause poverty.²⁴⁶ As for the welfare of children, there is no agreement among social scientists on the relative significance of factors such as family structure, income, parental relationships, and psychological factors in determining a child's well-being. Most of the research suggests that children thrive best when they form a stable and intimate relationship with at least one responsible adult, but that the gender, sexual orientation, and kinship status of that adult is irrelevant to their quality of life.²⁴⁷

With respect to teenage parents, significant demographic changes have occurred in the recent past. About three-quarters of the children of teen mothers are born out-of-wedlock, but teen births account for only thirty percent of all out-of-wedlock births.²⁴⁸ The percentage of non-marital births to teen women has actually decreased over time because the trend towards out-of-wedlock births for older women has increased

240. U.S. DEP'T. OF HEALTH & HUMAN SERVS., INDICATORS, *supra* note 76, at III-39-40. For an overview of the history of sexuality in the United States, see JOHN D'EMILIO & ESTELLE FREEDMAN, *INTIMATE MATTERS: A HISTORY OF SEXUALITY IN AMERICA* (1997).

241. Wright, *supra* note 68, at 377.

242. Levesque, *Looking to Unwed Dads*, *supra* note 177, at 24 n.99. As explained above, the relation between divorce and poverty is also class and race specific. See *supra* text accompanying notes 234 and 235.

243. Handler, *Is It for Real*, *supra* note 101, at 157.

244. Linda C. McClain, "Irresponsible" *Reproduction*, 47 *HASTINGS L.J.* 339 (1996).

245. Schultz, *supra* note 182, at 659; Wilson, *Underclass*, *supra* note 238, at 5-7.

246. STACEY, *supra* note 69, at 97.

247. STACEY, *supra* note 69, at 55-60.

248. DOUGLAS KIRBY, THE NATIONAL CAMPAIGN TO PREVENT TEEN PREGNANCY, NO EASY ANSWERS: RESEARCH FINDINGS ON PROGRAMS TO REDUCE TEEN PREGNANCY 6 (1997) [hereinafter KIRBY, NATIONAL CAMPAIGN].

significantly. All fertility rates have decreased, but the negative rate of change among unmarried teens has been slower than that for other women.²⁴⁹ The overall birth rate among teen women has decreased since 1960, but because teenagers who are single are more likely than their married counterparts to have children, and because single pregnant teen women are less likely to get married than they were before, the proportion of births to unmarried teen women has increased.²⁵⁰ The average age at which a young man or woman engages in heterosexual intercourse has in fact decreased,²⁵¹ but the proportion of youth who have had a sexual experience by any given age has stabilized since 1990.²⁵² Almost sixty-six percent of high school seniors reported that they had had at least one heterosexual intercourse experience before they graduated.²⁵³ Although unmarried black teens are somewhat more likely to be engaging in sexual practices than their white counterparts, this racial difference diminished in the 1980s as more white teens became sexually active.²⁵⁴ Contraception use for young practicing heterosexuals is quite common. Among sexually active teenagers, seventy-two percent of 15- to 17-year-olds and eighty-four percent of 18- to 19-year-olds use some form of birth control.²⁵⁵ Condoms are more popular among the younger teens, while the birth control pill is more widely used as age and experience increases.²⁵⁶ However, many sexually active heterosexual teens do not use birth control consistently and effectively.²⁵⁷ As a result, the vast

249. WILSON, TRULY DISADVANTAGED, *supra* note 230, at 66.

250. Blank et al., *supra* note 182, at 30. Teen pregnancy, abortion, and birth rates began to decline in 1991 and have continued to decline steadily since then. DOUGLAS KIRBY, EMERGING ANSWERS: RESEARCH FINDINGS ON PROGRAMS TO REDUCE TEEN PREGNANCY (SUMMARY) v (May 2001), [hereinafter KIRBY, EMERGING ANSWERS], available at <http://www.teenpregnancy.org/053001/emerswsum.pdf>. According to the Center for Disease Control, the 1997 pregnancy rate for all women was the lowest ever recorded since consistent data on national pregnancy rates were first generated in 1976. The pregnancy rate for teen women in particular declined 19% between 1991 and 1997, and reached a record low in 1997. The pregnancy rates for younger teenage women declined more than the rates for older teenage women. Stephanie Ventura et al., *Trends in Pregnancy Rates for the United States, 1976-1997: An Update*, 49 NAT'L VITAL STATISTICS REP. 1-2 (June 6, 2001).

251. KIRBY, NATIONAL CAMPAIGN, *supra* note 248, at 3.

252. KIRBY, NATIONAL CAMPAIGN, *supra* note 248, at 4.

253. KIRBY, NATIONAL CAMPAIGN, *supra* note 248, at 3.

254. Taylor et al., *supra* note 233, at 24. For an account of the differences between the experiences of the typical white middle class pregnant teen woman and her black working class counterpart during the 1950s, see RICKIE SOLINGER, WAKE UP LITTLE SUSIE: SINGLE PREGNANCY AND RACE BEFORE ROE V. WADE (1992).

255. KIRBY, NATIONAL CAMPAIGN, *supra* note 248, at 4.

256. KIRBY, NATIONAL CAMPAIGN, *supra* note 248, at 4-5.

257. KIRBY, NATIONAL CAMPAIGN, *supra* note 248, at 8-9.

majority of teen pregnancies are unintended.²⁵⁸ Unmarried teen women are more likely to seek an abortion than all other groups of unmarried women.²⁵⁹

Many single teenage mothers live in poverty, but only four percent of TANF recipients were teen parents in 1999.²⁶⁰ The consensus in the social science research is that teen childbearing does not cause poverty. It is nevertheless often the case that poor teen women are more likely than their wealthier counterparts to become pregnant. The rates of teen pregnancy for different regions in the United States and for different countries in the developed West closely correspond to differences in youth poverty rates.²⁶¹ Although teen pregnancies, like all social phenomena, are enormously complex,²⁶² a young woman's expectations about her future socio-economic success seem to be among the most important factors shaping her sexual decision-making. When a sexually active teen woman expects that she will pursue an academic education beyond high school, find meaningful employment, and earn a decent income, she is much more likely to use birth control consistently and effectively.²⁶³ The health of the babies born to women varies directly according to the mother's poverty rather than the mother's age at the time of the birth.²⁶⁴ The socio-economic condition of a young woman,

258. Of the total number of teen pregnancies in 1990, 14% ended in miscarriage, 35% were terminated in abortion, 37% resulted in unintended births, and 14% resulted in intended births. KIRBY, NATIONAL CAMPAIGN, *supra* note 248, at 6. Black teenage pregnant women are three times more likely than their white counterparts to say that their pregnancies are unwanted. GORDON, WOMAN'S BODY, *supra* note 51, at 451.

259. Garfinkle, *supra* note 239, at 1257.

260. In 1999, six percent of TANF adult recipients—the recipients who were not themselves a dependent of another adult—were teenagers. Four percent of TANF adult recipients were teen parents with a child who was also a member of the TANF household. U.S. DEP'T OF HEALTH & HUMAN SERVS., CHARACTERISTICS, *supra* note 7.

261. ROBERTS, KILLING THE BLACK BODY, *supra* note 70, at 118. The American teen pregnancy rate is one of the highest in the Western developed countries; it is twice that of England, France, and Canada, and three times greater than that of Sweden. Taylor et al., *supra* note 233, at 25. It is 10 times greater than the rate for the Netherlands. KIRBY, NATIONAL CAMPAIGN, *supra* note 248, at 2.

262. McClain, *supra* note 244, at 437.

263. See GORDON, WOMAN'S BODY, *supra* note 51, at 456–57; KIRBY, NATIONAL CAMPAIGN, *supra* note 248, at 48; ROBERTS, KILLING THE BLACK BODY, *supra* note 70, at 119; WILSON, WORK DISAPPEARS, *supra* note 232, at 107–08; Blank et al., *supra* note 182, at 35–36; Meagan Weinstein, *The Teenage Pregnancy 'Problem': Welfare Reform and the Personal Responsibility and Work Opportunity Reconciliation Act of 1996*, 13 BERKELEY WOMEN'S L.J. 117, 150 (1998); Wilson, *Underclass*, *supra* note 238, at 22.

264. ROBERTS, KILLING THE BLACK BODY, *supra* note 70, at 120. However, the risk of infant death for black children is actually lower when they are born to teen mothers

rather than the incidence and timing of childbirth, is the most important factor determining her income and employment status later in life. Consider, for example, the research that compares two groups of adult women who were poor during their childhood: first, women from poor families who postponed childbirth until their twenties and thirties, and second, women from poor families who had at least one child during their teenage years. The data suggest that as both groups reach their twenties and thirties, their economic conditions are quite similar. Members of both groups have the same chance that they will face unemployment or low-waged work.²⁶⁵ In other words, it appears that poor adult women who were teen mothers are poor not because of the timing of their own children's births, but because they themselves were born into poor families. Critics who argue that poor teens should postpone childbearing until they earn the income needed to support a family neglect the fact that the vast majority of poor youth will enter the work force but will never find a job that pays a living wage.²⁶⁶ The data sug-

as opposed to older women. ROBERTS, *KILLING THE BLACK BODY*, *supra* note 70, at 120.

265. Blank et al., *supra* note 182, at 35. The initial findings from a study that is tracking a random sample of 2,458 families on welfare suggest that among the women who have left the TANF program, the women with less education, with poorer health, with younger children, and who are themselves young have considerably lower incomes and rates of employment after leaving welfare than do the women with the opposite conditions. William Julius Wilson & Andrew J. Cherlin, *The Real Test of Welfare Reform Still Lies Ahead*, N.Y. TIMES, July 13, 2001, at A21. However, studies that compared pregnant teen women who had a child with their peers who miscarried concluded that if poor teen mothers did postpone their childbearing until later in life, they would not improve their socioeconomic status, level of educational achievement, or income. Elizabeth Hollenberg, *The Criminalization of Teenage Sex: Statutory Rape and the Politics of Teenage Motherhood*, 10 STAN. L. & POL'Y REV. 267, 282-83 n.84 (1999). Although black teenage mothers do not, on average, attain the same degree of educational achievement as childless black teenage women and experience greater employment instability and welfare dependence than their counterparts, the differences between the two groups decline significantly as these women move into middle age. Taylor et al., *supra* note 233, at 29-30. Black women who bear children early in life are also more likely than their white counterparts to acquire work experience. Taylor et al., *supra* note 233, at 29.

