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REPRESENTING RACE OUTSIDE OF EXPLICITLY RACIALIZED CONTEXTS

Naomi R. Cahn*

INTRODUCTION

Welfare “as we know it” ended in 1996,¹ a victim of a conservatism that views welfare recipients as lazy and immoral. One aspect of welfare that is, however, unlikely to experience radical change is child support.² More vigorous child support enforcement has become an increasingly important component of federal welfare reform bills over the past two decades because of the twin hopes of fiscal and parental responsibility: first, that child support will reimburse welfare costs, and second, that fathers will take more responsibility for their children.³

Child support programs within the welfare system perpetuate a negative perception of poor people. Many individuals assume that poor men and women are uncooperative — that women would rather stay home on the government dole than collect child support or find work, and that men have left their homes and are unwilling to support their children. These images of poor people are not just class based; they also rely on stereotypes of gendered and raced behavior.

This essay argues that we must challenge the gendered and raced images in welfare reform cases by making explicit the stereotypes that inform public welfare regulations. Even though such advocacy may not change the actual outcomes of the cases, it can begin to change the rhetoric, raising public awareness of the effect

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1. President Bill Clinton made this promise to the American people. See Jason DeParle, *The Clinton Welfare Bill: A Long, Stormy Journey*, N.Y. TIMES, July 15, 1994, at A1.

2. See The Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Title III, Pub. L. No. 104-193, 110 Stat. 2105. Indeed, the legislation did not change existing child support programs, and it extended child support cooperation requirements to food stamp recipients. See The Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Title III, Pub. L. No. 104-193, § 822, 110 Stat. 2321-22. As the states are struggling to implement other aspects of the Act, it is highly unlikely that they will do anything but strengthen the child support requirements.

3. See *infra* notes 49-52 and accompanying text.

of such programs. Ultimately, advocates can take apart the raced and gendered spaces in which poor people live, allowing them both to stay at home and to leave the home. Representation in welfare reform litigation, then, allows advocates to point out the racialized aspects of their cases. It shows the relevance of race to litigation claims and the litigation process.

As an introductory matter, I want to connect my essay with others in this Symposium. Unlike many other participants, I am examining an issue that is not explicitly race based. There are white and black recipients of welfare; this article is not about violence between the races, or about competition for jobs between the races, or even about litigation between parties who belong to different racial groups. Although welfare reform is not an explicitly raced issue, I want to use it to show the implicitly raced nature of various forms of representation. The goal of this essay, then, is not just to discuss substantive welfare reform; I also would like to examine critically the role of race as it appears throughout the representation process.

How, then, is representing welfare recipients "raced"?⁴ There are several different levels of response that interweave substantive law and lawyering concerns. First, notwithstanding the numbers, the public perception of welfare is raced black.⁵ Thus, regardless of the actual impact of Aid to Families with Dependent Children ("AFDC") regulations, their implementation is perceived as affecting blacks, even though this perception does not reflect reality. Indeed, welfare reform can be seen as an attempt to control poor black women.⁶ Thus, although welfare is not explicitly raced, it is implicitly a raced issue.

4. Professor Jerome Culp identifies "the race question [as] . . . 'How does race alter the contours of legal reality?'" Jerome McCristal Culp, Jr., *Neutrality, the Race Question, and the 1991 Civil Rights Act: The "Impossibility" of Permanent Reform*, 45 RUTGERS L. REV. 965, 966 (1993) (emphasis omitted). For feminists, this issue is phrased as asking "the woman question." See Katharine T. Bartlett, *Feminist Legal Methods*, 103 HARV. L. REV. 829 (1990). For a discussion of the dangers of analogizing race and sex discrimination, see Trina Grillo & Stephanie M. Wildman, *Obscuring the Importance of Race: The Implication of Making Comparisons Between Racism and Sexism (or Other -isms)*, 1991 DUKE L.J. 397.

5. See RUTH SIDEL, *KEEPING WOMEN AND CHILDREN LAST: AMERICA'S WAR ON THE POOR* 29 (1996) ("Even if one asks a sociology class, most of whom are themselves members of minority groups, 'From what racial background are most AFDC recipients?' the answer invariably is that most of them are African-American."); Lucy A. Williams, *Race, Rat Bites and Unfit Mothers: How Media Discourse Informs Welfare Legislation Debate*, 22 FORDHAM URB. L.J. 1159 (1995); Lisa A. Crooms, *An "Age of [Im]possibility": Rhetoric, Welfare Reform, and Poverty*, 94 MICH. L. REV. 1953, 1971-72 (1996) (book review) (suggesting that being black has become "a proxy for poverty," thus helping to explain myths about welfare recipients and dependency).

6. See Dorothy E. Roberts, *The Value of Black Mothers' Work*, 26 CONN. L. REV. 871, 873 (1994); Williams, *supra* note 5; see *infra* text accompanying notes 37-55. Professor Twila

Second, African Americans are disproportionately recipients of welfare; they are disproportionately poor, and disproportionately in single-parent households.⁷ Thus, even though blacks do not constitute the majority of public welfare⁸ recipients, welfare has a disproportionate effect on the African-American community.⁹ It follows, then, that African Americans will constitute a significant number of legal-services clients, and that welfare reform will have a significant impact on them.

Third, the legal system is overwhelmingly white. Over 85% of the legal profession is white; only 3.3% is African American.¹⁰ The legal services lawyers who do much of the welfare representation are white; given the race of low-income people, there will be inter-race (as well as intrarace) representation.¹¹ In addition, judges are overwhelmingly white, meaning that a black plaintiff will, most

Perry suggests that the contemporary obsession with blacks on welfare exists because "many of the consequences of poverty often associated with single mother families can no longer be internalized within the black community." Twila L. Perry, *Family Values, Race, Feminism, and Public Policy*, 36 SANTA CLARA L. REV. 345, 353 (1996).

7. Approximately 25% of black mothers of childbearing age, and 7% of corresponding white mothers, are AFDC recipients. BUREAU OF CENSUS, U.S. DEPT. OF COMMERCE, *MOTHERS WHO RECEIVE AFDC PAYMENTS* (1996), available in LEXIS, Legis Library, Feddoc File.

8. As I was writing this article, Congress enacted legislation that abolished AFDC and replaced the federal program with block grants to states. See The Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Title III, Pub. L. No. 104-193, 110 Stat. 2105. The cases that I discuss, and the statistical compilations that I use, are based on the AFDC program. Although the AFDC program no longer exists, the child support cooperation requirements that I discuss in this essay remain similar under the new legislation.

9. See, e.g., *Personal Responsibility Act: Hearings on H.R. 4 Before the Subcomm. on Human Resources of the House Ways and Means Comm.*, 104th Cong. (1995), available in LEXIS, Legis Library, CNGTST File (statement of Katherine McFate, policy analyst) (discussing the Contract with America's impact on African Americans). David Ellwood and Mary Jo Bane note that race does not predict welfare dependence, but that "African-American AFDC recipients are more likely than white recipients to have low levels of education, to be single, and to have large families — all factors that are positively associated with welfare dependence." David T. Ellwood & Mary Jo Bane, *Understanding Welfare Dynamics*, in *WELFARE REALITIES: FROM RHETORIC TO REFORM* 28, 45 (David T. Ellwood & Mary Jo Bane eds., 1994).

10. BUREAU OF THE CENSUS, U.S. DEPT. OF COMMERCE, *STATISTICAL ABSTRACT OF THE UNITED STATES 1995*, at 411 tbl. 649 (115th ed. 1995) (providing 1994 statistics); Robert L. Nelson, *The Futures of American Lawyers: A Demographic Profile of a Changing Legal Profession in a Changing Society*, 44 CASE W. RES. L. REV. 345, 378 (1994) (reporting that 5.1% of American law students in 1990 were African American). In 1993, there were 22,820 black lawyers and judges. See *Blacks in the Legal Profession*, USA TODAY, Feb. 20, 1995, at 1A.

11. Five and one-half percent of all African American students take public interest jobs. See Nelson, *supra* note 10, at 378; see also Susan N. Herman, *Why the Court Loves Batson: Representation-Reinforcement, Colorblindness, and the Jury*, 67 TUL. L. REV. 1807, 1808 (1993) (noting that when she takes her first-year criminal law class to the local court to watch criminal cases, the defendants are never white, while the judges, prosecutors, and defense attorneys are always white).

likely, face a white judge. And, as studies of race discrimination in the courts show, racial biases infect the American judicial process.¹²

Fourth, all representation can be raced.¹³ Each of us has a race, even though whites tend to think that everyone except them has a race,¹⁴ or else they find it difficult to confront the role that race plays in their own lives, a role that is very different from the role that race plays in the lives of people of color.¹⁵ Thus, the mere fact of representation implicates race, regardless of the race of the client or the actors in the legal system. Race will inevitably affect how the representation is conducted.¹⁶ The interaction between the lawyer and the client, and the decision whether to make race an explicit issue in a complaint, are “infected” by race consciousness.¹⁷

Finally, welfare reform lawyering shows how race might appear in lawyering, when the actual legal problem is not explicitly about race. Although the legal issues in welfare reform do not appear to involve particularly racialized issues because there is no interracial conflict — unlike, for example, with affirmative action — the “race question” still needs to be asked. How then should race be represented in this lawyering? Is it appropriate not to mention race?

12. See generally Todd D. Peterson, *Studying the Impact of Race and Ethnicity in the Federal Courts*, 64 GEO. WASH. L. REV. 173 (1996); *Report of the Special Committee on Race and Ethnicity to the D.C. Circuit Task Force on Gender, Race, and Ethnic Bias*, 64 GEO. WASH. L. REV. 189 (1996); Suellen Scarnecchia, *State Responses to Task Force Reports on Race and Ethnic Bias in the Courts*, 16 HAMLINE L. REV. 923 (1993); Angela Davis, *Benign Neglect of Racism in the Criminal Justice System*, 94 MICH. L. REV. 1660, 1686 n.100 (1996) (book review) (noting that eleven states and the District of Columbia have published reports on racial bias in the legal system).

13. For a discussion of what I mean by “raced,” see D. Marvin Jones, *Darkness Made Visible: Law, Metaphor, and the Racial Self*, 82 GEO. L.J. 437, 440 (1993).

14. See RUTH FRANKENBERG, *WHITE WOMEN, RACE MATTERS: THE SOCIAL CONSTRUCTION OF WHITENESS* 137 (1993); ELIZABETH V. SPELMAN, *INESSENTIAL WOMAN* 104-07 (1988); Barbara J. Flagg, “*Was Blind, But Now I See*”: *White Race Consciousness and the Requirement of Discriminatory Intent*, 91 MICH. L. REV. 953, 969-70 (1993); Martha R. Mahoney, *Whiteness and Women, In Practice and Theory: A Reply to Catharine MacKinnon*, 5 YALE J.L. & FEMINISM 217, 221 (1993). For discussions of race in legal representation, see Clark Cunningham, *The Lawyer as Translator, Representation as Text: Towards an Ethnography of Legal Discourse*, 77 CORNELL L. REV. 1298, 1370-83 (1992); Binny Miller, *Give Them Back Their Lives: Recognizing Client Narrative in Case Theory*, 93 MICH. L. REV. 485 (1994); Margaret M. Russell, *Beyond “Sellouts” and “Race Cards”: Black Attorneys and the Strait-jacket of Legal Practice*, 95 MICH. L. REV. 766 (1997); Lucie E. White, *Subordination, Rhetorical Survival Skills, and Sunday Shoes: Notes on the Hearing of Mrs. G.*, 38 BUFF. L. REV. 1 (1990).

15. See Grillo & Wildman, *supra* note 4; Russell, *supra* note 14.

16. See, e.g., Bill Ong Hing, *Raising Personal Identification Issues of Class, Race, Ethnicity, Gender, Sexual Orientation, Physical Disability, and Age in Lawyering Courses*, 45 STAN. L. REV. 1807, 1809 (1993).

17. For further discussion of what I mean by “race consciousness,” see *infra* notes 130-35 and accompanying text. I am aware that, in this essay, I am using race consciousness primarily to refer to the impact of welfare on African Americans.

When advocates describe their clients, or when judges write opinions, where is race?¹⁸ It is this issue — the tension between making race explicit, and not mentioning it at all — that is at the core of this article. It could be that discussing race, even when it, for example, invokes existing stereotypes of blacks, will be beneficial to black plaintiffs, and therefore justifiable;¹⁹ or it may be that the stereotypes are too destructive.²⁰ Thinking about race in the context of welfare lawyering may focus too much attention on the negative images of black recipients. On the other hand, and especially in light of all of the reasons that this representation process is “raced,” why not make it explicit? Yet, given that legal issues in welfare reform affect all races, does race really matter?

In thinking about how to represent race in welfare lawyering, I hope to draw some lessons more generally for litigation in which race issues otherwise might not seem visible. My goal is to explore the implications of an ethic of race consciousness in a variety of different contexts. This essay is, then, concerned with representing race on two different, albeit intertwined, levels: the first is law reform, and the second is lawyering reform. Part I briefly discusses the relationship between child support and public welfare, and then focuses on the requirement that welfare recipients cooperate in establishing child support. Part I first shows how the cooperation requirement itself represents various negative images of black men and women, and then explores how courts have addressed these images when confronting legal challenges to the cooperation

18. This is not an effort to criticize legal services lawyers. Having been a legal services lawyer, I know the difficulties presented by political realities and heavy caseloads. Cf. Alan W. Houseman, *Political Lessons: Legal Services for the Poor — A Commentary*, 83 GEO. L.J. 1669, 1699 (1995). Instead, I am exploring strategies that have been used in individual and class representation, as well as in legislative advocacy efforts, and am offering tentative suggestions. Indeed, lawyers involved in the first welfare reform case to reach the Supreme Court repeatedly raised a race discrimination claim. See *King v. Smith*, 392 U.S. 309 (1968); *infra* note 36.

19. See Robin D. Barnes, *Interracial Violence and Racialized Narratives: Discovering the Road Less Traveled*, 96 COLUM. L. REV. 788, 789-90 (1996).

