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# LEGAL STORIES, CHANGE, AND INCENTIVES— REINFORCING THE LAW OF THE FATHER\*

MARTHA ALBERTSON FINEMAN\*\*

## I. INTRODUCTION

This article addresses the problems for women and children latent in recent suggestions to use the law to create incentives for men to use birth control.<sup>1</sup> It examines these problems in the context of exploring the ways in which various “stories”<sup>2</sup> or narratives about the family are generated and used as society confronts changes in intimate behavior. The search for incentives is undertaken as part of a contemporary reexamination of what constitutes responsible male sexuality and fatherhood. It is only one aspect of a much larger contemporary reconstruction of the traditional family narrative in the wake of pressures generated by changing patterns of behavior and altered expectations for the family as a social institution.

In contemporary society, it is no longer clear what constitutes appropriate family role behavior—who is acting as a good mother or father. In fact, it is no longer clear who or what constitutes a family. One aspect of the reconstruction of the family narrative currently underway involves the creation of a generic category of family relationship—parenthood—from the previously differentiated roles of mother and father and a corresponding redefinition of the social and cultural understandings of fatherhood and its legal implications.<sup>3</sup> This reconstruction of the family narrative has been undertaken largely in response to women resisting their historically assigned roles as wives and mothers in the traditional family story.<sup>4</sup>

Changes quite often generate controversy and resistance. Traditional stories are met with alternative visions and, as a result, are modified, restated, and reintroduced into the ongoing debates. Ultimately, the collected and conflicting stories we tell about families in our society reveal

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1. This suggestion was an explicit part of the discussion in a “by invitation only” seminar I attended in Washington, D.C., in the spring of 1992, sponsored by the National Institute of Health.

2. See discussion *infra* part II.A.

3. See Martha L. Fineman, *The Neutered Mother*, 46 U. MIAMI L. REV. 653, 660-62 (1991).

4. See *id.* at 665.

a great deal about how we view and understand the world in which we operate.

Despite the existence of alternative stories, it is important to remember that not all stories can be equally verified by empirical observations. For example, the dominant spousal story for the past decade has been one of *equality*; yet, there continues to be great gender *inequality* in the allocation of the burdens and costs associated with reproduction.<sup>5</sup> This difference is only one aspect of a much larger pattern of ingrained and persistent gender inequality that characterizes the functioning of intimate entities in our culture. The burdens associated with intimacy and the maintenance of intimacy have always been disproportionately allocated to women. Furthermore, given the cultural and market structures built upon this fundamental division of family labor, this inequality is going to be very difficult to change. If we were serious about redistributing these burdens, it would require an ideological and structural reorientation of society that does not seem likely to occur any time within the near future.

A final cautionary note is necessary to those prone to place too much faith in the potential power of alternative stories. Even if one believes in the possibility of change, it is unlikely that it will occur through legal restructuring. Law is more reflective than constitutive of social realities, tracking closely existing power alignments. Historically, real change has been difficult to achieve. In particular, legal reforms in the area of intimate relations have tended to be misdirected, addressing the wrong questions and neglecting certain significant issues.<sup>6</sup> This has resulted in actions that reinforce, rather than alleviate, existing gender inequalities.

## II. RETHINKING THE CONCEPT OF FAMILY

### A. *The Struggle over the Family*

The retelling of family narratives is a process that deserves some initial attention to put the reproduction and male-incentive story into context. The contemporary family is a social and cultural construct with multiple valuations. In recent years there have been significant shifts in the

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5. See generally MARTHA A. FINEMAN, *THE ILLUSION OF EQUALITY: THE RHETORIC AND REALITY OF DIVORCE REFORM* (1991) (noting that there have been various backlashes generated by the women's movement's push for family and workplace equality, including formation of fathers'-rights groups); VICTOR R. FUCHS, *WOMEN'S QUEST FOR ECONOMIC EQUALITY* (1988) (concluding that the constant conflict between simultaneously maintaining family and career arises much more for women than for men, persistently frustrating women's goal of attaining economic equality).

6. See Martha L. Fineman, *Images of Mothers in Poverty Discourses*, 1991 DUKE L.J. 274, 295.

importance attached to the family as a cultural icon, as well as reconsideration of it as a functional institution. It seems that family in our society is viewed as such a simple and undisputed institution that a mere reference to it serves as a full definition of widely shared values and norms and, at the same time, as a complex, changing site of ongoing struggle over basic ideological divisions in our society.<sup>7</sup>

The family is an increasingly important object of study, however, generating federal grants and volumes of sociological, psychological, and political literature. The family is both overvalued on a symbolic and metaphoric level and systematically devalued in terms of the allocation of societal resources. A cultural and political schizophrenia exists about the institution.<sup>8</sup>

Fundamental changes in the way many Americans organize their day-to-day family lives have contributed to that schizophrenia. Social movements such as feminism and children's rights, organized in part to bring the existence of the exploitive potential within traditional family roles to political light, have set the stage for a collective reimagining of the family.<sup>9</sup> As a result, there is a great deal of cultural negotiation around the ways that we have traditionally organized intimacy in American society.

The evolutionary dialogue associated with such negotiation reveals the inescapably political (in the largest sense of that word) and ideological nature of change. The arguments for and against change are largely carried on through the use of stories or narratives, which are generated in a variety of ways. These narratives come in multiple guises. They may be cast as social science or case studies, illuminated and buttressed by "scientific" or other designated objective means; framed as legislative or judicial fact-finding, legitimated because it is asserted that they were democratically produced within a stylized system of legal processes; or merely selected for dramatization because it is recognized that they will attract an audience when reported in the media or represented in fiction

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7. See Martha A. Fineman, *Intimacy Outside of the Natural Family*, 23 CONN. L. REV. 955, 969 (1991).

8. See Susan M. Okin, *Change in the Family: Change in the World*, UTNE READER, Mar.-Apr. 1990, at 74 (stating that the family in modern theory seems to be considered as a background institution—the real focus being on the individual). A related phenomenon is that typically any legal feminist who writes about the family has been cast as a "cultural feminist" and marginalized as being primarily domestically oriented, even if the focus of the analyses of the family is on concepts such as power and domination. See Patricia A. Cain, *Feminism and the Limits of Equality*, 24 GA. L. REV. 803, 835-38 (1990). See generally Robin West, *Feminism, Critical Social Theory and Law*, 1989 U. CHI. LEGAL F. 59 (defending the choice of some feminists to discuss the law without employing the framework suggested by critical social theorists).