266. Garfinkle, *supra* note 239, at 1242. Studies have found that people who were born into poor families in the mid-1990s are much more likely to remain poor than their counterparts in the late 1960s and 1970s. Keith Bradsher, *America's Opportunity Gap*, N.Y. TIMES, June 4, 1995, at A15. Among all participants in the labor force in 1998, 6.8% earned a below-poverty-level income. BEERS, *supra* note 234, at 5. The poverty rate for full-time workers, all part-time workers, and involuntary part-time workers was 5.0, 11.5, and 26.7% respectively. BEERS, *supra* note 234, at 5. About 13% of the workers with only a high school diploma who worked at least 27 weeks during the year earned less than poverty-level wages. BEERS, *supra* note 234, at 7. Twenty-six percent of children with at least one fully employed (working full-time on a twelve-

gest that even if teen pregnancy was significantly decreased, poverty would not be substantially reduced as a result.²⁶⁷

In spite of this evidence, moral conservatives argue that poverty ought to be addressed primarily by promoting marriage and sexual abstinence for unmarried teenagers. The PRWORA contributes to the institutionalization of their position.²⁶⁸ It states that the purpose of the TANF program is not only to provide assistance to impoverished families, but also to “end the dependence of needy parents on government benefits by promoting job preparation, work and marriage; [to] prevent and [to] reduce the incidence of out-of-wedlock pregnancies and [to] establish numerical goals for preventing and reducing the incidence of these pregnancies; and [to] encourage the formation and maintenance of two-parent families.”²⁶⁹ None of the previous laws that defined the purpose of ADC or AFDC referred to a governmental interest in the promotion of marriage, the reduction of out-of-wedlock births, and the encouragement of two-parent families.²⁷⁰ The PRWORA’s purpose is so broad that programs designed to reduce out-of-wedlock births and to promote two-parent families may be funded under this law even if they are aimed at both needy and non-needy persons.²⁷¹

month basis) resident parent lived below the poverty line in 1997. U. S. DEP’T OF HEALTH AND HUMAN SERVS., *TRENDS IN THE WELL-BEING OF AMERICA’S CHILDREN AND YOUTH: 1999* 115 (2000). Bryner notes that in 1998, it was found that the real value of the minimum wage had declined to such an extent that it was near a forty-year low. BRYNER, *supra* note 60, at 59.

267. Garfinkle, *supra* note 239, at 1241–42.

268. In this sense, the PRWORA can be situated within a long tradition in which marriage has been promoted by churches and governments to discourage the formation of masses of unsupported children as well as to secure inheritance rights. See E.J. GRAFF, *WHAT IS MARRIAGE FOR?* 99–104 (1999). Marriage has also been historically viewed as an important vehicle for the pacification of otherwise unruly bachelor men. Council on Families in America, *supra* note 63, at 303.

269. Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, § 103, 110 Stat. 2105, 2113 (1996).

270. Social Security Act of 1935, Pub. L. No. 74-271, § 401, 49 Stat. 620, 627 (1935); Social Security Amendments of 1956, Pub. L. No. 84-880, § 312, 70 Stat. 807, 848–49 (1956); Public Welfare Amendments of 1962, Pub. L. No. 87-543, § 104, 76 Stat. 172, 185–86 (1962); Social Security Amendments of 1967, Pub. L. No. 90-248, § 241, 81 Stat. 821, 916 (1968).

271. JODIE LEVIN-EPSTEIN, *CTR. FOR LAW & SOC. POLICY, FREQUENTLY ASKED QUESTIONS: TAPPING TANF FOR REPRODUCTIVE HEALTH OR TEEN PARENT PROGRAMS* 9–10 (1999), at <http://www.clasp.org/pubs/TANF/tanffederal.htm>. For a theoretical account of the tendency among modern Western governments and official institutions to expand the target populations of their policies such that more and more people are embraced by their various regulatory regimes, see FOUCAULT, *supra* note 112.

The PRWORA orders each state to track out-of-wedlock pregnancy rates—with a special emphasis on teenage out-of-wedlock pregnancy rates—for the entire population and to “take action” to reduce illegitimate births in the state’s population as a whole.²⁷² The states are also invited to compete for a bonus of \$20 to \$25 million that will be awarded to the states that achieve the highest decreases in out-of-wedlock births without increasing abortions.²⁷³ Sixteen states were actively competing for the bonus in 1999, and several others were planning to enter the competition in the near future.²⁷⁴ The PRWORA also directs the states to conduct an education program about statutory rape²⁷⁵ for law enforcement officials, teachers, students, and counselors,

272. Personal Responsibility and Work Opportunity Reconciliation Act of 1996, § 103, 110 Stat. 2105, 2113–34 (1996).

273. Personal Responsibility and Work Opportunity Reconciliation Act of 1996, § 103, 110 Stat. 2105, 2118 (1996). In 1999, \$20 million was awarded under this provision to each of the following states: Alabama, California, Massachusetts, Michigan, and the District of Columbia. *Four States Set to Claim Welfare Perk*, PROVIDENCE JOURNAL-BULLETIN, Aug. 6, 1999, at 15A. The same bonus was distributed to Alabama, Arizona, Illinois, Michigan, and the District of Columbia in 2000. Tamar Lewin, *Cut Down on Out-of-Wedlock Births, Win Cash*, N.Y. TIMES, Sept. 24, 2000, at D5.

274. The sixteen states are Alaska, Arizona, Arkansas, Colorado, Delaware, Kansas, Louisiana, Maryland, Massachusetts, Mississippi, Nevada, Tennessee, Texas, Vermont, Virginia, and Wyoming. NOW LEGAL DEF. & EDUC. FUND, *supra* note 185, at 6–38.

275. Some aspects of the campaign to stop statutory rape are problematic. See Hollenberg, *supra* note 265, at 275–76 (arguing that the emphasis in statutory rape programs is the prosecution of men, rather than assisting young women); Hollenberg, *supra* note 265, at 268 (noting that as the states are expanding their statutory rape prosecution efforts, they are simultaneously reducing expenditures in the area of teen services); Hollenberg, *supra* note 265, at 270 (arguing that the majority of teen births actually occur among women who are 18 or 19, that many of the teen mothers with older male partners are married to their partners, and that only a small proportion of teen pregnancies are actually the result of statutory rape); Rigel Oliveri, Note, *Statutory Rape Law and Enforcement in the Wake of Welfare Reform*, 52 STAN. L. REV. 463, 484–86 (2000) (arguing that the enforcement of statutory rape laws is generally not an empowering experience for the young women in question, especially when the alleged victim is relatively mature and has given her consent); Oliveri, *supra*, at 503–04 (arguing that statutory rape enforcement programs can be especially problematic when they are used as a “tool to scapegoat vulnerable parts of the population, such as low-income people and minorities”). The evidence does suggest, however, that some older men do select young teen and pre-teen women for sexual exploitation and assault, and that these younger women do need to be effectively protected from inappropriate sexual contact with older men. See Hollenberg, *supra* note 265, at 271 (arguing that young women who describe their first sexual experience as non-voluntary are much more likely to be substantially younger than their partners); Oliveri, *supra*, at 505 (arguing that among all pregnant teenage women, the women with the male partners who are several years older than themselves tend to be less than 15 years of age); Oliveri, *supra*, at 473 (arguing that where young teen and pre-teen women engage in sexual practices with men who are several years older, contraception

and to ensure that men are included in teenage pregnancy prevention programs.²⁷⁶ It also orders the Secretary of Health and Human Services to establish and implement a plan to reduce out-of-wedlock births across the entire national population and to ensure that teenage pregnancy prevention programs are operating in at least twenty-five percent of the communities in the U.S.²⁷⁷

In addition to these broadly-aimed measures, the PRWORA imposes strict rules on teen parent TANF recipients themselves. In order to receive benefits, they must attend high school and, if they are not married, they must reside with their parents or legal guardians.²⁷⁸

However, the PRWORA also reaches far beyond the relatively small numbers of teen parents on welfare. Under the PRWORA, federal funds are provided to the states in a matching grant system for the purposes of conducting abstinence education programs.²⁷⁹ These programs are explicitly defined in the PRWORA. They must have, as their sole purpose, the promotion of abstinence: “[T]he term, ‘abstinence education’ means an educational or motivational program which has as its exclusive purpose, teaching the social, psychological, and health gains to

is less likely to be used than in the sexual practices involving women in the same age group and their male peers); Oliveri, *supra*, at 473 (arguing that the majority of the sexual experiences of young women under the age of 14 were described by them as “non-voluntary”). Because the numbers of pregnancies to young teen women and pre-teen women that are caused by men who are several years older make up such a small proportion of teen pregnancies as a whole, however, the protection of these young women from sexual exploitation and assault will have little effect on the teen pregnancy rate. *See* Oliveri, *supra*, at 505 (arguing that the births to young women under the age of 15 that were caused by men several years older account for fewer than 3% of all teenage births). Finally, statutory rape prosecution programs may be very poorly suited to the goal of protecting these young women. *See* Oliveri, *supra*, at 506–08 (proposing the replacement of statutory rape laws with programs aimed at enforcing existing laws against forcible rape, “date rape,” “chemical rape,” sexual abuse, sexual exploitation, sexual harassment, domestic violence, and child abuse).