20. See Anthony V. Alfieri, *Defending Racial Violence*, 95 COLUM. L. REV. 1301 (1995); see also Sheri Lynn Johnson, *Racial Imagery in Criminal Cases*, 67 TUL. L. REV. 1739 (1993) (discussing the importance of protections against racial stereotypes for defendants, victims, and witnesses in criminal cases). For a comparable discussion of the destructive stereotypes of battered women who kill, see Naomi R. Cahn, *The Looseness of Legal Language: The Reasonable Woman Standard in Theory and in Practice*, 77 CORNELL L. REV. 1398 (1992); Elizabeth M. Schneider, *Describing and Changing: Women's Self-Defense Work and the Problem of Expert Testimony on Battering*, 9 WOMEN'S RTS. L. REP. 195 (1986). The use of such images in criminal cases affects the ultimate outcome. See Bernard E. Harcourt, *Imagery and Adjudication in the Criminal Law: The Relationship Between Images of Criminal Defendants and Ideologies of Criminal Law in Southern Antebellum and Modern Appellate Decisions*, 61 BROOK. L. REV. 1165 (1995).

requirement. By rereading these decisions Part I demonstrates how race and gender are absent and appear not to affect the litigation process. Part II examines gender theory and shows the gendered nature of these different representations of black men and women. Finally, Part III suggests methods for challenging the legislative and judicial representations of black men and women portrayed through the cooperation requirement, and discusses reasons to consider making representation raced.

I. CHILD SUPPORT: AT-HOME WOMEN²¹ AND ABSENT MEN

In contemporary culture, public welfare,²² race, and gender are integrally connected. While it is true that, proportionately, there are more African American recipients of welfare than white recipients, and proportionately, there are more blacks living in poverty than whites, the majority of AFDC recipients nevertheless are not black.²³ Yet the media routinely depict welfare recipients as African-American women, and, correspondingly, as lazy and immoral.²⁴ Race has also affected the distribution of welfare benefits — the history of AFDC shows repeated attempts to exclude African Americans through morality requirements.²⁵

21. Cf. *HOME GIRLS: A BLACK FEMINIST ANTHOLOGY* (Barbara Smith ed., 1983). "Home Girls" is a positive term that Smith chose as a way of depicting a black feminist community.

22. This section focuses on AFDC recipients. As feminists have noted, "public welfare" takes many different forms and covers not just poor people, but also private corporations and upper-income families who receive various forms of federal subsidies and tax breaks. See MARTHA ALBERTSON FINEMAN, *THE NEUTERED MOTHER, THE SEXUAL FAMILY AND OTHER TWENTIETH CENTURY TRAGEDIES* 163, 191 (1995); Frances E. Olsen, *The Myth of State Intervention in the Family*, 18 U. MICH. J.L. REF. 835 (1985); Martha Matthews, *Baby Savers and Family Fixers: Some Reflections on Child Welfare Reform* 43 (Oct. 19, 1995) (unpublished manuscript, on file with author); see also DAVID T. ELLWOOD, *POOR SUPPORT* 5 (1988) (pointing out that Americans do not consider the money received by the elderly and the disabled to be "welfare"); LINDA GORDON, *PITIED BUT NOT ENTITLED: SINGLE MOTHERS AND THE HISTORY OF WELFARE, 1890-1935*, at 2-3, 5-6 (1994) (discussing the development of negative connotations for "welfare" programs, in contrast to the neutral, or even positive connotations attached to social insurance programs); Dorothy E. Roberts, *Welfare and the Problem of Black Citizenship*, 105 YALE L.J. 1563, 1577 & n.89 (1996) [hereinafter Roberts, *Black Citizenship*].

23. See Teresa L. Amott, *Black Women and AFDC: Making Entitlement out of Necessity*, in *WOMEN, THE STATE, AND WELFARE* 280, 281 (Linda Gordon ed., 1990) [hereinafter *WOMEN AND WELFARE*]; Judith Olans Brown et al., *The Mythogenesis of Gender: Judicial Images of Women in Paid and Unpaid Labor*, 6 UCLA WOMEN'S L.J. 457, n.133 (1996).

24. See Williams, *supra* note 5, at 1163; see also Beverly Horsburgh, *Schrödinger's Cat, Eugenics, and the Compulsory Sterilization of Welfare Mothers: Deconstructing an Old/New Rhetoric and Constructing the Reproductive Right to Natality for Low-Income Women of Color*, 17 CARDOZO L. REV. 531, 535 (1996) ("The stereotype of the lazy Black welfare queen of low intelligence, who breeds children in order to avoid working, dominates the public discussion on the federal budget.")

25. See GORDON, *supra* note 22, at 48 (discussing the lack of mothers' aid benefits received by minorities); Williams, *supra* note 5, at 1176; Alexia Pappas, Note, *Welfare Reform:*

AFDC recipients are also gendered: they are mothers,²⁶ and they are unmarried. Statistics show that single mothers comprise ninety-five percent of the adults on AFDC.²⁷ Historically, however, all unmarried women and African American women were generally excluded from welfare because of their failure to comply with morality requirements.²⁸

Aid to Dependent Children ("ADC") was part of the Social Security Act of 1935, although its roots reach far earlier. Attempts to provide support for the children of morally worthy widows first received national attention at a 1909 White House Conference on Children.²⁹ Illinois enacted a Mother's Aid Law in 1911, which provided money to women so that they could mother their own children; the law limited eligibility to widows who were American citizens.³⁰ Thirty-eight states had enacted similar legislation by 1919.³¹ The actual benefits received from these programs were highly variable — not only did a large percentage of potentially eligible mothers not receive aid, but the amount received was generally insufficient to allow women to stay home as full-time mothers.³² Moreover, in light of the morality standards written into such laws, large categories of women could not receive aid. Only three of the laws allowed unmarried mothers to receive pensions,³³ and, in a 1931 study, the U.S. Children's Bureau found that ninety-

Child Welfare or the Rhetoric of Responsibility?, 45 DUKE L.J. 1301, 1307 (1996) ("A state could 'impose such . . . eligibility requirements — as to means, moral character, etc. — as it [saw] fit.'" (alterations in original) (quoting S. REP. NO. 74-628, at 36 (1935))).

26. See David L. Chambers, *Fathers, the Welfare System, and the Virtues and Perils of Child-Support Enforcement*, 81 VA. L. REV. 2575, 2575 (1995) ("AFDC is a program for children and their mothers.").

27. Bonna de la Cruz, *Welfare Plan Gains More Favor; But Critics Wait for Funding Details*, TENNESSEAN, Jan. 21, 1996, at 1A, available in LEXIS, News Library, Tennes File.

28. See *infra* notes 32-38 and accompanying text.

29. See Barbara J. Nelson, *The Origins of the Two-Channel Welfare State: Workmen's Compensation and Mother's Aid*, in WOMEN AND WELFARE, *supra* note 23, at 123, 138.

30. See *id.* at 139; see also Gwendolyn Mink, *The Lady and the Tramp: Gender, Race, and the Origins of the American Welfare State*, in WOMEN AND WELFARE, *supra* note 23, at 92, 110. See generally MIMI ABRAMOVITZ, REGULATING THE LIVES OF WOMEN: SOCIAL WELFARE POLICY FROM COLONIAL TIMES TO THE PRESENT 181-213 (1989) (discussing the history and adoption of pension laws for mothers); THEDA SKOCPOL, PROTECTING SOLDIERS AND MOTHERS: THE POLITICAL ORIGINS OF SOCIAL POLICY IN THE UNITED STATES 424-79 (1992) (same). A 1911 Missouri law allowed a pension to a widow who was "in the judgement of the Juvenile Court . . . a proper person, morally, physically, and mentally, for the bringing up of her children." SKOCPOL, *supra*, at 428 (alteration in original) (quoting ROY LUBOVE, THE STRUGGLE FOR SOCIAL SECURITY, 1900-1935, at 100 (University of Pittsburgh Press 1986) (1968)).

31. See SKOCPOL, *supra* note 30, at 446-47 (providing a chart with the dates of state enactments); Nelson, *supra* note 29, at 139.

32. See SKOCPOL, *supra* note 30, at 471.

33. See SKOCPOL, *supra* note 30, at 467.

six percent of the recipients were white, and only three percent were black.³⁴ After the enactment of ADC, blacks continued to be excluded through morality requirements;³⁵ “man-in-the-house” rules³⁶ simultaneously discouraged the formation of two-parent families while policing the behavior of single women.

The history of aid to poor women is thus replete with attempts to control their lives by conditioning public welfare on their compliance with morality requirements.³⁷ The purpose of the morality requirements has, to some extent, changed: the original purpose of these requirements was to support worthy women, while the contemporary purpose is to stigmatize recipients.³⁸

34. See Nelson, *supra* note 29, at 139.

35. See generally GORDON, *supra* note 22; Roberts, *Black Citizenship*, *supra* note 22.

36. See *King v. Smith*, 392 U.S. 309 (1968) (striking down man-in-the-house rules). The Alabama regulation at issue in *King* is a dramatic illustration of the impact of the man-in-the-house rules. Under federal law, “dependent children” with an absent parent were eligible for AFDC; Alabama denied aid to children who had a “substitute father.” See *King*, 392 U.S. at 313. A substitute father was a man who “‘visits [the home] frequently for the purpose of cohabiting with the child’s natural or adoptive mother.’” *King*, 392 U.S. at 314 (alteration in original). The meaning of “frequently” varied, depending on the caseworker; a woman might be “allowed” to cohabit once or twice a month, although, for at least one worker, cohabitation every six months with the same man meant that he was acting as a “substitute father.” See MARTHA F. DAVIS, *BRUTAL NEED: LAWYERS AND THE WELFARE RIGHTS MOVEMENT, 1960-1973*, at 62-68 (1993) (discussing the litigation strategy in *King*); MARTIN GARBUS, *READY FOR THE DEFENSE* 164 (1971). Although the state claimed that the regulation was not an attempt to regulate sexual conduct, the pretrial testimony appeared to indicate otherwise. See *King*, 392 U.S. at 336 (Douglas, J., concurring) (“The standard is the so-called immorality of the mother.”); GARBUS, *supra*, at 157. The Commissioner responsible for drafting the regulation stated that the woman could decide “‘to give up her pleasure or to act like a woman ought to act and continue to receive aid.’” GARBUS, *supra*, at 157-58. Moreover, it did not matter to Alabama if the man was not the father, nor if he was legally responsible for any of the children. See *King*, 392 U.S. at 314. The “substitute father” regulation, then, effectively prevented women from cohabitating. If they married the man, instead of cohabitating, then they were denied aid. See *King*, 392 U.S. at 318 n.13 (noting that, pursuant to federal legislation, although dependent children with two parents in the house could be eligible for aid, so long as a parent was unemployed, the majority of states, including Alabama, had chosen not to extend eligibility to such families).

The effect of the *King* regulation was also, not coincidentally, to deny aid to blacks. In the initial complaint, Martin Garbus, the attorney representing Ms. Smith, claimed that the regulation was racially discriminatory. See GARBUS, *supra*, at 155. He candidly admitted, in a subsequent book, that he had few facts in support of this claim at the time of filing. See *id.* Nonetheless, he found that although two-thirds of the AFDC recipients were black, virtually all of the families terminated from aid as a result of the substitute-father rule were black, and that the state’s purpose in developing these regulations was to exclude blacks. See *id.* at 159-61. The Supreme Court, however, struck down the regulation without reaching the issue of race discrimination. See *King*, 392 U.S. at 313. For further discussion of courts’ attempts to avoid deciding race issues in welfare cases, see *infra* section I.C.2.

37. This was true regardless of the type of “aid” these mothers received. See LINDA GORDON, *HEROES OF THEIR OWN LIVES* 280-85 (1988) (discussing attempts to impose middle-class norms on poor women who were victims of domestic abuse).

38. See Gwendolyn Mink, *Welfare Reform in Historical Perspective*, 26 *CONN. L. REV.* 879, 880-81 (1994).

A. *The Cooperation Requirement*

To receive public welfare, a custodial parent must relinquish her³⁹ rights to receive child support, and assign all such rights to the state.⁴⁰ Generally, at her initial interview with a caseworker, the potential recipient signs a simple form in which she agrees that the state is entitled to collect her child support. The custodial parent must also agree to cooperate with the local child support agency by helping to establish the identity of the father and obtain child support payments.⁴¹ Federal regulations require states to define "cooperation" to include providing information during an interview with the local child support office, and even testifying at child support hearings, although the recipient may be excused from providing information if she attests, under penalty of perjury, to her inability to do so.⁴² The only other excuse for noncooperation is the existence of "good cause,"⁴³ and the recipient bears the burden of proof.⁴⁴ As a sanction for noncooperation, the mother becomes ineligible to receive benefits,⁴⁵ and, in some states, the grant to the entire family may be terminated.⁴⁶

Although federal regulations on the cooperation requirement provide some uniformity, states have adopted various additional requirements when defining the requirement's parameters. In several states, for example, the state not only requires that mothers provide the names and social security numbers of the fathers, but mandates that their benefits be withheld if they fail to do so, regardless of

39. Virtually all of the custodial parents on AFDC are women.

40. See 42 U.S.C. § 602(a)(26)(A) (1994). This section was unchanged by The Personal Responsibility and Work Opportunity Act of 1996.

41. See 45 C.F.R. § 232.12(a) (1995).

42. See 45 C.F.R. § 232.12(b) (1995).

43. See 45 C.F.R. § 232.12(a) (1995); see also Lisa Kelly, *If Anybody Asks You Who I Am: An Outsider's Story of the Duty to Establish Paternity*, 3 AM. U. J. GENDER & L. 247 (1995) (offering a fictionalized, "but true," account of how the cooperation requirement affected one woman).

44. See 45 C.F.R. § 232.40(c) (1995). The applicant has 20 days from the date of making a good cause claim to provide sufficient corroborating evidence. See 45 C.F.R. § 232.43(b) (1995).

45. See 45 C.F.R. § 232.12(d) (1995). While the child may still be able to receive AFDC money through an alternative mechanism, the amount of aid is determined without taking into account the actual needs of the mother.

