The Role of Unwed Fathers in Welfare Law: Failing Legislative Initiatives and Surrendering Judicial Responsibility

Roger J.R. Levesque*

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Introduction

Alarmed by the increasing number of children in poverty, female-headed households facing severe financial hardship, and dependents on welfare programs, Congress enacted a series of laws that have attempted to shift the responsibility of supporting indigent children from the federal government to parents.[1] This shift was accomplished by requiring states to establish paternity, implementing child support guidelines, and allocating the noncustodial parents' support contribution to the states.[2] Although there is no

* Fellow, Law/Psychology Program, Center on Children, Families & the Law, University of Nebraska-Lincoln. J.D., Columbia University School of Law, 1993; Ph.D., University of Chicago, 1990; B.A., University of Maine-Fort Kent, 1986.

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1. *See infra* § I.

2. For a summary of the federal enforcement process, see Brian L. Calistri, Note, *Child Support and Welfare Reform: The Child Support Enforcement Provi-*

agreement as to who will ultimately benefit from this legislation,[3] it seems clear that there will be a new group of losers: fathers.

Although most agree that there is nothing legally or morally wrong with shifting the burden of child support to fathers,[4] few agree about the extent of the support obligation. Congress has essentially left the task of delineating support guidelines to each state,[5] a move which has had the unfortunate result of leading to disparate outcomes.

For example, the Indiana Supreme Court recently held that an unwed father has no obligation to reimburse the Aid to Families with Dependent Children (AFDC) program for money it spent to

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sions of the Family Support Act of 1988, 16 J. LEG. 191, 192-95 (1990) (explaining the history of federal child support enforcement procedures); Rebecca Burton Garland, Note, *Second Children Second Best? Equal Protection for Successive Families Under State Child Support Guidelines*, 18 HAST. CONST. L.Q. 881, 882 (1991) (describing congressional attempts to enforce child support with the 1974 social services amendments of the Social Security Act and the Child Support Enforcement Amendments of 1984); Harry D. Krause, *Child Support Reassessed: Limits of Private Responsibility and the Public Interest*, 24 FAM. L.Q. 1, 7-11 (1990) (detailing AFDC enforcement procedures mandated by federal law, especially the 1984 Child Support Amendments, which state agencies must follow) [hereinafter Krause, *Child Support Reassessed*].

3. *See, e.g.*, Calistri, *supra* note 2, at 194, 201 (concluding that the legislation will benefit taxpayers and children); Krause, *Child Support Reassessed*, *supra* note 2, at 13-14; Harry D. Krause, *Reflections on Child Support*, 1983 U. ILL. L. REV. 99, 107 (concluding that attorneys and welfare administrators will benefit most from the series of legislation). As we will see below, there is no agreement as to whether this series of legislation will culminate in benefitting poor children, for whom the legislation was originally intended; or poor mothers, for whom later legislation was intended; or the taxpayers, for whom the most recent legislation was intended.

4. There is nothing inherently objectionable about a welfare program which, at some level, encourages natural fathers to assume support obligations which many already voluntarily assume. Congress justified its early measures on the grounds that all children have the right to receive support from their fathers and on the need to deter fathers from deserting their families to welfare. S. Rep. No. 1356, 93rd Cong., 2d Sess. (1974), *reprinted in* 1974 U.S.C.C.A.N. 8133, 8146 [hereinafter *1974 Senate Report*]. The Supreme Court has found these reasons persuasive. Bowen v. Gilliard, 483 U.S. 587 (1987). It seems unlikely that the focus will be reversed. Legislators and commentators have not been keen on departing from an historical framework built upon an emotionally appealing, if simplistic, foundation: since the natural father brought the children into the world, let him pay for them. *Cf.* Chambers, *The Coming Curtailment of Compulsory Child Support*, 80 MICH. L. REV. 1614, 1618 (1982) ("One jurisprudential foundation for governmentally imposed child support is remarkably simple and straight-forward: parents cause children to come into being[;] . . . . having engaged in an act of their free will, they can justly be held responsible for the consequences.") This is not to say, however, that legislators have not attempted a rational assessment and accommodation of competing values—stepfathers and grandparents have always been proposed as viable alternatives to paternal support.

5. S. Rep. No. 387, 98th Cong., 2d Sess. 40 (1984), *reprinted in* 1984 U.S.C.C.A.N. 2397, 2436. The federal government is now requiring that all states establish guidelines for setting child support awards. 45 C.F.R. § 302.56 (1992).

provide for children that were not his own.[6] Without revealing its legal reasoning, the court ruled that the unwed father's responsibility to his child was no different from that of any other parent simply because the mother was on AFDC.[7] The court simply stated that it would be unjust to have a father support either children not his own or a woman to whom he had no legal tie.[8]

On the other hand, the Supreme Judicial Court of Maine recently came to the opposite conclusion.[9] The court ordered an unwed father to reimburse the AFDC program for money given to support his child and its mother.[10] The court reasoned that a father, whether married, divorced or never married, owes a duty of support.[11] The court further reasoned that if the government makes AFDC payments on behalf of his child and such payments constitute necessary support for that child, the father can be required to reimburse the Department; even if the payments were made to someone to whom the father owes no separate duty of support.[12] The highest court of Maine concluded that there was a properly operative presumption that child support payments, even when used by a mother and her other children, benefit the intended child.[13]

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6. Humphrey v. Woods, 583 N.E. 2d 133 (Ind. 1991). In this instance, the parents were never married and the mother received $405 in AFDC payments for herself and her four children, only one of whom was stipulated to be the defendant's. *Id.* at 134.

7. *Id.* at 135-36.

8. *Id.* A fervent dissenter argued that the majority worked a great injustice on the taxpayers who would not be reimbursed for their AFDC payments to the family: "In choosing whether the father of this child or the taxpayers of the State should benefit, my vote is for the taxpayers." *Id.* at 136 (Krahulik, J., dissenting).

9. Wellman v. Department of Human Services, 574 A.2d 879 (Me. 1990).

10. *Id.* at 885 (affirming the trial court's order of payment). In *Wellman*, the mother received $289 per month for herself and her child. *Id.* at 881. The father contended that he should only reimburse $108 (the equivalent of a monthly payment for a child alone) for each month that AFDC payments were made. *Id.* at n.1.

11. *Id.* at 883.

12. *Id.*

13. *Id.* at 884. The appellant argued that requiring him to reimburse the Department for AFDC payments made to the child's mother deprived him of equal protection because the "requirement treat[ed] him less favorably than unmarried fathers whose children live[d] with a relative other than the mother; divorced fathers; and mothers." *Id.* at 883. The court ruled that equal protection did not apply because married or divorced men and those who had simply abandoned their wives were not similarly situated to the "never-married Wellman." *Id.* It also found that the statute, in theory, did not discriminate between men and women. *Id.*

The court further reasoned that this finding was consistent with AFDC statutes that encourage:

> the care of dependent children in their own homes . . . by enabling each state to furnish financial assistance . . . to needy dependent children and the parents or relatives with whom they are living to help maintain and strengthen family life and to help such parents or relatives to at-

State courts also have been inconsistent in terms of arrearages for which natural fathers will be held accountable. For example, the Kansas Supreme Court found that a trial court properly refused to require a natural father to reimburse AFDC benefits given to the mother and child prior to the determination that he was the natural father.[14] In other states, fathers have been held liable for payments made prior to that determination. In this vein, a California appellate court recently found that a father whose child receives AFDC payments is required to pay retroactive child support to the state.[15] The court noted that although no California court had ordered retroactive child support in a civil case as a matter of common law,[16] the father, in this case, "fell between the cracks."[17] Likewise, the New Hampshire Supreme Court found that a trial court had the authority to order a natural father to reimburse the state for all AFDC payments received by the child and its mother prior to the establishment of paternity.[18]

These divergent court holdings, as well as numerous others,[19] point to the need for a reexamination of the obligations of poor fa-

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> tain or retain capability for the maximum self-support and personal independence consistent with the maintenance of continuing parental care and protection. . . .

Id. at 882 (quoting 42 U.S.C. § 601) (emphasis deleted). The court elaborated, "[s]ince the person caring for the child must have food, clothing and other essentials, amounts allotted to the children must be used in part for this purpose if no other provision is made to meet her needs." *Id.* at 885 (quoting S.M. v. State, 297 A.2d 980, 982-83 (Me. 1979) (emphasis omitted).

Such interpretations have allowed courts to require fathers to reimburse AFDC benefits given to mothers and children, even when the children are also living with the father. *E.g.*, County of Yolo v. Worrell, 208 Cal. App. 3d 471, 477 (1989) (holding that even though parents had joint, physical custody in that the father actually did have custody of the minor child for half the time, the father was required to reimburse the state for AFDC benefits given to mother and child. The court reasoned that the father was a "noncustodial parent whose absence trigger[ed] the eligibility for AFDC"); Washington v. Cobb, 194 Cal. App. 3d 773, 777 (1987) (where a father who had custody of minor for more than 30% of the year was required to reimburse AFDC money given to mother, even when the child was not living with her. "This statute seeks to recoup government revenue spent in maintaining the household of the custodial parent even during periods of the child's temporary absence, in order that the child may have a stable home to which to return.")

14. Kansas v. Baker, No. 62, 368, 1988 Kan. App. LEXIS 755, *6 (Kan. Ct. App. Nov. 4, 1988).

15. Hobbs v. Christenson, 243 Cal. Rptr. 633, 638 (Cal. App. 1988).

16. *Id.* at 636.

17. *Id.* at 638.

18. New Hampshire v. Weeks, 590 A.2d 614 (NH 1991). The reimbursement was ordered even though paternity had been established 14 years after the minor's birth. *Id.* at 616-18.

19. Another example of a discrepency exists in the interpretation of the AFDC provision that allows states to retain all but $50 a month of a father's payments in order to offset the cost of welfare to the family. 42 U.S.C. § 602 (a)(8)(A)(vi) (1992). Despite this seemingly straightforward rule, what actually constitutes $50 has been

thers, especially unwed fathers. This scrutiny is especially imperative for three reasons. First, the Supreme Court of the United States found the above deviations permissible.[20] Furthermore, even when the Supreme Court has dealt with the question of whether biological fathers have a constitutionally cognizable interest in a child born to unmarried or married women, the Court has not protected an unwed father's right to a relationship with the child he is asked to support.[21] Fathers, then, may be faced with the unfortunate scenario of having no social/emotional relationship with a child for whom they are financially responsible.[22] Lastly,

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the subject of disagreement. For example, when Social Security Dependant's Insurance Benefits is the source of a child's support, courts do not agree on whether the $50 "monthly disregard" is applicable. Baylor v. New Jersey Department of Human Services, 561 A.2d 618, 624 (N.J. Super. 1989) (the $50 does not qualify as disregard, because social security benefits do not necessarily qualify as support payments required to be disregarded); Lebetter v. Foster, 350 S.E.2d 31, 33 (Ga. Ct. App. 1986) (social security benefits found subject to the disregard).

In *Baylor*, the reasoning behind not allowing the benefits as disregard rested on the following distinction: the problem addressed by the child support disregard is the collection of child support from absent parents, and "Children's Insurance Benefits" simply are not part of that problem. *Baylor*, 561 A.2d at 623-24. The court, using a rational basis test, found the above-stated legislative purpose constitutionally sufficient and rational enough for distinguishing between support payments from an absent parent and benefits paid to a disabled parent under the Social Security laws. *Id.* at 624 (citing Bowen v. Gilliard, 483 U.S. 587 (1987)).

States also disagree as to who is to account for attorney's fees incurred in response to paternity proceedings. In *Santa Barbara County v. David R.*, the court upheld a statute that denied a putative father's recovery of attorney's fees resulting from a successful defense of a paternity/reimbursement action initiated by the District Attorney. 200 Cal. App. 3d 98, 101-2 (1988). The court also upheld the requirement that, if a father loses, he must pay costs to the county. *Id.* at 102. The court reasoned that,

> However unfair and inconsistent we perceive this legislative determination to be from the point of the incorrectly alleged parent who prevails, we conclude that under our tripartite system of government such a determination is within the province of the legislative branch — a determination with which we may not tamper . . . [we are] bound to the law as [we] find it to be and not as [we] might fervently wish it to be.