276. Personal Responsibility and Work Opportunity Reconciliation Act of 1996, § 103, 110 Stat. 2105, 2114 (1996).

277. Personal Responsibility and Work Opportunity Reconciliation Act of 1996, § 905, 110 Stat. 2105, 2349 (1996).

278. Personal Responsibility and Work Opportunity Reconciliation Act of 1996, § 103, 110 Stat. 2105, 2135–36 (1996). Conservatives have also called for the exclusion of teenage parents from public school activities. COUNCIL ON CIVIL SOCIETY, *supra* note 58, at 20. This specific reform, however, was not integrated into the PRWORA.

279. The states can accept the federal funds for abstinence education if they match three state dollars for every four federal dollars. Congress has allocated \$250 million in federal funds for a five year period for this program. NOW LEGAL DEF. & EDUC. FUND, *supra* note 185, at 1.

be realized by abstaining from sexual activity.”²⁸⁰ They must teach that sex outside of marriage is psychologically “harmful;” that abstaining from sex outside of marriage is “the only certain way to avoid out-of-wedlock pregnancy, sexually transmitted diseases, and other associated health problems;” and that “a mutually faithful monogamous relationship in the context of marriage is the expected standard of human sexual activity.”²⁸¹ The abstinence education programs are also supposed to be operated “with a focus on those groups which are most likely to bear children out-of-wedlock.”²⁸² Researchers have found that abstinence education programs have had no impact whatsoever on students’ sexual behavior.²⁸³ Forty-nine states have nevertheless accepted PRWORA

280. Personal Responsibility and Work Opportunity Reconciliation Act of 1996, § 912, 110 Stat. 2105, 2354 (1996).

281. Personal Responsibility and Work Opportunity Reconciliation Act of 1996, § 912, 110 Stat. 2105, 2354 (1996).

282. Personal Responsibility and Work Opportunity Reconciliation Act of 1996, § 912, 110 Stat. 2105, 2354 (1996).

283. See KIRBY, EMERGING ANSWERS, *supra* note 250, at 8 (stating that studies of teen abstinence education available in 2001 suggest that these programs are not effective in transforming sexual behavior, but that comprehensive sex education programs have delayed the onset of intercourse and increased the use of condoms and contraceptives); KIRBY, NATIONAL CAMPAIGN, *supra* note 248, at 25 (arguing that although some of the evaluations of abstinence education programs are inconclusive, there is strong evidence that abstinence-only education programs do not delay the onset of intercourse); DAVID SATCHER, SURGEON GENERAL, THE SURGEON GENERAL’S CALL TO ACTION TO PROMOTE SEXUAL HEALTH AND RESPONSIBLE SEXUAL BEHAVIOR 11 (2000) (citing Kirby’s two reports as the best sources on the effectiveness of sexual abstinence education). See also KIRBY, NATIONAL CAMPAIGN, *supra* note 248, at 37, 41, 47 (arguing that sexual education programs that provide students with contraceptives and comprehensive sexual information do not increase sexual activity); Oliveri, *supra* note 275, at 473–74 n.46 (noting that the most famous youth abstinence education program, California’s Education Now and Babies Later, was discontinued in 1996 when it was found that the participants were just as likely as non-participants to be sexually active, father a child or give birth to a child, and contract sexually transmitted diseases); Brigid Rentoul, *Cognitus Interruptus: The Courts and Minors’ Access to Contraceptives*, 5 YALE L. & POL’Y REV. 212, 231 (1986) (arguing that international comparative studies demonstrate that the countries with the most accessible confidential contraceptive services for minors have the lowest teen pregnancy rates); Kristen Rufo, Note, *Public Policy vs. Parent Policy: States Battle Over Whether Public Schools Can Provide Condoms to Minors Without Parental Consent*, 13 N.Y.L. SCH. J. HUM. RTS. 589, 599 n.60 (1997) (citing a study from the Center for Disease Control and the Department of Health and Human Services that suggests that although sex education courses can improve students’ knowledge about sex, they have virtually no impact on their sexual behavior); Rufo, *supra*, at 623–24 (arguing that the provision of contraceptives to minors should be held constitutional). But see Lynne Kohm & Maria Lawrence, *Sex at Six: The Victimization of Innocence and Other Concerns Over Children’s Rights*, 36 BRANDEIS J. FAM. L. 361, 370–73 (1998) (arguing that sex education courses ought to be removed from the school curricula because they endorse

funds for the operation of teenage pregnancy prevention programs and sexual abstinence education programs.²⁸⁴ Although these funds have been used to support a wide variety of projects, including media campaigns, self-esteem counseling, and youth sports leagues, twenty-five states have used at least part of their grant to conduct school programs.²⁸⁵ Within the public education system, the federal funds are being used primarily to support abstinence education programs in the junior high schools.²⁸⁶

B. The Findings and Analysis

Again, the integration of initiatives that are explicitly designed to transform sexual practices on the most intimate level into the very core of welfare policy is striking. It is also significant that this dimension of welfare policy entails a unique form of cross-agency cooperation. Some of the federal funds earmarked for poverty assistance are being directed towards state education departments to support abstinence education courses that are delivered to all public school students, poor and non-poor alike.²⁸⁷ The abstinence education and pregnancy prevention programs operated under the PRWORA by not-for-profit community groups, religious organizations, local health departments, family

an amoral position, promote "premature" sexual activity and contraception, and adopt an inappropriately tolerant attitude towards homosexuality). For a general overview of the political and legal dimensions of sex education curricula and contraception provision programs for youth, see Debra Haffner, *Sexuality Education: Issues for the 1990s*, 38 N.Y.L. SCH. L. REV. 45 (1993); Janice Irvine, *Doing It With Words: Discourse and the Sex Education Culture Wars*, 27 CRITICAL INQUIRY 58 (2000); Rentoul, *supra*.

284. Only California declined to appropriate the funds on the grounds that abstinence education programs are not effective. NOW LEGAL DEF. & EDUC. FUND, *supra* note 185, at 2-3. Some states are attempting to use the PRWORA funds in ways that would enhance the reproductive rights of women by strengthening family planning services, expanding condom distribution programs, and placing reproductive rights advocates on pregnancy prevention task forces. NOW LEGAL DEF. & EDUC. FUND, *supra* note 185, at 3.

285. Tamar Lewin, *Sexual-Abstinence Grants Put to Broad Use by States*, N.Y. TIMES, April 4, 1999, at A18.

286. Lewin, *supra* note 285, at A18.

287. This dimension of the PRWORA is reminiscent of the "Americanizing" school curricula that reformers championed in the early twentieth century. The reformers believed that once the children from needy immigrant families were exposed to teaching on civics, literacy, English language skills and, for the girls, home-making and etiquette, the students would learn to conform to the moral and cultural standards of white Anglo-American bourgeois society. See MINK, MOTHERHOOD, *supra* note 29, at 77-96.

planning agencies, and other non-school institutions have been described elsewhere.²⁸⁸ For my purposes, I will focus exclusively on the legislative and regulatory context in which the public school abstinence programs are being conducted by asking: how do the current state laws and regulations define the content of sex education courses in the public schools? The contemporary welfare reform debate is not, of course, the only factor that shapes sex education curricula. Several states already had laws and regulations on human sexuality curricula in effect before the passage of the PRWORA. Many of these measures were clearly influenced by a conservative interpretation of the risks associated with the transmission of the human immunodeficiency virus (HIV). The following data²⁸⁹ does not distinguish between the measures adopted before and after the PRWORA, but aims instead to give a comprehensive account of state laws and regulations currently in effect.

Sexuality education experts have expressed strong concerns and reservations regarding the PRWORA's abstinence education initiative.²⁹⁰ The consensus among these experts is that the schools should teach abstinence-based course material, but they should teach that material in the context of a comprehensive human sexuality curriculum.²⁹¹ The

288. NOW LEGAL DEF. & EDUC. FUND, *supra* note 185, at 6–38. See also, MARIE COHEN, CTR. FOR LAW & SOC. POLICY, TAPPING TANF: WHEN AND HOW WELFARE FUNDS CAN SUPPORT REPRODUCTIVE HEALTH OR TEEN PARENT INITIATIVES (1999). An exception to the rule that TANF funds must not be used for medical services has been made specifically to allow for the support of family planning programs. COHEN, *supra*, at 11. In New York, TANF funds now account for 16% of the state's reproductive health budget. COHEN, *supra*, at 11. None of the programs described in these reports involve the improvement of poor teens' access to adequate secondary and post-secondary education, or the creation of employment opportunities.

289. The 50 states' education statutes were read in traditional "hard copy" form between September 15 and October 15, 2000. Where a state only had a vague statute or no statute at all governing sex education curricula a search of the state's administrative code was conducted using LEXIS and state-based web sites.

290. See, e.g., Debra Haffner, *What's Wrong With Abstinence-Only Sexuality Education Programs?* 25 SIECUS REPORT 9 (1997) (hereinafter Haffner, *What's Wrong With Abstinence*). Haffner is the President of Sexuality Information and Education Council of the U.S. (SIECUS). SIECUS organizes the National Coalition to Support Sexuality Education, a body that includes the American College of Obstetricians and Gynecologists, the American Medical Association, the American Public Health Association, the Boston Women's Health Book Collective, the Children's Defense Fund, the National Black Women's Health Project, the National Gay and Lesbian Taskforce, the National Urban League, Planned Parenthood Federation of America and the YWCA of the U.S.A.