46. Virginia is an example of a state with such a policy. See Affidavit of Vicki Turetsky at 2, *Smyth v. Carter* (W.D. Va. 1996) (96-0089-H).

whether they know the father's identity.⁴⁷ President Clinton has proposed requiring states to adopt such policies.⁴⁸

The cooperation requirement first appeared in 1975.⁴⁹ Congress apparently believed that collecting child support on behalf of AFDC recipients would prove to be fiscally efficient, because the support monies would reimburse states and the federal government for their AFDC assistance.⁵⁰ As a long-term benefit, Congress apparently wanted to deter fathers from leaving the home, and also to provide children with the benefit of an intact family.⁵¹ Dual concerns about the "absent" father and the unmarried mother appear throughout the legislative history of the cooperation requirement.⁵²

The fiscal concerns underlying the cooperation requirement resulted, in large part, from the success of welfare rights activists in increasing the number of women who receive AFDC.⁵³ The race of these new welfare recipients was increasingly black. The reappearance of "morality" concerns about the breakup of the family in the form of the cooperation requirements can similarly be traced to the race of the new recipients.⁵⁴ The Moynihan report had been issued in the previous decade, and there was special concern with the structure of black families.⁵⁵ Thus, the cooperation requirement can be seen as a reaction to the number of poor black women receiving AFDC.

47. See Spencer S. Hsu, *Virginia Suffers Setback on Welfare Benefit Rule; In Case of 2 Women, Judge Suspends Regulation on Identifying Fathers*, WASH. POST, June 26, 1996, at A1 (identifying similar regulations that had been struck down in Massachusetts, and noting that South Carolina intended to adopt a comparable policy); see also *Defenders of Welfare*, WASH. TIMES, June 24, 1996, at A18, available in LEXIS, News Library, WTIMES File.

48. See *New Welfare Rules Imposed*, DES MOINES REGISTER, June 19, 1996, at 8A.

49. See Pub. L. No. 93-647, § 101 (Jan. 4, 1975); Kelly, *supra* note 43, at 247 n.1.

50. See 120 CONG. REC. 40,323-24; 41,653 (1974); S. REP. NO. 93-1356, at 42-43 (1974), reprinted in 1974 U.S.C.C.A.N. 8146.

51. See S. REP. NO. 93-138, at 42 (1974), reprinted in 1974 U.S.C.C.A.N. 8146.

52. For example, the Senate Report to the Social Service Amendments of 1974 stated, "It is in those families in which the father is 'absent from the home' that the most substantial growth [in AFDC recipients] has occurred." S. REP. NO. 93-1356, at 42-43 (1974), reprinted in 1974 U.S.C.C.A.N. 8146.

53. See Amott, *supra* note 23, at 287; *id.* at 288 ("As a result of welfare rights organizing among the poor, welfare rolls expanded dramatically. Between 1970 and 1973 alone, the average number of recipients rose nearly 50 percent" (footnote omitted)); Joel F. Handler, *The Transformation of Aid to Families with Dependent Children: The Family Support Act in Historical Context*, 16 N.Y.U. REV. L. & SOC. CHANGE 457, 489 (1987-88).

54. See Dorothy E. Roberts, *Irrationality and Sacrifice in the Welfare Reform Consensus*, 81 VA. L. REV. 2607, 2621 (1995) ("[A]s AFDC became increasingly associated with black mothers, it became increasingly burdened with behavior modification, work requirements and reduced effective benefit levels.").

55. See DANIEL PATRICK MOYNIHAN, *THE NEGRO FAMILY: THE CASE FOR NATIONAL ACTION* (1965); Kelly, *supra* note 43, at 248 n.3.

B. *Images of the Cooperation Requirement*

Underlying the cooperation requirements are assumptions of noncooperation, irresponsibility, and immorality; the requirements take a punitive approach toward both mothers and fathers.⁵⁶ The stern sanction for failure to comply with the requirement assumes that mothers are not telling the truth, or that they are deliberately withholding information about the father.⁵⁷ The attempt to coerce paternal involvement assumes that fathers will not otherwise assume responsibility for their families.

1. *Mothers*

When discussing recent changes to the cooperation requirements that would require mothers to provide information before they were eligible to receive AFDC, President Clinton used the term "responsibility":

[W]e must do more to insist on more parental responsibility. . . . For too long, we have let the men off the hook. We must insist that they do their part to support the children that they help to bring into this world. . . . Our system should say to mothers, "If you want our help, help us to identify and locate the father so he can be held accountable as well." And it should say to fathers, "We're not going to let you just walk away."⁵⁸

Or, as an editorial on the cooperation requirement phrased it, the issue is "whether taxpayers are obliged to support not just welfare but welfare for anonymous one-night stands."⁵⁹ In these formulations, irresponsibility is a label attached to the behavior of both mothers and fathers: mothers have failed to provide information, and fathers have failed to act as responsible fathers.⁶⁰

The cooperation requirement has come to stand for illegitimacy.⁶¹ Coinciding with the increasing number of African Ameri-

56. See Robert Pear, *Clinton Announces Steps to Find Parents Who Owe Child Support*, N.Y. TIMES, June 19, 1996, at A14 (quoting an advocate who noted the government's assumption that the mother would not cooperate).

57. See Affidavit of Vicki Turetsky, *supra* note 46, at 3.

58. President Bill Clinton, Remarks at the American Association of Nurses Meeting (June 18, 1996), available in LEXIS, News Library, Curnws File.

59. *Defenders of Welfare*, *supra* note 47; see also Susan Everitt, *If Parents Were So Great, Why Did CPS Have Child?*, ARIZ. REPUBLIC, Oct. 22, 1994, at B9 ("When does the public stop paying for the illegal and immoral acts of irresponsible parents?").

60. For further criticism of single-mother households, and the need for fathers to assume the paternal role, see DAVID BLANKENHORN, *FATHERLESS AMERICA: CONFRONTING OUR MOST URGENT SOCIAL PROBLEM* (1995); Barbara Dafoe Whitehead, *Dan Quayle Was Right*, ATLANTIC MONTHLY, Apr. 1993, at 47.

61. See *Defenders of Welfare*, *supra* note 47 (quoting Robert Rector of the Heritage Foundation).

can welfare recipients, AFDC is transformed into a condemnation of the mother's morality, rather than a program for meeting the needs of children.⁶² By admitting that a child was conceived as a result of a one-night stand with a man whose social security number she does not know, the mother's actual cooperation is irrelevant.⁶³ She must meet certain standards of responsibility not just in how much she must report, but also in the behavior that she is reporting. The reporting standards appear to be punishing the underlying behavior.

Indeed, "responsibility" has become a code word in contemporary welfare debates.⁶⁴ Society views women who have additional children while on welfare as immoral, irresponsible, and undeserving, in contrast to wealthier woman who can "afford" to have children.⁶⁵ In an essay that compares the reasons that poor HIV-infected mothers and infertile women have children, Carol Sanger notes:

[I]f we accept motherhood as a good choice for women whose lives are rich in resources because it is understood to be a source of self- and community esteem, of family life, of continuity, and of loving relationships, then the decision to have a child when made by women with few external resources, should make similar sense.⁶⁶

The cooperation requirement is simply another example of an attempt to impose morality on women.⁶⁷ The nature of the cooperation requirement is such that it may require close questioning of the woman's sexual history. Many states have developed paternity

62. See Mink, *supra* note 38.

63. See Order, *Smyth v. Carter* (W.D. Va. 1996) (No. 96-0089-H); Complaint, *Smyth* (No. 96-0089-H); Attached Exhibit A, *Smyth* (No. 96-0089-H) (challenging Virginia regulation that withholds benefits from women who are unable to provide the full names of their children's father(s)); Hsu, *supra* note 47, at A1 (noting that Massachusetts had a similar policy).

64. See Handler, *supra* note 53, at 462 (contrasting the "entitlements" ideology of welfare reform in the 1960s and 1970s with the "responsibility" ideology of the 1980s). For a full discussion of responsibility in the context of welfare reform and pregnancy, see Linda C. McClain, "Irresponsible" Reproduction, 47 HASTINGS L.J. 339 (1996).

65. See FINEMAN, *supra* note 22 (discussing the moral deviance of the category of single mothers); McClain, *supra* note 64; Williams, *supra* note 5; M.M. Slaughter, *Fantasies: Single Mothers and Welfare Reform*, 95 COLUM. L. REV. 2156 (1995) (book review).

66. Carol Sanger, *M is for the Many Things*, 1 S. CAL. REV. L. & WOMEN'S STUD. 15, 63 (1992); see also Roberts, *supra* note 54, at 2608-09 (discussing the belief that the poor are immoral for bearing children they cannot support); Stephen D. Sugarman, *Financial Support of Children and the End of Welfare as We Know It*, 81 VA. L. REV. 2523, 2523-24 (1995) (describing the "conservative" view, in which it is "morally reckless" to have additional children without sufficient financial resources).

67. The welfare reform legislation enacted in 1996 contained \$250 million for "abstinence education," and \$400 million in extra money to states that controlled their "illegitimate" birthrates. See Joyce Purnick, *Welfare Bill: Legislating Morality?*, N.Y. TIMES, Aug. 19, 1996, at B1.

questionnaires that ask about sexual activity around the time that the child was conceived.⁶⁸ There seems to be no understanding of the loss of dignity that accompanies questions regarding the woman's sexual history.⁶⁹ Especially in light of the historical treatment of black women's sexuality in this country, the cooperation requirement is particularly punitive.⁷⁰

2. Fathers

For fathers, there are comparable assumptions of irresponsibility and noncooperation.⁷¹ Indeed, one of the purposes of the cooperation requirement was to ensure that fathers remained present in their children's lives, thus revealing an underlying assumption that, without such an incentive, fathers would not participate in child rearing. That is, unless they are coerced into paying money, fathers not only will not support their children, but will also remain uninvolved in their children's lives, abandoning the family itself.⁷² So coercive is this requirement that fathers who provide support are essentially required to support not only their own children, but also any other children in the family. The so-called sibling rule deems any income received to be part of the entire family's income. Thus, the child of an AFDC mother with a relatively wealthy father is supported in the same manner as her half-siblings, whose father(s) may be poorer.⁷³

68. See James W. Johnson & Adele M. Blong, *The AFDC Child Support Cooperation Requirement*, 20 CLEARINGHOUSE REV. 1388, 1397, 1399 (1987); Elaine McCrate, *Accounting for the Slowdown in the Divorce Rate in the 1980s: A Bargaining Perspective*, 50 REV. SOC. ECON. 404, 414 (1992) (citing 1991 Vermont Paternity Questionnaire).

69. See Kathryn Abrams, *Complex Claimants and Reductive Moral Judgments: New Patterns in the Search for Equality*, 57 U. PITT. L. REV. 337, 343 (1996) (discussing how the contemporary paradigms of equality do not comprehend the injuries suffered by young black unmarried mothers).

70. See HAZEL V. CARBY, RECONSTRUCTING WOMANHOOD 26-27 (1987) (discussing images of the black woman's "overt sexuality" in contrast to the cult of true (white) womanhood's image of modesty); Brown et al., *supra* note 23, at 529-37 (discussing "The Promiscuity Myth for Poor Women"); Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581 (1990) (arguing that rape laws have not adequately protected black women because society assumes that they are sexually promiscuous); Dorothy E. Roberts, *The Genetic Tie*, 62 U. CHI. L. REV. 209 (1995).

71. See also Chambers, *supra* note 26, at 2576 ("The irresponsibility of fathers takes three forms: they bring into the world 'illegitimate' children they do not intend to support, they leave marriages they should remain in, and, whether married or not, they fail to pay support for the children they leave behind.").

72. For discussion of the relationship between visitation and child support, see Karen Czapanskiy, *Child Support and Visitation: Rethinking the Connections*, 20 RUTGERS L.J. 619 (1989).

73. See 42 U.S.C. § 602(a)(38) (1994); Bowen v. Gilliard, 483 U.S. 587 (1987); Amy E. Hirsch, *Income Deeming in the AFDC Program: Using Dual Track Family Law to Make Poor Women Poorer*, 16 N.Y.U. REV. L. & SOC. CHANGE 713 (1987-88). Until 1984, a

Images of the "absent father" suggest a dysfunctional family structure, one that allegedly characterizes low-income families.⁷⁴ Indeed, the Moynihan report of 1965 linked African American poverty to the absence of black fathers.⁷⁵ While advocates of paternal presence assume that the absent father is responsible for many social problems, and thus believe that keeping fathers involved will cure those problems, this is not necessarily true. First, the history of the black family is *not* about the absence of fathers.⁷⁶ Historically, contrary to the Moynihan report, black families have been stable. In detailed research, Herbert Gutman concluded that slavery was not responsible for the disintegration of black families, and instead blamed an absence of work for any such crumbling.⁷⁷ Black fathers, then, have been a strong presence within their families.

Nonetheless, while the involvement of fathers is generally a good thing, it is not always critical or beneficial. First, fathers may be absent for "good cause," such as violence between the parents⁷⁸ or against the children. For example, more than half of all participants in welfare-to-work programs appear to be domestic violence victims.⁷⁹ Numerous studies have shown that children are healthier in a violence-free environment, albeit one without a father, than in

mother did not have to include all of her children on the welfare grant; she could receive child support for one child, while receiving AFDC for her other children. *See Bowen*, 107 S. Ct. at 3013.

74. The rate of marriage for black men and women has been declining steadily since the 1960s. *See* Robert D. Mare & Christopher Winship, *Socioeconomic Change and the Decline of Marriage for Blacks and Whites*, in *THE URBAN UNDERCLASS* 175, 175, 181 (Christopher Jencks & Paul E. Peterson eds., 1991).

75. *See* PATRICIA HILL COLLINS, *BLACK FEMINIST THOUGHT: KNOWLEDGE, CONSCIOUSNESS, AND THE POLITICS OF EMPOWERMENT* 73-75 (1990) (discussing how the image of black women as matriarchal has affected the harshness of public policy toward poor families); MOYNIHAN, *supra* note 55, at 5-14.

76. *See* Naomi R. Cahn, *Pragmatic Questions About Parental Liability Statutes*, 1996 WIS. L. REV. 399, 423-24 (discussing reasons why women form single-parent households); Nancy E. Dowd, *Stigmatizing Single Parents*, 18 HARV. WOMEN'S L.J. 19 (1995); Martha L.A. Fineman, *Masking Dependency: The Political Role of Family Rhetoric*, 81 VA. L. REV. 2181, 2195 (1995) (addressing the perniciousness of assumptions about the "normal" family).