Id. at 103-104. The potential consequences of this ruling may be devastating. For example, in *San Francisco v. Ragland*, an alleged father incurred legal fees in excess $35,000 to fend off a paternity action when everyone, including the mother, the District Attorney and Judge, acknowledged he was not the father. 188 Cal. App. 3d 1375, 1378 (1987).

State courts, however, have found that indigent men are entitled to appointed counsel in paternity proceedings. *E.g.*, Caroll v. Moore, 423 N.W.2d 757 (Neb. 1988); Kennedy v. Wood, 439 N.E.2d 1367 (Ind. App. 1982); Corra v. Coll, 451 A.2d 480 (Pa. 1982); Keeny v. Lawson, 484 N.E.2d 745 (Ohio 1984); Lavertue v. Niman, 493 A.2d 213 (Conn. 1985).

20. *See infra* § II A.

21. *See infra* § II B.

22. Some commentators have observed that little attention has been given to the rights of the unwed mother. The rights of unwed mothers have decreased even though she has borne not only the same financial duty of the father, but also the

with current attempts to reform the welfare system, now is an opportune time to reexamine past efforts in order to develop a fair and cost-effective system.

This article's analysis centers on the uneven extension of poor, unwed fathers' legal obligations to include financial support for their children's mothers and to children allegedly not their own. This article begins with a brief history of the child support system for indigent children and an examination of the legislature's rhetoric, as it grappled with conflicting societal forces.[23] Focus is placed on delineating the rhetoric that attaches moral failures to poverty and to unwed parenthood. The target of this rhetoric has shifted from the illegitimate child to the unwed father. This article argues that legislative efforts, by focusing on moral failures, have failed to protect those for whom legislative inititatives were intended and thereby have perpetuated a "dual system of family law:"[24] one for poor fathers and one for the rest of society.

The article next examines the Supreme Court's reaction to this legislation. In the Court's analysis we find a continuation and refinement of the rhetoric which serves as the linchpin for important legal issues throughout our history. This section focuses on

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exclusive responsibility to provide a home and family relationship for the child. *See generally*, MICHAEL GROSSBERG, GOVERNING THE HEARTH: LAW AND FAMILY IN NINETEENTH CENTURY AMERICA (1985) (describing the historic development of American family law in the nineteenth century and arguing that by the turn of the century Amercian family law amounted to judicial patriarchy over domestic relations); HARRY D. KRAUSE, CHILD SUPPORT IN AMERICA: THE LEGAL PERSPECTIVE (1981) (analyzing child support laws and procedures at the federal and state level and especially the establishment of paternity for children born to unwed parents); Mary E. Becker, *The Rights of Unwed Parents: Feminist Approaches*, 1989 SOC. SERV. REV. 496 (arguing that under a feminist analysis, traditional rules favoring unwed mothers in child support and child custody contexts should be retained); Karen Czapanskiy, *Volunteers and Draftees: The Struggle for Parental Equality*, 38 UCLA L. REV. 1415 (1991) (arguing that child support law should place an ungendered responsibility on parents to provide a child with the support of which a parent is capable); John W. Ester, *Illegitimate Children and Conflict of Laws*, 36 IND. L.J. 163 (1961) (discussing legislative and judicial efforts to reduce formal discrimination against illegitimate children and ameliorate the negative effects of their status, and further arguing that in most cases there is no valid rationale for treating them differently).

23. In order to appreciate the nature and power of this legal rhetoric one must first understand the history and cultural backdrop of its basic premises. *See* LAWRENCE M. FINEMAN, THE ILLUSION OF EQUALITY 10 (1991) ("No matter what the formal legal articulation, the implementation of legal rules will tack and reflect the dominant conceptualizations and conclusions of the majority culture."). *See generally*, MARK KELMAN, A GUIDE TO CRITICAL LEGAL STUDIES (1987) (arguing that judicial decisions are essentially political and the many fundamental inconsistencies within American law demonstrate that the principle of objective application of clear principles of law is a myth and is impossible to achieve).

24. The phrase comes from tenBroek's seminal article. Jacobus tenBroek, *California's Dual System of Family Law: Its Origin, Development, and Present Status*, (pts. 1, 2 & 3), 16 STAN. L. REV. 257 and 900 (1964), 17 STAN. L. REV. 614 (1965).

judicial helplessness: an indifference which abdicates responsibility and allows state officials to both allocate public welfare funds and determine who can be required to contribute to the funds.

I. Development of the Welfare Child Support System[25]

Commentators have observed that the basic and determinative elements of laws for the poor emanate from the public assumption of responsibility for poor individuals, and the need to conserve public funds.[26] In order to ration limited funds, the welfare system necessarily makes distinctions between those who qualify and those who do not, the poor and the non-poor. These economic differentiations inevitably lead to moral distinctions between the deserving and the undeserving, the worthy and the unworthy.[27]

In addition to relieving misery, responses to poverty perform the important function of defining and confirming status. Ideology

25. The following brief chronicle forcibly makes generalizations and simplifications. Such generalizations about public discourse are tricky. Social welfare history is undoubtedly complex, a product of many voices from different historical periods. The article primarily focuses on the conservative, social control aspects because it has proved to be the dominant voice. Progressive voices do exist, but continue to be muffled. For an in-depth analysis and influential study of poverty in America, see MICHAEL HARRINGTON, THE OTHER AMERICA: POVERTY IN THE UNITED STATES (1963). For a more recent and liberal analysis, see CHRISTOPHER JENCKS, RETHINKING SOCIAL POLICY: RACE, POVERTY AND THE UNDERCLASS (1992); for a more conservative analysis, see LAWRENCE M. MEAD, THE NEW POLITICS OF POVERTY: THE NONWORKING POOR IN AMERICA (1992).

26. The most notable commentator to make this observation was tenBroek, who wrote that the family law of the poor "derives its particular content and special nature from the central concept of the Poor Law system: public provision for the care and support of the poor." *See* tenBroek, *supra* note 24, at 676. His proposal, however, did not go unchallenged. *E.g.*, Thomas Lewis & Robert Levy, *Family Law and Welfare Policies: The Case for a Dual System*, 54 CAL. L. REV. 748 (1966) (arguing that a dual system of family law — one for the rich and one for the poor — is not inappropriate since the poor get at least a minimal counsel and protection of rights while the rich rightly receive counsel and protection from the system because they pay more).

27. LAWRENCE M. FREIDMAN, A HISTORY OF AMERICAN LAW, 89-90, 215-217, 448-495 (1973). *See also* Joel F. Handler, *The Transformation of Aid to Families With Dependent Children: The Family Support Act in Historical Context*, 16 N.Y.U. REV. L. & SOC. CHANGE 457, 467 (1987-88) (arguing that an enduring principle of welfare policy has been "that the failure to earn one's living was a moral failure."); Jack Katz, *Caste, Class, and Counsel for the Poor*, 1985 AM. B. FOUND. RES. J. 251 ("In modern society, poverty has been defined not only by quantitative measures of well-being but as a morally distinct category."). For a more recent analysis of the immorality attached to parents who could not support their children, see Donna Schuele, *Origins and Development of the Law of Parental Child Support*, 27 J. FAM. L. 807 (1988-89). *See also*, Martha Albertson Fineman, *Images of Mothers in Poverty Discourses*, 1991 DUKE L. J. 274, 282-83 (describing single mothers as having been lumped with drug addicts, criminals and other degenerates); Sylvia Law, *Women, Work, Welfare, and the Preservation of Patriarchy*, 131 U. PA. L. REV. 1249, 1254 (1983) (describing the AFDC program as "Gratuitous Charity for Worthy Women").

and rhetoric explain a great deal of the massive disjunctures between the stated goals of welfare policy and their results.[28] This section focuses on the rhetoric of difference and deviance. By focusing on the single variable of economic wealth and then drawing a line on the wealth continuum, society and legislators create a class of people who are "them," not "us." It is this creation of the category of the "poor" which makes possible the assertion of their moral weakness. To assert their moral weakness, "they" must exist as a conceptually distinct group. Thus, when we hear legal rhetoric about the poor, we often hear an underlying message of deviance: we are normal, they are deviant. Their deviance is a product of a single aspect of their lives, their relative wealth position. All other aspects of their lives are either distorted by the label of deviance or ignored. By creating this class of people, we are at once able to distinguish ourselves from them and reaffirm our own normalcy.[29]

American society has historically used a "worthy-person standard" to define status.[30] The links between deviance, morality and poverty were a dominant cultural theme reflected in early American legal rhetoric.[31] In this manner, the dominant nineteenth century cultural assumption, that the poor were morally degenerate, formed the basis for the legal treatment of the poor during that period. Such distinctions continue to this day.

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28. *See* Murray Edelman, *The Construction of Social Problems as Buttresses of Inequalities*, 42 MIAMI L. REV. 7 (1987) (observing that the rhetoric of public policy constructs societal conditions as problems, and legislatures attempt to deal with societal conditions but are often ineffective because there is no realization that the societal condition is a natural evolution and not a temporary problem caused by special circumstaces).

29. *Cf.* MARTHA MINOW, MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION AND AMERICAN LAW (1990) (arguing that American law sets up distinctions between classes of people in part to assert the preeminence of the dominant group); Martha Minow, *The Supreme Court 1986 Term — Foreword: Justice Engendered*, 101 HARV. L. REV. 10 (1987) (exploring this problem in the context of how the Supreme Court approached gender issues in the 1986 term).

30. *E.g.*, City of New York v. Miln, 36 U.S. (11 Pet.) 102 (1837). In *Miln*, the court upheld the validity of a New York statute that required the master of every ship arriving in New York to report the occupation of each of the ship's passengers. The court found that:

> it [is] as competent and as necessary for a state to provide precautionary measures against the moral pestilence of paupers . . . as it is to guard against the physical pestilence, which may arise from unsound and infectious articles imported, or from a ship, the crew of which may be labouring under an infectious disease.

Id. at 142-43.

31. Poor parents were deemed to be immoral not only because they were poor, but also because they were not able to support their children. Handler, *supra* note 27, at 470-71. This societal belief has a long history, as exemplified by Blackstone's thinking, which emphasized the moral obligation (not legal), arising out of natural law, of a parent to support the children they had brought into being. *Id.* at 467.

Commentators argue that the poor in general, and poor women in particular, are treated as unworthy.[32] It has been well recognized that a series of federal amendments to AFDC created a dual track family law system that imposes costs on women[33] and that the dual system is based on whether the custodial parent, most likely the mother, is on welfare.[34] A closer look at AFDC history and the current AFDC amendments, however, reveals that the focus, use, and costs of the worthy-person standard have materially shifted from the unwed mother and her illegitimate children to the unwed father and *his illegitimate family*. That is, the new amendments include the father among the unworthies and force him to simultaneously contribute to public funds and receive the least benefit.[35]

A. The Unworthy-Person Standard

Commentators often point out that AFDC's precursor, Aid to Dependent Children (ADC)[36], was intended as a program for the "worthy."[37] The ADC program was slipped into the Social Security

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32. 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, 714 (1987-88).

33. *Id.* at 715 ("In the course of reducing income, [AFDC] also creates a dual track family law — one set of family responsibility requirements for the poor . . . [and a] less onerous set of state family law requirements for everyone else.)

34. *See* Bowen v. Gilliard, 483 U.S. 587, 613 (1987) (Brennan J., dissenting) ("Almost 90% of single-parent households are headed by women, and a considerable percentage of them face great financial difficulty (citing U.S. DEPT. OF COM., BUREAU OF THE CENSUS, CURRENT POPULATION REPORTS, HOUSEHOLD AND FAMILY CHARACTERISTICS: MARCH 1984 5 (1985))).