291. Haffner, *What's Wrong With Abstinence*, *supra* note 290, at 9. See also SATCHER, *supra* note 283, at 13 (recommending, as Surgeon General, that teens be taught sex education courses and that the curricula should "stress the value and benefits of remaining abstinent until [involvement] in a committed, enduring and mutually monogamous

sexuality education experts strongly favor courses that avoid fear-based teaching methods. Instead, they support programs that promote positive communication between parents and their children; that teach students how to deal with interpersonal and family relationships, decision-making, and goal-setting; and that help students to identify pressures that may lead to sexual involvement and to develop skills to resist such pressures.²⁹²

Sexuality education experts also point to the fact that there is no credible research that proves the effectiveness of abstinence-only curricula in preventing or delaying sexual intercourse among teenagers.²⁹³ The abstinence-only curriculum that is defined in the PRWORA also contradicts the scientific evidence on the effects of extra-marital and pre-marital sex. The PRWORA requires programs to teach that "sexual activity outside of the context of marriage is likely to have harmful psychological and physical effects."²⁹⁴ The evidence suggests, however, that the majority of married adults who have had sexual relationships

relationship; but assure awareness of optimal protection from sexually transmitted diseases and unintended pregnancy, for those who are sexually active, while also stressing that there are no infallible methods of protection, except abstinence, and that condoms cannot protect against some forms of sexually transmitted diseases").

292. "Abstinence-Only" Curricula Without the Fear, 25 SIECUS REPORT 22 (1997). A report issued by the National Campaign to Prevent Teen Pregnancy similarly advised educators to provide comprehensive information about sexual activity and contraception, to teach students how to communicate effectively and to deal with peer pressure, to use culturally and age appropriate materials, to favor interactive and dialogical teaching techniques, to appoint interested and specially trained teachers and peer leaders to present the sex education curricula, and to ensure that the courses on sex education last a significant length of time. KIRBY, EMERGING ANSWERS, *supra* note 250, at 10. The SIECUS guidelines state that adolescents between the ages of 12 and 15 should be taught that "young teenagers are not mature enough for a sexual relationship that includes intercourse," but also that "there are many ways to give and receive sexual pleasure and not have intercourse." Haffner, *What's Wrong With Abstinence*, *supra* note 290, at 10. Where the courses are directed at students between the ages of 15 and 18, the SIECUS guidelines recommend that the students be taught that "sexual intercourse is not a way to achieve adulthood," that many American teens have not had sexual intercourse, and that many adults experience periods of abstinence, but also that "teenagers in romantic relationships can express their sexual feelings without engaging in sexual intercourse." Haffner, *What's Wrong With Abstinence*, *supra* note 290, at 10. For the complete version of the SIECUS recommendations on sex education curricula, see NATIONAL GUIDELINES TASK FORCE, GUIDELINES FOR COMPREHENSIVE SEXUALITY EDUCATION, KINDERGARTEN-12TH GRADE (1991).

293. *E.g.*, Haffner, *What's Wrong With Abstinence*, *supra* note 290, at 9.

294. Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, § 912, 110 Stat. 2105, 2354 (1996).

prior to marriage experienced no negative consequences from that activity and described their first intercourse as a desired event.²⁹⁵

The abstinence-only approach might also have serious consequences: it might encourage students to believe that contraception and condoms cannot effectively prevent pregnancy and sexually-transmitted diseases.²⁹⁶ Sexually active teens exposed to this instruction might therefore avoid using contraception and condoms at a time when HIV transmission still remains a serious public health concern.²⁹⁷ The National Institute of Health (NIH) guidelines state, “although sexual abstinence is a desirable objective, programs must include instruction in safe sex behavior, including condom use.”²⁹⁸ The recommendations issued by the National Commission on Adolescent Sexual Health similarly state, “society should encourage adolescents to delay sexual behaviors until they are ready physically, cognitively, and emotionally for mature sexual relationships and their consequences.” Furthermore, the recommendations state that “society must also recognize that a majority of adolescents will become involved in sexual relationships during their teenage years. Adolescents should receive support and education for developing the skills to evaluate their readiness for mature sexual relationships.”²⁹⁹ A recent study by the Alan Guttmacher Institute nevertheless found that twenty-three percent of teachers said that they taught abstinence as the only way to avoid pregnancy and venereal disease.³⁰⁰

The sexuality education experts’ arguments and curricular guidelines provide the background knowledge necessary for a qualitative evaluation of the states’ sex education provisions. Each state’s laws and regulations that define the required course of study in sex education were coded as “severely conservative,” “strongly conservative,” “conservative,” or “moderate.”³⁰¹ States coded as “severely conservative” have

295. Haffner, *What’s Wrong With Abstinence*, *supra* note 290, at 12.

296. Haffner, *What’s Wrong With Abstinence*, *supra* note 290, at 11.

297. Haffner notes that “professionals who work directly with adolescents in schools and clinics can attest that adolescent vows of abstinence fail far more than condoms do.”

Haffner, *What’s Wrong With Abstinence*, *supra* note 290, at 11.

298. Haffner, *What’s Wrong With Abstinence*, *supra* note 290, at 11.

299. Haffner, *What’s Wrong With Abstinence*, *supra* note 290, at 12.

300. See Diana Jean Schemo, *Promised Sex-Ed Report Languishes*, N.Y. TIMES, Apr. 21, 2001, at A9.

301. As we will see below, none of the states with explicit provisions determining the content of sex education courses of study merit a “liberal” coding. See *infra* text accompanying notes 297–327. Some of the statutes and regulations on sex education are not included in the data. Many states have established processes by which the parents of schoolchildren are notified about the content of sexual education courses. Parents are typically given the right to withdraw their children from the classroom during human sexuality instruction. One state, Nebraska, orders its public schools to

laws and/or administrative codes in effect that establish that abstinence education is the primary—or only—approved form of sexual education in public schools. In the typical abstinence-only education curriculum, it is taught that sexual conduct should only take place in the context of a legal heterosexual monogamous marriage, and positive information about sexual desire and the use of contraception and condoms is excluded. The states with “severely conservative” curricula have standards that closely resemble the abstinence-only approach and, in addition, either ban abortion information and contraception distribution or include anti-homosexual material in their courses of study.

The human sexuality courses in North Carolina, for example, must emphasize that “abstinence from sexual activity outside of marriage is the expected standard for all school-age children,” and that “a mutually faithful monogamous heterosexual relationship in the context of marriage is the best lifelong means of avoiding diseases transmitted by sexual contact, including AIDS.”³⁰² Contraceptives may not be distributed on

publicize the state laws establishing mandatory parental notification for minor women seeking abortion. NEB. REV. STAT. § 71-6909 (2000). Because they are not directly relevant to an analysis of course content, parental consent laws and this specific part of Nebraska’s curricula are not included in the data. Bans on the distribution of condoms in vending machines in public schools (see, for example, HAW. REV. STAT. § 321-115 (2000) and MD. ANN. CODE art. 27, § 41A (2000)) are also not included. Some schools offer programs for “at-risk” students—a group that usually includes pregnant and parenting students—that encourage participants to complete their high school education. The special curricula that some states have developed for the special courses designed for teen parents are not included here since they are not delivered to the entire student body. It should also be noted that many states give local school boards a great deal of autonomy where the construction of sex education curricula is concerned. South Carolina, for example, bans the distribution of contraceptives on school grounds (S.C. CODE ANN. § 59-1-405 (Law. Co-op. 2000)) and instruction about “alternate sexual lifestyles from heterosexual relationships including, but not limited to, homosexual relationships, except in the context of instruction concerning sexually transmitted diseases.” (S.C. CODE ANN. § 59-32-30 (A)(5) (Law. Co-op. 2000)) South Carolina does not, however, establish the precise content of human sexuality courses; it directs local school boards to develop their own health education curricula in consultation with a local advisory committee. (S.C. CODE ANN. § 59-32-20, § 59-32-30 (B) (Law. Co-op. 2000)). The Kansas administrative code similarly establishes that the state-approved health education curriculum must include instruction on the rights and responsibilities of the individual as they relate to family systems and parenthood. KAN. ADMIN. REGS. § 91-1-102(a)(b). It orders the local school boards to determine the human sexuality curriculum (KAN. ADMIN. REGS. § 91-31-20(b)), but it cautions that “the provisions of this subsection shall not be construed as requiring, endorsing or encouraging the establishment of school-based clinics or the teaching of birth control methods.” KAN. ADMIN. REGS. § 91-31-20 (b)(D)(4).

302. N.C. GEN. STAT. § 115C-81 (1999).

school property.³⁰³ School personnel must obey the local school board's parental consent rules where the provision of information about contraceptives and abortion referrals are concerned.³⁰⁴ Teachers must also include instruction on the current legal status of homosexual acts.³⁰⁵ North Carolina currently has a "crime against nature" statute in effect that classifies all "unnatural" sexual acts perpetrated by heterosexuals and homosexuals, such as fellatio and sodomy, as felony crimes.³⁰⁶ It also has statutes that prohibit bigamy³⁰⁷ and fornication and adultery³⁰⁸ among heterosexuals. The abstinence education curriculum, however, only requires teaching on criminal law insofar as the latter relates to homosexual practices.