77. *See* HERBERT G. GUTMAN, *THE BLACK FAMILY IN SLAVERY AND FREEDOM, 1750-1925*, at 461-68 (1976). Gutman carefully documents familial relationships among slaves and ex-slaves.

78. *See* Joan Meier, *Domestic Violence, Character, and Social Change in the Welfare Reform Debate*, 19 LAW & POLY. (forthcoming 1997) (manuscript at 10, on file with author).

79. *See id.* at 6.

a household with violent fathers.⁸⁰ While the cooperation requirement includes an exemption for good cause, it is under-utilized.⁸¹

Second, a father's presence may not be necessary for the well-being of the children. It is poverty, not absent fathers, that correlates most highly with negative outcomes for children, such as delinquency.⁸² While some studies show that children in single-parent households are more likely to become delinquents than are those in two-parent families, *and* those in extended families,⁸³ these data show that it is having *at least* two parents — neither (or none) of whom may be a father — that correlates with better outcomes. Of course, poverty correlates with the absence of a father — the most common reason for women to begin receiving AFDC is the departure of a father⁸⁴ — but this is due to women's lower earning ability and the economic structure, rather than the per se absence of another parent in the family.⁸⁵ Indeed, delinquent children are more likely to have lived in poverty than to have lived in a single-headed

80. See generally Naomi R. Cahn, *Civil Images of Battered Women: The Impact of Domestic Violence on Child Custody Decisions*, 44 *VAND. L. REV.* 1041 (1991); Evan Stark & Anne H. Flitcraft, *Women and Children at Risk: A Feminist Perspective on Child Abuse*, 18 *INT. J. HEALTH SERVICES* 97, 106 (1988).

81. See Mary R. Mannix et al., *The Good Cause Exception to the AFDC Child Support Cooperation Requirement*, 21 *CLEARINGHOUSE REV.* 339 (1987). Welfare reform activists are currently seeking to clarify the good-cause standard so that more domestic violence victims can use it. See Telephone Interview with Joan Meier, Professor of Clinical Law and Director of Domestic Violence Advocacy Project, George Washington University Law School (July 20, 1996).

82. See Sara McLanahan & Karen Booth, *Mother-Only Families: Problems, Prospects, and Politics*, 51 *J. MARRIAGE & FAM.* 557, 573 (1989) (stating that although poverty is not the full explanation, "we know that a significant part of children's lower attainment [from single-family households] is due to economic deprivation in the family of origin"); Gary B. Melton, *Children, Families, and the Courts in the Twenty-First Century*, 66 *S. CAL. L. REV.* 1993, 2003 (1993) ("[P]overty accounts for the greatest portion of variance in community rates of delinquency"); see also Dowd, *supra* note 76, at 32-34 (discussing the effects of poverty on children and parents); Joel F. Handler, *Two Years and You're Out*, 26 *CONN. L. REV.* 857, 862 (1994) (noting that poverty, not the receipt of welfare, is associated with higher risks of delinquency). Of course, as Sara McLanahan and Karen Booth suggest, ultimately the entire concept of single motherhood is "highly politicized," fraught with competing values. See McLanahan & Booth, *supra*, at 569; see also Dowd, *supra* note 76 (arguing that single motherhood is unjustly stigmatized).

83. See James Q. Wilson, *The Family-Values Debate*, *COMMENTARY*, Apr. 1993, at 26 (citing a study by Sheppard Kellam).

84. See Ellwood & Bane, *supra* note 9, at 28, 54. Ellwood & Bane's study shows that wives who become the head of household (because of the husband's absence) account for 42.1% of people beginning their first spell on welfare, while unmarried women with children account for 38.8% of all new entries. See *id.* at 54. The most common reason for women leaving welfare was marriage. See *id.* at 57.

85. As Nancy Dowd points out, only 2% of single households headed by a man are in poverty, while almost 50% of single households headed by a woman are in poverty. See Dowd, *supra* note 76, at 34.

household.⁸⁶ While child support collection efforts attempt to promote paternal financial and emotional support, the plain fact is that many of the men simply do not have the financial resources to support their families adequately; child support collection is not a panacea for poverty.

Third, black children in two-parent families still have much higher poverty rates than do white children who are in *single-parent* households.⁸⁷ Simply requiring paternal presence is not a guarantor of affluence, especially in light of the limited job opportunities for black men. The unemployment rate for African American men is much higher than for white men.⁸⁸

C. *Realities Behind the Cooperation Requirement*

The actual facts are very different from the apparent images of noncooperation. Studies of welfare recipients, of fathers, and of narratives in court cases portray a very different image from that assumed by AFDC.

1. *Actual Behavior of Mothers and Fathers*

Most AFDC recipients do provide information about the father, and child support agency directors generally believe that mothers are willing to cooperate in establishing the father's identity.⁸⁹ Indeed, women have sued their local child support offices to force them to pursue support orders.⁹⁰ Women are, then, more than willing to cooperate. One study of custodial parents who had not yet obtained a child support order found that all of the mothers had provided the father's name, 75% had provided his home address, 54% had provided his social security number, and 50% had provided his work address.⁹¹ Most other studies report similarly high

86. See, e.g., Pierre Thomas, *These Kids are the Throwaways of Society*, WASH. POST, Mar. 18, 1996, at A8.

87. See McClain, *supra* note 64, at 361.

88. For black men, the average unemployment rate is 12%, compared to 5.4% for white men; and the percentage of black men living below poverty level is 20%, compared to 7% for white men. See Connie Cass, *Many Black Men Face Fear, Distrust*, ROCKY MOUNTAIN NEWS, Oct. 16, 1995, at 2A, available in LEXIS, News Library, RMTNEW file.

89. See Affidavit of Vicki Turetsky, *supra* note 46, at 4.

90. See, e.g., *Freestone v. Cowan*, 68 F.3d 1141 (9th Cir. 1995), cert. granted sub nom. *Blessing v. Freestone*, 116 S. Ct. 1671 (1996) (detailing the inadequacies of the state's child support collection process); *Howe v. Ellenbecker*, 774 F. Supp. 1224 (D.S.D. 1991), *affd.*, 8 F.3d 1258 (8th Cir. 1993) (same).

91. See NATIONAL CHILD SUPPORT ASSURANCE CONSORTIUM, CHILDHOOD'S END: WHAT HAPPENS TO CHILDREN WHEN CHILD SUPPORT OBLIGATIONS ARE NOT ENFORCED (1993), cited in *Aff. of Vicki Turetsky*, *supra* note 46, at 4 n.6.

levels of cooperation.⁹² The establishment of paternity appears to depend instead on the competency and efficiency of the local child support agency, so that “systemic factors, not individual noncompliance,”⁹³ are the main problem. Noncooperation by the mother, then, is not nearly as important as improving collection procedures within the social services agencies.

When it comes to fathers, there are two different stories: while some putatively absent fathers are in fact present, others do not even see themselves as fathers. On the one hand, far from abandoning the family unit, “absent” fathers often provide regular support “under the table.”⁹⁴ In her study of how AFDC recipients were able to support themselves, Kathryn Edin found that more women received money from absent fathers outside of the child support system than did so through the system — twenty-three percent versus fifteen percent.⁹⁵ Almost one-quarter of the recipients in her study, then, acknowledged receiving unreported money from

92. *See id.* Kathryn Edin has reported two conflicting results: in one study, she concluded that more than half of AFDC recipients engaged in covert noncooperation with respect to child support, and in another study, she concluded that virtually every mother cooperated. *See Declaration of Ann Nichols-Casebolt at 7, Smyth v. Carter (W.D. Va. 1996) (No. 96-0089-H) (discussing both studies).*

93. Declaration of Ann Nichols-Casebolt, *supra* note 92, at 6. Slightly more than one-third of the AFDC recipients who were eligible for a child support order actually had one. *See ANDREA H. BELLER & JOHN W. GRAHAM, SMALL CHANGE: THE ECONOMICS OF CHILD SUPPORT* 27 tbl. 2.3 (1993). In 1979, 41.5% of recipients had a child support award, and, by 1986, this figure had dropped to 36.4%. *See id.*

94. *See Affidavit of Vicki Turetsky, supra* note 46; Ellwood & Bane, *supra* note 9; Memorandum from Michael R. Henry, Assistant Commissioner, Virginia Department of Social Services, to John Littel & Eric Berger 2 (Nov. 4, 1994) (on file with the Virginia Department of Social Services) (reporting that Virginia caseworkers believed that less than 3% of recipients were receiving covert support, but that the low number might be due to the state’s failure to catch such payments).

95. *See KATHRYN EDIN, THE MYTHS OF DEPENDENCE AND SELF-SUFFICIENCY: WOMEN, WELFARE, AND LOW-WAGE WORK* 11 tbl. 6 (Rutgers Ctr. for Urban Pol. Res. Working Paper No. 67, 1994) [hereinafter EDIN, MYTHS OF DEPENDENCE AND SELF-SUFFICIENCY]. In another study, Edin concluded:

[T]he fathers of welfare reliant children are much more involved in bearing at least some financial responsibility for their children than official statistics show. Thirty-three percent of the women in our sample reported that they received regular financial support from the fathers of their children, though only 14 percent received any of that support through official channels. Another 30 percent of the mothers we interviewed said that although they didn’t get cash assistance, they received in-kind contributions such as disposable diapers, school clothing and shoes, and/or Christmas and birthday gifts.

KATHRYN EDIN, *SINGLE MOTHERS AND ABSENT FATHERS: THE POSSIBILITIES AND LIMITS OF CHILD SUPPORT POLICY* 8 (Rutgers Ctr. for Urban Pol. Res. Working Paper 68, 1994) [hereinafter EDIN, *SINGLE MOTHERS AND ABSENT FATHERS*].

Even caseworkers acknowledge that few of the fathers in welfare cases are men who earn a lot of money and do not pay child support. *See Rick Bragg, Rethinking Welfare: Collecting from Fathers — A Special Report: Georgia, Pursuing Child Support, Discovers its Potential and Limits*, N.Y. TIMES, Apr. 14, 1995, at A1.

the fathers, even outside of a formal child support order.⁹⁶ We have no way of measuring the actual number of fathers who provide such support, given the tendency to underreport such behavior and the limited means for measuring support.

On the other hand, some fathers provide no support at all. Many fathers who may otherwise be involved with their families are unable to provide support because their income is so low. Forcing such fathers to pay further impoverishes them. Within poor black communities, the unemployment rate of men has experienced a steady increase, and jobs are difficult to find.⁹⁷ Other black fathers are literally absent from the family. First, ethnographers report that poor black men do not see themselves as fathers, and thus are simply not around for their families.⁹⁸ Second, even devoted fathers may be absent because they are in prison. The rate of incarceration of black men is staggeringly high.⁹⁹ For example, Kathryn Edin found that of the 112 mothers who had complied with child support officials but were not receiving any money from the fathers, twenty of the fathers were not employed, and another twenty of the fathers were incarcerated.¹⁰⁰

Third, as discussed earlier, there may be good reasons, such as domestic violence, that the fathers are absent. As with many stereotypes, the image of the "absent" father is partially true. The reasons for his absence, however, do not support broad generalizations.

There is, as David Chambers points out, "no easy answer" to the question of whether parents who earn below the poverty level

96. This number may be even higher, depending on the willingness of study participants to acknowledge illegal income. Edin also found that 29% of the women received covert contributions from their boyfriends, which also shows male responsibility. See EDIN, MYTHS OF DEPENDENCE AND SELF-SUFFICIENCY, *supra* note 95, tbl. 6.

97. See William Julius Wilson, *Work*, N.Y. TIMES, Aug. 18, 1996, § 6 (Magazine), at 27. A father's income has been positively correlated to his child support payments. See BELLER & GRAHAM, *supra* note 93, at 78-79. Beller and Graham report on a study that found that the fathers of children receiving AFDC have very few financial assets; only half of the fathers even owned a car. See *id.* at 79.

98. See *infra* note 109.

99. Blacks are incarcerated at a much higher rate than whites — in 1989, the rate of incarceration was seven times greater. See SIDEL, *supra* note 5, at 179. Almost one-third of black men in their twenties are involved in the criminal justice system. See Ted Gest, *A Shocking Look at Blacks and Crime*, U.S. NEWS & WORLD REP., Oct. 16, 1995, at 53, 53.

100. See EDIN, SINGLE MOTHERS AND ABSENT FATHERS, *supra* note 95, at 11. Thirty-six women received no support because the father could not be found; two mothers did not know the father's identity; seven mothers had good-cause exemptions because of the father's violent history; and 41 mothers had cases caught in the child support system. See *id.*

should be required to pay support.¹⁰¹ While the requirement to pay may promote parental responsibility, the amount collected may be so minimal as to scarcely justify the effort.¹⁰²

2. *Narratives in Legal Challenges to Cooperation Requirements*

In cases challenging the cooperation requirement, advocates employ narratives that speak on three different levels: legal, socio-economic, and emotional. These narratives challenge the images of irresponsibility and show the actual effects on families of the AFDC cooperation requirements.¹⁰³ The legal narratives are straightforward assertions of the constitutional and statutory claims of the AFDC recipients. The socioeconomic and emotional narratives add "color" to the legal assertions by portraying the life situations of the AFDC recipients. Even if the plaintiff's race is not mentioned in the complaints or in briefs, or is sometimes visible only by implication ("from Puerto Rico"), race appears, obviously, in the courtroom whenever the plaintiffs are present; it may also appear through testimony of expert witnesses.

Nonetheless, there is virtually no mention of race in court opinions. While race may appear in the advocacy efforts, it simply does not appear in the judicial representation of women challenging the cooperation requirements, even though it is clearly present in the media and undoubtedly has influenced the structure of American welfare programs. To show the technical separation of race from judicial reasoning, I turn to an Illinois child support cooperation case.