35. This is not to say that fathers have been the only targeted group. For example, the new "grant group composition" rules, which deem the income of others in the household as available to the indigent child or parent, are a clear example of how the new amendments impose more extensive familial obligations on the poor than on any other class. Hirsch, *supra* note 32, at 714-15; *see* 42 U.S.C.A. §§ 602(a)(31), 602(a)(38), 602(a)(39) (West Supp. 1988). Although these rules are perhaps more justifiable (at least as far as common law obligations would go), as the people are either related or involved in an ongoing relationship, they still contain the moralistic overtones reflected in the attempt to burden those most disadvantaged in order to reduce the burden that the poor place on society. *See* Hirsch, *supra* note 32, at 715.

36. Social Security Act of 1935, Pub. L. No. 74-271, ch. 531, tit. IV, § 401, 49 Stat. 627 (codified as amended at 42 U.S.C. §§ 601-617).

37. The usual starting point for such claims is Bell's treatise, which was an early classic study of the ADC program focusing on "suitable home" policies. WINIFRED BELL, AID TO DEPENDENT CHILDREN, 174-198 (1965). *See also* King v. Smith, 392 U.S. 309, 313-325 (1968); Ronald J. Chilton, *Social Control Through Welfare Legislation: The Impact of a State "Suitable Home Law"*, 5 LAW & SOC'Y REV. 205 (1970) (describing an AFDC policy in which dependant children were required to live in a "suitable home"; as determined by the state board. The "suitable home" policy ususally forbade certain conditions including parental immoral sexual conduct, the birth of illegitimate children after AFDC payments were initiated, and the abuse or neglect of children); Julius Paul, *The Return of Punitive Sterilization Proposals:*

Act to provide grants to state pension programs that had run out of money as a result of the Depression.[38] The funds were earmarked for widows with young children who were covered by the existing state pension programs for mothers.[39] Child support was not an issue; the children's fathers were dead.

ADC continued to be a program for the "worthy." This restriction was consistent with the congressional discussions of the proposed ADC program which clearly stated that participating states could consider a mother's "moral character" in determining eligibility.[40] Children were disqualified because their homes were not "suitable" (e.g., illegitimate children were considered as proof of the mother's immoral behavior and unsuitability), because their mothers were employable (black women were considered able to work), or because they had "substitute parents" in the form of their mothers' amorous relationships with men.[41]

Beginning in the late 1960's, the use of the worthy-person concept was set back by two significant milestones in welfare rights. First, the Supreme Court voided state rules that excluded "unworthy" children who otherwise met federal eligibility criteria by claiming that "federal public welfare policy now rests on a basis considerably more sophisticated and enlightened than the 'worthy-

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Current Attacks on Illegitimacy and the AFDC Program, 3 LAW & SOC'Y REV. 77 (1968) (describing the policy of punitive sterilization which was aimed at "purging" the country of undesirable classes. The practice regained popularity in the late 1960's and was primarily aimed at mothers of illegitimate children, especially those receiving AFDC. The practice was part of a punitive action program that often included loss of AFDC benefits, imprisonment or fining of the mother, custody loss of children, or any combination of the above). *See also* Bernard L. Diamond, *The Children of Leviathan: Psychoanalytic Speculations Concerning Welfare Law and Punitive Sanctions*, 54 CALIF. L. REV. 357, 361-65 (1965)(describing how the attitudes behind welfare law are closely tied to the emotions of guilt and fear. On the one hand, efforts to protect the weak and poor benefit the donor, rather than the receiver, by easing the feelings of guilt. On the other hand, the very existence of the poor and weak threatens the growth and prosperity of society, thus leaving the poor and the weak as "nonpersons" for societal purposes. Traditional welfare laws achieve an insecure balance between these two forces.)

38. Deborah Harris, *Child Support for Welfare Families: Family Policy Trapped in its Own Rhetoric*, 16 N.Y.U. REV. L. & SOC. CHANGE 619, 630-31 (1987-88).

39. *Id.* Although the statutory definition of dependent children in the Social Security Act also included children of divorced, separated, and never-married mothers as well as children of widows, the state programs mostly reached only the latter group. *Id. See also*, King v. Smith, 392 U.S. 309, 320-21 (1968); MICHAEL B. KATZ, IN THE SHADOW OF THE POORHOUSE: A SOCIAL HISTORY OF WELFARE IN AMERICA 128-29 (1986)(describing mother's pensions as the precedent and model for ADC and finding that, as expected, most payments of mother's pensions went to widows); Bell, *supra* note 36.

40. H. R. Rep. No. 615, 74th Cong., 1st Sess. 24 (1935); S. Rep. No. 628, 74th Cong., 1st Sess. 36 (1935).

41. *King*, 392 U.S. at 313-22.

person' concept of earlier times."[42] Second, Congress extended welfare eligibility to the mothers of dependent children resulting in the renaming of the program to AFDC.[43]

The welfare rights movement of the 60's and 70's, however, was also coupled with a 37% increase in the number of children in single mother homes, for both blacks *and* whites.[44] This increase was not due to the death of fathers, but to changes in marital behavior resulting in their absence.[45] Blacks were increasingly less likely to marry, while whites married but increasingly divorced.[46] The increase in single mother families, coupled with the new Congressional and Judicial directives,[47] resulted in an unprecedented expansion of welfare payments to homes in which fathers were absent.[48] Congressional concern with the increase in the numbers of previously "unworthy" mothers and children on the welfare rolls resulted in a series of AFDC amendments that have largely reversed the progress made away from the use of moral standards during the welfare rights movement of the 1960's and 70's.[49]

Commentators have often pointed to a deep hostility toward the impoverished single mother household.[50] These commentators have shown that, as poverty became feminized and as images of black, unwed teen mothers became fixated in the public consciousness, welfare "reform" became more exclusive, miserly and harsh in its effort to contain, deter and stigmatize.[51] Although this un-

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42. *Id.* at 324-25.

43. 42 U.S.C. §§ 601, 606(b) (1988).

44. IRWIN GARFINKEL & SARA S. MCLANAHAN, SINGLE MOTHERS AND THEIR CHILDREN: A NEW AMERICAN DILEMMA 49 (1986).

45. Calistri, *supra* note 2, at 192-93 ("Today, only about 3.5% of those receiving AFDC have a deceased father: divorce accounts for 68% of single-parent families; illegitimacy another 20%; and extended separation 8%.") The program serves over seven million children. *Id.*

46. *See* GARFINKEL & MCLANAHAN, *supra* note 44, at 51-54.

47. *See supra* notes 40-41 and accompanying text.

48. *See* GARFINKEL & MCLANAHAN, *supra* note 44, at 114 ("In the first televised presidential speech . . . ever devoted entirely to welfare reform, President Nixon argued that the best way to stem the growth in welfare expenditures for families headed by single mothers was to extend eligibility for cash assistance to two-parent families.")

49. *Id.* at 117. For examples of the federal courts' progression away from the use of moral standards, see Lewis v. Martin, 397 U.S. 552 (1970); King v. Smith, 392 U.S. 309 (1968); Gilliard v. Craig, 331 F.Supp. 587 (W.D.N.C.) *aff'd*, 409 U.S. 807 (1972).

50. Fineman, *supra* note 27, at 281-82. *See generally* Law, *supra* note 27 (discussing discrimination against poor women seeking work outside the home in the context of federal policy).

51. Handler, *supra* note 27, at 460. Attempts to control the "unworthy" are not new. *See* Chilton, *supra* note 37. To a large extent, criticisms have not advanced much beyond views of earlier commentators who suggested that racial prejudice played a more than subtle role in welfare legislation. *Cf.* Paul, *supra* note 37. Nor

doubtedly is a valid observation, equally cogent is the proposition that Congress, influenced by Court prohibitions against basing AFDC eligibility on the moral worth of single mothers and illegitimate children[52] and motivated by an effort to stem costs, turned to the only other group which could be held responsible: fathers.[53] The "new" approach to the welfare problem, then, would be solved by privatizing responsibility[54] and foisting the burden of the welfare program onto "fugitive" fathers.

The perception has taken hold that an absent father, not society, is responsible for the support of his children. In some jurisdictions, the father is also responsible for supporting his children's mother, regardless of his ties to her. The perception is clear: if the father does not pay or pay enough, he is irresponsible and culpable.

Current legislative amendments well reflect the proposition that an absent father's child support obligation has become the new gospel. This new faith has all the moral trappings of the old. The emphasis has arguably been more on immorality — the culpability

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have we gone beyond what earlier commentators perceived as a deep, primitive, unconscious fear of the poor which translated into harsh attempts to control. Diamond, *supra* note 37, at 361-65.

52. It is important to note that states have been able to avoid the *King v. Smith* prohibitions and achieve the same result. For example, the *King* Court had held that a state could not reduce a child's AFDC benefits due to the presence of a substitute father or an unrelated adult male (UAM) in the child's home. *King*, 392 U.S. at 333. This was true regardless of whether a contribution from the UAM is assumed or proven. *Id.* at 314. In *Anthony v. McMahon*, the court found that benefits to a child could be reduced or eliminated because the state could consider the contribution of one of the mother's children's father's income to be available to the family. No. F014826, 1991 Cal. App. LEXIS 959, *28 (Cal. App. July 22, 1991). The California Court claimed that this ruling was not violative of the *King* holding since, even though the mother and father were not married, the mother and father were considered related by having had a child. *Id.* at *30.

53. It would, however, be naive to think that welfare mothers are no longer being discriminated against. Likewise, it would also be wrong to maintain that welfare mothers have been the only ones singled out for harsh treatment. This is exemplified by the passage of the General Relief program. Originally, recipients of General Relief were the totally unemployable. Handler, *supra* note 27, at 483. One commentator has noted that "General Relief was designed for the stereotypical male malingerer, the bum. . . ." *Id.* at 460.

54. *See* 1974 Senate Report *supra* note 4, at 8145-50. The privatizing of responsibility derives from ancient roots. *See* Schuele *supra* note 27. Family responsibility laws, however, were not the product of English common law, but of Poor Laws which imposed duties on husbands to support their wives, not their children. *See* Margaret Howard, *Relative Responsibility in AFDC: Problems Raised by the NOLEO Approach — "If at First You Don't Succeed . . .",* 9 URB. L. ANN. 203 (1975); Daniel R. Mandelker, *Family Responsibility Under the American Poor Laws*, 54 MICH. L. REV. 497, 498-99 (1956); tenBroek, *supra* note 24, at 258-91. *But see* R. H. Helmholz, *Filius Nullius: A Reassessment of the Common Law*, 63 VA. L. REV. 431 (1977) (arguing that although illegitimate children had no enforceable common law support rights prior to the Elizabethan Poor Laws, they did have support rights enforceable in the courts of the English Church).

of the father — than on the needs of the child and the constraints of the welfare program. This preoccupation with the absent father's fault and irresponsibility, however, displaces awareness of the limited resources of many absent fathers and of the administrative costs of "making them pay." Moreover, the congressional focus on fathers is based upon anachronistic familial concepts; notions which have become outmoded due to changing societal perceptions of divorce and sexual behavior and a general relaxation of traditional familial bonds.[55]

B. Ferretting Out Unworthy Support Fugitives

The history of federal welfare programs demonstrates that Congress and the states have increasingly relied upon the morally unworthy standard in order to place the burden of welfare dependency upon absent fathers. As early as 1952, the Notice to Law Enforcement Officials (NOLEO) amendments required state welfare officials to notify law enforcement officials whenever welfare was granted for a child who had been deserted or abandoned by a parent.[56] Congress and most other observers, however, eventually concluded that the NOLEO program was ineffective.[57]

Despite the legislation, in practice, American law remained deeply insensitive to the enforcement of child support obligations.[58] Congress relegated child support enforcement responsibility to state welfare officials and required them to develop and maintain their own program for establishing paternity and collecting support.[59] Some states responded by cutting off welfare benefits where mothers refused to cooperate in efforts to establish paternity and obtain child support from fathers. These efforts were struck down by the courts on the ground that the federal statute did not specifically authorize states to punish children for their mothers' failure

55. *E.g.*, MARY ANN GLENDON, THE NEW FAMILY AND THE NEW PROPERTY (1981); Katherine T. Bartlett, *Rethinking Parenthood as an Exclusive Status: The Need for Legal Alternatives when the Premise of the Nuclear Family Has Failed*, 70 VA. L. REV. 879 (1984); Herbert Jacob, *The Changing Landscape of Family Policy and Law*, 21 LAW & SOC'Y REV. 743, 747 (1988) (reviewing EVA R. RUBIN, THE SUPREME COURT AND THE AMERICAN FAMILY: IDEOLOGY AND ISSUES). *See generally* Martha A. Fineman, *Intimacy Outside the Natural Family: The Limits of Privacy*, 23 CONN. L. REV. 955 (1991) (arguing that the "family" of the past is extinct because, in both actual and ideological terms, the "family" structure has changed dramatically); Krause, *Child Support Reassessed*, *supra* note 2; Law, *supra* note 27.