Other states' laws contain similar provisions. Indiana's human sexuality courses must

teach abstinence from sexual activity outside of marriage as the expected standard for all school-age children; include that abstinence is the only certain way to avoid out-of-wedlock pregnancy, sexually transmitted diseases, and other associated health problems; and include that the best way to avoid sexually transmitted diseases and other associated health problems is to establish a mutually faithful monogamous relationship in the context of marriage.³⁰⁹

Another Indiana statute establishes that school employees are not authorized to dispense contraceptives and birth control devices.³¹⁰ Georgia's State Board of Education must produce a sex education and AIDS curriculum that stresses abstinence education and teaches the students about the legal consequences of parenthood.³¹¹ Contraceptives and abortifacients may not be distributed in the schools and abortion services and referrals are banned.³¹² In Texas, the Department of Health must develop a model sex education curriculum for the schools and make it available on request. The program must emphasize that "abstinence from sexual intercourse is the most effective protection against

303. N.C. GEN. STAT. § 115C-81 (1999).

304. N.C. GEN. STAT. § 115C-81(1999).

305. N.C. GEN. STAT. § 115C-81 (1999).

306. N.C. GEN. STAT. § 14-177 (1999).

307. N.C. GEN. STAT. § 14-183 (1999).

308. N.C. GEN. STAT. § 14-184 (1999).

309. IND. CODE ANN. § 20-10.1-4-11 (West 1998).

310. IND. CODE ANN. § 25-22.5-1-2(e) (West 1998).

311. GA. CODE ANN. § 20-2-143 (2001).

312. GA. CODE ANN. § 20-2-773 (2001).

unwanted teenage pregnancy, sexually transmitted diseases, and acquired immune deficiency syndrome (AIDS) when transmitted sexually” and that “abstinence from sexual intercourse outside of lawful marriage is the expected societal standard for school-age unmarried persons.”³¹³ The course materials must also emphasize that “sexual abstinence is the only completely reliable method of avoiding unwanted teen pregnancy and sexually transmitted diseases.”³¹⁴ They must teach that “homosexuality is not a lifestyle acceptable to the general public and that homosexual conduct is a criminal offense.”³¹⁵ The Department of Health is also ordered to establish a model education program on HIV transmission for persons younger than eighteen years of age that reiterates these points on sexual abstinence and homosexuality. It must also teach that “sexual activity before marriage is likely to have harmful psychological and physical consequences.”³¹⁶

Like the “severely conservative” coding, a “strongly conservative” coding is used to designate the states that give abstinence education a prominent place in the public schools’ sexual education curricula, and require the presentation of abstinence as the best method for the prevention of sexually transmitted diseases and pregnancy. In contrast to the “severely conservative” coding, however, the “strongly conservative” states do not ban abortion information and the distribution of contraceptives, and do not require teachers to take an intolerant position towards homosexuality. In Illinois, for example, sex education classes must teach that “abstinence is the expected norm in that abstinence from sexual intercourse is the only protection that is 100 percent effective against unwanted teenage pregnancy, sexually transmitted diseases, and acquired immune deficiency syndrome (AIDS) when transmitted sexually.”³¹⁷ Course material and instruction must also teach “honor and respect for monogamous heterosexual marriage,” stress that students should “abstain from sexual intercourse until they are ready for marriage,” advise students of the “laws pertaining to their financial responsibility to children born in and out of wedlock,” and inform students about the “circumstances under which it is unlawful for males to have sexual relations with females under the age of eighteen to whom they are not married.”³¹⁸ Similarly, Utah’s course of study stresses

313. TEX. HEALTH & SAFETY CODE ANN. § 163.001 (Vernon 1999).

314. TEX. HEALTH & SAFETY CODE ANN. § 163.002 (1) (Vernon 1999).

315. TEX. HEALTH & SAFETY CODE ANN. § 163.002(8) (Vernon 2001) (citation omitted).

316. TEX. HEALTH & SAFETY CODE ANN. § 85.007(c)(1) (Vernon 2001).

317. 105 ILL. COMP. STAT. 5/27-9.1(b) (2000).

318. 105 ILL. COMP. STAT. 5/27-9.1 (2000).

abstinence before marriage and fidelity within marriage.³¹⁹ In Utah, each student must receive at least one presentation that promotes adoption during the period in which they are in grades seven through nine, and at least one pro-adoption presentation in grades ten through twelve. Adoption promotion classes may also be included in local districts' teen pregnancy prevention programs.³²⁰ And in Arkansas, school-based health clinics must include sexual abstinence instruction in their programs, maintain records relating to the distribution of contraceptives and condoms, and refrain from providing abortion referrals.³²¹

Other "strongly conservative" states are using different approaches. Colorado has developed a comprehensive health education course of study that local school boards may adopt on a voluntary basis. Under this program, the curriculum and materials "developed and used in teaching sexuality and human reproduction shall include values and responsibility and shall give primary emphasis to abstinence by school-aged children."³²² In California, sex education classes must emphasize abstinence and teach "honor and respect for monogamous heterosexual marriage."³²³ Instruction on the use of contraceptives is allowed, but only when presented as a means of protection against unwanted teenage pregnancy and sexually transmitted diseases that is inferior to abstinence.³²⁴ Missouri's human sexuality courses must "present abstinence from sexual activity as the preferred choice of behavior in relation to all sexual activity for unmarried pupils because it is the only method that is one hundred percent effective in preventing pregnancy, sexually transmitted diseases and the emotional trauma associated with adolescent sexual activity."³²⁵ Students must also be informed about the financial obligations of married and unmarried parents to their children and about statutory rape provisions.³²⁶

The "strongly conservative" coding is also used to identify the states that have relatively weak abstinence education requirements, or no abstinence education requirement at all, and yet have measures in place that prohibit the provision of abortion-related information and contraceptives. Michigan, for example, orders the public schools to provide instruction on AIDS education and sex education that includes the teaching of abstinence as a "responsible method" for preventing the

319. UTAH CODE ANN. § 53A-13-101 (2000).

320. UTAH CODE ANN. § 53A-13-107 (2000).

321. ARK. CODE ANN. § 6-18-703 (Michie 1999).

322. COLO. REV. STAT. § 22-25-104 (2000).

323. CAL. EDUC. CODE § 51553 (West 2000).

324. CAL. EDUC. CODE § 51553 (West 2000).

325. MO. ANN. STAT. § 170.015 (1)(1) (West 2000).

326. MO. ANN. STAT. § 170.015 (1)(6) (West 2000).

spread of sexually transmitted diseases and as a “positive lifestyle for unmarried young people.”³²⁷ It nevertheless prohibits teaching about abortion and bans the distribution of family planning drugs and devices in the schools.³²⁸

States with “conservative” programs also order the public schools to include abstinence in their sex education curricula, but do not require them to grant it a prominent place in the public school’s course of study nor to teach that abstinence is the best method for the prevention of sexual disease transmission and pregnancy. Vermont’s health education courses, for instance, must include instruction that “promotes the development of responsible personal behavior involving decision making about sexual activity, including abstinence.”³²⁹ The courses must also offer “information regarding the possible outcomes of premature sexual activity, contraceptives, adolescent pregnancy, childbirth, adoption and abortion.”³³⁰ In New Hampshire, local boards must ensure that their schools’ health education programs include “systematic classroom instruction and activities designed to enable students to respect and support the decisions of others relative to abstinence from sexual activity.”³³¹ There are no apparent restrictions on the provision of abortion information and the distribution of contraceptives in these states, and teachers are not required to express intolerant opinions about homosexuality. However, these states do not require the schools to offer positive information about the use of contraception and condoms for individuals who are sexually active or to discuss sexual desire as a normal part of a healthy teenager’s life experiences.

One state, Oregon, is coded as “moderate.” Although its course of study includes material that promotes abstinence, teachers must also teach students about contraception and safer sex and must demonstrate respect for sexually active students. “Abstinence shall not be taught to the exclusion of other material and instruction on contraceptive and disease reduction measures. Human sexuality education courses shall acknowledge the value of abstinence while not devaluing or ignoring those young people who have had or are having sexual intercourse.”³³² Notwithstanding its inclusive treatment of sexually active students, however, the Oregon course of study does not deserve a more liberal rating. Like all the states for which data is available, it does not ensure

327. MICH. COMP. LAWS ANN. § 380.1169(1), 380.1507(1) (West 2000).

328. MICH. COMP. LAWS ANN. § 380.1507(7), (8) (West 2000).

329. VT. STAT. ANN. tit. 16, § 131 (2000).

330. VT. STAT. ANN. tit. 16, § 131 (2000).

331. N.H. CODE ADMIN. R. ANN. EDUC. 306.32 (2000).

332. OR. REV. STAT. § 336.455 (1999).

that tolerant material about homosexuality is included in the curriculum, and it does not require teachers to emphasize the equal rights of girls and women.

TABLE 4.
STATES WITH STATUTES AND REGULATIONS THAT DEFINE THE
CONTENT OF HUMAN SEXUALITY COURSES OF STUDY
BY TYPE OF CURRICULAR STANDARD

TYPE OF CURRICULAR STANDARD	STATES	NUMBER OF STATES
Severely Conservative	AL, AZ, GA, IN, NC, OK, TN, TX ³³³	8
Strongly Conservative	AR, CA, CO, DE, FL, ID, IL, MI, MO, MS, NM, NY, PA, RI, UT, VA, WA ³³⁴	17
Conservative	MN, NH, VT ³³⁵	3
Moderate	OR ³³⁶	1

Legislators and administrators are clearly making efforts to impose abstinence education in the majority of the states, but the states are generally failing to establish the curriculum recommended by sexuality experts and the NIH for public school students: eight states have or-

333. ALA. CODE § 16-40A-2 (2000); ARIZ. REV. STAT. ANN. § 15-716 (B), (C) (West 2000); GA. CODE ANN. § 20-2-143, § 20-2-773 (2000); IND. CODE ANN. § 20-10.1-4-11, § 25-22.5-1-2(e) (Michie 2000); N.C. GEN. STAT. § 115C-81 (2000); OKLA. STAT. ANN. tit. 70, § 11-105.1 (A), (B) (West 2000); TENN. CODE ANN. § 49-6-1005, § 49-6-1008, § 49-6-1301, § 49-6-1302, 68-1-1205 (2000); TEX. HEALTH & SAFETY CODE ANN. § 85.007, § 163.001, § 163.002 (Vernon 1999).