In 1986, an Illinois federal district court certified as a class AFDC recipients whose benefits were terminated as a result of their failure to cooperate with the state in establishing paternity or obtaining child support.¹⁰⁴ The class challenged state policies that implemented the cooperation requirement. One policy invalidated all excuses, including illness or inclement weather, for a recipient's

101. See Chambers, *supra* note 26, at 2595; Beller & Graham, *supra* note 93, at 258. In discussing the significance of race to images of welfare dependency, Lisa Crooms also suggests that the noncustodial parents of children on AFDC may be unable to pay because of their own poverty. See Crooms, *supra* note 5, at 1972 n.84.

102. See Chambers, *supra* note 26, at 2592 n.79 (reporting that the federal government experienced a loss of \$170 million in its child support collection program in 1992).

103. See Monica J. Evans, *Stealing Away: Black Women, Outlaw Culture and the Rhetoric of Rights*, in CRITICAL RACE THEORY: THE CUTTING EDGE 502, 505-06 (Richard Delgado ed., 1995).

104. See *Doston v. Duffy*, 732 F. Supp. 857 (N.D. Ill. 1988). For a fuller discussion of the facts, see *Doston v. Duffy*, No. 85C2356, 1988 U.S. Dist. LEXIS 17375 (N.D. Ill. Nov. 23, 1988).

failure to appear for an appointment, so that the state could terminate an AFDC grant for even a single nonappearance.¹⁰⁵ Other policies allowed caseworkers to determine what the AFDC recipient's knowledge *should be* about the absent parent, rather than relying on the client's *actual* knowledge.¹⁰⁶

The stories of two of the named plaintiffs show how these policies affected recipients and their children. Geraldine Doston missed a court hearing because her child was ill. She called her lawyer on the morning of the hearing to inform the state attorney's office that she would be unable to appear, and the attorney was able to get a continuance for a date six months later. Ms. Doston appeared at the later hearing. In the interim, however, she was deemed noncooperative, and her AFDC grant was reduced by about one-third.¹⁰⁷

The court recounted the experience of another named plaintiff, Rosa P., whose grant was cut by more than fifty percent because of her alleged noncooperation:

Rosa testified that she knew Peter [the putative father] for approximately one month in 1983. She had sexual relations with him four or five times at her home. When interviewed . . . Rosa gave Peter's name, birth date, the street he lived on in Chicago, a physical description, birth place, and that he was planning to go to Texas. According to [the caseworker's] notes, Rosa stated that she dated Peter from November 1983 to September 1984. Apparently because of the length of the relationship, [the caseworker] believed that Rosa should know more about Peter and concluded that she was not cooperating.¹⁰⁸

At the trial, the plaintiffs called Donna Franklin, a social work professor at the University of Chicago. Professor Franklin testified as to the transience of poor black men and the consequent difficulties of locating them; she also testified that black women were disproportionately more likely than black men to identify themselves as

105. See *Doston*, 1988 U.S. Dist. LEXIS 17375, at **16-17. For a discussion of the various reasons that poor clients may miss appointments with their lawyers, see Naomi Cahn, "Money Changes Everything": Class Differences in Representation (1996) (unpublished manuscript, on file with author).

106. See *Doston*, 732 F. Supp. at 862.

107. See *Doston*, 1988 U.S. Dist. LEXIS 17375, at *61.

108. *Doston*, 1988 U.S. Dist. LEXIS 17375, at *64. Other AFDC recipients tell similar stories about what constitutes their "noncooperation." See, e.g., *Complaint, Smyth v. Carter*, (No. 96-0089) (W.D. Va.).

parents.¹⁰⁹ Another witness testified about the low level of literacy among the poor in the United States.¹¹⁰

The plaintiffs, then, used legal, socioeconomic, and racial narratives to argue their case, and the judge clearly considered these narratives because he mentioned them in the findings of fact.¹¹¹ Nonetheless, in its conclusions of law, the court never mentioned the interrelationship of the cooperation requirements and the structure of black communities — although the court did find the cooperation requirements too harsh. Indeed, outside of Professor Franklin's testimony, race does not otherwise appear in the court's opinion. The description of the plaintiffs is completely race-less, so the reader does not even know why Professor Franklin's testimony is relevant. Race is similarly absent in other decisions on the cooperation requirement.¹¹² The choice not to address race serves, of course, to mark and reinforce the notion that welfare reform litigation is seemingly colorblind.¹¹³

II. GENDER IDEOLOGY

Poor black men and women occupy separate raced and gendered spaces in our culture.¹¹⁴ As African Americans, they are both perceived as part of the underclass in our society;¹¹⁵ however,

109. See *Doston*, 1988 U.S. Dist. LEXIS 17375, at *70.

In a survey of poor black women in the 18-44 age group, 69.7% indicated that they were parents. In the same age group, only 39.2% of the males responded that they were parents. . . . [T]he differential for other socioeconomic groups is in the range of five to seven percent. Ethnographers attribute some of the disparity to transiency among the population.

Doston, 1988 U.S. Dist. LEXIS 17375, at *70.

110. See *Doston*, 1988 U.S. Dist. LEXIS 17375, at **73-75.

111. See Kim Lane Scheppele, *Facing Facts in Legal Interpretation*, REPRESENTATIONS, Spring 1990, at 42, 57 ("So, even the initial, straightforward description of the facts used by the court . . . is full of law . . .").

112. See, e.g., *Smyth v. Carter*, No. 96-0089-H (W.D. Va. June 25, 1996) (order denying motion for class certification). The notion of judicial neutrality is a myth. See JOHN M. CONLEY & WILLIAM M. O'BARR, RULES VERSUS RELATIONSHIPS: THE ETHNOGRAPHY OF LEGAL DISCOURSE 82-125 (1990) (discussing the contracts between actual variability among judges and the popular notion of judicial neutrality and consistency); Judith Resnik, *On the Bias: Feminist Reconsiderations of the Aspirations for Our Judges*, 61 S. CAL. L. REV. 1877 (1988) (discussing the aspiration of judicial impartiality and concluding that it cannot be achieved). Discretionary decisionmaking is invariably influenced by race. See Flag, *supra* note 14, at 983-85.

113. See Jennifer M. Russell, *The Race/Class Conundrum and the Pursuit of Individualism in the Making of Social Policy*, 46 HASTINGS L.J. 1353, 1445 (1995).

114. See John O. Calmore, *Racialized Space and the Culture of Segregation: "Hewing a Stone of Hope from a Mountain of Despair,"* 143 U. PA. L. REV. 1233 (1995).

115. See Russell, *supra* note 113, at 1447; Lucy A. Williams, *The Ideology of Division: Behavior Modification Welfare Reform Proposals*, 102 YALE L.J. 719, 743 (1992); see also Paul Butler, *Willie Horton Scares All White People: Poor, Middle Income, Rich* (materials prepared for the Conference on Critical Networks, Mar. 1995) (on file with author).

as men and women, they are perceived differently. Poor black men are generally depicted as delinquents who are inadequately present in the home because they are in the street or in prison;¹¹⁶ they are encouraged to spend more time with their families and provide more support.¹¹⁷ Poor black women are generally depicted as unmarried mothers and high school dropouts; they are encouraged to leave the home for school or work through learnfare or workfare programs. Women are home-based and domestic, while men are “active” in the outside world. Paradoxically, then, while both images traditionally have had positive attributes when applied to whites — women are nurturing, men are rational — they are almost completely negative when applied to poor black men and women.

There is an anger toward welfare mothers for staying at home and taking care of their children, and toward poor fathers for allegedly deserting their children. While this anger conforms to traditional notions of the male role, it contradicts traditional women’s roles: women are supposed to stay home and take care of children. Ironically, the purpose of the mother’s pensions laws, and, at least in part for its first thirty years, of AFDC, was to enable women to stay at home with their children and remain homemakers.¹¹⁸ The state provided financial aid as a substitute for having a man in the house, or for women leaving the house to work. It was only as more blacks — and unmarried women generally — received welfare that the expectations began to change.

Black women have always worked outside of the home.¹¹⁹ Establishing programs such as workfare simply institutionalizes images of black women as workers, rather than mothers. It also punishes black women for seeking to enjoy some of the preroga-

116. Young black men are incarcerated at a much higher rate than whites, given comparable numbers of crimes committed. See MARC MAUER, *YOUNG BLACK MEN & THE CRIMINAL JUSTICE SYSTEM: A GROWING NATIONAL PROBLEM* 3 (The Sentencing Project 1995) (study found that one in four black men between the ages of 20 and 29 are either in jail, in prison, or on probation).

117. Black male filmmakers celebrate the importance of fathers. See Michele Wallace, *Boyz N the Hood and Jungle Fever*, in *BLACK POPULAR CULTURE* 123, 125 (Gina Dent ed., 1992).

118. See Sugarman, *supra* note 66, at 2550; *supra* notes 29-32.

119. See JACQUELINE JONES, *LABOR OF LOVE, LABOR OF SORROW: BLACK WOMEN, WORK, AND THE FAMILY FROM SLAVERY TO THE PRESENT* (1985); PHYLLIS PALMER, *DOMESTICITY AND DIRT: HOUSEWIVES AND DOMESTIC SERVANTS IN THE UNITED STATES, 1920-1945* (1989). See generally Linda Ammons, *Mules, Madonnas, Babies, Bathwater, Racial Images, and Stereotypes: The African-American Woman and the Battered Woman Syndrome*, 1995 WIS. L. REV. 1003 (discussing historical images of black women); Regina Austin, *Sapphire Bound!*, 1989 WIS. L. REV. 539.

tives that white women have traditionally enjoyed, such as the luxury of not working because of the necessity of caring for children.¹²⁰

Within the ideology of the cult of domesticity, men are the breadwinners. Indeed, in defining their roles, this is how men view themselves.¹²¹ Again, however, like black women, black men take their places outside of these traditional images. The child support cooperation requirement treats all men in a fashion that is consistent with an image of noncooperation and abandonment. This disparaging image of black men has deep historical roots. The dominant negative cultural image of the black man is as the savage and criminal beast,¹²² and this image is highly successful in influencing public policy.¹²³ In the media, black men are portrayed as dangerous, thereby influencing "legislators to seek immediate control of young Black men."¹²⁴ Similarly, police profiles tend to single out black men as potential, or actual, criminals.¹²⁵

120. Indeed, as Dorothy Roberts points out, welfare stigmatizes all single mothers because they are too similar to black women. See Dorothy Roberts, *Racism and Patriarchy in the Meaning of Motherhood*, 1 AM. U. J. GENDER & L. 1, 26-27 (1993). As increasing numbers of mothers are forced to work outside the home, it seems unfair to many to support welfare mothers who stay at home. See Mink, *supra* note 38, at 882; Pappas, *supra* note 25, at 1311.

121. One recent poll found that a large percentage of both men and women link masculinity to acting as a good provider. See Carol Iannone, *Endangered Species?*, NATL. REV., Sept. 25, 1995, at 91, 92 (reviewing ELLIS COSE, A MAN'S WORLD: HOW REAL IS MALE PRIVILEGE — AND HOW HIGH IS ITS PRICE? (1995)). In another poll, almost half of the respondents believed that women should remain at home, while men should be breadwinners. See *Poll Finds Dissatisfaction with Politics, Country's Future*, DALLAS MORNING NEWS, Nov. 5, 1995, at 11A, available in LEXIS, News Library, DALNWS File.

122. See Cheryl I. Harris, *Myths of Race and Gender in the Trials of O.J. Simpson and Susan Smith — Spectacles of Our Times*, 35 WASHBURN L.J. 225, 229 n.12 (1996); Lawrence Vogelman, *The Big Black Man Syndrome: The Rodney King Trial and the Use of Racial Stereotypes in the Courtroom*, 20 FORDHAM URB. L.J. 571, 573 n.5 (1993). For discussion of this image historically, see William W. Fisher III, *Ideology and Imagery in the Law of Slavery*, 68 CHL.-KENT L. REV. 1051, 1058 (1993).

123. As my colleague Paul Butler points out, "The image in the white imagination of the black man as a criminal is so strong that it is too successful at achieving its goal." Butler, *supra* note 115, at 646.

124. Dwight L. Greene, *Naughty by Nature: Black Male Joyriding — Is Everything Gonna Be Alright?*, 4 COLUM. J. GENDER & L. 73, 84 (1994); see Adeno Addis, *Recycling in Hell*, 67 TUL. L. REV. 2253, 2263 (1993) ("The media paints a picture of the black criminal threatening the innocence of white America. Indeed, 'crime' has virtually become a metaphor to describe young black men."); Richard Delgado, *Rodrigo's Eighth Chronicle: Black Crime, White Fears — On the Social Construction of Threat*, 80 VA. L. REV. 503, 514 (1994).

125. See Cunningham, *supra* note 14, at 1301 n.8 (discussing his client's race as a factor in his arrest); Davis, *supra* note 12, at 1661 (discussing race discrimination in criminal procedure); Margaret M. Russell, *Entering Great America: Reflections on Race and the Convergence of Progressive Legal Theory and Practice*, 43 HASTINGS L.J. 749, 762-66 (1992); Henry Louis Gates, Jr., *Thirteen Ways of Looking at a Black Man*, NEW YORKER, Oct. 23, 1995, at 56, 58-59 (discussing the experiences of African-American men stopped by police simply because of their race).

Maya Angelou explains that the caricatured black man, presented in minstrel shows, was someone “‘devoid of all sensibilities and sensitivities. [Minstrel shows] minimized and diminished the possibility of familial love.’”¹²⁶ Historically, black men who were slaves were unable to enter into binding marriages; they were frequently separated from their children with little thought.¹²⁷ Unlike white children, whose status was determined by their father, the status of black children was determined by their mother.¹²⁸ It is the evocation of this caricature, that black men do not care about their children, that appears to inform efforts at child support enforcement. The reality behind this rhetoric contradicts the caricatured image.

III. CHANGING REPRESENTATION

Race is certainly relevant to advocacy efforts writ large — that is, race affects how welfare is reformed. If only divorced or widowed white women received welfare, we might expect welfare to look quite different.¹²⁹ The very term “welfare” has now become associated with race, notwithstanding the many forms of welfare other than AFDC sponsored by the government. It is, consequently, important to use race in advocacy efforts to show how legislation affects blacks disproportionately, and how it reinforces negative images of blacks while using those same negative images to justify new and punitive requirements. There is a need to acknowledge the impact of these negative stereotypes so that they can be confronted in the hope of changing policy.