9. See Fineman, *supra* note 7, at 969.

or film.<sup>10</sup> There may be different forms to the stories—some are horror stories, others more like sentimental visions—but typically they seem to offer both explanations for the status quo, as well as normative direction for the future.

Rethinking the family has led to the discovery of ignored or suppressed family stories. These alternative family stories become part of the dialogue, more successfully embraced when confined to individuals and defined as choosing a lifestyle. The acceptance and integration of the changes on a general or a political level, however, have been impeded by the political treatment of the family and its exploitation as a changing institution in transition. In fact, the traditional stories gain potency in the context of attack.

### B. *Fathers and Families*

Rethinking the family on a grand scale is rightly recognized as a significant ideological endeavor. The societal nature of this core institution means that potential changes to it cannot be viewed in isolation from their impact on other institutions. Belying the traditional dichotomy between public and private spheres is the assertion that if the family changes, so will the market.<sup>11</sup> There is unease with the increasingly unavoidable conclusion that there are no independent, unconnected choices.<sup>12</sup>

The family as an institution has historically served important practical and ideological functions in our society. For centuries, it stood alone as the formal and institutionalized manifestation of condoned sexual intimacy, a cultural monopoly currently under attack. It has also operated as the social institution in which the dependency of the very young and,

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10. This list, by no means exhaustive, tacitly recognizes the validity of the post-modern claim that all texts are narrative and hence can be productively deconstructed.

11. See Fineman, *supra* note 3, at 661.

12. Increasingly, scholars and policymakers have recognized the relationship between such "unconnected" issues as the divorce rate and the increase in applications for Aid to Families with Dependent Children (AFDC), and the falseness of the dichotomy between work and family. See generally LENORE J. WEITZMAN, *THE DIVORCE REVOLUTION: THE UNEXPECTED SOCIAL AND ECONOMIC CONSEQUENCES FOR WOMEN AND CHILDREN IN AMERICA* (1985). The grand rethinking of the "family," however, will and must occur. The pressure of the growing numbers of untraditional families mandates that such rethinking proceed. One interesting question will be how explicitly political or ideological the rethinking will be. Many resist the application of ideological terms to their personal experiences. Women who support equal rights in work and at home are careful to indicate that they are not "feminists," and "alternative" families struggle to analogize their same-sex or non-marital cohabitation situations with the traditional norm of formal heterosexual marriage. See Fineman, *supra* note 7, at 969-72. People shun the characterization of their behavior as deviant and seek the safety of normality.

sometimes, the elderly and ill can be referred, confined, and thereby hidden and ignored.<sup>13</sup> The family functions as a complementary institution to the state, alleviating it from direct economic responsibility for its citizens.

These important social functions are premised on a division of labor within the family. This division has historically confined women to the private or family sphere, thus making them bear directly the burdens of intimacy and dependency in our society. Men, as fathers and husbands, have had the corresponding responsibility of economic support for the family. This gendered division of labor has been the dominant casting script for family stories. As more and more people are resisting their assigned roles, however, society experiences the emergence of alternative family narratives.

Fatherhood, for example, has certainly gained stature as more than a mere biological classification with certain legal consequences. But, the revised role must still be understood as an ideological construct implicated in and fashioned by traditional power relationships within the institutions of the family and the state. The historic organization and operative assumptions about traditional family relationships obscured the state-sanctioned power imbalance inherent in the family institution. The status of father, husband, and head of household needed no formal explication of the power the status held.

As adherence to the traditional family form has begun to wither away, the complementary power relationships embedded in it had to be made explicit to be preserved. New stories are fashioned. The emerging alternative narratives, however, do not always challenge the basic operation of the status quo.<sup>14</sup> In divorce law, newly wrought designations of the rights and/or responsibilities associated with the status of spouse and parent ensure that male control will survive the end of the marriage relationship. Traditional assumptions, refashioned for a no-fault-divorce world, are articulated as ongoing economic support obligations, along with coerced access to, and control over, ex-wife and child.

The contemporary challenges to traditional patriarchal family forms, however, are not limited to the divorce context. Divorce at least assumes an initial adherence to traditional heterosexual formal marriage. There are more profoundly deviant family forms gaining adherents and emerging as fundamental challenges to the traditional narrative. Increasing numbers of never-married women are becoming mothers, creating the perception of a social "crisis" for family traditionalists in our society. To many

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13. See Fineman, *supra* note 7, at 969-72.

14. See, e.g., Fineman, *supra* note 3, at 658 (providing an example of this in the context of alterations, labeled "reforms," in the area of custody at divorce and poverty-law rules).

observers of the contemporary scene, it seems clear that women are not behaving as they should. Furthermore, many men seem to welcome the reprieve from enforced economic responsibility for families. The old roles are ignored.

### III. LEGAL INCENTIVES AND THE MORAL TALE OF RESPONSIBLE FATHERHOOD

In recent years, as the institution of fatherhood has been transformed on an ideological and rhetorical level, there has been a lot of popular and political attention to the *new man*. Initially, the calls for change came from a feminist community convinced that the ideals of sharing and equality could be implemented in the family, as well as in the market context. More recently, however, the portends of change are not feminist rhetoric, but the statistically constructed stories of real-life mothering that seem to call into question the continued relevance of traditional fatherhood. In its extreme form, the new motherhood seems to reject men altogether. Many more women are living large segments of their lives as single mothers. The category of never-married mothers increases with each *new* governmental report, causing alarm in some circles.<sup>15</sup>

An essential part of the never-married or newly single mothers' story has become the failure of biological fathers to assume responsibility for their offspring. Currently, there are considerations of the potential role of the law in creating incentives for men to use contraception, pay child support, and marry their children's mothers. Given that feminists and liberal policymakers have long sought to distribute more evenly the burdens associated with reproduction and child rearing, one might inquire, "What is wrong with that goal?" I want to try to answer that question by examining the implications of the search for ways to provide legal incentives for male use of birth control and for exposing the potential for adding even more burdens to the load mothers carry.<sup>16</sup>

#### A. *Incentives and Punitive Potential*

My basic concern with proposals for using law to encourage male responsibility for birth control is that the question of how to provide incentives inevitably will slip into a discussion of how to create disincentives. This discussion will really be a debate about the appropriate

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15. See Fineman, *supra* note 6, at 275 n.1; see also Fineman, *supra* note 3, at 665 (noting that the birth rate to unmarried women has increased continuously since 1980).