56. Harris, *supra* note 38, at 632.

57. For a history of the NOLEO provision, *see* Howard, *supra* note 54.

58. Krause, *Child Support Reassessed*, *supra* note 2, at 5.

59. Social Security Amendments of 1967, Pub. L. No. 90-248, 81 Stat. 821 (1968).

to cooperate with paternity actions.[60] The Department of Health, Education and Welfare, however, gave the child support program low priority and did not even monitor states' activities.[61]

As mentioned above, pressure for vigorous child support enforcement grew as the welfare rolls increased markedly.[62] In 1974, Congress amended the Social Security Act by passing Title IV-D.[63] The amendment essentially established the federal government as overseer and standard-bearer of child support enforcement. By 1975[64] the essential features of the current welfare child support system, namely *compulsory* participation and the assignment of rights to the state, were added to the Social Security Act.[65] By that time, Congress had created the ideological framework for state welfare programs.[66] Nonetheless, while creating the basis for the cur-

60. *See, e.g.*, Shirley v. Lavine, 365 F. Supp. 818 (N.D.N.Y. 1973), *aff'd sub nom.*, Lascaris v. Shirley, 420 U.S. 730 (1975).

61. *See* 1974 Senate Report, *supra* note 4, at 8146-48.

62. *See supra* notes 44-49 and accompanying text.

63. The Child Support Enforcement Act, Pub. L. No. 93-647, 88 Stat. 2337 (1974) (codified as amended in scattered sections of 42 U.S.C. §§ 651-669 (1982 and Supp. 1989)). Title IV-D required the states to establish within their welfare agencies departments devoted solely to child support enforcement. *Id.* The federal government reimbursed states for seventy-five percent of the cost of administering the program. *Id.* Compliance was assured by periodic audits performed by the Department of Health and Human Services. *Id.* The amendment also created the Federal Parent Locator Service. *Id.* In addition, it required custodial parents to assign their support rights to the states if they wanted to qualify for AFDC benefits and to cooperate with the state in establishing paternity of the absent parent. *Id.* The provision also allowed for a tax refund intercept to offset overdue support claims against the obligor parent. *Id.*

64. Title IV-D was then added to the Social Security Act. Pub. L. No. 93-647, 88 Stat. 2351 (1975) (codified as amended at 42 U.S.C. §§ 651-667 (Supp. IV 1986)). From that point on, welfare mothers had to cooperate in getting child support as a condition for receiving subsistence welfare benefits. 42 U.S.C. § 602(a)(26)(B) (1982 & Supp. IV 1986).

65. 42 U.S.C. § 602(a)(26)(B) (1982 & Supp. IV 1986). The required cooperation has been described as an intrusive, kafkaesque experience. The recipient is at the mercy of a seemingly arbitrary and chaotic system. For example, when paternity has not been established, the mother must reveal her sexual history, subject herself and her child to blood tests, and testify against the alleged father. If she does not cooperate to the satisfaction of the welfare officials, she loses her portion of the welfare grant. *See* Harris, *supra* note 38, at 621-22; Hirsch, *supra* note 32, at 729; James W. Johnson & Adele M. Blong, *The AFDC Child Support Cooperation Requirement*, 20 CLEARINGHOUSE REV. 1389, 1397-99 (1987).

There are, however, "good cause" exceptions if the caretaker is able to prove good cause for failure to cooperate. 42 U.S.C.A. § 602(a)(26)(B) (West Supp. 1988). Commentators have remarked on the low number of AFDC recipients who take advantage of the exception; a failure attributed to state officials who do not inform applicants adequately of their rights and the government's failure to follow applicable standards and procedures when assessing claims. *See* Mary Mannix, Henry Freedman & Natarlin Best, *The Good Cause Exception to the AFDC Child Support Cooperation Requirement*, 21 CLEARINGHOUSE REV. 339, 346 (1987).

66. This is not to say, however, that a growing "national" law of domestic relations did not exist prior to these amendments. A common, national tradition of gov-

rent federal approach to children in poverty, the 1974 Amendments left primary enforcement and administrative responsibility to the states.[67]

By 1984, a series of significant federal amendments announced a more active federal role in the states' remaining areas of responsibility.[68] States were now required to sharpen their laws and strengthen their enforcement powers.[69] The focus was on effective methods of support enforcement.[70]

By 1988, however, even more significant amendments were adopted as part of the comprehensive Family Support Act of 1988 (FSA).[71] Under these rules, welfare parents may no longer exclude an independently supported child's income from the government's determination of the family's welfare grant.[72] As part of the FSA, the legislature mandated that each state's child support guidelines were to carry rebuttably presumptive weight.[73]

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erning the family existed prior to this time. The states had acquired a rather universal law of the family, even before the Supreme Court became involved in "constitutionalizing" the family or before Congress enacted the federal welfare legislation of concern here. Schuele, *supra* note 27, at 808 (citing GROSSBERG *supra* note 22, at 17 ("In the nineteenth century, the states assumed the task of forging a republican code of family governance.")).

67. 42 U.S.C. § 652(a) (1988).

68. This is not to say that the federal government had not been active. The year 1981 ushered in the first round of welfare cuts, as contained in the Omnibus Budget Reconciliation Act. Pub. L. No. 97-35, 95 Stat. 357 (1981). Its major provisions, however, were aimed at reducing or terminating benefits for welfare recipients with any connection to the work force through their own earnings or those of a spouse. Several requirements worked to prevent poor families from receiving AFDC benefits including: monthly reporting, retrospective budgeting, reductions of earned income disregards, and the imposition of stepparent deeming. *Id.* at §§ 2315, 2301, 2306, 95 Stat. 855, 843, 846 (1981) (respectively). *See also* Hirsch, *supra* note 32, at 729-730.

69. Child Support Enforcement Amendments of 1984, Pub. L. No. 98-378, 98 Stat. 1305 (codified as amended in scattered sections of 42 U.S.C.); *See also* Krause, *Child Support Reassessed*, *supra* note 2, at 8-11.

70. 42 U.S.C. § 666 (Supp. 1989) (requiring the states to recover unpaid child support through wage withholding, income tax offsets, liens against property, etc.)

71. Pub. L. No. 100-485, 102 Stat. 2343 (1988) (codified at scattered sections of 42 U.S.C.).

72. *See* Bowen v. Gilliard, 483 U.S. 587, 593-94 (1987) (citing S. Print No. 98-169, p. 980 (1984)); *see also id.* at 619 (Brennan J., dissenting) ("[T]he Government . . . has told children who live with mothers who need AFDC that they cannot both live with their mothers and receive child support from their fathers. . . . It has declared that, for an indigent mother with a child receiving child support, a condition of *her* AFDC eligibility is that *her child* relinquish its fundamental constitutional interest in maintaining a vital bond with either her or the child's father." (emphasis in original)).

73. *See* S. Rep. No. 377, 100th Cong., 2d Sess. 2, 17, *reprinted in* 1988 U.S.C.C.A.N. 2776, 2779, 2794; H.R. Cong. Rep. No. 988, 100th Cong. 2d Sess. 91-92, *reprinted in* 1988 U.S.C.C.A.N. 2776, 2879-80. *See* 42 U.S.C.A. § 677 (West Supp. 1990).

The result is that the financial status of a custodial parent determines that of his or her child; regardless of the amount the noncustodial parent pays in child support. Furthermore, the Government counts child support paid for one child in a household as available to each of that child's half-siblings. This contradicts traditional state family law doctrines which base child support upon the unique needs of the child for whom it is paid and restricts its use to that child.[74] Likewise, in addition to half-siblings, stepparents and grandparents of indigent children are now presumed to be financially responsible even though they have no legal obligation.[75] Once again these presumptions completely counter traditional family law where neither were siblings obliged to support each other; nor were grandparents required to support their grandchildren; nor were stepparents generally obligated to support their stepchildren.[76]

Several justifications have been advanced to support these new amendments: reducing the budget, reallocating scarce dollars to the most needy, promoting the sharing of income, and encouraging families to gain autonomy.[77] These justifications, however, are quite malleable and readily provide facades for moralistic impulses. In this vein, the policy of encouraging self-support and familial independence seems to contradict the rationale behind recent amendments that allow state agencies to refuse to pay AFDC benefits to teenage mothers who do *not* live with their own parents.[78] Ironi-

74. Hirsch, *supra* note 32, at 715.

75. 42 U.S.C.A. §§ 602(a)(31),(39). In the Deficit Reduction Act of 1984, Congress determined that if a child's parent was a minor living with the child's grandparent or stepparent, a portion of the grandparent's or stepparent's income must be considered available to the dependant child. *Id.* If the minor parent is not living with the grandparent(s), however, the grandparent's income might not be presumed to be available. *See also* Morell v. Flaherty, 428 S.E.2d 492, 494 (N.C. Ct. App. 1993) (discussing the impact of the Deficit Reduction Act of 1984 and its impact on grandparent deeming).

76. Margaret M. Mahoney, *Support and Custody Aspects of the Stepparent-Child Relationship*, 70 CORNELL L. REV. 38, 43-45 (1984). *See also*, Mary A. Goldsmith, Note, *AFDC Eligibility and the Federal Step-parent Regulation*, 57 TEX. L. REV. 79, 94-95 (1978); Hirsch, *supra* note 32, at 715.

77. *See* Bowen v. Gilliard, 483 U.S. 587, 599 (1987). *See also* Diann Dawson, Comment, *The Evolution of a Federal Law Policy Under the Title IV-A of the Social Security Act — The Aid to Families with Dependent Children Program*, 36 CATH. U. L. REV. 197, 198 (1986); Hirsch, *supra* note 32, at 731; Howard, *supra* note 54, at 203-209.

78. Pub. L. No. 100-485, § 403, 102 Stat. 2397 (1988). See also, H.R. CONF. REP. No. 861, 98th Cong., 2d Sess. 1407-08, *reprinted in* 1984 U.S.C.C.A.N. 1445, 2095-96; S. Rep. No. 494, 97th Cong., 2d Sess. 51-52, *reprinted in* 1982 U.S.C.C.A.N. 781, 827-28.

cally, this policy of refusal was originally justified as a means of reinforcing parental authority over wayward youth.[79]

The half-sibling deeming provisions did not derive from pure motives either. They descended directly from earlier welfare restrictions based on "unsuitable home" and "man in the house" rules which denied benefits on the basis of a woman's allegedly immoral character.[80] Grandparent deeming rules are perhaps the most pernicious.[81] These rules apply only when the parent is under 18 years of age, is living in the same household as the child and grandparent, and is related to the grandparent.[82] Surprisingly, these provisions remain unchallenged under the Equal Protection Clause, although they appear to be legislative attacks on minority families with matriarchal structures.

Although several "reforms" included in the FSA[83] generated considerable controversy,[84] the most notable achievement of the

79. Hirsch, *supra* note 32, at 718 (citing H.R. CONF. REP. No. 861, 98th Cong., 2d Sess. 1407-08, *reprinted in* 1984 U.S.C.C.A.N. 1445, 2095-96; S. REP. No. 494, 97th Cong., 2d Sess. 51-52, *reprinted in* 1982 U.S.C.A.A.N. 781, 827-28).

80. Law, *supra* note 27, at 1280; tenBroek, *supra* note 24, at 654-58.

81. *See supra* note 75.

82. 42 U.S.C.A. § 602 (a)(39) (1984).