334. ARK. CODE ANN. § 6-18-703 (a)(3) (Michie 2000); CAL. EDUC. CODE § 51553 (West 2000); COLO. REV. STAT. § 22-25-104 (2000); DEL. CODE REGS. tit. 72.00.008, § 800.25 (2000); FLA. STAT. ANN. § 233.0672 (West 2000); IDAHO CODE § 08.02.03.451 (Michie 2000); 105 ILL. COMP. STAT. 5/27-9.1 (2000); MICH. COMP. LAWS ANN. § 380.1169 (1), § 380.1507 (1), § 380.1507 (7), (8) (West 2000); MISS. CODE ANN. § 37-13-171 (2000); MO. ANN. STAT. § 170.015 (West 2000); N.M. ADMIN. CODE tit. 6, § 1.6.2.9 (2000); N.Y. COMP. CODES R. & REGS. tit. 8, § 135.3 (b)(2), (c)(2)(i) (2000); 55 PA. CODE § 4.29(b) (2000); R.I. GEN. LAWS § 16-22-17 (a), 16-22-18 (a) (2000); UTAH CODE ANN. § 53A-13-101, -107 (2000); VA. CODE ANN. § 22.1-207.1 (Michie 2000); WASH. REV. CODE ANN. § 28A.230.070 (7) (West 2000).

335. MINN. STAT. ANN. § 121 A.23 (1)(2) (West 2000); N.H. CODE ADMIN. R. ANN. EDUC. 306.32 (2000); VT. STAT. ANN. tit. 16, § 131 (2000).

336. OR. REV. STAT. § 336.455 (1999).

dered their schools to conduct "severely conservative" courses of study, seventeen others have imposed "strongly conservative" curricula, and of the twenty-nine states for which data is available, only one has adopted "moderate" standards. However, even if we assume that the public schools are actually implementing the statutes and regulations in question, we cannot be certain that more students will actually abstain from heterosexual intercourse outside of marriage. Given the prevalence of reproductive heterosexual practices among teenagers and the limited success of moralistic sex education programs where changes in teens' sexual behavior are concerned, it is entirely possible that the abstinence education courses will have very little effect on the incidence of teen pregnancies.

It is nevertheless problematic that public funds are being used to finance these moralistic campaigns and that a key opportunity to teach young adults about safer sex and HIV is being missed. When practicing heterosexual youth were asked why they did not always use contraception, their most common reply was that they tended to have sex on an unanticipated and sporadic basis and that they were often not prepared to use birth control at the time of intercourse.³³⁷ In other words, these young people are not consciously accepting the fact that they are going to be faced with opportunities for sexual encounters, that they do have underlying sexual desires, and that, in the "heat of the moment," they will often want to give their consent for heterosexual intercourse even though they did not anticipate that they would do so. In-depth studies of sex education effectiveness have not generated any credible evidence whatsoever that would suggest that abstinence education can actually transform sexual behavior or delay the onset of sexual intercourse among the student population.³³⁸ These studies have also found that sex education, school-based clinics, and condom distribution programs have not increased sexual activity.³³⁹

A few specific sex education courses, though, have actually increased students' knowledge about sex and appear to have delayed the onset of heterosexual intercourse and increased the use of condoms and contraception.³⁴⁰ These particular courses focused on the provision of accurate and comprehensive information about pregnancy and sexually

337. KIRBY, NATIONAL CAMPAIGN, *supra* note 248, at 5. ("When adolescents are asked why they did not use contraception when they had sex, one of the most frequent responses is that they did not expect or plan to have sex, and thus, were not prepared. Adolescents say far less frequently that they can't afford birth control, don't know where to get it, can't get it, or don't know how to use it." (citation omitted)).

338. KIRBY, NATIONAL CAMPAIGN, *supra* note 248, at 8, 47.

339. KIRBY, NATIONAL CAMPAIGN, *supra* note 248, at 5.

340. KIRBY, NATIONAL CAMPAIGN, *supra* note 248, at 47.

transmitted diseases in an age-appropriate and culturally-sensitive manner, and used a wide variety of teaching techniques, including peer education.³⁴¹ Indeed, AIDS educators have learned that the best way to teach teens to change their sexual behavior is to work in a culturally-sensitive manner, and to use non-judgmental, sex-positive, “consciousness-raising,” and peer education techniques.³⁴² Historical analysis and international comparisons also suggest that young women are more likely to use birth control—and are more likely to find themselves in sexual situations in which they are able to insist on birth control—when they are empowered by gaining access to concrete socio-economic resources.³⁴³

Shame and condemnation, by contrast, not only do not work, but they actually endanger the students in question by promoting denial. Abstinence education courses may in fact backfire: they might encourage teens to imagine that they will always say “no” when many of them will in fact say “yes” on the spur of the moment. Abstinence education may therefore increase the number of pregnancies and the transmission of the HIV virus among teens. It encourages the students to enter into a state of denial about their sexuality and discourages the ones who will consent to intercourse to take appropriate measures in advance to reduce the risk of pregnancy and HIV transmission, such as commencing a course of birth control pills, purchasing condoms, learning about condom use, and carrying condoms. The abstinence education culture also places a taboo on the mere possession of condoms or birth control pills, since any discovery of these items by a responsible adult may be interpreted as a sign that the youth in question has already violated the “community’s” moral standards.

341. KIRBY, NATIONAL CAMPAIGN, *supra* note 248, at 47. There is also some initial evidence that comprehensive sex education courses that are combined with programs that provide needy teens with opportunities for academic improvement, employment, community service, artistic expression, sports, and health care services can be especially effective in reducing sexual risk-taking, especially among teenage women. KIRBY, NATIONAL CAMPAIGN, *supra* note 248, at 13–15.

342. Lillian Lioeanjie, *AIDS Education: Innovative Methods for Adolescents in New Orleans*, in *AIDS EDUCATION: REACHING DIVERSE POPULATIONS* 133 (Melinda Moore & Martin Frost eds., 1996). See CINDY PATTON, *FATAL ADVICE: HOW SAFE-SEX EDUCATION WENT WRONG* (1996) for a wide-ranging and politically astute analysis of the safe-sex education campaigns conducted by governmental agencies and non-profit organizations in the lesbian and gay community.

343. GORDON, *WOMAN’S BODY*, *supra* note 51, at 455–56. See also SATCHER, *supra* note 283, at 7 (citing studies that suggest that young women who remain in school and are more involved in sports tend to have lower rates of pregnancy and childbearing than their peers, and that programs that improve the educational experiences and life chances of young women tend to reduce their pregnancy and birth rates).

The non-school programs are also problematic. The creative ways in which community groups and family planning agencies are successfully obtaining TANF grants for a remarkably wide range of programming indicates that administrative ingenuity is thriving in the non-profit sector in the context of governmental austerity. However, the fact that perfectly legitimate youth groups and women's health services must claim that their programs promote teenage abstinence and discourage out-of-wedlock births to obtain public funds is yet more evidence that the "downsizing" of governmental responsibility for the provision of public goods has had a tremendous effect.

Indeed, effects of moralistic abstinence education programs are far reaching. Because they teach that all sexual activity outside legal heterosexual marriage is immoral, the abstinence education programs also reinforce intolerant attitudes towards lesbians and gay men. In addition, no effort is being made at the legislative and regulatory level to ensure that students in sex education classes will be taught that the rights and dignity of young women should be respected and that young heterosexual men and women ought to share an equal burden of responsibility where sexual behavior is concerned. And, finally, the moralistic abstinence education programs in the public schools and the provision of public funds for out-of-wedlock pregnancy prevention programs in the community exemplify a disturbing trend in American public policy, namely the continuing erosion of the separation between religious institutions and the state.³⁴⁴

CONCLUSION

Conservative critics of welfare programs have long used sexual deviance metaphors to demonize welfare recipients. Within the conservative "culture of poverty" rhetoric, family structure—not

344. See TED G. JELEN, *TO SERVE GOD AND MAMMON: CHURCH-STATE RELATIONS IN AMERICAN POLITICS* (2000) (arguing that religion continues to play a central role in the United States, even as it declines in importance in other Western countries, and that the Establishment Clause paradoxically may be nurturing the continued flourishing of religious values in the public sphere); Phillip E. Hammond, *American Church/State Jurisprudence from the Warren Court to the Rehnquist Court*, 40 J. FOR SCI. STUDY RELIGION 455 (2001) (arguing that although the Warren Court tended to be separationist, the Rehnquist Court decisions generally reflect accommodationist thinking); Gary Mozer, Note, *The Crumbling Wall Between Church and State: Agostini v. Felton, Aid to Parochial Schools, and the Establishment Clause in the Twenty-first Century*, 31 CONN. L. REV. 337 (1998) (arguing that the separationist doctrine has been increasingly set aside by the courts in favor of religious neutrality and equal funding approaches where funding for parochial schools is concerned).

employment opportunities, access to education and training, gendered pay equity, universal child care, or the elimination of racism—is considered the single most important factor in determining economic well-being. The sexual dimension of contemporary welfare policy is not, however, limited to rhetoric alone. Sexuality-oriented rules permeate the states' welfare laws at the most basic level. The purpose statement of the PRWORA itself, the states' "quality control" and "bonus" competition measurements, and, in some states, caseworkers' interactions with each client, are all shaped by an over-arching attempt to promote traditional heterosexual marriage and to discourage reproduction outside marriage and in conditions of poverty. The states have been using federal funds to intervene in the private lives of welfare recipients since the 1935 Social Security Act came into effect. Under the new regime, however, they have been sheltered from possible Supreme Court rulings by permissive federal legislation. Further, their efforts to "correct" sexual "deviance" and family structure "pathologies" among the poor have never been so well codified, coordinated, and funded by the federal government. The states are also using new methods and technologies in carrying out their laws including: "streamlined" administrative procedures; mass case processing methods; cross-agency, inter-state, and state-federal information technology systems and state-of-the-art data-bases; and genetic testing technologies. By their very structure, these strategies are defining the act of conceiving, giving birth to, and raising a child as a privilege that can only be purchased by the wealthy, rather than a universal human right. Finally, the states are expanding their target population. Supported by the expansive character of the PRWORA's purpose statement, the states are creating new paternity identification procedures, strengthening child support enforcement agency services, measuring out-of-wedlock births for the population as a whole, and promoting abstinence outside of marriage in the public schools and in the community. These specific initiatives will affect individuals from all socio-economic backgrounds, the needy and non-needy alike.