16. Other incentive proposals should be considered separately, although there are common threads that accompany child-support and other single-mother tales in the stories about irresponsible fathers.

form of punishment for irresponsible reproduction. Furthermore, in regard to reproductive issues, typically it is women who are punished, even in those cases in which men were the initial focus of the incentive-disincentive system.<sup>17</sup> Perhaps this is due to an implicit realization that, because of their "unique" position regarding reproduction, women are likely to be more effective targets for coercive social policy reforms.

Asking the wrong questions regarding incentives and reproduction in areas other than contraception has meant that the issue of how best to support women and children in society is relatively neglected. The concern with child poverty in welfare debates, for example, is subsumed into the debate on nonmarital reproduction and how to curtail it.

One basic problem with a consideration of incentives is that the wrong issues are often addressed due to the inherent limitations of law and the process of lawmaking. Law is a very crude instrument with which to fashion and further social policy. For one thing, law is much better at fashioning prohibitions and determining punishments than creating affirmative incentives for behavior. In either case, whether developed to structure incentives or to define punishments for certain behavior, law is most effective when it tracks societal norms and values about which there is strong agreement.<sup>18</sup> Attempts to use law to transform society by imposing norms on an unreceptive population, however, are seldom successful.<sup>19</sup>

In addition, when societal norms are in a state of flux, as they certainly are in relation to matters of sexual intimacy, contraception, and reproductive rights, the law tends to be identified as a site of contest. Warring societal factions seek to codify their world view, thereby giving legitimacy to their stories about what are appropriate ideals and values. Policy formation and law reform in this regard are political or, at least, tend to develop in a politicized environment. This is significant because it means that the lawmaking process often becomes a highly charged, symbolic endeavor. In such instances, the explicit subject matter under consideration is merely the tip of a larger, ideologically potent iceberg. The political nature of policy formation also means that lawmaking occurs in the context of compromise and conciliation, activities that may undermine specific, controlled steps in a well-considered strategy to accomplish certain goals. Furthermore, it is important to remember that quite often the weaker, underrepresented members of society—women, children, and the poor—are those whose interests are first sacrificed in the

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17. Cf. Fineman, *supra* note 6, at 294-95.

18. See Fineman, *supra* note 3, at 662.

19. See *id.*



spirit of compromise, or whose version of the story is never heard in the first place.

These warnings about the nature of law are relevant in considering how skeptical we should be about the quest for legal incentives for male use of contraception. In the abstract, such an endeavor may be worthwhile, but, because incentive has tended historically to be perceived and implemented as punishment,<sup>20</sup> we should be concerned about the ultimate punitive possibilities of any specific incentive-directed outcomes.

### B. *Men Who Are Cast as Responsible Reproducers*

The focus on incentives for men is shaped by and reflective of a story laden with values and norms about the appropriate contexts for reproduction that needs further exploration and refinement. Regarding the question of existing incentives, for example, the fundamental premise of the reproduction story seems to be that women have a natural incentive to use birth control because the context of their decision making is defined by the potential for pregnancy and the resulting social role they will play as mothers. For men, however, the incentive must be artificially manufactured through the creation of economic consequences using the legal system.

The conclusion that legal changes are necessary to provide contextual incentives for men, as an *undifferentiated* group, to use birth control is not an obvious one for someone familiar with existing family law and policy. Because of the existing, well-established set of legal obligations that adhere to the marital status, a more careful consideration reveals a reproductive story in which men are divided into two distinct categories with regard to the incentive question.<sup>21</sup> Some men are responsible

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20. See JAMES Q. WILSON, THINKING ABOUT CRIME 118 (1983) (stating that “[t]o a psychologist, deterring persons from committing crimes or inducing persons to engage in noncriminal activities are but special cases of using ‘reinforcements’ (or rewards) to alter behavior”); see also HERBERT L. PACKER, THE LIMITS OF THE CRIMINAL SANCTION 37-39 (1968). For Packer, the notion of retribution is also significant as an underlying rationale for deterrence arguments for sanctions. Although atonement through suffering has historically been a major theme in religious thought, it doubtless plays a role in thought about secular punishment as well. The retribution view of punishment shifts the emphasis from deterrence to demands that the criminal take it upon himself or herself to become reconciled with the social order. *Id.* It is precisely this notion of punishment for failure to conform to the social order that this article explores.

21. This process of categorization is consistent with much of the “we/them” distinction that characterizes criminal law. Commentators differ on the degree of “difference” between normal and criminal individuals. For example, James Wilson has stated that

potential reproducers, while others are not. The legal institution of marriage provides the context of responsibility for some men. Men who are neatly and securely tied to the nuclear family by marriage have plenty of legal and economic incentives to plan families—to engage in responsible reproduction.

The incentives that married men experience in regard to reproduction are not biologically compelled. They are derivatively compelled, however, because the status of being married ties the economic future of husbands to their wives' reproductive fortunes. It is well known that married men are legally responsible for child support, an obligation that extends beyond the marital tie should there be a divorce. Therefore, from a policy perspective, married men can be comfortably presumed to be responsible reproducers, not in need of further incentives regarding birth control. Married men's reproductive potential is contained and contextualized within an institution that has well-defined legal expectations and obligations for them and their relationship to their children.

Of course, it could be that, as a policy matter, we are not satisfied by the incentive for male *participation* in decision making about contraception that marriage provides. Some policymakers may want to use law to enhance male *control* over reproduction in the nuclear-family context. Perhaps some people feel that men would make better, more responsible decisions about reproduction than women do. A few men have expressed dismay about their perception that men have lost control (or perhaps they never had control) over reproduction.<sup>22</sup> These men believe that women unfairly exercise a monopoly over the reproductive decision.<sup>23</sup> This attitude is reflected in the rhetoric of spokesmen for several men's rights groups who strongly endorsed the idea of an oral male contraceptive because, as Dan Logan, Executive Director of the men's rights group Free Men stated:

[W]e always treat reproductive rights as a women's subject and something they control[.] I think the fact that women carry a

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to assert that "deterrence doesn't work" is tantamount to either denying the plainest facts of everyday life or claiming that would-be criminals are utterly different from the rest of us. They may well be different to some degree—they most likely have a weaker conscience, worry less about their reputation in polite society, and find it harder to postpone gratifying their urges—but these differences of degree do not make them indifferent to the risks and gains of crime.

WILSON, *supra* note 20, at 119.