83. The child support enforcement provision constitutes the first title of the seven-title FSA. The remaining titles of the FSA are devoted to, respectively, job search and skills training, "workfare" or AFDC-UP, child care for parents participating in education and training, demonstration projects, miscellaneous provisions, and funding provisions.

84. Perhaps the most controversial of these measures was workfare, which has historically been one of the most bitterly contested proposals. Congress, and to a large extent society, has long held that welfare undermines work incentive. Congress passed the first major federal work program for AFDC in 1967. Social Security Amendments of 1967, Pub. L. No. 90-248, § 204. 81 Stat. 821, 1002-1012. Despite the controversy, "[a]mong both liberals and conservatives, by the latter 1980's underclass and workfare had become the key concepts in American discourse about poverty and reform (emphasis omitted)." MICHAEL B. KATZ, THE UNDESERVING POOR: FROM THE WAR ON POVERTY TO THE WAR ON WELFARE 233-34 (1989). Despite good intentions, commentators agree that most of the poor mothers on AFDC cannot become independent through paid work alone. Critics claim that the non-poor reinforce their attitudes toward AFDC recipients through the process of "creaming"; whereby only those who conform to the expectations of the educated and skilled succeed in escaping poverty. Handler, *supra* note 27, at 519.

The early WIN amendments were a resounding failure in terms of reducing welfare dependency. Handler, *supra* note 27, at 490. Despite that failure, and as a reflection of the powerful societal belief that work is a way out of poverty, the amendments were incorporated into the FSA. Family Support Act of 1988, Pub. L. No. 100-485, 102 Stat. 2343. For a discussion of the FSA amendments (JOBS), as well as alternatives (GAIN, ET), see Handler, *supra* note 27, at 489-509. A recent study of the way to move welfare recipients into permanent positions, though, lends credence to the fact that the efforts may well be paying off. Jason DeParle, *Welfare Plan Linked to Jobs Is Paying Off, a Study Shows*, N.Y. TIMES, April 23, 1992, at A1.

For reviews that see workfare as desirable, see GARFINKEL & MCLANAHAN, *supra* note 16, at 148-50 (1986); Handler, *supra* note 27, at 462-463. For a not so flattering review, see Law, *supra* note 27, at 1280. For a brief look at other reforms,

FSA was its sharpened child enforcement standards. The standards were to be met by (1) changing the state's use of child support guidelines, (2) implementing immediate wage withholding, (3) establishing paternity and (4) continuing to assign all support rights to the state.[85]

In slightly more than one decade, fathers became responsible for not only welfare children (even if they weren't their own) but also mothers (even if they had no legal relationship to them). The political rhetoric of the 60's and early 70's about ending poverty was replaced with political rhetoric about ending welfare dependency by essentially switching the burden of dependency onto fathers.

To understand the switch, one must understand its thrust. When Congress enacted sweeping legislation to strengthen enforcement of child support obligations, its primary goal was to reduce the federal cost of the AFDC program.[86] When the blueprint was formed, however, there were essentially no data to support the claim that fathers could be made to pay enough to reduce welfare costs.[87] Although being tough about child support can only have a negligible impact on welfare families because of the small earnings of fathers,[88] Congress nevertheless concluded that financial responsibility for welfare children could be transferred from the government to the children's fathers. Commentators, even those who were at the forefront of the effort to make fathers responsible, now lament this strategic move. They now claim that the current emphasis on enforcing fathers' obligations clouds our judgement about how much money we can realistically expect fathers to provide. Such efforts are simply not cost effective,[89] as we will see below.

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see Robert D. Reischauer, *Welfare Reform: Will Consensus Be Enough?* BROOKINGS REV. 3-8 (1987).

85. *See supra* note 2.

86. Krause, *Child Support Reassessed*, *supra* note 2, at 6; Calistri, *supra* note 2, at 191.

87. The 1974 Senate Report, which contains the basic outlines of the present welfare child support requirements, cited only one study. 1974 Senate Report, *supra* note 4, at 8145-47 (citing *Nonsupport of Legitimate Children by Affluent Fathers as a Cause of Poverty and Welfare Dependence*). The cited article did not deal with the potential for support collections from poor fathers or from fathers of illegitimate children who were prompting the increasing concern. *Id.*

88. Handler, *supra* note 27, at 511 ("Of all the mothers in poverty, less than one-third [a]re awarded child support, and of this group, minorities, the less well educated, and the young [a]re even worse off.").

89. *See* Harris, *supra* note 38, at 635-41; Krause, *Child Support Reassessed supra* note 2, at 422-31; Philip K. Robins, 76 AM. ECON. REV. 768 (1986) (child support reforms are likely to have no appreciable effect if there are no increases in the amount of award).

C. *Justifying Reforms*

Why does the system persist despite its economic ineffectiveness and despite the avowed effort to save public funds? Two reasons are particularly relevant as they are central aspects of congressional efforts to reform the welfare system. One is the seemingly ingrained belief that the Government can make welfare cost effective by devising better support collection methods. The other is the notion that fathers should be made to support their children regardless of the administrative cost.

In its recent reform effort, Congress maintained that most of the welfare savings would be realized through four improvements in the child support system.[90] The potential cost-effectiveness of these reforms, however, has received considerable scrutiny.

The first reform, child support guidelines, was intended to increase the adequacy of child support orders and improve the consistency and predictability of child support awards.[91] Nonetheless, commentators report that welfare children are not being helped, and that support may actually decrease.[92] Commentators have

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90. *See supra* text accompanying note 85.

91. *See supra* note 5 and accompanying text. The guidelines were based upon studies which pointed to inequities in setting child support amounts. *See* Charles David Creech, Note, *Legislating Responsibility: North Carolina's New Child Support Enforcement Acts*, 65 N.C.L. REV. 1354, 1357 (1987); William H. Douglas, *Factors in Determining Child Support*, 1985 JUV. & FAM. CT. J. 27, 27-28 (Special Issue); Sally F. Goldfarb, *Child Support Guidelines: A Model for Fair Allocation of Child Care, Medical, and Educational Expenses*, 21 FAM. L.Q. 325, 326 (1987); Robert G. Williams, *Guidelines for Setting Levels of Child Support Orders*, 21 FAM. L.Q. 281, 282-86 (1987). These studies and the resulting legislation, however, were seriously limited in that they only referred to consistency in setting child support obligations. This is apparently because the thrust behind the guidelines was the fear that judges would set inadequate awards. These fears were justified. Peter Leehy, Note, *The Child Support Standards Act and the New York Judiciary: Fortifying the 17 Percent Solution*, 56 BROOK. L. REV. 1299, 1304-05 (1991). *See also* Carol S. Bruch, *Developing Standards for Child Support Payments: A Critique of Current Practice*, 16 U.C. DAVIS L. REV. 49, 54-56 (1982); Lucy M. Yee, *What Really Happens in Child Support Cases: An Empirical Study of Establishment and Enforcement of Uniform Support Orders in the Denver District Court*, 57 DENV. L.J. 21, 21-23 (1979). Perhaps because of this overriding concern, they did not include important considerations; they failed to establish who should have the obligations and what should be considered as income. Judith M. Billings, *From Guesswork to Guidelines — The Adoption of Uniform Child Support Guidelines in Utah*, 1989 UTAH L. REV. 859, 861-63.

92. Harris, *supra* note 38, at 644. The major reason is that fathers of children on welfare have incomes which are less than 60% of the average income of men in the United States. Garfinkel has reported that the use of mandatory awards even ended up in lowering awards for low income fathers. IRWIN GARFINKEL, UTILIZATION AND EFFECTS OF IMMEDIATE INCOME WITHHOLDING AND THE PERCENTAGE-OF-INCOME STANDARD: AN INTERIM REPORT ON THE CHILD SUPPORT ASSURANCE DEMONSTRATION 19, table 6 (1986). *See generally* Krause, *Child Support Reassessed*, *supra* note 2 (reporting studies show that many fathers are unable to provide the support their children need to get a decent start in life).

found the second reform, wage withholding, to be equally ineffective as the instability of employment, compounded by low paying employment, results in low collections from low income fathers.[93] The third reform, paternity establishment, has also been relentlessly criticized as the least effective way to offset welfare costs.[94] The last reform, assigning support money to the state, has received opposition from poor women and commentators.[95] Nevertheless, this

93. Harris, *supra* note 38, at 647-48. Some commentators have demonstrated how child support has turned into an income transfer program from poor fathers to lawyers and welfare bureaucrats. Krause, *Child Support Reassessed supra* note 2, at 13-14; Krause, *Reflections on Child Support*, *supra* note 3, at 106-11. *See also* Jessica Pearson & Nancy Thoennes, *Supporting Children After Divorce: The Influence of Custody on Support Levels and Payments*, 22 FAM. L.Q. 319, 337 (1988) (concluding that the major factor predicting the payment of child support was employment stability; the second predictor was the relationship between the two parents).

94. In terms of welfare expenditure, the most expensive cases are those in which paternity must be established. *Cf.* Greg J. Duncan, Martha S. Hill & Saul D. Hoffman, *Welfare Dependence Within and Across Generation*, 239 SCIENCE 467, 468 (1988) (the greater incidence of long-term receipt of welfare by never-married mothers of young children suggests that paternity establishment may generate collections over time). *But cf.* Harris, *supra* note 38, at 649 (collections in these cases remain the lowest, effort should be placed on collections that would be more cost effective, especially given these fathers' lack of ability to pay). *See generally*, Paula Roberts, *Child Support and Beyond: Mapping a Future for America's Low-Income Children*, 22 CLEARINGHOUSE REV. 594, 597 (1988) (discussing the European model for providing family or children's allowance).

95. *E.g.*, Virginia Cartoof, *The Negative Effects of AFDC Policies on Teenage Mothers*, 61 CHILD WELFARE 269 (1982); Krause, *Reflections on Child Support*, *supra* note 3. Women receiving AFDC oppose child support enforcement for several reasons. *Id.* at 102. Some argue that enforcement eliminates unreported, voluntary contributions by fathers which results in the alienation of the father and the loss of emotional support. Others argue that they prefer to have no contact whatsoever with the fathers. *Id. But see* Cecilia Rivera-Casale, Lorraine V. Klerman & Roger Manela, *The Relevance of Child-Support Enforcement to School-Age Parents*, 63 CHILD WELFARE 521 (1984) (arguing that obligations for economic support should even be extended to the teenage father's families).

Others argue that, unlike the voluntary system where the mother may avoid custody battles by not bringing support actions against the father, the welfare support system places mothers in a precarious position if the fathers decide to retaliate and counter-sue for custody and/or increased visitation. Harris, *supra* note 38, at 624. The mother, forced into the support proceeding, is left hanging when the father brings a counter-claim. *See* Paula Roberts & Michael Allen, *An AFDC Mother's Right to Counsel: Custody Issues in Proceedings Instigated by the IV-D Agency*, 19 CLEARINGHOUSE REV. 278 (1985); Paula Roberts, *In the Frying Pan and in the Fire: AFDC Custodial Parents and the IV-D System*, 18 CLEARINGHOUSE REV. 1407 (1985). This is perhaps one of the few instances in which the mother has a higher chance of losing the custody battle. Recent studies indicate that these mothers lose anywhere from half to two-thirds of all litigated custody disputes. The welfare mother is likely to be seen as the least desirable custodian; she again becomes a victim of both economic discrimination and double standards as to what constitutes a "good" mother. *See e.g.*, NATIONAL CENTER ON WOMEN AND FAMILY LAW, *Sex and Economic Discrimination in Child Custody Awards*, 19 CLEARINGHOUSE REV. 278 (1985); Jeff Atkinson, *Criteria for Deciding Child Custody in the Trial and Appellate Courts*, 18 FAM. L.Q. 1 (1984); CHESLER, MOTHERS ON TRIAL (1986); Hirsch, *supra* note 32, at 725-27.

reform was continued in order to insure that the system was "effective"[96] enough to protect mothers,[97] and to make sure that all welfare families were subjected to the support requirements.