The laws and regulations governing the TANF program's child support enforcement measures, "family cap" provisions, and family planning promotions and the encouragement of relinquishing non-abused poor children for adoption have greatly intensified and expanded the already flourishing sexual regulation dimension of welfare policies. In the early twentieth century, the recipients of mothers' pensions were subjected to intrusive home inspections and moralistic policing; later, single mothers in the ADC and AFDC programs had the "substitute father," "man-in-the-house," and illegitimate children rules imposed upon them. Today's poor single mothers on welfare face even more in-

tense intrusions: they are required to submit to interrogations about their sexual histories, to undergo genetic tests to establish paternity, and to assist the state in collecting support payments from the absent fathers of their children even if they do not want to be dependent upon them—and, in many cases, even if they are fleeing from the absent fathers' violent conduct. The social science research suggests that poverty assistance programs can play a key role for domestic violence victims when they engage in the difficult work of leaving a controlling and abusive relationship. Welfare benefits might make all the difference—they might even save the lives of the women and children at risk—and yet the domestic violence dimension of the states' TANF programs has been either insufficiently developed or neglected altogether.

Further, in twenty-three states, TANF households do not receive any additional benefits when a child is born. Sixteen states make provisions for the systematic initiation of family planning promotion for all adult TANF recipients. Three states encourage recipients to relinquish their children for adoption even though the families in question have not necessarily been investigated for child abuse or neglect. The moralistic dimension of these policies clearly has its roots in the bi-partisan consensus which holds that there is a causal relation between irresponsible sexual conduct, out-of-wedlock births, teenage pregnancies, and the decline of the traditional nuclear family on the one hand and poverty on the other.

The genealogy of the abstinence education programs in the public schools is more complicated. Many of the current sexual education laws and regulations that emphasize abstinence but fail to provide comprehensive programs were in effect well before the PRWORA was passed, and were designed first and foremost as a conservative response to the AIDS crisis. The public schools' abstinence programs have been only partly shaped by the moralistic approach to welfare reform that has become predominant. Half of the states are nevertheless cooperating in a remarkable multi-jurisdictional and cross-agency transfer by accepting federal TANF funds to support their public schools' abstinence education courses.

Welfare reform is therefore structured according to a complex logic. By intensifying existing sexual regulation initiatives and introducing new moralistic measures, welfare reform has expanded the governmental presence into the private sphere. At the same time, however, the sphere of public responsibility has been sharply reduced. Private corporations and religious organizations are taking the place of governmental agencies where program delivery is concerned. The value of AFDC/TANF benefits has been reduced in real terms, the eligible

population has been re-defined more narrowly, and participants are expelled from the program if they fail to meet strict requirements or exceed the time limits. The collective obligation to support poor mothers and their children³⁴⁵ is being transformed into a private familial debt that is defined in terms of officially recognized patriarchal and biological ties.

Although it is beyond the scope of this article to construct a comprehensive alternative to the current welfare regime, a different approach can nevertheless be sketched out in brief terms. Economic deprivation directly creates and indirectly contributes to some of the most serious difficulties that parents in all types of families face when they attempt to create a nurturing environment for their children. Strictly speaking, economic incentives do not cause human beings to engage in specific social practices—the culturally-mediated, historically-specific, socially-situated, and self-reflective nature of our decisions is such that we cannot reduce them to the mere effects of economic causes.³⁴⁶ Economic relations do nevertheless shape some of the choices that we make. If we had more economic equality, more individuals would be free to construct alternative kinship and family structures in a self-determining manner. In a society that delivered better job opportunities for poor women, for example, more battered mothers would be able to flee from abusive men with their children and to create safe homes.

A progressive response to poverty would take the form of a radical transformation of the entire economic structure. No truly democratic society would allow the perpetuation of the extreme and deeply institutionalized forms of economic inequality that are currently prevalent in the United States.³⁴⁷ Profound and entrenched forms of inequality are

345. See *supra* text accompanying notes 81–83 for a discussion on the normative foundation in the democratic theory literature detailing the argument that citizens bear a collective obligation to support the poor as a whole—and poor parents and their children in particular.

346. See *supra* note 182.

347. Between 1995 and 1998, all families in the United States saw an increase in their net worth, except those earning less than \$10,000 per year and those headed by individuals who did not have a high school diploma. The rate of increase was greatest for those families with the largest family income. Families earning \$100,000 or more each year increased their net worth 22.8% from \$1,411,900 to \$1,727,800 on average. Families with incomes between \$10,000 and \$100,000 enjoyed rates of increase in their net worth between 6.6% and 9.2% on average. Families earning less than \$10,000 saw a 14.2% decrease in their average net worth, from \$46,600 to \$40,000. In 1998, the net worth for families earning more than \$100,000 was, on average, 43.2 times greater than the net worth for families earning less than \$10,000. Family net worth also increased more slowly for non-whites and Hispanic whites than for white non-Hispanics. In 1998, the family net worth of non-whites and Hispanic

antithetical to democratic principles precisely because citizens can only engage in the development of their individual potentials and participate in the democratic process to the extent that they have adequate access to key socio-economic resources. Under a progressive government, programs would be established to provide for job creation, public school and higher education investment, democratic control over the location of large-scale employers, regulation of international trade and the financial markets, job training and relocation assistance, a living-wage-level minimum wage, an earned income tax credit for the working poor, strong protections and enhancements of workers' right to collective bargaining, vigorous governmental action against gender and racial discrimination, improvements in public housing, child care and paid parental leave programs, and universal health care.³⁴⁸ The funding for these public initiatives would be secured by establishing progressive taxation schemes and enforcing taxation laws.

These progressive programs would be combined with a massive information campaign designed to address the widely held misconceptions about poverty. By perpetuating racialized, sexual, pathologizing ideas about the "underclass," conservatives in both of the right-wing camps—the pro-free market neo-conservatives and the religious right—have been able to ignore the fact that the United States has become the most inegalitarian country in the developed West, and that it is the underlying structure of the economy—one that has facilitated the enormous expansion of corporate power and greatly diminished the power of the non-wealthy—that is to blame.³⁴⁹

whites remained only 30.4% of the value of white family net worth on average. (Note: all figures are given in 1998 dollars). A. KENNICKELL ET AL., U.S. FED. RESERVE BD., RECENT CHANGES IN U.S. FAMILY FINANCES: RESULTS FROM THE 1998 SURVEY OF CONSUMER FINANCES 7 (2000).

348. SKOCPOL, FUTURE POSSIBILITIES, *supra* note 22, at 250–72; Martha A. Fineman, *The Family in Civil Society*, 75 CHI.-KENT L. REV. 531, 545–54 (2000); Jennifer Hochschild, *Equal Opportunity and the Estranged Poor*, in *THE GHETTO UNDERCLASS: SOCIAL SCIENCE PERSPECTIVES* 160 (William Julius Wilson ed., 1993); Roberts, *supra* note 238, at 2623.

349. See BRYNER, *supra* note 60, at 106–71 for a discussion on the political divisions between Republican factions on welfare reform and the maneuvering that took place before the passage of the PRWORA. On the use of underclass rhetoric to knit various factions of the right together and to conceal the structural causes of poverty, see KATZ, *supra* note 23, at 195–96; Williams, *Ideology*, *supra* note 70, at 742; Ann Withorn, *Fulfilling Fears and Fantasies: The Role of Welfare in Right-Wing Social Thought and Strategy*, in UNRAVELING THE RIGHT: THE NEW CONSERVATISM IN AMERICAN THOUGHT AND POLITICS 126, 133–40 (Amy Ansell ed., 1998). See Keith Bradsher, *Gap in Wealth in U.S. Called Widest in West*, N.Y. TIMES, Apr. 17, 1995, at A16, for international comparisons on the distribution of wealth in developed Western countries. For the argument that the treatment of the poor as a pathological

But a more egalitarian distribution of income and wealth would not, in itself, eliminate the racialized and gendered sexual policing strategies identified above. A progressive approach would also reconstruct the entire distinction between the “private” and “public” sphere in an anti-racist and feminist manner. A radicalized right to privacy would stop the government from interfering with sexual practices involving consenting adults, from intervening when a woman chose to have an abortion or to have a child, and from creating eugenics-oriented social engineering campaigns designed to discourage reproduction by individuals in the lowest class fractions and status groups. It would also tolerate cultural diversity and respect democratic differences. A radicalized right to privacy would not simply limit governmental interference in the private sphere; it would also oblige the government to provide the material resources—such as public funding for battered women’s services, abortions, child care, and pro-lesbian and gay sex education courses in the public schools—that are necessary for the meaningful exercise of these freedoms.³⁵⁰

A radicalized right to privacy would also not stop the government from intervening in the family and in sexual relationships altogether. For example, the very young women who are preyed upon by much older men for the purposes of sexual exploitation and assault³⁵¹ ought to be protected. Pregnant young black women are today much more likely than their white counterparts to say that their pregnancies are unwanted;³⁵² a progressive government would work to empower these women and to help them to avoid unwanted sexual intercourse. Further, the problem of domestic violence and child abuse would have to be addressed. A progressive government would adopt the feminist type of domestic violence and anti-rape intervention that seeks to empower the victims of abuse and to provide girls and women with the resources that they need to avoid abusive situations in the first place. In this sense, a progressive government would in fact actively intervene in the “private” sphere to address incest, sexual abuse, exploitation, rape, violence, and

population in urgent need of moral correction is but one aspect of a broader phenomenon, namely the medicalization of welfare, and that once welfare is medicalized, the necessity of economic restructuring and improving the bargaining power of labor is ignored as the social policy emphasis is placed on therapeutic interventions and individual behavior modification, see Sanford Schram, *In the Clinic: The Medicalization of Welfare*, 18 Soc. TEXT, Spring 2001, at 81.