22. See Jean Marbella, *Men Offer Mixed Opinions on Male Birth Control Pill*, L.A. TIMES, May 14, 1990, at E3.

23. See *id.*

womb in their body is an accident of biology. It could just as easily have been men. We have just as much at stake in reproductive subjects as women do.<sup>24</sup>

In addition, Fredric Hayward, executive director of Men's Rights, Inc. believes it is important for men to get equal access to better contraceptive options because under the current system of reproductive roles, men have been excluded from full parenthood. He stated that a woman's "[i]dea that, 'It's my body, I'm bearing the risk, therefore I'm the one who will make the decisions,' that's the female chauvinism version of men who think women shouldn't have the vote because they weren't the ones who fought in the fields to get democracy. . . ."<sup>25</sup>

In regard to the desire to increase married men's participation and control in the reproductive area, it is interesting to note that one of the issues of first impression in the Pennsylvania abortion case, recently decided by the Supreme Court, was spousal notification.<sup>26</sup> The Third Circuit recognized that existing Supreme Court doctrine precluded viewing any requirement of spousal notification as an expression of the State's interest in protecting a husband's interest in a pre-viable fetus.<sup>27</sup> The judges determined that what the Pennsylvania legislature must have sought to preserve was something considerably more modest—the preservation for the husband of “the *possibility of participating* in a decision his wife is constitutionally privileged to make on her own for her own reasons.”<sup>28</sup> For the Third Circuit, this possibility did not constitute the kind of compelling state interest that could justify substantial burdens on the wife's right to abortion.<sup>29</sup>

Although a majority of the Supreme Court ultimately agreed on the impermissibility of spousal notification,<sup>30</sup> one thing that remains apparent is that segments of society are very concerned with protecting a role for married men regarding abortion.<sup>31</sup> Furthermore, this concern may be gaining adherents. One of the dissenting Third Circuit judges in *Casey*

24. *Id.* (quoting Dan Logan, Executive Director, Free Men).

25. *Id.* (quoting Fredric Hayward, Executive Director, Men's Rights, Inc.)

26. *See* Planned Parenthood v. Casey, 112 S. Ct. 2791 (1992).

27. *See* Planned Parenthood v. Casey, 947 F.2d 682, 709-15 (3d Cir. 1991), *aff'd in part and rev'd in part*, 112 S. Ct. 2791 (1992).

28. *Id.* at 715 (emphasis added).

29. *See id.*

30. *See Casey*, 112 S. Ct. at 2796.

31. *See* Kay Miller, *How Do Married Men Feel About Ruling on Abortion?*, STAR TRIB. (Minneapolis), July 6, 1992, at 1E.

stated that the Court had already determined that

a man has a fundamental interest in preserving his ability to father a child. . . . [A] husband who is willing to participate in raising a child has a fundamental interest in the child's welfare. . . . It follows that a husband has a "legitimate" interest in the welfare of a fetus he has conceived with his wife. . . . This interest may be legitimately furthered by state legislation. . . . The Pennsylvania legislature could have rationally believed that some married women are initially inclined to obtain an abortion without their husbands' knowledge because of perceived problems—such as economic constraints, future plans, or the husbands' previously expressed opposition—that may be obviated by discussion prior to the abortion.<sup>32</sup>

### C. *The Tale of the Irresponsible Reproducer*

While furthering male control over reproductive decisions made in the context of marriage may be of some concern, most law-reform efforts have focused on controlling the conduct of the unmarried man, presumed to be an irresponsible potential reproducer.<sup>33</sup> It is with regard to *this* group of men that the reason for the use of law in the search for incentives becomes clear. Recent changes in the law are attempts to replicate the derivative incentives for reproductive responsibility that marriage provides—to tie legally the father to the mother and the child. While the paternity proceeding, the particular device to accomplish this

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32. *Casey*, 947 F.2d at 725-26 (Alito, J., concurring in part and dissenting in part).

33. See generally GORDON H. LESTER, U.S. DEP'T OF COMMERCE, SERIES P-60, CURRENT POPULATION REPORTS, CHILD SUPPORT AND ALIMONY: 1989 (listing the statistics, according to demographics, of alimony and child-support awards). This presumption about differentiated responsibility has concrete implications. Unmarried fathers are not held to the same economic standards as married fathers, even by courts. As of 1989, for example, the child-support award rate for never-married mothers was 24%, while the rate for ever-married mothers, by contrast, was 72%, or three times that of never-married women. Of the women due child support, the percentages of women who received some payments in 1989 were not significantly different for the two groups—72% of never-married mothers entitled to it received some support, while about 73% of ever-married mothers received payments. *Id.* at 6. The mean child-support amount differed greatly, however, depending on status. In 1989, divorced women received a mean child-support payment of \$3,268, while the payments to never-married women averaged \$1,888. *Id.* at 7. Such differences undoubtedly contribute to the high rate of never-married women who live below the poverty level (53.9%). *Id.* at 2.

goal, has been with us a long time, recent measures greatly increase its use and direct its consequences.<sup>34</sup>

Theoretically, through the paternity proceeding, irresponsible reproducers are burdened with the same economic and legal consequences that men within traditional marriage relationships would have. The logic is that they will then have the same incentive to be responsible. The use of the term incentive in this context, however, is disingenuous. To a great extent, the social policy search is really for an effective *deterrent* for irresponsible potential reproducers. In this case, therefore, the legal response should be viewed as creating disincentives or punishment—punitive responses to socially unacceptable behavior and its consequences.

A punitive model is consistent with history. At common law, criminal sanctions were imposed for indulgence in nonmarital sex.<sup>35</sup> Disincentives for irresponsible reproduction included bastardy proceedings and the use of the criminal process to coerce marriage by designating marriage as a defense to criminal proceedings for fornication or nonmarital cohabitation.<sup>36</sup> Such starkly punitive responses seem out-of-date in our more sexually permissive era. But while most states have abolished criminal regulation of nonmarital heterosexual relations, noncriminal consequences exist that are still enforced by the legal system. The criminal process has been replaced with civil proceedings that assign financial responsibility for nonmarital children, thereby coupling the single mothers' economic needs with presumed economically viable fathers. Theoretically these fathers will assume the financial obligations for their nonmarital children.

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34. See *infra* part III.D.

35. See generally Martha L. Fineman, *Law and Changing Patterns of Behavior: The Sanctions on Non-Marital Cohabitation*, 1981 WIS. L. REV. 275, 278-80 (stating that in Wisconsin, criminal prohibition on cohabitation without formal marriage dates back to 1839).