On the individual representation level, however, the relevance of race appears more questionable. In the child support area, the plaintiff’s race does not affect the applicability of the cooperation requirement, even though it may have been highly relevant to the existence of the requirement itself. On the other hand, race may affect the caseworker’s perception of her “client,” and it certainly affects the income potential of the father. In this area, it is important for advocates to be aware of how race affects the representation process, and for advocates to use race to challenge the legal

126. Gates, *supra* note 125, at 62 (quoting Maya Angelou).

127. See, e.g., Anthony R. Chase, *Race, Culture, and Contract Law: From the Cottonfield to the Courtroom*, 28 CONN. L. REV. 1, 23 (1995); Twila L. Perry, *Family Values, Race, Feminism and Public Policy*, 36 SANTA CLARA L. REV. 345, 347 (1996).

128. See Roberts, *supra* note 70, at 226.

129. See Slaughter, *supra* note 65, at 2167 n.34. While earlier forms of welfare also had morality requirements, they were eased during the late 1960s and early 1970s, only to be reimposed as welfare rolls have become increasingly black.

requirements placed on their clients. The difficult issues concern the relevance of race and deciding how to use it in the advocacy process.

Thus, fathers' advocates could show that their client's inability to pay child support is based, at least in part, on employment discrimination against blacks; and mothers' advocates could show how the cooperation requirement reinforces negative images of black motherhood. We need to expand the narratives available to both mothers and fathers. When race may be relevant, the advocate has the obligation to think through the implications of making race-based claims a basis for arguments on the client's behalf, and has a corresponding obligation to discuss the utility and consequences of making such claims.

In exploring race consciousness, it is useful to think about Ruth Frankenberg's three paradigms of race.¹³⁰ Frankenberg developed her paradigms through interviews with white women to determine how they thought about race in their own lives. She argues that white women must recognize how race shapes their lives. Frankenberg found that white women were located within a set of discursive paradigms of race.¹³¹ She defines the first, "essentialist racism," as an attitude in which racial difference means inequality,¹³² while the second, "color/blind racism" ignores differences based on race;¹³³ the third is "race cognizance," pursuant to which paying attention to racial differences becomes, itself, an antiracist strategy. Through race cognizance, whites self-consciously recognize "that race makes a difference in people's lives and that racism makes a difference in U.S. society,"¹³⁴ but do not believe that racial difference leads to inferiority.¹³⁵ The paradigm of race cognizance, or consciousness, provides a useful perspective on how to recognize race and its attendant differences without using these differences as a subordinating tool; thinking carefully about the relevance of race need not lead to either racism or essentialism.

130. See FRANKENBERG, *supra* note 14, at 138-40. Professor Martha Mahoney also uses Frankenberg's paradigm. See Martha R. Mahoney, *Segregation, Whiteness, and Transformation*, 143 U. PA. L. REV. 1659, 1666-67 (1995).

131. See FRANKENBERG, *supra* note 14, at 238-39.

132. See *id.* at 14, 139.

133. See *id.* This second paradigm parallels what Gary Peller terms the "integrationist" approach. See Peller, *supra* note 180, at 759-60; see also Flagg, *supra* note 14, at 953-56.

134. FRANKENBERG, *supra* note 14, at 159. Professor Flagg advocates a somewhat similar approach, which involves "a deliberate and thorough-going skepticism regarding the race neutrality of facially neutral criteria of decision." Flagg, *supra* note 14, at 977.

135. For a brief discussion of how race cognizance can empower whites, see Patricia Hill Collins, Book Review, 20 SIGNS 728, 731 (1995).

A. Race-Based Claims

Thinking about the relevance of race suggests how advocates can develop alternative sets of arguments to supplement the existing legal stories.¹³⁶ Race cognizance opens up additional case theories and strategies.

1. Fathers

Requiring poor fathers to pay child support is, at best, a questionable enterprise, not only because they may be unable to do so, but also because, even if they are able to do so, the amount of money spent in collecting the support may exceed the amount collected. In their child support guidelines, most states set a minimum amount that all noncustodial parents must pay, regardless of their employment status. Such minimums are admirable attempts to ensure that fathers take responsibility, yet they do not account for the realities of involuntarily poor fathers.¹³⁷ As has already been discussed, poor fathers often provide support under-the-table when they are able to do so. Fathers may provide such support in the form of money, they may provide diapers whenever they are able to do so, or they may participate in other informal support processes.¹³⁸ Given the existence of an underground economy, pursuant to which diapers might be discounted or traded for services, the fathers might not be able to provide the same financial equivalents if they were subject to strictly financially based child support orders.

On the other hand, I do not advocate allowing fathers to evade responsibility for their children. Of course, when the father has been completely uninvolved in the child's life, and has had no relationship with the mother after the child's conception, he perhaps

136. For other examples, see Cunningham, *supra* note 14; Miller, *supra* note 14, at 542, 545 ("By starting with race, we can see a picture of the case that is very different from the one a traditionalist would see. . . . Thinking about the incident . . . as a racial encounter changes how we look at legal elements . . .").

137. For example, almost two-thirds of the fathers who would be affected by Congressional legislation that would deny means-tested benefits to fathers who are more than two months delinquent in child support were unemployed; 50% of the affected fathers were receiving food stamps or were living in public housing. See Elaine Sorensen, *Tapping "Dead-beat" Dads No Cure-All for Poor Kids*, PHOENIX GAZETTE, November 21, 1995 at B7, available in LEXIS, News Library, PHNXGZ File.

138. My clients frequently explained to me that their children's fathers would leave "Pampers" — their term for diapers as well as other child-related objects — whenever they could afford to do so. Cf. EDIN, SINGLE MOTHERS AND ABSENT FATHERS, *supra* note 95, at 22 ("In our interviews with mothers of younger children, we found that Pampers (a generic term used to describe all disposable diapers) were a universally accepted symbolic expression of fatherhood for poor absentee fathers.").

should not be accountable, and correspondingly, the mother should not be responsible for providing information about him. In an overwhelming number of families, however, this will not be true because the fathers will be involved with their children¹³⁹ and the mother should be expected to be candid with her caseworker. If the father has been involved with the mother, with the children, or both, then it seems fair to ask him to contribute in some way. Perhaps he could care for the children while the mother works, thereby saving child care costs, or perhaps he should contribute financially, but not accumulate arrearages if he is unemployed for good cause.¹⁴⁰ Requiring a financial contribution, however, may not be the most appropriate method in all child support cases.¹⁴¹

An alternative suggestion is that child support be sought from noncustodial parents only while they are working. While this might appear to be a disincentive to holding a job, such a perspective minimizes the reasons that the parent holds a job. Only a tiny minority of men would rather be, and can afford to be, unemployed than pay child support. And, under the current system, there are mechanisms for dealing with fathers who become voluntarily unemployed so that they can evade child support responsibilities.¹⁴² Collection efforts need to distinguish between fathers who do all that they can, and fathers who are, literally, seeking to avoid responsibility. This becomes particularly important within black families, which have a

139. One study found that most unwed fathers visit their children until age two. The study also found that only 12% of unwed black fathers versus 37% of white fathers and 30% of Latino fathers never visited their children. See Sheryl Stolberg, *Teen Dads Who Didn't Run Away*, L.A. TIMES, Mar. 12, 1996, at A1; Robert I. Lerman, *A National Profile of Young Unwed Fathers*, in YOUNG UNWED FATHERS, *supra*, at 27, 46. For a discussion of how fathers negotiate informal support mechanisms, see Mercer L. Sullivan, *Young Fathers and Parenting in Two Inner-City Neighborhoods*, in YOUNG UNWED FATHERS: CHANGING ROLES AND EMERGING POLICIES 52 (Robert I. Lerman & Theodore J. Oons eds., 1993); Susan Chira, *Novel Idea in Welfare Plan: Helping Children by Helping Their Fathers*, N.Y. TIMES, Mar. 30, 1994, at B6. Professor Lerman reports: "[W]e see two broad patterns of fathering. Half or more of unwed fathers live near their children, visit them often, and make child support payments. Most of the remaining group only rarely visit and usually make no payment whatever." *Id.* at 46.

140. This is one of the solutions also suggested by Edin. See EDIN, SINGLE MOTHERS AND ABSENT FATHERS, *supra* note 95, at 27-28. Even if 100% of child support were collected, welfare would be reduced by only 25%. See Bragg, *supra* note 95, at D18 (quoting Professor Irwin Garfinkel).

141. Edin reports that she knows of no studies investigating whether fathers who make relatively small, covert contributions do ultimately make larger contributions as they earn more, but that her interviews indicated that such fathers were more likely to contribute at a later point than fathers who made no contributions at all. See EDIN, SINGLE MOTHERS AND ABSENT FATHERS, *supra* note 95, at 23. When the father has been violent, financial contributions may be the only appropriate method of state-supported involvement.

142. Most men will probably not quit their jobs because they are forced to pay child support. See Chambers, *supra* note 26, at 2596.

much higher rate of single-mother households than white families.¹⁴³

2. Mothers

When it comes to issues of child support, a bottom-line assumption must be that welfare recipients are cooperating. The problems with child support collection efforts go far beyond issues of cooperation, as evidenced by the lawsuits against collection agencies and the studies on the amount of cooperation. If the women are not cooperating, then there may well be good cause for failing to do so.¹⁴⁴ The actual good cause may vary, from domestic violence to financial concerns. For example, if they are receiving money under-the-table, which exceeds the extra fifty dollars available through a child support order, then they clearly will not want to relinquish such funds. And, given the realities of low welfare grants, this supplemental support may mean the difference between making it and not making it.¹⁴⁵ Or, they may believe that formal procedures would adversely affect the father-child relationship and thus be unwilling to cooperate.¹⁴⁶ Until the level of welfare grants, or the pass-through amount, is increased, perhaps "good cause" should be redefined to include financial necessity, thus encouraging recipients to provide information about absent fathers without jeopardizing the additional income.

Ideally, custodial parents who receive welfare should be able to decide whether to pursue fathers for child support.¹⁴⁷ Cooperation

143. See Paula C. Johnson, *At the Intersection of Injustice: Experiences of African American Women in Crime and Sentencing*, 4 AM. U. J. GENDER & L. 1, 43 (1995) (reporting that 44% of African American families are headed by single mothers, while single mothers head only 13% of white families).

144. Kathryn Edin asserts that welfare recipients fail to comply with grant requirements only to ensure their day-to-day survival. See EDIN, SINGLE MOTHERS AND ABSENT FATHERS, *supra* note 95, at 14.

145. Indeed, Edin found that not reporting support was a "rational strategy" because some women did receive more than the \$50 pass-through; some women knew that the father would be unable to maintain regular child support payments; and some women believed that this form of payment improved the relationship between father and child. See EDIN, SINGLE MOTHERS AND ABSENT FATHERS, *supra* note 95, at 14-15.

146. In the story told by Lisa Kelly, the custodial parent is very worried about this outcome. See Kelly, *supra* note 43, at 250-56.

147. See Deborah Harris, *Child Support for Welfare Families: Family Policy Trapped in its Own Rhetoric*, 16 N.Y.U. REV. L. & SOC. CHANGE 619, 656 (1987-88) ("One alternative . . . is to make child support enforcement voluntary for welfare mothers. . . . It seems reasonable to suppose that welfare mothers are just as able as nonwelfare mothers to decide whether [it is worthwhile to obtain a child support order]."). While giving women this choice does not address issues of fiscal responsibility, the amount of money foregone by the state would presumably be negligible, especially when compared with the administrative costs of collecting the support.

would no longer be mandatory, but voluntary. Wealthier women certainly have the choice of whether to pursue child support — it seems only fair to allow poor women to have the same option. While wealthier women do not need welfare grants, and thus do not require the same amount of public support as poorer women, they nonetheless receive some forms of public welfare, albeit in differently titled forms.¹⁴⁸ Allowing recipient women the opportunity to make this choice would give them an appropriate level of control over their relationship with the fathers and with the welfare system.

These welfare reforms would affect all poor women, black and white, and thus, as discussed at the beginning of the essay, may not appear “raced.” Because, however, images of black recipients of welfare seem to motivate welfare reform, and given the impact of welfare reform on the black community, a race-conscious lawyering strategy may be warranted. A strategy is race conscious if it recognizes how welfare policy affects the black community; the “welfare queen” image is black, not white, and legal narratives of blacks that do not conform serve to challenge that image and force courts to confront the realities that are obscured by rhetoric.

B. *The Relevance of Race for Representation*

Race consciousness is currently left out of professional responsibility models¹⁴⁹ and the lawyer-client representation process.¹⁵⁰ When race is obviously relevant to the representation, as with an African-American attorney representing the Ku Klux Klan, the role

148. For example, the home mortgage deduction, child care credits, and social security. See GORDON, *supra* note 22, at 4-6; Matthews, *supra* note 22, at 41.

149. See, e.g., Alfieri, *supra* note 20, at 1321 (noting that current ethical codes affirm a “colorblind vision of practice susceptible to racialized forms of narrative”); Barnes, *supra* note 19, at 793 (same). Sheri Johnson argues that the legal profession needs a “race-shield” law to prevent the negative use of racial images. For further discussion of her proposal, see *infra* note 165.

The one place that race is beginning to appear in professional responsibility rules is in a prohibition against discrimination that has been adopted by approximately seventeen jurisdictions. See Andrew E. Taslitz & Sharon Styles-Anderson, *Still Officers of the Court: Why the First Amendment is No Bar to Challenging Racism, Sexism and Ethnic Bias in the Legal Profession*, 9 GEO. J. LEGAL ETHICS 781, 781-82 (1996). Colorado, Idaho, and Texas prohibit conduct or words that show bias or prejudice against any individual involved in the relevant legal proceedings. See COLO. RULES OF PROFESSIONAL CONDUCT Rule 1.2(f) (1996); IDAHO RULES OF PROFESSIONAL CONDUCT Rule 4.4(a) (1996); TEX. RULES OF PROFESSIONAL CONDUCT Rule 5.08 (1995).

The professional responsibility rules developed to regulate a predominantly white profession; it is then no surprise that they lack race consciousness. Cf. Naomi R. Cahn, *A Preliminary Feminist Critique of Legal Ethics*, 4 GEO. J. LEGAL ETHICS 23 (1990).