350. See ZILLAH EISENSTEIN, *THE FEMALE BODY AND THE LAW* (1988) (discussing the radicalization of the right to privacy).

351. See *supra* note 275.

352. See *supra* note 258.

the dis-empowerment of girls and women.³⁵³ And it would ensure that official investigations of these wrongs properly reflected their cross-class nature, such that child abuse interventions would not use “class-profiling” and violate poor parents’ privacy rights.

A progressive government would radically transform family law and welfare law. It would adopt the Fineman³⁵⁴ model: marriage would be abolished as a legal category and the caregiver/dependent dyad would be recognized as the fundamental core of the officially defined family. A universal caregiver’s benefit would be created to provide a public subsidy to the custodial parents of children below the age of majority and to those who care for the seriously ill, the incapacitated, and the elderly.³⁵⁵ The universal dimension of the benefit is crucial.³⁵⁶ The current system

353. See Gordon, *Family Violence*, *supra* note 27, at 314–30 for a discussion of the dilemmas that feminists must deal with concerning the role of the state in addressing domestic violence.

354. See FINEMAN, *THE NEUTERED MOTHER*, *supra* note 218; Martha A. Fineman, *The Nature of Dependencies and Welfare “Reform,”* 36 SANTA CLARA L. REV. 287 (1996); Martha A. Fineman, *Cracking the Foundational Myths: Independence, Autonomy and Self-Sufficiency*, 8 AM. U. J. GENDER SOC. POL’Y & L. 13 (2000) [hereinafter Fineman, *Foundational Myths*]. Fineman specifically deploys the Mother/Child metaphor to capture the caretaking relationship. In my view, we need to subject such terminology to further debate. It may very well enhance public awareness of, and respect for, women’s domestic work, but it might also normalize the idea that men have no childcare obligations and conceal the caretaking labor that takes place outside the parent-child relationship. For these reasons, I will refer to the caregiver/dependent dyad. Fineman further enriches her model by arguing that the right to privacy should be conferred not only onto the individual family member but also onto the family as an entity. See Martha A. Fineman, *What Place for Family Privacy?*, 67 GEO. WASH. L. REV. 1207, 1211 (1999).

355. FINEMAN, *THE NEUTERED MOTHER*, *supra* note 218, at 230–33.

356. Skocpol similarly argues for universal social welfare programs on the grounds that they are less politically vulnerable because they benefit the middle class and the working class as well as the poor. SKOCPOL, *FUTURE POSSIBILITIES*, *supra* note 22, at 250–72. *But see* PIERSON, *supra* note 22, at 100–28 (arguing that in some institutional contexts, universal income-support programs can be even more vulnerable to conservative retrenchment than means-tested programs). Sugarman proposes a “child assurance” benefit for the children of single parents modeled after the current Social Security program. Stephen Sugarman, *Financial Support of Children and the End of Welfare As We Know It*, 81 VA. L. REV. 2523 (1995). However, Sugarman’s plan would entail a child support enforcement component. Recipients would be obliged to participate in paternity establishment procedures; all absent parents with adequate means would have to pay child support; the government would only guarantee the payment of the benefit and the actual child support payments would be used to reimburse the government; benefits would reflect the wage history of the absent parent; and the children of absent parents who had not worked long enough to be eligible for Social Security would not be eligible. The Sugarman plan would discriminate on the basis of marital status. Unmarried mothers’ families would receive only a dependent child benefit; they would be ineligible for support for the caregiver herself. It would

sets poverty assistance programs apart from universal benefits such as Social Security. In particular, ADC, AFDC, and TANF have been unique in that they have incorporated highly intrusive moralistic policing and sexual regulation initiatives. They have also been very poorly funded and their program participants have been stigmatized. The progressive alternative, the universal caregiver's benefit, would be equivalent to a living wage and would officially recognize the caregiver's essential contribution to society.³⁵⁷ Under the current regime, unmarried hetero-

also include a "family cap." The Fineman plan, by contrast, would be universal, and would not discriminate on the basis of marital status. FINEMAN, *THE NEUTERED MOTHER*, *supra* note 218, at 230. Spousal support obligations and, presumably, absent parents' child support obligations, would be eliminated under the Fineman plan. FINEMAN, *THE NEUTERED MOTHER*, *supra* note 218, at 230. Since the welfare-oriented child support enforcement system has not—and cannot—alleviate poverty, and yet necessarily entails procedures that profoundly abrogate poor women's rights, the latter dimension of the Fineman plan is entirely reasonable. We can also assume that the Fineman plan would not impose a "family cap," and that the benefit would not be tied to the wage-earning history of non-custodial parents. In any event, the benefit would simply reflect the number of dependents and the degree of their dependency in the ideal regime presented here.

357. Fineman quite rightly sets out to ensure that caretaking will be properly valued, and therefore constructs her plan as a universal entitlement. FINEMAN, *THE NEUTERED MOTHER*, *supra* note 218, at 231–33. In her later argument for a universal caregiver's benefit, however, Fineman concedes too much to those who would reject the notion that "collective society"—in the form of the state—has an obligation towards groups that have been traditionally excluded and dis-empowered. Fineman, *Foundational Myths*, *supra* note 354, at 18–19. She deliberately grounds her argument in the universal character of dependency: because biological dependency is inherent to the human condition, we all find ourselves needing a caregiver at some point in our lives. We all therefore share a debt to caregivers; indeed, the reproduction of society itself requires caregivers' labor. Fineman neatly constructs a parallel between (a) the universality of the condition—dependency—that gives rise to the social justice problem: caregivers' support, (b) the universality of the obligation: we all owe a debt to caregivers, and (c) the universality of the remedy: the universal, non-means-tested caregiver's entitlement. Fineman is clearly attempting to shape her proposal in a pragmatic manner such that it takes the current public policy debates into account. Her legitimating arguments, however, foreclose an alternative approach. In an ideal society, we would construct a system of social programs through a process of democratic deliberation guided by principles of fairness and individual and group rights. We would, therefore, collectively address social justice problems that arise from universal, majority, and minority conditions alike. On this basis, the caregiver's allowance would not, by definition, enjoy a logical priority over other measures such as affirmative action or indigenous people's land claims, and progressives like Fineman would not have to deploy a different legitimation strategy when they call for the latter programs. See WILLIAM KYMLICKA, *MULTICULTURAL CITIZENSHIP: A LIBERAL THEORY OF MINORITY RIGHTS* (1995), for a liberal democratic theory that addresses both individual and group rights where redistribution is concerned. See NANCY FRASER, *JUSTICE INTERRUPTUS: CRITICAL REFLECTIONS ON THE "POSTSOCIALIST" CONDITION* (1997), for the

sexual mothers and lesbian mothers have to be wealthy enough to purchase governmental respect for their right to construct alternative households. The universal caregiver's benefit, by contrast, would be designed as an entitlement along the lines of the current Social Security program. Morality tests would be abolished, the decisions of the caregiver to determine his/her private relationships would be respected, and the caregiver's relationship with his/her dependent would be sheltered from unreasonable governmental intrusion.³⁵⁸

Finally, these legal transformations would be supported by, and continually challenged by, an active, broad-based, and progressive political bloc.³⁵⁹ The translation of this bloc's values into legislation would require not only a massive political campaign to mobilize popular support, but also a complete restructuring of the political system that would eliminate the profoundly disproportionate influence that is currently exerted by well-funded elite groups.³⁶⁰ One axis of this progressive bloc would consist of social movements seeking to change the entire context in which welfare laws and family laws are legislatively

argument that redistribution measures must be combined with multicultural recognition.

358. Although the Fineman model is an excellent starting point for a discussion of the caregiver's program, it may nevertheless prove to be incomplete in some respects. In order to safeguard against the entrapment of women in the caretaking position, the benefit itself would have to be equivalent to a living wage and it would have to be combined with generous childcare and family leave programs and legislation securing a caregiver's right to return to employment. Action would have to be taken to ensure that unmarried women, gay men, and lesbians do not encounter discrimination in child custody disputes. The caregiver's benefit would also have to be combined with aggressive official measures that would protect domestic workers from exploitation and increase the earnings of domestic workers to a livable minimum wage. On its own, a caregiver's program would not address the ways in which nannies and housekeepers are treated in the paid domestic labor sector, an area of employment in which women of color and immigrant women are heavily over-represented.
359. A progressive bloc is much more than a coalition. It is an ensemble of movements that are constantly learning from each other's specific democratic struggles; it tends to produce a common radical democratic worldview, although the latter is constantly subjected to new forms of interrogation; and it seeks to implement legal reforms, to re-define institutions, and to transform the entire socio-cultural landscape that frames political thought. A progressive bloc brings together actors not only on the basis of their membership in the categories of exploited and oppressed peoples, but on the basis of the democratic resemblances between their goals, aspirations, and utopian visions as well. ANNA MARIE SMITH, *LA CLAU AND MOUFFE: THE RADICAL DEMOCRATIC IMAGINARY* (1998).
360. DAN CLAWSON, ALAN NEUSTADTL & DENISE SCOTT, *MONEY TALKS: CORPORATE PACS AND POLITICAL INFLUENCE* (1992); THOMAS EDSALL, *THE NEW POLITICS OF INEQUALITY* (1984); THEODORE LOWI, *THE END OF LIBERALISM* (1979); THEODORE LOWI, *THE END OF THE REPUBLICAN ERA* (1995).

produced, administratively implemented, and judicially interpreted. It would bring activists working in the area of poor people's rights together with members of the pro-choice and lesbian and gay rights movements. They would struggle to defeat the conservative sexual regulation agenda in all its forms, and to move us towards a more democratic and emancipatory world. ♣