36. See Hendrik Hartog, *The Public Law of a County Court: Judicial Government in 18th Century Massachusetts*, 20 AM. J. LEGAL HIST. 282, 299-300 (1976). Fornication accounted for over 40% of prosecutions in a Massachusetts court in the 18th century. The number of men and married women prosecuted for fornication fell after 1740, and it was primarily single women who were brought before the court on charges of criminal fornication in the latter half of the century. Men continued, however, to be sued for bastardy. *Id.*

**D. Paternity Proceedings:  
Transformation of Irresponsible Reproduction**

The paternity proceeding is typically classified as civil in nature; yet, it is viewed by many public-interest advocates as akin to a criminal trial.<sup>37</sup> The imposition of a child-support award is considered to be the equivalent of an eighteen-year sentence.<sup>38</sup> There are constant efforts to secure criminal-process-type protections for putative fathers in these proceedings, such as the right to counsel, the imposition of higher burdens of proof, and other reforms.<sup>39</sup> Paternity proceedings, from a State's perspective, however, are far more remedial than punitive in nature. Perhaps most significantly, they are for the purpose of restitution—to restore to the State public funds expended on the nonmarital child.<sup>40</sup>

The frequency of paternity proceedings, prompted by state and federal reforms, has greatly increased during the past several years. Reliance on this process is an essential step in assuring private or family responsibility for children, and it has been a mainstay of recent welfare reforms. These reforms seek to ensure that children are firmly anchored financially, morally, and legally to a father. Cynically, one might observe that the paramount welfare reform objective of paternity actions is letting the State off the economic hook by substituting paternal-support obligation for State funds.<sup>41</sup>

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37. See Mark D. Esterle, *Indigents in Paternity Actions*, 24 J. FAM. L. 1, 9-10 (1985).

38. See *id.* at 3.

39. See Victoria S. Williams & Robert G. Williams, *Identifying Daddy: The Role of the Courts in Establishing Paternity*, 28 JUDGES' J. 2, 3 (1989). The criminal roots of paternity proceedings may account for the complex procedures that attend the process. Some states continue to use criminal terminology, such as "arraignment" and "paternity warrant," in the judicial processing of paternity cases. *Id.*; see also Reynolds v. Kimmons, 569 P.2d 799, 801 (Alaska 1977) (finding that although paternity proceedings will not result in immediate incarceration, a parent of a child under 16 who intentionally fails to provide support may be held criminally liable).

40. See generally Harry D. Krause, *Child Support Reassessed: Limits of Private Responsibility and the Public Interest*, 24 FAM. L.Q. 1 (1990) (exploring the mounting tension between "(1) society's continuing need for a functioning family infrastructure, (2) the modern 'Me Generation's' emphasis on individual's rights . . . , (3) traditional financial responsibility for dependents . . . , and (4) the care-giving capacity of the one parent family"); Williams & Williams, *supra* note 39, at 3. Only a small fraction of paternity establishment cases are brought to the court by private plaintiffs. *Id.*

41. See Hartog, *supra* note 36, at 302. It is interesting to note that early fornication prosecutions served a similar purpose. Because most New England towns had the right after 1758 to bind into servitude any woman with an illegitimate child who refused to reimburse or "procure the reimbursement" for the public expense of raising the child,

The objective of paternity proceedings is the creation of a legal tie between the single father and the dependent single mother and child. Unlike the consensual nature of the relationship between a married couple, neither the mother's nor the father's wishes regarding the establishment of such a tie are considered relevant. This tie is essential for the incentive or sanction of child support to apply in a nonmarital situation.

Child support as a sanction for irresponsible reproduction (reproduction outside of marriage) is part of the structure of the Family Support Act of 1988 (FSA),<sup>42</sup> the first major legislation addressing

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fornication prosecutions became a method of forcing women to name the putative father in an effort to obtain support. The fornication prosecutions ultimately functioned as an administrative procedure to reallocate the costs of illegitimacy. *Id.*

42. See Pub. L. No. 100-485, 102 Stat. 2343 (codified as amended in scattered sections of 42 U.S.C. (1988)). Subtitle A, entitled "Child Support" provides in § 101 that the wages of an absent parent shall be subject to withholding in enforcing payment of child-support orders and that the Secretary of Health and Human Services will conduct a study to determine the feasibility of requiring immediate income withholding of all child-support awards in a state. Exceptions are allowed when both parties agree to other arrangements or when one party shows good cause. *Id.* § 101, 102 Stat. at 2344-45.

Section 102 clarifies that a family receiving public assistance will not have the first \$50 of each month's child-support payment counted against their entitlement, even if that payment is made more than once in a single month; e.g., payments made for prior months. *Id.* § 102, 102 Stat. at 2346.

Section 103 provides that the state must establish support payment guidelines and that there must be a judicial "rebuttable presumption" that such guidelines are correct. This presumption may be overcome by showing that enforcement of such standards would be "unjust or inappropriate in a particular case." *Id.* § 103, 102 Stat. at 2346-48.

Subtitle C, entitled "Improved Procedures for Child Support Enforcement and Establishment of Paternity," provides various standards for States' support enforcement mechanisms. It provides that States must establish time limits for response to requests for investigations and time limits by which payments must be made of support money collected by the State. Section 123 requires that States have either automated data processing and information retrieval systems or a system that the State can show is equivalent. *Id.* § 123, 102 Stat. at 2352-53.

Section 125 provides that "each State shall require each parent to furnish to such State . . . the social security account number issued to the parent unless the State (in accordance with regulations prescribed by the Secretary) finds good cause for not requiring the furnishing of such number." *Id.* § 125, 102 Stat. at 2353-54.

Section 126 established the Commission on Interstate Child Support, which makes recommendations to Congress for improving interstate child support and holds at least one conference on interstate child support to assist in formulating these recommendations. *Id.* § 126, 102 Stat. at 2354-55.

Section 128 requires the Secretary of Health and Human Services to conduct a study of the patterns of expenditures on children in two-parent families, in single-parent families following divorce or separation, and in single-parent families in which the parents were never married, giving

poverty to pass Congress in several decades. The FSA reflects the belief that welfare dependency is a significant problem requiring dramatic reorientation of welfare policy.<sup>43</sup> Provisions of the FSA mandate stricter

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particular attention to the relative standards of living in households in which both parents and all of the children do not live together.