150. See Anthony V. Alfieri, *The Politics of Clinical Knowledge*, 35 N.Y.L. SCH. L. REV. 7, 16-18 (1990) (discussing how race is left out of a prominent text on the lawyering process). For suggestions on how to make students more conscious of such issues, see Hing, *supra* note 16.

that race should have with respect to any aspect of the case is highly contested.¹⁵¹ Does an African-American attorney have a special obligation not to take such cases, or does she have an obligation to represent the otherwise unrepresented?¹⁵² While the lack of explicit condonation of, or prohibition on, race consciousness permits lawyers and clients to decide on the appropriate role of race in any particular representation, there is little consensus on frameworks¹⁵³ for lawyers who need to consider race, much less on whether race consciousness is beneficial in any context. Should lawyers think about race, especially when the case is not about explicitly racialized issues? I offer below some tentative thoughts on the advisability of race-conscious lawyering in certain contexts.

1. *Professional Responsibility Models*

Rules of professional responsibility generally privilege the client's interests over any other interests, including those of the lawyer, third parties, or communities.¹⁵⁴ If the goals of the representation are set by the client's needs, it nonetheless remains the lawyer's responsibility, pursuant to traditional conceptions of the lawyer's role, to develop and implement the case strategy.¹⁵⁵ Although the rules allow lawyers to take into account moral concerns beyond those explicitly raised by the client, there is no requirement that this process occur. Scholarly justifications and admonitions for lawyers to consider the "common good" range from a belief that this directly benefits the individual, to more direct appeals to a generalized morality,¹⁵⁶ to a recognition of the scarce

151. See David B. Wilkins, *Race, Ethics, and the First Amendment: Should a Black Lawyer Represent the Ku Klux Klan?*, 63 GEO. WASH. L. REV. 1030 (1995).

152. See Wilkins, *supra* note 151; David B. Wilkins, *Two Paths to the Mountaintop? The Role of Legal Education in Shaping the Values of Black Corporate Lawyers*, 45 STAN. L. REV. 1981 (1993).

153. See, e.g., Anthony Alfieri, *Colloquy: Race-ing Legal Ethics*, 96 COLUM. L. REV. 800 (1996); Barnes, *supra* note 19; Johnson, *supra* note 20.

154. For comments on this, see Alfieri, *supra* note 153; Cahn, *supra* note 149; Bill Ong Hing, *In the Interest of Racial Harmony: Revisiting the Lawyer's Duty to Work for the Common Good*, 47 STAN. L. REV. 901 (1995); David Luban, *The Social Responsibilities of Lawyers: A Green Perspective*, 63 GEO. WASH. L. REV. 955 (1995); Peter Margulies, "Who Are You to Tell Me That?": *Attorney-Client Deliberation Regarding Nonlegal Issues and the Interests of Nonclients*, 68 N.C. L. REV. 213 (1990); William H. Simon, *Ethical Discretion in Lawyering*, 101 HARV. L. REV. 1083 (1988).

155. For a discussion of this responsibility, see DAVID LUBAN, *LAWYERS AND JUSTICE: AN ETHICAL STUDY* 159-60 (1988).

156. See Hing, *supra* note 154; Thomas D. Morgan & Robert W. Tuttle, *Legal Representation in a Pluralist Society*, 63 GEO. WASH. L. REV. 984, 998 (1995) (arguing that the law provides a "shared moral standard to which both lawyer and client are properly held morally accountable").

resources available within some communities.¹⁵⁷ Calls for client-centered lawyering try to place the client more directly in this process so that the lawyer listens to the client in conducting the representation. Ultimately, however, while power is constantly negotiated,¹⁵⁸ it remains the responsibility of the lawyer to raise these concerns when the client does not do so. This section briefly explores the potential conflicts between client, community, and lawyer in the representation envisioned by the traditional model of legal ethics.

a. Zealous Advocacy, Part I: Community vs. Client Interests. Much of the controversy over racialized representation has occurred in discussions of whether to privilege the "common good" over an individual's putative interest in cases that clearly present the opportunity to make arguments based on race.¹⁵⁹ Thus, for example, in exploring the ethical obligations of lawyers in cases involving black-on-white violence, Professor Tony Alfieri suggests that criminal defense attorneys forego use of certain racialized stories of deviance in order to prevent the demeaning of client and community, even when such stories might, in the short run, help the client by preventing conviction.¹⁶⁰ By telling such stories, he believes, lawyers run the risk of furthering the subordination of racial minorities. In response, Professor Robin Barnes argues that it is important for defense attorneys to use whatever stories will most likely acquit their clients; at worst, by using potentially subordinating narratives, lawyers run the risk of simply replicating existing hierarchies.¹⁶¹

157. See Paul R. Tremblay, *Toward a Community-Based Ethic for Legal Services Practice*, 37 UCLA L. REV. 1101, 1102-04 (1990).

158. See William L.F. Felstiner & Austin Sarat, *Enactments of Power: Negotiating Reality and Responsibility in Lawyer-Client Interactions*, 77 CORNELL L. REV. 1447, 1447-50 (1992); Lucie E. White, *Seeking " . . . The Faces of Otherness . . . ": A Response to Professors Sarat, Felstiner, and Cahn*, 77 CORNELL L. REV. 1499, 1501-02 (1992).

159. In addition to those scholars discussed in the text, see Hing, *supra* note 154 (suggesting that lawyers be required to counsel their clients that certain courses of action might exacerbate racial tension in the community).

In examining how a lawyer's own affiliation affects her representation, David Wilkins notes that questions about the "relationship among professional role, group affiliation, and personal morality arise in many more mundane areas of legal practice. Consider, for example, a black lawyer defending a company accused of race discrimination, or a woman defending an accused rapist, or a Korean-American lawyer negotiating a joint venture with a Korean company." Wilkins, *supra* note 151, at 1068. Even in these examples, however, there is a potentially clear conflict based on race or sex. For a discussion of how a feminist can defend a rapist, see Abbe Smith, *Rosie O'Neill Goes to Law School: The Clinical Education of the Sensitive New Age Public Defender*, 28 HARV. C.R.-C.L. L. REV. 1, 54-59 (1993).

160. See Alfieri, *supra* note 20.

161. See Barnes, *supra* note 19.

Underlying this debate, however, is an implicit acknowledgment that there will be actual conflicts between individual interests and the common good.¹⁶² Resolving these conflicts depends on whose story is privileged: the lawyer's (or client's) vision of a common good, the lawyer's (or client's) vision of what is best for the individual, or the profession's vision of what is best for society, regardless of the views of the lawyer or client.¹⁶³ Conflicts between the common good and individual good are highlighted in racialized conflicts because the stories that could be told in such contexts do have the potential to perpetuate stereotypes and inflame interethnic tensions. Recommendations that attorneys refrain from using these stereotypes are based on a perceived harm to the community, whatever the cost or benefit to the individual client; the counterarguments allege that the interests of the individual client must be privileged.

For my purposes, the interesting aspect of these arguments is the focus on race consciousness. There is an underlying requirement that the attorneys think about the raced, and communal, impact of their advocacy. This use of race cognizance in per se racialized conflicts should lead to questions about the importance of race consciousness in other types of cases, when race could be, but is not explicitly, an issue.

Perhaps we should treat many more cases as involving racial tensions and thus develop rules that apply more universally, rather than requiring lawyers to decide whether their cases do involve such tensions, and then applying special rules to them. Under these circumstances, what we can hope for is that privileging one story is a deliberate step, undertaken by lawyer and client in consultation with each other, and perhaps with the relevant communities.¹⁶⁴ How this issue is resolved in any particular representation should, perhaps, not be subject to definitive rules, other than a requirement that the lawyer consider the impact on a community of her use of racialized images and discuss this assessment with the client.¹⁶⁵

162. For an early recognition of this conflict, see Derrick A. Bell, Jr., *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 *YALE L.J.* 470 (1976). These conflicts are not, of course, inevitable. They do, however, implicate the issue of the lawyer's role as moral judge or zealous, single-minded advocate.

163. See Hing, *supra* note 154, at 935-36 (discussing potential conflicts between a client-centered approach and his racialized-tension approach).

164. See generally GERALD P. LÓPEZ, *REBELLIOUS LAWYERING: ONE CHICANO'S VISION OF PROGRESSIVE LAW PRACTICE* (1992).

165. Perhaps racial stereotyping should be banned, except when it is used as a defensive shield. This policy would not, of course, preclude using statistics to show the impact of certain practices, as occurs in disparate impact employment discrimination litigation. See 42

b. Zealous Advocacy, Part II: Lawyer vs. Client. The decision of whether to raise moral concerns that go beyond the client's actual legal needs depends on the lawyer's actions. For example, will a lawyer choose to discuss the impact of a client's actions on her community, or will the lawyer choose to pursue nonadversarial techniques?¹⁶⁶ That is, the very problem of whether to privilege the client or larger social goals must be solved by the lawyer. As William Simon points out, "[t]he Dark Secret of Progressive Lawyering is that effective lawyers cannot avoid making judgments in terms of their own values and influencing their clients to adopt those judgments."¹⁶⁷ The lawyer chooses her clients, and then chooses what advice to offer, and how to conduct the representation.¹⁶⁸

On the other hand, the lawyer, at least pursuant to the professional responsibility rules, is supposed to separate her interests from those of her client scrupulously. The Model Rules provide that "[a] lawyer shall not represent a client if the representation of that client may be materially limited by the . . . lawyer's own interests"¹⁶⁹

The lawyer's perceived responsibilities to entities other than her client may, however, "limit" the representation¹⁷⁰ and potentially conflict with the client's goals.¹⁷¹ How can a lawyer accommodate her own views and those of her client? There are three answers to this dilemma: the lawyer can disclose her potential conflicts and obtain the client's consent to continued representation, she can withdraw completely, or she can advocate for changes in the rules.

U.S.C. § 2000e-2(k) (1994) (defining the burden of proof in disparate impact cases); *Griggs v. Duke Power Co.*, 401 U.S. 424, 431-33 (1971); see also GARBUS, *supra* note 36, at 155 (using a race discrimination claim in welfare rights case); Dorothy E. Roberts, *Punishing Drug Addicts Who Have Babies: Women of Color, Equality, and the Right of Privacy*, 104 HARV. L. REV. 1419 (1991) (addressing race discrimination claims).

166. Professor Hing received varying responses from lawyers in response to this question. See Hing, *supra* note 154, at 922-27.

167. William H. Simon, *The Dark Secret of Progressive Lawyering: A Comment on Poverty Law Scholarship in the Post-Modern, Post-Reagan Era*, 48 U. MIAMI L. REV. 1099, 1102 (1994); see also Naomi R. Cahn, *Inconsistent Stories*, 81 GEO. L.J. 2475, 2490-91 (1993).

168. See Simon, *supra* note 167, at 1102-03. For a critique of this model that emphasizes the impossibility of creating separate domains for lawyer and client decisionmaking, see Alex J. Hurder, *Negotiating the Lawyer-Client Relationship: A Search for Equality and Collaboration*, 44 BUFF. L. REV. 71 (1996).

169. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.7(b) (1987); see also DOUGLAS E. ROSENTHAL, *LAWYER AND CLIENT: WHO'S IN CHARGE?* 95-116 (1972) (discussing conflicting interests of lawyers and clients); Cahn, *supra* note 149, at 36-37 (1990) (discussing the prohibition against conflicts of interest); Cahn, *supra* note 167, at 2522-23; Felstiner & Sarat, *supra* note 158 (discussing conflicting goals of lawyers and clients).

170. See Wilkins, *supra* note 152, at 1984 (proposing that successful blacks have obligation to consider the interests of their communities).

171. See Cahn, *supra* note 167, at 2523.

The problem, under existing rules, is deciding on the "materiality" of the possible conflict; disclosure or withdrawal is otherwise unnecessary and unwarranted. Nonetheless, regardless of whether the rules would label a conflict as material, the lawyer at least should discuss any potentially raced aspects of the representation, including the lawyer's own perspective on the common good versus individual goals. Pursuing race consciousness makes explicit one form of power that the lawyer enjoys. It also expands the options of legal arguments that are available to the client and makes the client better informed about her lawyer's decisionmaking.

2. Representation Process

It is a truism that race and other identity characteristics affect the lawyer-client relationship, although it is less clear *how* they do so. Differences between the lawyer and the client may have an impact on the rapport between lawyer and client,¹⁷² or even on the abilities of the lawyer and client to understand each other.¹⁷³ The language used by lawyers and clients may differ because of race or class.¹⁷⁴ They may also affect the client's attitude toward her case simply because she feels more comfortable with a lawyer of the same race. Race consciousness is thus important for both the lawyer and the client, regardless of the substantive nature of the representation.

3. Litigation

In crafting complaints and other court documents, in developing a case strategy, what role should race play?¹⁷⁵ Race certainly plays a role in how people are perceived in the courtroom.¹⁷⁶ Legal ac-

172. See Hing, *supra* note 16, at 1809.

173. See Cunningham, *supra* note 14; Leslie G. Espinoza, *Legal Narratives, Therapeutic Narratives: The Invisibility and Omnipresence of Race & Gender*, 95 MICH. L. REV. — (1997).

174. See, e.g., JOHN M. CONLEY & WILLIAM R. O'BARR, *RULES VERSUS RELATIONSHIPS: THE ETHNOGRAPHY OF LEGAL DISCOURSE* (1990); Brian E. Albrecht, *You Are How You Speak; Dialect Experts Discuss Complexity Within Language*, THE PLAIN DEALER (Cleveland), July 1, 1996, at 1B.

175. For a compelling article on how better to draft complaints in civil rights cases, see Herbert A. Eastman, *Speaking Truth to Power: The Language of Civil Rights Litigators*, 104 YALE L.J. 763 (1995). For discussion of case strategy, see Miller, *supra* note 14.