These child support reforms have been championed as leading to a number of social benefits including: encouraging the idea that unmarried men are responsible for the consequences of their behavior; reducing the stigma of illegitimacy and giving illegitimate children a sense of identity; increasing children's opportunities to develop relationships with their fathers; improving children's health prospects by enabling them to learn their fathers' health histories; providing fathers with opportunities to share child rearing responsibilities; giving fathers opportunities to develop close relationships with their children.[98] Nonetheless, not one of these benefits has received empirical support.

In addition to identifying the spurious nature of the intended benefits, one may question the basis of an entire program that ostensibly helps fathers who neither want to be helped nor want to have relationships foisted upon them. Even if one would grant that some fathers do not want to shun responsibility,[99] and that such

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Even if she does win, the welfare system is more likely to impose artificially low support orders. Harris, *supra* note 38, at 625-26.

96. *See* S. Rep. No. 1356, 93d Cong., 2nd Sess. at 2 (1974).

97. 120 Cong. Rec. H 4182 (daily ed. Dec. 20, 1974) (statement of Rep. Pettis). Some legislators claimed that assignment would protect the mother from retaliatory action or harassment by the absent parent. *E.g.*, 120 Cong. Rec. S 40,324 (daily ed. Dec. 17, 1974) (statement of Sen. Long).

98. Harris, *supra* note 38, at 651-52; tenBroek, *supra* note 24; *see also* TAX REFUND OFFSET PROGRAM FOR DELINQUENT STUDENT LOANS AND CHILD SUPPORT PAYMENTS: HEARINGS ON S. 150 BEFORE THE SUBCOMM. ON OVERSIGHT OF THE INTERNAL REVENUE SERVICE OF THE SENATE FINANCE COMM., 98th Cong., 1st Sess. 89-90 (1983) (statement of Dan Copeland) (stating that the reforms have the potential for expanding the number of parents that will want to use child support because cases that were deemed uncollectable in the past will now produce results); POTENTIAL INEQUITIES AFFECTING WOMEN, 98th Cong., 1st Sess. 143 (1983) (statement of Sue Hunter) (stating that the implementation of an effective national support enforcement program will in the long run save taxpayers the most money); Howard, *supra* note 54, at 203-09 (reviewing the popularly asserted justifications for relative responsibility provisions and narrowing the main justifications to three: encourage responsibility, strengthen and preserve family ties, save public welfare money).

99. This theme formed the basis for the men's rights movement. *See* Jerry W. McCant, *The Cultural Construction of Fathers as Nonparents*, 21 FAM. L.Q. 127, 141-42 (1987); Dan Menzie, Note, *Fathers are Parents Too*, 57 U.M.K.C.L. REV. 963 (1989). This movement, as well as the general movement toward gender equality, is largely responsible for the emphasis on joint custody and the increase in father's visitation rights. FINEMAN *supra* note 23, at 81.

This increased awareness of father's rights and responsibilities has not gone unnoticed in other fields. *See* FATHERHOOD AND FAMILIES IN CULTURAL CONTEXT 131-32 (Frederick W. Bozett & Shirley M.H. Hanson eds., 1991); MEN IN FAMILIES 131-212 (Robert A. Lewis & Robert E. Salt eds., 1986); Paula Allen-Mears, *Adolescent Pregnancy and Parenting: The Forgotten Adolescent Father and His Parents*, 3 J. SOC.

responsibility should be encouraged, there is a weakened rationale for imposing a support obligation on absent parents. This is especially true in the case of unwed fathers who rarely seek social relationships with the children they are asked to support. The lack of a social link or reciprocity between father and child has somewhat different implications in the case of an unwed father who did not have a relationship with his child than in the case of a father who had such a relationship. The consistent relationship between a father's willingness to pay support and the quality of his personal relationship with his child[100] tells us something more than society seems willing to accept.[101] Furthermore, the mere existence of a biological link without a social link is curiously deemed sufficient to justify imposing an unmitigated support obligation on the absent, especially involuntarily absent, father. This is more curious given that the Supreme Court has weaved a pattern of preference for the social father-child relationship and has found that a genetic link only offers the father the opportunity to develop a relationship with his offspring.[102] Lastly, the rationale as to why absent parents could end up with support obligations larger than those imposed on nonabsent parents remains unclear.[103]

WORK & HUM. SEX. 27 (1984) (advocating that the minor father and, more importantly, his parents take on some financial responsibility for his child); James Garbarino, *Reinventing Fatherhood*, 74 FAM. IN SOC. 51 (1993) (expanding on the notion that the father's role is a social invention which relies on cultural perspective); Sebastian Kraemer, *The Origins of Fatherhood: An Ancient Family Process*, 30 FAM. PROC. 377 (1991) (tracing the evolution of fathers as the dominant parent); Kyle D. Pruett, *The Parental Presence*, 74 FAM. IN SOC. 46 (1993) (demonstrating how men and their children can profoundly affect each other).

Despite all the interest in men's rights and in giving them a fair deal, no one has yet documented any significant changes in gendered behavior. Even though differences could be discerned, the ideology of patriarchy remains as the most instrumental force in the creation and acceptance of discourse about the family. Fineman, *supra* note 27, at 289.

100. *See* Pearson & Thoennes, *supra* note 93, at 320; Frank F. Furstenberg, Christine Whinquist Nord, James L. Peterson & Nicholaus Zill, *The Life Course of Children of Divorce: Marital Disruption and Parental Contact*, 48 AM. SOC. REV. 656 (1983). *See also* JOHN H. BECKSTROM, EVOLUTIONARY JURISPRUDENCE: PROSPECTS AND LIMITATIONS ON THE USE OF MODERN DARWINISM THROUGHOUT THE LEGAL PROCESS (1989) (a theoretical but empirically weak examination of the importance of the parental social bond to the economic tie).

101. This is not necessarily to argue that fathers should be given greater visitation or custody rights. For the dangers resulting from poor use of social science data in family law, *see* FINEMAN, *supra* note 23, at 113-14, 118, 124-25.

102. *See* Lehr v. Robertson, 463 U.S. 248 (1983); Michael H. v. Gerald D., 109 S. Ct. 2333 (1989).

103. *See, e.g.*, Rawles v. Hartman, 527 N.E.2d 680 (Ill. App. Ct. 1988), *leave to appeal denied*, 535 N.E.2d 410 (Ill. 1989) (court ordered an unmarried father to provide a college education for his nonmarital child; an obligation fathers who are married and in an ongoing marriage relationship do not have). *See generally* Marvin M. Moore, *Parent's Support Obligations to Their Adult Children*, 19 AKRON L. REV. 183

All existing data point to one conclusion: the reformed system will not be cost effective and will not alleviate single mothers' pains.[104] In utilitarian terms, by not relieving poor mothers' pains and by failing to alleviate the poverty of children, the justifications offered for child support reforms are at best disingenuous. The focus (rationalization) has, to a large extent, come full circle: "benefiting" father and child at the expense of the mother and taxpayer dollars.

A plausible extrapolation for this failure is that the welfare child support program, although cloaked in the rhetoric of public service, exists to punish poor people rather than benefit them. Lacking fiscal justification, the program seeks to punish men who have children on welfare by making them pay society for their desertion and bastardy. Equally plausible is the proposition that the program, as usual, seeks to punish mothers for failing to keep a man to support them.[105] Viewed in this light, the rehabilitative features continue to be mostly rhetoric.

The welfare system, then, has not moved beyond the worthy-person standard as the Warren Court mandated.[106] Will the Court re-evaluate its premature conclusion? With the current composition of the Court, it is unlikely that it will. Even if the Court's composition were different, however, there is little reason to believe that the result would differ. The next section will discuss the Supreme Court's role in welfare reform by examining the Court's apathy towards poor families, unwed fathers, and their claims of equal protection.

II. The Judicial Response

In theory, there are several constitutional grounds upon which statutes dealing with welfare rights may be challenged. Although the Constitution is not a source of positive rights to wealth, the

(1985) (examining and evaluating the states' support laws in so far as they impose an obligation on parents to provide financial assistance to their adult children).

104. In our attempt to emphasize the rights of unwed fathers, we should not belittle the mother's side of the story. Single mothers, who are three times more likely to become welfare recipients, report substantially higher rates of anxiety and depression than married mothers, use mental health facilities at a higher rate, have children who do less well in school or obtain less desirable jobs, and have children who also beget children early. *See* GARFINKEL & MCLANAHAN, *supra* note 44, at 26-31. *See also* Nan D. Hunter, *Child Support Law and Policy: The Systematic Imposition of Costs on Women*, 6 HARV. WOMEN'S L.J. 1 (1983); FINEMAN, *supra* note 23.

105. Otherwise, if the establishment of paternity is so socially beneficial, why enforce it against the welfare mothers' will and why not have a compulsory program for all families?

106. King v. Smith, 392 U.S. 309, 320-27 (1968); *see supra* notes 42-43 and accompanying text.

Warren Court used the Fourteenth Amendment's due process clause to impose constitutional constraints on the structure and administration of governmental wealth transfers. Following the lead of *Goldberg v. Kelly*,[107] the Court might have chosen to oversee wealth transfer programs to assure rationality in their structures, and decency and fairness in their administration. Instead, the Burger Court abandoned the rhetoric of equal justice for the poor; rhetoric which promised more than the Warren Court had delivered and far more than the Burger Court was prepared to provide in the name of equal protection.[108]

In conjunction with its deflation of rhetoric, the Rehnquist Court has recast what were originally equal protection and equal access cases into a new mold of "minimal protection" and minimal access.[109] The compassion for the plight of the poor, which at least informed and perhaps generated so many of the Warren Court's holdings, has been replaced with a reluctance to tell the states how to deal with the problems of the poor. The Rehnquist Court has chosen to use neither the due process clause nor the equal protection clause to shape wealth transfer programs. By and large, the Court has left the structure and process of these programs to federal, state, and local politicians and bureaucrats.[110]

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107. 397 U.S. 254 (1970) (holding that government benefits in the form of welfare payments were interests in liberty and property, not merely privileges, and therefore could not be terminated without procedural due process).

108. *See infra* notes 111-124 and accompanying text.

109. *See infra* notes 124-130 and accompanying text.

110. Several commentators have offered various approaches to deal with the plight of the poor. These solutions, however, were even too optimistic for the liberal Warren Court, let alone the conservative Rehnquist Court. Several have proposed various ways in which the Constitution may be interpreted to grant a right to some minimum level of material resources and thus require wealth transfers. *See* Charles L. Black, *Further Reflections on the Constitutional Justice of Livelihood*, 86 COLUM. L. REV. 1103 (1986) (arguing for a "constitutional justice of livelihood" using the 9th Amendment); Thomas C. Grey, *Property and Need: The Welfare State and Theories of Distributive Justice*, 28 STAN. L. REV. 877, 880-86 (1976) (interweaving both Rawlsian and libertarian principles to create an argument for a constitutionally guaranteed minimal level of material wealth); Frank I. Michelman, *On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7, 9-13 (1969) (developing a constitutional duty to satisfy the "just wants" of each person); Charles A. Reich, *Beyond the New Property: An Ecological View of Due Process*, 56 BROOK. L. REV. 731 (1990) (exploring the consequences of governmental growth on the transformation of property). *See also* Charles A. Reich, *The New Property*, 73 YALE L. J. 733 (1964) (arguing that the moderate due process cost benefit approach to individual security has failed, and that society must now make economic security a constitutional right); William J. Brennan, *Reason, Passion, and 'The Progress of the Law,'* 10 CARDOZO L. REV. 3 (1988) (examining the interplay of forces between applying pure reason to legal problems and applying personal will or passion, and suggesting that this interplay is essential to the vitality of the judicial process); Peter B. Edelman, *Essay: The Next Century of Our Constitution: Rethinking Our Duty to The Poor*, 39 HASTINGS L. J. 1 (1987) (making an argument for a constitutional right to survival income); Brad-

An analysis examining the willingness of the Court to intervene on behalf of poor fathers best starts with an examination of *Dandridge v. Williams*.[111] That opinion is important for three reasons: (1) it illustrates the usefulness of the morally unworthy-person standard; (2) it reflects the futility of challenging discriminatory welfare laws on equal protection grounds; and (3) it exemplifies the recurring theme of judicial helplessness.