*Id.* § 128, 102 Stat. at 2356. The Secretary is also required to submit policy recommendations based on this study. *Id.*

43. See 42 U.S.C. § 602 (1988). The primary objective seems to be the insertion of welfare recipients into the workforce. This is accomplished for the single mother either by mandating her to work or train for work and/or by substituting the employed father as the child's primary source of support instead of the State. The new legislation's focus on reinforcing the work ethic and dominant individualistic norms of self-sufficiency through the imposition of "workfare" provisions for mothers of young children has been the major emphasis of most commentators. The Job Opportunities and Basic Skills (JOBS) component of the reform legislation represents the latest instance in the long history of welfare to promote work and discourage welfare dependency among the poor. Most often the term "workfare" has been reserved for the requirement that recipients work off their benefits, usually by accepting some form of public or community work assignment. The JOBS program has been called the "new workfare" in that, while requiring work, it also offers opportunities for education, job training, skill development, job counseling, and placement in the private sector, along with other support services such as extended child care and health insurance. Fineman, *supra* note 6, at 277 n.4. The JOBS program, then, is workfare with support services. The JOBS program replaces the Work Incentive Program (WIN), 42 U.S.C. § 602 (1967), which was initiated in 1967. See Fineman, *supra* note 6, at 277 n.4.

Prior to the passage of the Family Support Act, policy discussions emphasized research that highlighted the effectiveness of "new workfare" programs in moving people from welfare to work. See JUDITH M. GUERON, REFORMING WELFARE WITH WORK (Occasional Paper Number Two, Ford Foundation Project on Social Welfare and the American Future, 1987); LAWRENCE M. MEAD, BEYOND ENTITLEMENT (1986) (stressing that low-cost programs emphasizing work requirements as a general norm are cost-efficient and likely to provide considerable movement from welfare to work); Lawrence M. Mead, *The Potential for Work Enforcement: A Study of WIN*, 7 J. POL. ANALYSIS & MGMT. 264 (1988). But see Christopher Jencks & Kathryn Edin, *The Real Welfare Problem*, 1 AM. PROSPECT 31 (1990). Increased employment through workfare programs, however, was hardly a solution to the poverty problems of poor, female-headed families if we take into account the earnings needed by these families to get out of poverty. Mothers in these particular families would, on average, need jobs that pay in the vicinity of two to three times the minimum wage before they could be reasonably expected to leave welfare and meet their expenses, including child and health care.

The essence of the so-called "welfare trap" is not that welfare warps women's personalities or makes them pathologically dependent, though that may occasionally happen. The essence of the "trap" is that while welfare pays badly, low-wage jobs pay even worse. Most welfare mothers are quite willing to work if they end up with significantly more disposable income as a result. But they are not willing to work if working will leave them as poor as they were when they stayed home.



enforcement of child-support orders, including wage withholding.

While federal provisions help collect support from divorced fathers, thereby insuring continuation of responsible reproduction, it is in relation to unmarried men that major efforts were undertaken. States are required to meet federal standards for establishing paternity for children born out of wedlock as a means of obtaining child support from absent fathers.<sup>44</sup> The provisions mandating paternity proceedings reflect the idea of responsible reproduction and, by legally tying the father to the mother-child unit, reinforce traditional norms of male economic responsibility for children that are typically expressed in the context of the nuclear family.

The political rhetoric surrounding the reforms evidences the assumed desirability of the traditional family form. In addressing the FSA in the Senate, for example, Senator Moynihan began his comments by commending President Bush for his remarks at the United Nations World Summit for Children. Senator Moynihan stated that

[o]ne sentence [of Bush's remarks is] especially notable. "We want to see the day when every American child is part of a strong and stable family." The importance of this statement is elemental. Unlike the problems of children in much of the world, age-old problems of disease, new problems of ecological disaster, the problems of children in the United States are overwhelmingly

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. . . .  
All these calculations lead inexorably to one conclusion. An unskilled single mother cannot expect to support herself and her children in today's labor market either by working or by collecting welfare. If she wants to make ends meet, she must either get help from someone else (usually an absent father, parent, or boyfriend) or she must combine work and welfare. At present, the only way she can combine work and welfare is to collect AFDC and then work without telling the welfare department.

*Id.* at 43-45.

44. See 42 U.S.C. § 666(a)(5)(A) (1988). The FSA imposes standards of compliance on the States, requiring that, as of 1991, each State's "paternity establishment percentage for such fiscal year equals or exceeds" a requisite amount. The "paternity establishment percentage" is the ratio of the total number of children born out of wedlock who are receiving some form of public assistance and for whom paternity has been established, to the total number of children born out-of-wedlock who are receiving some sort of public assistance. This section also requires the child and all other parties in contested paternity cases to submit to genetic tests, except where good cause has been shown that this is not in the best interest of the child. Those not in receipt of AFDC may be charged for such tests. The statute encourages the State to adopt simple civil procedures for voluntary acknowledgement of paternity and for establishing paternity in civil cases. Pub. L. No. 100-485, § 111(a), 102 Stat. at 2348-50 (codified at 42 U.S.C. § 652(g)(2)(A) (1988)).

associated with the strength and stability of their families. Our problems do not reside in nature, nor yet are they fundamentally economic. Our problems derive from behavior.<sup>45</sup>

Having established his basic premise, Moynihan continued that

[t]here is a mountain of scientific evidence showing that when families disintegrate, children often end up with intellectual, physical, and emotional scars that persist for life . . . . We talk about the drug crisis, the education crisis, and the problems of teen pregnancy and juvenile crime. But all these ills trace back predominantly to one source: broken families.<sup>46</sup>

Moynihan's rhetoric, which attributes the problems of the poor to their own behavior, tracks the simplistic tendency in poverty discourses to categorize mothers negatively—single mothers and their children seem to be cast as merely a by-product of the real concern that is male irresponsibility.

#### IV. SINGLE MOTHERS AND THE "COSTS" OF RESPONSIBILITY

The connection between irresponsibility and marital status is even more explicit in the stories told in the recently enacted welfare reforms in New Jersey.<sup>47</sup> The New Jersey reform has two basic thrusts. First, it encourages marriage formation by creating economic *incentives*, thereby demonstrating a preference for responsible family formation. Married

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45. 136 CONG. REC. S14,416 (daily ed. Oct. 3, 1990) (statement of Sen. Moynihan) (quoting President George Bush).