176. See Michelle Jacobs, *Legitimacy and the Power Game*, 1 CLINICAL L. REV. 187 (1994) (recounting incidents of racism against her in the courthouse, and her students' reactions). The 12 race bias studies similarly show the significance of race. See *supra* note 12. Sex also plays a role. Karen Czapanskiy notes that women litigants represented by female lawyers can be disadvantaged because of bias against the lawyers. See Karen Czapanskiy, *Domestic Violence, the Family, and the Lawyering Process: Lessons from Studies on Gender Bias in the Courts*, 27 FAM. L.Q. 247, 249 (1993).

tors will perceive a white lawyer with a white client differently than a black lawyer with a black client.

Beyond that, however, lawyers must struggle with whether, when, and how to mention race. As discussed above, challenges to the cooperation requirement need not mention race, and, indeed, most court decisions do not. When race is not explicitly an issue, as in the child support cooperation cases, the question is whether and how to make it an issue. The plaintiff's race could easily make its first appearance in the initial complaint. While the defendant will probably know the plaintiff's race, a judge may not see the plaintiff until the trial, so the judge will not be conscious of any race issues.¹⁷⁷

Regardless of how race figures in the complaint, a lawyer must decide how to use race at trial. Race could become an issue, for example, by calling witnesses who will testify to customs in poor black communities, or by showing the disparate impact of race on poor black women.¹⁷⁸ Given the many different ways that attorneys can define and construct the relevant stories, these racialized choices become critical to the client's case.¹⁷⁹

Most others who have considered the importance of race in developing the client's case have focused on criminal encounters, such as African-American men stopped by white police, or whites who commit crimes against blacks. Race is already visible in the differences between the victim and defendant.¹⁸⁰ It is outside of these

177. By this I mean that the judge may not question any assumptions that she makes about the plaintiff's race. Omitting race results in a "seemingly neutral" story. See Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411, 2422 (1989).

178. See Roberts, *supra* note 165.

179. See Cunningham, *supra* note 14 (discussing how the use of race as a lens through which to develop case theory completely changes the case theory); Miller, *supra* note 14, at 545. Binny Miller later explains:

At one level, the fact that [the client] is black and the security guards are white makes the encounter a racial incident. We do not need case theory to see this encounter as having something to do with race, given the power of racial images in our society. But once we highlight the role of race as a critical factor, then the story comes into sharper focus.

Id. at 542.

180. In addition to those sources already cited, see Jody D. Armour, *Race Ipsa Loquitur: Of Reasonable Racists, Intelligent Bayesians, and Involuntary Negrophobes*, 46 STAN. L. REV. 781 (1994); Paul Butler, *Racially Based Jury Nullification: Black Power in the Criminal Justice System*, 105 YALE L.J. 677 (1995). Gary Peller begins an article on racism and criminal justice by observing that "[c]riminal law is an obvious topic for a critical analysis of racial power." Gary Peller, *Criminal Law, Race, and the Ideology of Bias: Transcending the Critical Tools of the Sixties*, 67 TUL. L. REV. 2231, 2231 (1993). Sheri Johnson suggests a general prohibition against the use of racial imagery in the courtroom, albeit with exceptions such as for race-based motives, or where racial imagery is "necessary to the accurate determination of the truth of the charges against the defendant(s)." Johnson, *supra* note 20, at 1799-802.

contexts that the issue of representing race becomes much more problematic.

Race may be relevant on many different levels, ranging from explanations for an individual's actions to challenges to white-based rules. For example, race could play several roles in constructing a case theory to challenge the child support cooperation requirement. First, a lawyer might point to racially biased decisionmaking by an individual caseworker who deemed the client noncooperative. While such decisionmaking may be difficult to document, a review of who has been deemed noncooperative may reveal race discrimination.¹⁸¹ Second, a lawyer might introduce sociological evidence as to the employability of, and job availability for, poor black men as a method of explaining why the mother cannot, or will not, provide the requisite information about the father.¹⁸² Third, the lawyer might challenge, more generally, the cooperation requirement itself by showing its assumptions about welfare recipients. And fourth, the lawyer could challenge the entire welfare system as operating on a racist basis.¹⁸³

While there is no existing obligation in the professional responsibility rules that the lawyer consider case strategies on any of these levels, we might choose to add a requirement that the lawyer think through the race implications both of her actions in representing the client, and of the client's case itself.¹⁸⁴ Such a requirement would neither ban nor encourage racial narratives, although it should foster more of them as attorneys realize the relevance of race to any particular case. While difficult to enforce, such a requirement would serve as a reminder and, ideally, as an inspiration.

While I agree with her on the damaging effects of negative racial stereotypes, she focuses on criminal cases; she does not explore how racial images may benefit a plaintiff in a civil case.

181. This is what Martin Garbus found with respect to man-in-the-house rules in *King v. Smith*. See *supra* note 36.

182. This appears to have been the theory in *Doston*. See *supra* text accompanying note 104.

183. Bringing an equal protection claim based on race may lead courts to examine more closely all of the other possible grounds for decision because of the "last resort rule," pursuant to which courts will decline to decide a case based on a constitutional ground if a nonconstitutional basis is available. See *King v. Smith*, 392 U.S. 309 (1968); *Ashwander v. Tennessee Valley Auth.*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring); Lisa A. Kloppenberg, *Avoiding Constitutional Questions*, 35 B.C. L. REV. 1003 (1994).

184. As David Wilkins notes, disciplinary rules in this area are highly problematic and inevitably vague. See Wilkins, *supra* note 151, at 1069 n.183. Nonetheless, this accusation could be leveled at any number of existing rules of legal ethics; it is through adopting and living with these rules that they can acquire content.

In a slightly different context, Professor Johnson has developed comprehensive and relatively detailed rules to prevent the use of racially derogatory stereotypes. See Johnson, *supra* note 20.

It would carry a corresponding obligation that the lawyer counsel her client as to the existence, as well as the potential benefits and drawbacks, of such stories.¹⁸⁵

As an alternative to such a vague standard, or as a supplement to it, we could change legal education so that race considerations are made more explicit throughout the curriculum.¹⁸⁶ Lest I be accused of requiring political correctness in the classroom, I would not mandate race-conscious legal education. But, in a manner similar to what has happened with respect to sex-gender consciousness in legal education,¹⁸⁷ individual professors, with institutional support, can attempt to incorporate an awareness of the race concerns of any particular case into any course so that race issues appear outside of classes explicitly concerned with race and racism in American law.¹⁸⁸

C. *Objections to Race Relevance*

There are many objections to race consciousness in representation. The first addresses whether it is necessary to think through race in cases to which it seems utterly irrelevant. The simple answer is no — I am not arguing that all attorneys in all cases become race conscious. Yet only by considering the race implications of a particular case will a lawyer be able to assess the relevance of race. Litigation over the disposition of a testator's property, the custody of children, or the infringement of a patent does not appear to implicate race or racial images. But if, for example, they involve parties of different races, race may be an issue. And because they all involve application of rules developed in a legal system that, until

185. See Stephen L. Pepper, *Counseling at the Limits of the Law: An Exercise in the Jurisprudence and Ethics of Lawyering*, 104 *YALE L.J.* 1545, 1549, 1607, 1609 (1995) (suggesting that the lawyer has a "presumptive moral obligation" to engage in counseling when the client may take illegal or other destructive actions).

186. Such concerns are raised in specialized courses. See, e.g., Hing, *supra* note 16; see also Judith G. Greenberg, *Erasing Race from Legal Education*, 28 *U. MICH. J.L. REFORM* 51 (1994) (discussing race in legal education). Professor Kimberlé Crenshaw argues that teachers of the objectivity and neutrality of legal discourse actually reinforce a specific set of white middle-class values. See Kimberlé Williams Crenshaw, *Foreword: Toward a Race-Conscious Pedagogy in Legal Education*, 11 *NATL. BLACK L.J.* 1, 3 (1989). David Wilkins recommends that students "be encouraged to ask whether racial identity does or should play a role in our evaluation of legal texts or our understanding of legal problems." Wilkins, *supra* note 152, at 2020.

187. For a perspective on this issue, see Colloquy, *Women in Legal Education — Pedagogy, Law, Theory, and Practice*, 38 *J. LEGAL EDUC.* 1 (1988). A recently published contracts casebook attempts to incorporate race and gender into a standard first-year course. See AMY HILSMAN KASTELY ET AL., *CONTRACTING LAW* (1996).

188. For further discussion of pedagogy, see BELL HOOKS, *TEACHING TO TRANSGRESS* (1994).

relatively recently, failed to recognize the formal civil and political equality of whites and blacks, the standards themselves may be raced.¹⁸⁹ It is the suggestion of the significance of considering race that is important as a means of ensuring that the issues are raised.

A second, more serious objection is that a race-conscious approach may actually lead to stereotyping and racism. Using race to frame a litigant's claims can evoke, and invoke, damaging myths.¹⁹⁰ This contention is much more difficult to address because it implicates our attitudes and approaches toward race. Our aspirations to colorblindness are an effort to ensure that race will not matter, that we will treat people as individuals, rather than as raced caricatures. Making race count could easily return us to stereotyping. It may also lead to thinking about only nonwhites as raced, rather than acknowledging the omnipresence of race.

Given, however, that the stereotypes are already present, race may be useful as a means for presenting countermyths and narratives; or, when the stereotypes help the individual plaintiff win her case, then the attorney and client may decide together to exploit those myths.¹⁹¹ For example, one way of subverting the racialized image of welfare recipients is to emphasize when they are white.

189. See Flagg, *supra* note 14; Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987). My colleague Paul Butler distinguishes between a "liberal critique," which attributes race discrimination to individual actors, and a "radical critique," which suggests that the law "is an instrument of white supremacy." Butler, *supra* note 180, at 692-95 (explaining this distinction within the criminal law).

190. This is a claim made by Professors Brown, Williams, and Baumann. See Brown et al., *supra* note 23, at 531, 537-38. Professor Tony Alfieri notes that critical race theorists could "complain that race-consciousness encourages an essentialist construction of racial identity and narratives in legal storytelling." Alfieri, *supra* note 20, at 1340. His response is to advocate "contingent and . . . unstable notion[s]" as the basis for storytelling. *Id.*

191. Thinking about the relevance of race could, as Professor Margaret Russell suggests, result in another problem: "rampant and misguided uses of so-called 'racial' or 'cultural' defenses and arguments." Russell, *supra* note 113, at 1449. For discussion of this potential problem, see, e.g., Daina C. Chiu, *The Cultural Defense: Beyond Exclusion, Assimilation, and Guilty Liberalism*, 82 CAL. L. REV. 1053 (1994); Leti Volpp, *(Mis)Identifying Culture: Asian Women and the "Cultural Defense"*, 17 HARV. WOMEN'S L.J. 57 (1994); see also Naomi Cahn & Joan Meier, *Domestic Violence and Feminist Jurisprudence: Towards a New Agenda*, 4 B.U. PUB. INT. L.J. 339, 357-59 (1995) (discussing the dilemmas involved in recognizing culturally specific claims); Abbe Smith, *On Representing a Victim of Crime*, in LAW STORIES 149, 162-63 (Gary Bellow & Martha Minow eds., 1996) (exploring whether a lesbian public defender would raise arguments that the defendant was provoked because of his victim's lesbian sexual relationship). There are, however, existing mechanisms for handling such unsubstantiated defenses that should prevent them from being raised. When such mechanisms do not exist, then, as a culture, we must decide whether to allow such claims to proceed. Indeed, the more that they are raised, the more opportunities available for establishing their irrelevance and inapplicability. While this does not mean that only "colorblind" claims should be permitted, it does mean that only nonfrivolous race-based claims should be brought.

I hope that the effort to think through and interrogate race would prevent stereotyping and instead lead to a healthy appreciation of the difference that race makes, and the detrimental effects of a failure to understand the impact of allegedly race-neutral decisionmaking.¹⁹² I do not believe that race must be mentioned in every case, nor even that it is relevant to every legal dispute; it may help, for example, to use “neutral” language to describe the parties in an attempt to avoid stereotyping. My argument is that lawyers need to think about race, to become conscious of the issues of race within their advocacy, rather than refer to, or avoid referring to, race constantly in their litigation.¹⁹³ Many types of advocacy have the potential to implicate race on some level, whether it be an individual’s racist actions or laws developed in a legal system that has excluded blacks; the critical dilemma is deciding if and how to handle these issues. It becomes important to acknowledge that our model of lawyering was not developed in a colorblind world, and that it is not, and should not be, colorblind.

CONCLUSION

Notwithstanding liberal integrationist goals, we remain a race-conscious society. When thinking through a case strategy, when developing techniques for the courtroom, advocates need to consider the implications of race. Using race consciousness in client advocacy requires asking “the race question” in representation and discussing raced issues with the client. It means questioning the alleged neutrality of the rules governing representation to see how they assume white lawyers and clients.

Consciousness of race in lawyering will certainly improve the representation process with respect to the lawyer-client relationship. Although it may be less clear how to use race in litigation,

Professor Jody Armour draws a useful distinction between “rationality-enhancing and rationality-subverting group references” to African Americans and other stereotyped groups. Jody Armour, *Stereotypes and Prejudice: Helping Legal Decisionmakers Break the Prejudice Habit*, 83 CAL. L. REV. 733, 768 (1995). The former challenge jurors to confront their negative stereotypes, while the latter exploit those stereotypes. *See id.* He recommends that courts permit only the use of the rationality-enhancing references. While I am unsure whether an absolute bar against such “subverting” references is beneficial, *cf.* Barnes, *supra* note 19, I agree on the utility of using race to confront stereotypes. And I would expand his proposal to include stereotypes about whites as well.

192. *See* Armour, *supra* note 180; Flagg, *supra* note 14, at 977, 982 (discussing the importance of skepticism about racial neutrality).

193. Professor David Wilkins speaks of somewhat similar obligations for black lawyers. *See* Wilkins, *supra* note 152, at 2015. And Professor Alfieri discusses the importance of considering the impact of racialized narratives. *See* Alfieri, *supra* note 20, at 1338-39. I believe that lawyers must consider the impact of race on their lawyering.

outside of cases that explicitly involve interracial issues, the relevance of race should be considered in other aspects of the lawyering process. Race consciousness may lead to additional case theories and litigation strategies, as well as an improved understanding of the client's situation. While race will not be relevant to many cases, it certainly is an issue beyond cases involving parties of different races, and beyond cases involving black clients and black attorneys.