A. *Accepting the Morally Unworthy-Person Standard*

The *Dandridge* opinion is a striking model of the implicit acceptance of the morally unworthy-person standard. Maryland argued that the maximum grant ceiling provided "incentives for family planning," thus providing a rationale for discriminating among AFDC recipients.[112] The argument rests on stereotypical images of welfare mothers procreating irresponsibly. Since these women become pregnant because of moral weaknesses, the grant ceiling encouraged them to do the right thing and have no more children.[113] Although Justice Stewart did not explicitly endorse this argument in favor of the regulation, he recounted it as part of the state's rationale for the regulation.[114] The family planning argument is based on the rhetorical theme of the moral weakness of the poor.

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ley R. Hogin, *Equal Protection, Democratic Theory, and the Case of the Poor*, 21 RUTGERS L. J. 1 (1989) (arguing that the prevailing form of equal protection review, by excluding republican and participatory models, imposes an overly narrow heuristic vision of political process); Frank I. Michelman, *Welfare Rights in a Constitutional Democracy*, 1979 WASH. U. L. Q. 659 (responding to objections made to his prior welfare rights thesis that there should be a constitutional right to certain basic ingredients of individual welfare); William H. Simon, *Rights and Redistribution in the Welfare System*, 38 STAN. L. REV. 1431 (1986) (discussing substantive connotations of the notion of a "right" that has dominated liberal discussions of the welfare system); William H. Simon, *The Invention and Reinvention of Welfare Rights*, 44 MD. L. REV. 1 (1985) (contrasting the jurisprudence of welfare entitlement developed by social workers during and after the New Deal with the lawyers' welfare jurisprudence of the past two decades); William H. Simon, *Legality, Bureaucracy, and Class in the Welfare System*, 92 YALE L. J. 1198 (1983) (examining the relation of contemporary legal discourse to the institutional and social developments of the welfare system); William L. Taylor, *Brown, Equal Protection, and the Isolation of the Poor*, 95 YALE L. J. 1700 (1986) (retrospectively examining the effectiveness of *Brown v. Board of Education*, the current vitality of its principles, and its continuing reference).

111. 397 U.S. 471 (1970).

112. *Id.* at 484.

113. Even assuming that the state could encourage mothers to "do the right thing," it is not clear that mothers would be acting morally: they would be reacting to the state's financial incentives rather than individual moral sources.

114. *Dandridge*, 397 U.S. at 484.

The regulation further assumes that the poor are poor by choice. The linchpin of Justice Stewart's opinion was the asserted need for a "semblance of an equitable balance between families on welfare and those supported by an employed breadwinner."[115] This argument depends on the creation of two categories of families: "welfare families" and "wage earner families." It also rests on the need for a balance between the two. The "welfare family" must not be financially better off than the "wage earner family." Ostensibly, such a system must exist in order to maintain a level of welfare sufficiently unattractive so as to assure the continued supply of cheap labor that the economy demands.[116]

The only way that the economic status of a family is an appropriate basis for desert is if a welfare family is somehow responsible for its status. In other words, a welfare family has choices and its behavior explains its poverty. This has become the most common account for the welfare family's moral weakness: poor people choose to shirk employment and would rather be welfare dependents than become independent wage earners.

The Court's acceptance of this argument was reemphasized in *Jefferson v. Hackney*,[117] where the Court again rejected an equal protection argument challenging the Texas AFDC program.[118] The Court found that in order to limit its public assistance expenditures, a state could reduce the amount paid to AFDC recipients by 25 percent while reducing the amount given to the blind and disabled by 5 percent and by *not* reducing the amount given to the aged at all.[119]

Writing for the majority, Justice Rehnquist argued that Texas officials rationally might

> have concluded that the aged and infirm are the least able of the categorical grant recipients to bear the hardships of an inadequate standard of living . . . that the young are more adaptable than the sick and elderly, especially because the latter have less hope of improving their situation in the years remaining to them.[120]

Justice Rehnquist concluded that "[w]hether or not one agrees with this state determination, there is nothing in the Constitution

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115. *Id.* at 486.

116. *See id.* ("It is enough that a solid foundation for the regulation can be found in the State's legitimate interest in encouraging employment and in avoiding discrimination between welfare families and the families of the working poor.").

117. 406 U.S. 535 (1972).

118. *Id.* at 537-38.

119. *Id.* at 545-56.

120. *Id.* at 549.

that forbids it."[121] Once again the background assumption underlying the *Jefferson* analysis of the Texas law is that notwithstanding the existence of appropriate and sensible employment opportunities, the AFDC poor chose to be on public assistance rather than earn an honest living. Much like Justice Stewart's opinion in *Dandridge*,[122] Rehnquist's opinion in *Jefferson* did not explicitly comment on the moral weakness of the poor. Yet the rhetoric of both opinions draws its power from that implicit premise. Just as Stewart's assertion of the need for an equitable balance between welfare families and wage earner families depended on an assumption of relative worthiness between us and them,[123] Rehnquist's construction of the rationale behind the Texas scheme depended on the assumption that able-bodied poor people shirk work.

In *Bowen v. Gilliard*,[124] the Court reaffirmed its view that in the eyes of the law, poor people are poor by choice. In *Gilliard*, the Court found that the Deficit Reduction Act of 1984 (DEFRA), which required that the income of all family members be included in a filing unit, was violative of neither Fifth Amendment due process nor equal protection principles.[125] Congress could rationally adjust the AFDC program to reflect that support money for a single child generally provides significant benefits for entire family units.[126] The Court concluded by finding that the state had not unconstitutionally taken the petitioner's property: "[t]he law does not require any custodial parent to apply for AFDC benefits."[127]

In essence, and as Justice Brennan argued in dissent,[128] the *Gilliard* Court found that a state could reasonably condition an indigent mother's welfare eligibility on her child surrendering a vital connection with either its father or its mother. Indigent fathers have two choices: reimburse the government or have the mother

121. Jefferson v. Hackney, 406 U.S. 535, 549 (1972).

122. Dandridge v. Williams, 397 U.S. 471, 496 (1970).

123. *Id.* at 486.

124. 483 U.S. 587 (1987).

125. *Id.* at 592. In dissent, Justice Brennan also noted that it was "true that benefits to other household members may redound to the benefit of the child . . . [but that] there must be some limit to such attribution of benefits. . . ." *Bowen*, 483 U.S. at 630 n.18 (Brennan, J., dissenting). Although the Supreme Court found that the state law required that child support be used solely for the benefit of the child, it further held that the government could include that child support amount in the determination of the AFDC grant and, thus, deny benefits to the entire family. *Id.* at 607-08 (Brennan, J., dissenting).

126. *Id.* at 592.

127. *Id.* at 608 (Brennan, J., dissenting).

128. *Id.* at 611 (Brennan, J., dissenting).

relinquish custody. Fathers are more likely to pay the government — the least costly alternative.[129]

It is important to emphasize that fathers were not represented[130] and accordingly, the majority opinion in *Gilliard* did not consider the rights of custodial fathers. The *Gilliard* majority failed to address the DEFRA amendment's impact on a father's entitlement to care for his children's unique needs and right to sustain[131] a relationship with them. Although it is interesting to speculate how the Court would have factored in a noncustodial father's rights, the Court's approach is clear: such a father's rights are not to be considered.[132]

B. Denying Putative Father's Rights

The Supreme Court has been willing to extend visitation/custody protections to unwed fathers and their illegitimate children, but only when a substantial psychological/social relationship existed.[133] Despite high tributes, this line of cases extending parental rights to unwed fathers was not the turning point for which so many had hoped. The rights of unwed fathers' have proved to be quite vulnerable.

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129. *Id.* at 623 (Brennan, J., dissenting) ("The financial and emotional cost of losing this connection with the father may be too much for the child to bear. If so, the only way to avoid it is for the child to leave the custody of the mother. . . . The burden of this choice hardly requires elaboration.").

130. The attorneys for the appellees represented the interests of the children receiving child support, custodial mothers, and indigent siblings receiving AFDC. *Id.* at 590 n.3. The National Organization for Women (NOW) filed an amicus brief. *Id.* at 589. No men's organization or father's rights group, however, filed such a brief. This supports the assertion that Men's rights groups are not concerned with indigent men.

131. Emphasis should be placed on the term "sustain," since a father's right to a relationship with his child(ren) seemingly comes into consideration when the father has shown investment. *See infra* note 133 and accompanying text.

132. The Court had ample opportunity to do so; Justice Brennan's dissent went to a great length in demonstrating the precedents that granted constitutional protection to father's rights, as well as a host of social and psychological literature that would show the negative consequences of eliminating a father's provider role, i.e., the total withdrawal from the relationship. Although this writer does not agree with this assessment, others have. *E.g.*, *The Supreme Court - Leading Cases*, 101 HARV. L. REV. 119, 270-80 (1987).

133. Stanley v. Illinois, 405 U.S. 645 (1972) (holding that an unwed father, who had lived with the mother of his children for 18 years prior to her death, has a constitutional right to a hearing on his fitness as a parent before the children could be removed from his care); Caban v. Mohammed, 441 U.S. 380 (1979) (holding that a statute that allowed an unwed mother, but not an unwed father, to block the adoption of their children by withholding consent found to violate the father's right to equal protection; note that the father had maintained a relationship with his children for 4 years after his separation from the mother).

When putative fathers have never had any actual or legal custody of their children, their rights have been easily outweighed.[134] Likewise, when a mother is married to another man, the putative father's relationship with his child is of no significance. For example, in *Michael H. v. Gerald D.* the Court found that a putative father who had formed a relationship with and provided economic support for his child born out of wedlock was not allowed to continue the relationship with his child; principally because the mother had returned to her estranged husband.[135]

It is important to note that the Supreme Court has never found a father's fundamental right to a relationship with his child born out-of-wedlock.[136] The Court has only recognized a substantial liberty interest in relationships between a natural father and his children when the parents had been married.[137] In this manner, the Court has only applied a rational basis test to cases involving unmarried fathers.

In *Lehr v. Robertson*,[138] the Court explicitly stated that "[i]f one parent has an established custodial relationship with the child and the other parent has either abandoned or never established a relationship, the Equal Protection Clause does not prevent a State from according the two parents different legal rights."[139] The *Lehr* Court applied the same test it had applied a decade earlier in *Parham v. Hughes*,[140] where the Court concluded that "mothers and fathers of illegitimate children are not similarly situated,"[141] and therefore may be differentially treated.

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134. Quilloin v. Walcott, 434 U.S. 246 (1978); Lehr v. Robertson, 463 U.S. 248 (1983).

135. 491 U.S. 110 (1989). Not all commentators, however, agree that the *Michael H.* decision was as restricted as this writer believes it to be. For different interpretations and higher hopes, see David Line Batty, Note, Michael H. v. Gerald D.: *The Constitutional Rights of Putative Fathers and a Proposal for Reform*, 32 B. C. L. REV. 1173 (1990); Elizabeth A. Hadad, Note, *Tradition and the Liberty Interest: Circumscribing the Rights of the Natural Father*, 56 BROOK. L. REV. 291 (1990); Gail A. Secor, Note, Michael H. v. Gerald D.: *Due Process and Equal Protection Rights of Unwed Fathers*, 17 HASTINGS CONST. L. Q. 759 (1990); Joan C. Sylvain, Note, Michael H. v. Gerald D.: *The Presumption of Paternity*, 39 CATH. U. L. REV. 831 (1990). *But see*, Carol Lynn Tebben, *A Father's Right: Some Inconsistencies in the Application of Due Process and Equal Protection to the Male Parent*, 4 AMER. J. OF FAM. L. 139 (1990) (arguing that, for many fathers seeking to protect the relationship with a child, the 14th Amendment has proven to be meaningless).

136. *See* Michael H. v. Gerald D., 491 U.S. at 124.

137. Armstrong v. Manzo, 380 U.S. 545 (1965) (holding that divorced fathers have a liberty interest in the preservation of visitation rights sufficient to warrant procedural protection).