46. 136 CONG. REC. S14,418 (daily ed. Oct. 3, 1990) (statement of Sen. Moynihan) (introducing to the record an article by Sen. Moynihan); *see also* 134 CONG. REC. S7730 (daily ed. June 14, 1988) (statement of Sen. Specter) (discussing the hand-in-hand relationship between poverty and crime, and the need to reform welfare from a hand-out to a hand-up system); 134 CONG. REC. S4712 (daily ed. Apr. 26, 1988) (statement of Sen. Cochran) (discussing the need to reform the welfare program from a system of reliance to a ladder of self-dependency, calling for requirements that all able-bodied welfare recipients work and that absent fathers pay child support, thus strengthening family cohesion); 134 CONG. REC. S3069 (daily ed. Mar. 25, 1988) (statement of Sen. Cochran) (noting that two-thirds of those classified as "poor" are single mothers and children, resulting in their long-term dependence on public assistance).

47. *See* N.J. STAT. ANN. §§ 44:10-19, -20 (West Supp. 1992) The statute's purpose is to go beyond economic aid to the recipient alone by offering the recipient assistance in obtaining higher academic and vocational training.

couples would be allowed to live together without losing a portion of their welfare benefits, as would have happened under the earlier law.<sup>48</sup>

Second, the reform both escalates and defuses the punishment or sanctions for irresponsible reproduction. The sanctions are justified by the rhetorical linking of reforms in public assistance with the assumption of personal responsibility. The punitive paternity proceeding is present,<sup>49</sup> of course, but the legislation goes further than this in its imposition of sanctions. Mothers and children are *directly punished* by the removal of economic incentives for irresponsible reproduction. The new statute denies a sixty-four-dollar monthly increase for each additional child born into a welfare family.<sup>50</sup>

As the New Jersey reforms indicate, the logic behind economic incentives in conjunction with reproduction ultimately leads to sanctions (disguised as incentives) on the single mother and her child. Justification for the escalation and expansion of disincentives is couched in terms of incentives—translated into an attempt at weaning people off welfare by forcing them to “be responsible for their actions.”<sup>51</sup>

In fact, it may be that even if fathers are also a source of concern, the mothers' behavior is more easily brought within the incentives conceptualization, simply because they are the ones who actually give birth and assume care for the children. The State of Maryland recently announced welfare reforms designed to reduce benefits for welfare mothers who fail to exhibit responsible behavior regarding their children's school attendance and health care.<sup>52</sup> In California, Governor Wilson's deputy press secretary commented on reforms to limit or deny aid if a variety of behaviors, including having additional children, were engaged in by welfare mothers: “We're not asking them to get off aid and seek a 40 hour-a-week job; we're asking [the welfare mother] to start taking responsibility for [her] life, to do something positive and constructive to increase self-esteem, to go out and start earning on [her] own.”<sup>53</sup>

Even liberal commentators, such as Irwin Garfinkel of the Institute for Poverty Research, have concluded that it is the potential for maternal deterrence or incentive that is relevant to welfare reforms. He stated that the problem with providing more aid to single-parent families is that doing so creates incentives for the formation and preservation of single-parent

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48. *See id.* § 44:10-3.5.

49. *See id.* § 44:4-1.04.

50. *See id.*

51. Paul Taylor, *Carrots and Sticks of Welfare Reform*, WASH. POST, Feb. 4, 1992, at A13.

52. *See* Julie Kosterlitz, *Behavior Modification*, NAT'L J., Feb. 1, 1992, at 271.

53. *Id.* (quoting James Lee).

families. Garfinkel, unlike some conservative commentators, recognizes that single-mother families may not be all bad:

Of course, it is possible that society is better off—or at least no worse off—as a result of whatever additional single-parent families are created by more favorable treatment of those groups. Not all marriages are made in heaven. Some men beat their wives and children . . . . In some of these cases, all the parties may be better off separate rather than together.<sup>54</sup>

Nonetheless, he concludes that “[d]espite the fact that increases in single parenthood may not be socially pernicious, prudence would suggest that in the face of ignorance we should seek to minimize incentives for single parenthood.”<sup>55</sup>

If it is in fact easier to structure arguments for incentives directed at mothers because they will be considered potentially more effective, this is likely to produce more mean-spirited and parsimonious reforms like those in New Jersey. As a political matter, these women and their children are the weakest members of society, the most dependent, and the least immediately dangerous. And, if contraception fails, punishment seems to be ideologically justified in contemporary welfare rhetoric.

There is a second concern, however, about the potential for the use of law to provide economic incentives for male use of birth control. Even if incentives or reforms are conceived of as exclusively aimed at fathers, they will inevitably affect mothers negatively as a group.

This negative effect on mothers is the reason paternity proceedings raise concern. For instance, aspects of the process itself are objectionable. Single mothers lose their privacy.<sup>56</sup> They are asked questions about their

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54. Irwin Garfinkel, *The Role of Child Support in Anti-Poverty Policy*, Institute for Research on Poverty, Discussion Paper #713-82, at 12 (1982) (unpublished paper, on file with the author).

55. *Id.*

56. To support an alleged father's denial of paternity at a contested hearing, attorneys will often subpoena all men with whom the woman had sexual relations during the period in question. *See Stenzel v. Bennett*, 374 N.Y.S.2d 175 (App. Div. 1975) (using the testimony of the petitioner's landlord regarding the number of men going in and out of her apartment helped cast doubt on the asserted paternity of the child by inferring sexual relations with other men); *Russo v. Hardy*, 328 N.Y.S.2d 888, 889 (Fam. Ct. 1972) (finding that social-services records concerning statements made by the mother about her relations with men are admissible). *But see Margaret B. v. Gilbert W.*, 382 N.Y.S.2d 306 (App. Div. 1976) (illustrating that the intrusiveness of the hearing to the putative father may be significantly less and that answers to interrogatories by the alleged father and income-tax records may not be admissible at a hearing), *rev'd*, 363 N.E.2d 712 (N.Y. 1977).

intimate lives and potentially are subject to penalties, including incarceration.<sup>57</sup> Benefits may be withheld if they refuse to cooperate.<sup>58</sup>

It is the mothers, and ultimately the children, who are now, and will continue to be, sanctioned in pursuit of incentives for male responsibility for birth control. Not only will single mothers lose their privacy, but also many will find themselves exposed to possible violence and abuse as a result of the establishment of an unwanted paternity tie.<sup>59</sup> Furthermore, there may be other long-term implications because along with paternity obligations come visitation rights and, perhaps, claims for custody.<sup>60</sup>

Even non-AFDC<sup>61</sup> single mothers are vulnerable to the sanctioning resulting from this incentive-conferring process. In Wisconsin, for example, under a rhetorical bludgeon that dictates that every child has a right to a father or at least to a father's name on a birth certificate, legislation has been passed that requires *all* single mothers to participate in paternity proceedings.<sup>62</sup> These proceedings are mandated even if the State is not likely to be asked to become a source of economic support for the child. The major architect of the legislation has stated that

[w]e have now in Wisconsin a law that I authored that will become the model for the nation regarding paternity. It has as its foundation that every child born in Wisconsin has a legal right to a father. Children without legal fathers have started down a slippery slope that leads to poverty. Our new paternity law is a

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57. See Fineman, *supra* note 6, at 295.