138. 463 U.S. 248 (1983).

139. *Id.* at 267-68.

140. 441 U.S. 347 (1979).

141. *Id.* at 355

Viewing these Supreme Court cases in their entirety, a mother's unilateral action of marrying another man automatically cuts off the biological father's rights to his child, even though the father may desire to know, nurture, love and support his child. Furthermore, since states may allow a mother to rebut the presumption of legitimacy and establish paternity in the biological father, she may force legal obligations to the child upon the biological father.[142]

In a significant number of states, biological fathers have been denied the right to rebut the presumption of legitimacy, even though the presumed father, the mother, and sometimes the child, have that right.[143] In other states the presumption of legitimacy

142. The *Stanley* line of cases has received a great deal of attention from commentators and prompted many states to revise their statutory schemes. *See, e.g.*, Elizabeth Buchanan, *The Constitutional Rights of Unwed Fathers Before and After* Lehr v. Robertson, 45 OHIO ST. L. J. 313 (1984); Sharon Nelson Freytag, *Equal Protection and the Putative Father: An Analysis of* Parham v. Hughes *and* Caban v. Mohammed, 34 SW. L. J. 717 (1980); Lisa Weinhaus, *Substantive Rights of the Unwed Father: The Boundaries Are Defined*, 19 J. FAM. L. 445 (1980-81); John T. Wright, Comment, Caban v. Mohammed: *Extending the Rights of Unwed Fathers*, 46 BROOK. L. REV. 95 (1979-80); Deborah Davis Alleman, Note, *Adoption: The Constitutional Rights of Unwed Fathers*, 40 LA. L. REV. 923 (1979-80); Katherine L. Corley, Comment, *Removing the Bar Sinister: Adoption Rights of Putative Fathers*, 15 CUMB. L. REV. 499 (1984-85); Mary M. DeMarco, Note, *Delineation the Boundaries of Putative Fathers' Rights: A Psychological Parenthood Perspective*, 15 SETON HALL L. REV. 290 (1985); Mary M. Horton, Comment, *Domestic Relations - Parental Rights of the Putative Father: Equal Protection and Due Process Considerations*, 14 MEM. ST. U. L. REV. 259 (1984); Rona Klein, Note, *Putative Fathers: Unwed, but No Longer Unprotected*, 8 HOFSTRA L. REV. 425 (1979-80); Jennifer J. Raab, Note, Lehr v. Robertson: *Unwed Fathers and Adoption - How Much Process is Due?*, HARV. WOMEN'S L. J. 265 (1984); Mary F. Radford, Note, *Constitutional Law - Equal Protection* - Caban v. Mohammed, 29 EMORY L. J. 833 (1980); Juliann J. Sitoski, Note, *Limiting the Boundaries of* Stanley v. Illinois: Caban v. Mohammed, 57 DENV. L. J. 671 (1980); *Developments in Law - the Constitution and the Family*, 93 HARV. L. REV. 1156 (1980); *Supreme Court Review: 1978-79 Term* - Caban v. Mohammed, Parham v. Hughes, 7 HASTINGS CONST. L. Q. 445 (1980).

143. *See, e.g.*, Shereece B. v. Donald W., 231 Cal. App. 3d 613 (1991) (A natural father is not denied equal protection when his parental rights were terminated, even when he had taken steps to forge a relationship. The legislature may distinguish between presumed and natural fathers and accord presumed fathers greater rights than natural fathers; in this instance, it may offer a hearing to determine the best interests of the child when a presumed father is involved, but not when it is only a natural father). For an analysis of various state approaches, *see* Ann Minnick Wheeler, *A Father's Right to Know His Child: Can it Be Denied Simply Because the Mother Married Another Man?*, 20 LOY. L.A. L. REV. 705 (1987).

The Uniform Parentage Act (UPA) at § 4(a)(1) (1990), has adopted the middle approach: although the presumption is rebuttable by clear and convincing evidence, it is not rebuttable by a man wishing to establish paternity when another man is presumed to be the father. This is true despite the UPA's explicit claim that marital status is irrelevant in the establishment of a relationship between parent and child. *Id.* at § 3. The Uniform Putative and Unknown Fathers Act (UPUFA), at § 2(a) (1990), provides that a putative father may bring an action to determine whether he is the father of a particular child, but that it must be done in accordance with appli-

remains rebuttable.[144] Some states, however, have statutorily recognized unwed fathers as "parents."[145] Nonetheless, no state has extended substantial substantive parental rights to unwed fathers as a class.[146] If they do extend rights, it is only to those fathers who have taken certain steps toward legitimizing their child or if it is in the child's best interests.[147]

C. *The Recurring Theme of Judicial Helplessness*

The *Dandridge* opinion[148] is also significant for illustrating the recurring theme of judicial helplessness. Justice Stewart acknowledged that in some AFDC families no person may be employable.[149] He further explained,

> [i]t is also true that with respect to AFDC families whose determined standard of need is below the regulatory maximum, who therefore receive grants equal to the determined standard, the employment incentive is absent. But the Equal Protection Clause does not require that a State must choose between attacking every aspect of a problem or not attacking the problem at all. *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61. It is enough that the State's action be rationally based and free from invidious discrimination. The regulation before us meets that test.[150]

Justice Stewart also noted that the Court did *not* decide

> that the Maryland regulation is wise, that it best fulfills the relevant social and economic objectives that Maryland might ideally espouse, or that a more just and humane system could not be devised. . . . But the intractable economic, social, and even philosophical problems presented by public welfare assistance programs are not the business of this Court. . . . [T]he Constitution does not empower this Court to second-guess state officials charged with the difficult responsibility of allocating

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cable state law. The UPUFA, however, would give the unknown father substantial rights in judicial proceedings for adoption or termination of parental rights, a right which may even require a judge to use "publication or public posting of notice." *Id.* at § 3(g).

144. *See* MARTHA A. FIELD, SURROGATE MOTHERHOOD 118-21 (1988); John Lawrence Hill, *What Does it Mean to be a 'Parent'? The Claims of Biology as the Basis for Parental Rights*, 66 N.Y.U. L. REV. 353, 372-82 (1991); Marjorie Maguire Shultz, *Reproductive Technology and Intent-based Parenthood: An Opportunity for Gender Neutrality*, 1990 WIS. L. REV. 297; John R. Hamilton, Note, *Rebutting the Marital Presumption: A Developed Relationship Test*, 88 COLUM. L. REV. 369 (1988).

145. *See* John R. Hamilton, Note, *The Unwed Father and the Right to Know of His Child's Existence*, 76 KY. L.J. 949, 981-85 (1987-88).

146. Wheeler, *supra* note 143, at 705-06 nn.3-4.

147. *Id.* at 740.

148. *See supra* notes 111-115 and accompanying text.

149. Dandridge v. Williams, 397 U.S. 471, 486 (1990). Here, the Court offhandedly notes that no family members of any of the named plaintiffs in the present case were employable. *Id.*

150. *Id.* at 486-87.

> limited public welfare funds among the myriad of potential recipients.[151]

The above passages contain a dual message of helplessness. Stewart and his colleagues chose not to use their available power to demand a real measure of wisdom, justice and humanity in the Maryland welfare program. Instead, they chose to demand only the formality of minimal rationality. Stewart also argued the helplessness of us all by his reference to the "intractable economic, social, and even philosophical problems" of poverty and welfare and the "myriad of potential recipients."[152] In the Supreme Court's vision, the problem of poverty and welfare is dauntingly too complex and the poor simply overwhelm the finite resources available for their assistance. The assumption is that the Court must either be in the business of restructuring the entire welfare system, or stay out of the area altogether.

The majority's test and assertion of helplessness, as expressed in *Dandridge*, became the rhetoric of the Court's subsequent AFDC cases. The Court has continued to profess its helplessness and has validated welfare structures that have lacked wisdom, justice, and humanity but have nevertheless met the Court's criteria of rationality. In this vein, Justice Rehnquist concluded his *Jefferson* opinion by "re-emphasiz[ing] what the Court said in *Dandridge v. Williams*. . . '[T]he intractable economic, social, and even philosophical problems presented by public welfare assistance programs are not the business of the Court.'"[153] In other words, the Court is simply not in the business of assuring wisdom, justice, and humanity in the realm of welfare and poverty.

In *Gilliard*, the Court reiterated not only its helplessness, but also its seeming lack of concern:

> [A] number of needy families have suffered, and will suffer, as a result of the implementation of the DEFRA amendments to the AFDC program. Such suffering is frequently the tragic by-product of a decision to reduce or to modify benefits to a class of needy recipients. Under our structure of Government, however, it is the function of Congress — not the courts — to determine whether the savings realized, and presumably used for other critical governmental functions, are significant enough to justify the costs to the individuals affected by such reductions.[154]

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151. *Id.* at 487.

152. *Id.*

153. *Id.* at 551 (quoting Dandridge v. Williams, 397 U.S. 471, 487 (1970)); *see supra* notes 117-121 and accompanying text.

154. Bowen v. Gilliard, 483 U.S. 587, 596 (1987).

The *Gilliard* court concluded by adopting the *Dandridge* standard: "the Constitution does not empower this Court to second-guess . . . officials charged with the difficult responsibility of allocating limited public welfare funds."[155] The Court surrendered its responsibility for the poor.

Conclusion

Social concerns have always played a critical role in determining the content of laws dealing with the poor. In the Family Support Act we see how these concerns remain determinative in molding the character and fixing the features of attempts to deal with complex societal problems. Now, however, it seems that we are witnessing how fiscal considerations have become secondary to punitive, moralistic, and political motives. Legislators currently dealing with restructuring this nation's welfare system have ignored how these motives may be at work, especially when dealing with unwed, indigent fathers.

In this article, we have seen how the dual rhetoric of moral weakness and judicial helplessness fits the needs of a Court that has chosen to minimize the constitutional basis for intervention on behalf of the poor. Under this rhetoric, either the poor are undeserving of the Court's intervention or, if they do come close to deserving protection because they are not treated equally, the Court becomes functionally helpless to do justice. The Court is willing to terminate an unwed father's right to contact with his child, but not his obligation to provide support. The implementation of welfare policies, then, is likely to remain in the hands of state officials guided by failing legislative initiatives.

The troubling aspect of the recent legislative reforms and the Court's stance is not that they allow unequal treatment. The Family Support Act is only a manifestation of general dissatisfaction with the welfare system — its increasing rolls and increasing costs. As each step to reverse or slow the trend proves to be unsuccessful, legislators vainly seek to strengthen their control, impose stricter standards, exclude, stigmatize, and privatize. This trend continues while reformers are increasingly unwilling to examine the theories underlying their laws and blindly pursue a course begun in the vain belief that it is the details that foil them, rather than their basic premise. What is most troubling is that as the legislature steers an increasingly unjust course, the Supreme Court is no longer there to guide.

155. *Id.* at 609; Dandridge v. Williams, 397 U.S. 471, 487 (1970).

Recent developments in welfare reform aimed at indigent fathers have not been accidental; they have been coupled with a shift in jurisprudence and a return to rhetoric most thought the Court had reversed and Congress had abandoned. Unfortunately, the legislature is no longer guided by its own rules, which had "determined that immorality and illegitimacy should be dealt with through rehabilitative measures."[156] The Court has also adopted the legislature's rhetorical themes and attached its own. The morally unworthy face judicial helplessness.

In the end, we return to the words of the inflamed dissenter in *Humphrey*, who thought that an unwed father should be held financially responsible for an entire family simply because one of the children was allegedly his.[157] In arguing that any other result would work a great injustice to taxpayers who would not be reimbursed for AFDC payments made to the family, the dissenter protested, "[i]n choosing whether the [immoral, irresponsible] father of this child or the taxpayers of this state should benefit, my vote is for the taxpayers."[158]

156. King v. Smith, 392 U.S. 309, 310 (1968).

157. Humphrey v. Woods, 583 N.E. 2d 133, 136 (Ind. 1991) (Krahulik, J., dissenting). *See supra* notes 6-8 and accompanying text.

158. *Id.* (Krahulik, J., dissenting).