58. See *Tomas v. Rubin*, 926 F.2d 906, 910 (9th Cir.), *clarified on denial of reh'g*, 935 F.2d 1555 (9th Cir. 1991). The requirement of cooperation may include the willingness to: talk, provide information, give complete answers, maintain a pleasant tone, and give the names of others who can provide information regarding the absentee parent. The requirement may also include friendliness, interest, sincerity, and the maintenance of eye contact.

59. See, e.g., *Waller v. Carlton Co. Hum. Servs. Dep't*, No. C6-89-1116, 1989 WL 145393 (Minn. Ct. App. Dec. 5, 1989). The court denied a request of the good cause exception to the cooperation requirement in light of anticipated physical and emotional abuse to the applicant. The court held that the mother had failed to substantiate her allegation that the child was the product of rape with legal documentation. The applicant had, however, presented affidavits from her social worker and a friend attesting to the violent nature of the putative father. *Id.*

60. See Helen Donigan, *Calculating and Documenting Child Support Awards Under Washington Law*, 26 GONZ. L. REV. 13, 20 (1990). In a survey of Washington attorneys and judges, 61% of attorneys and 71% of judges indicated that women may trade lower child support in exchange for a promise not to contest custody. See *id.*

61. See Aid to Families with Dependent Children, 42 U.S.C. § 602 (1988).

62. See WIS. STAT. ANN. §§ 767.45-.53 (West 1988).

radical departure in that the interests of the child will become equal if not paramount to the interests of the natural parents. The law seeks to ensure that at the time of birth the state and the mother will pursue, for non-marital birth, the establishment of paternity and the subsequent collection of support.

But the philosophy of the law is not punitive. Rather, it assumes that families are natural and that it is not appropriate to have laws that have as their result that in one out of every two births outside of marriage the child will have no legal father—paternity will never be established.

Under our new law the birth certificate will be the vehicle to establish paternity early on. A presumption of paternity will be created with the filing of a statement. It will go with the birth certificate in most cases when the baby leaves the hospital. It will provide the basis for courts to order child support. But most important, it will give that child a legal father.

Both our child support law and our new paternity law are designed to ensure parental responsibility and to help families form and most importantly give new rights to children.<sup>63</sup>

The legislator seems unconcerned that the mother's cooperation, which will require her to reveal details of her sexual and personal life, will be compelled under the potential sanction of incarceration by use of the contempt power. Nor does he take note of the fact that the legal father's paternal involvement with the child will not be mandated by the court beyond, *perhaps*, payment of child support. Also absent is any mention of the fact that a legal father can exercise legal rights, becoming an unwanted, perhaps abusive, presence in the mother's and child's lives merely because he fathered the child.<sup>64</sup>

#### V. CONCLUSION—THE META-NARRATIVE: THE PRIVATIZATION OF INTIMACY

The story of responsible reproduction and the role of incentives has significant social consequences that are perhaps even more important than the potential for individual harm. The focus on paternity proceedings designed to tie men to single mothers and their children financially is a moral to the story, which has significant ideological implications. Most important is that it obscures the magnitude and dimensions of the

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63. Speaker Tom Loftus of the Wisconsin State Legislature, Remarks at the National Child Support Enforcement Association, New Orleans, La. (Aug. 23, 1988) (on file with the author).

64. See Fineman, *supra* note 6, at 294-95.

economic deprivations that make it difficult for women who make decisions to reproduce or to raise their children.<sup>65</sup> Rather than addressing the needs of existing single mothers, disincentive reforms take the form of either punishing them for reproducing or pushing them into a nuclear family form—a model of family life increasingly discredited, even in the middle class from which it arose.

A legal anthropologist might view the paternity proceeding as a ritual. The State, in its orchestration and performance of the proceeding, reinforces, recreates, and reiterates several fundamental societal values. Paramount among these is, of course, the strong preference for formally celebrated heterosexual marriage as the core social unit upon which all else is founded. This preference places responsible reproduction within the context of the traditional family—a context in which the legal consequences are clear and the decisions will be considered and controlled.

For far too long and to too great an extent, family policy in this country has been fashioned and formulated with this dominant ideological construct in mind. The nuclear-family ideal, and the policy based on it, foster the assumption that the maintenance of intimacy, from contraception to responsibility for the day-to-day care of children, is primarily a private task. Intimacy and the costs it generates are placed within the confines of the traditional family structure—a unit that is self-sufficient, and independent, in which independent gender roles function to assure reproduction and nurturing. This type of thinking has allowed the withdrawal of governmental assistance from *all* families in the past decade, not only the poor.

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65. See LESTER, *supra* note 33, at 7. Of all women living with children under 21 years of age whose father is not living in the household, only 58% were awarded child-support payments. *Id.* at 10. Only about half of these women received the full amount of payments they were due, leaving 32% of all such families below the poverty level. *Id.* at 1. Of the 4.2 million women who were never awarded child-support payments, 64% wanted an award but did not obtain one. *Id.* at 10. Furthermore, there is significant doubt whether the provisions of the reforms are effective measures of increasing child-support payments from absent fathers. The detailed requirements for wage withholding call for accurate records; when the forms were enacted, States were faced with large backlogs of delinquent cases which "compounded startup problems." *Id.* Delays in States' institution of wage withholding, in approval of federal funding for automated child-support systems, and in the issuing of federal guidelines for the systems have contributed to a low rate of collection of payment under the reforms. Eighty-one percent of advocates questioned indicated that enforcement of payment through use of liens was "poor," and used phrases like "never done," "non-existent," and "refuses to do this" when commenting on these provisions. In one case, an advocate was told by the IV-D agency that personnel did not know the procedure for enforcing payment through liens.

For these reasons, the idea of using law to provide incentives for male use of birth control presents difficulties. It seems to be that the logic of this particular reproductive story will inevitably contribute to the creation and furtherance of associated myths about the idealized private family and its relationships that should be challenged. The stories we are telling about our families, whether traditional or reconfigured, continue to justify sanctions and punitive reforms that create disadvantages for women and children.



