

## Single Mothers' Equal Right to Parent: A Fourteenth Amendment Defense Against Forced-Labor Welfare "Reform"

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My name is not 'Lazy, Dependent Welfare Mother.'

If the unwaged work of parenting, homemaking and  
community building was factored into the Gross Na-  
tional Product,

My work would have untold value.<sup>1</sup>

In a dramatic shift of values from the original goals of Aid to  
Families with Dependent Children (AFDC)<sup>2</sup>, the latest wave of

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\* J.D. expected 1997, University of Minnesota Law School. B.A. 1994, University of Minnesota. I would like to thank Julia Dinsmore, Mary Devitt, Eliza Erickson and the Mother's Union for educating me about the injustices of "welfare reform" that I have cast in constitutional terms in this article; the editors and others who offered comments on various drafts, particularly Professor Arthur Eisenberg, Laurel Haskell, Christopher Lee, James McConnell, Margaret Ware and Melissa Weldon; Christopher Petersen, Anne Becker, Beth Docherty, Lesley Hayden, Rinky Parwani Manson and Mark Siegel for their attention to detail; and my parents, Ricky and David Weiss, for support of both tangible and intangible kinds. Special recognition is due to Jill Sanders for retyping the entire article after the computer destroyed both the main and backup copies of the page proofs!

My life has been immeasurably enriched by my contact with a number of children who, in the absence of public assistance, would in all likelihood not be alive today. I dedicate this article in particular to my "little brothers," Wintersun Lemieux and Robert Lemieux Jr., and to Daniel, Isaac and Jacob Dinsmore.

1. Julia K. Dinsmore, "My Name Is Not 'Those People,'" Copyright 1992. Used by permission.

2. AFDC, which remains in place at this writing, is colloquially called simply "welfare." It provides cash assistance as an entitlement to families with children whose incomes fall below levels determined by the individual states in which they reside. Grants are reduced one dollar for every dollar a recipient earns in the labor market. The program is jointly funded by federal and state governments. Based on the mothers' pension programs that many states enacted in the 1910s and 1920s, AFDC was enacted nationwide as part of the Social Security Act of 1935. LINDA GORDON, PITIED BUT NOT ENTITLED 1-13, 37 (1994).

The major goal of AFDC is to enable single mothers to care for their children at home. *Id.* at 23, 45-46. Before the establishment of mothers' pensions, most children in orphanages or foster care were not orphans, but had living parents who lacked jobs or child care. *Id.* Originally restricted to widows who could provide a caseworker's version of a "suitable home," AFDC coverage expanded gradually until a series of court decisions in the 1960s invalidated various eligibility tests which states had used to deny AFDC to racial minorities. See FRANCES FOX PIVEN &

federal welfare "reform" emphasizes moving poor single mothers<sup>3</sup> into the workplace by any means necessary. In addition to mandating states to adopt "workfare" programs, which require AFDC recipients to work outside the home in exchange for their benefits,<sup>4</sup>

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RICHARD A. CLOWARD, *REGULATING THE POOR* 306-14 (2d ed. 1993). In 1988, Congress mandated that states provide AFDC to two-parent families. See WALTER I. TRATTNER, *FROM POOR LAW TO WELFARE STATE* (4th ed. 1989).

Because the term "welfare" properly describes a wide variety of programs for the middle class as well as the poor, this Note refers to cash aid for poor families with children as "AFDC," although laws enacted in the last year call for the abolition of the present AFDC program.

3. For convenience, this Note will refer to parents receiving AFDC in female terms. In Minnesota, 93% of single-parent families receiving AFDC are headed by women. *Most Families on AFDC Are Small, Have One Parent, YOU SHOULD KNOW...* (Children's Defense Fund—Minnesota.), Jan. 1994, at 1. Framing the issue in terms of women is appropriate because much of the current wave of "reform" relies on gender-based stereotypes, particularly regarding reproductive behavior. See, e.g., Mickey Kaus, *The Work Ethic State*, in *POINTS OF LIGHT: NEW APPROACHES TO ENDING WELFARE DEPENDENCY* 52 (Tamar Ann Mehuron ed., 1991) (referring to a "welfare culture of women who have babies without thinking seriously of either working or marrying someone who works").

4. The "welfare reform" bill President Clinton signed on August 22, 1996, mandates states to have 50% of aid recipients "engaged" in paid employment, unpaid "work experience" or "community service" for at least 20 hours per week by the year 2002. Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, sec. 103, § 407(a)(1), 407(c)(1)(A), 407(d), 110 Stat. 2105, 2137-38 (to be codified as amended in scattered sections of 2, 5, 7, 8, 10, 11, 13, 15, 20, 21, 25, 26, 29, 31 and 42 U.S.C.; unless otherwise indicated, the sections cited in this Note are to be codified at 42 U.S.C.) [hereinafter Pub. L. No. 104-193]. This figure does *not* include women who leave public assistance for employment entirely. Jean Hopfensperger, *A Walk in One Working Mom's Shoes*, STAR TRIB. (Minneapolis), Aug. 23, 1996, at 1A. Job search or "job readiness assistance" can qualify as "work" for up to six weeks in a given year (no more than four weeks consecutive) or twelve weeks if the employment rate of the *state* (not the mother's region of residence) is 50% above the national average; vocational education training can qualify for up to one year. Pub. L. No. 104-193, sec. 103, §§ 401(c)(2)(A)(i), 407(d)(8). States have the option to exclude mothers with infants under one year old in calculating their quotas. *Id.* sec. 103, § 407(b)(5). Mothers who refuse to "work" have their assistance reduced proportionately to the number of "work" hours under 20 per week (or more, at the state's option) or terminated. *Id.* sec. 103, § 407(e)(1). Single parents of children under six can avoid reduction or termination of aid by demonstrating an "unavailability" of "appropriate" child care, but the mother bears the burden of proof and the state, with its "work" quota, gets to determine "availability" and "appropriateness." *Id.* sec. 103, § 407(e)(2). Consequently caseworkers appear to have complete discretion in determining which families to subject to the work requirement.

Previous versions of the Act required aid recipients to enter into a binding "personal responsibility contract" with the state, which included a "negotiated" cutoff date for benefits within the five-year maximum; failure to fulfill one's end of the "contract" would have resulted in a reduction and eventual termination of benefits. H.R. 4, 104th Cong., 2d Sess. § 405(a) (1995). Although the bill stated that the contract became invalid if the state failed to comply, *id.* § 405(a)(2)(D), the one-sided nature of a state's "bargains" with destitute families invite traditional contract law questions of adhesion, duress and unconscionability. The enacted version did away with the contract language, instead placing total discretion on

recently enacted federal legislation, the so-called Personal Responsibility and Work Opportunity Act, has adopted two drastic means toward achieving this goal: placing a five-year lifetime limit on receipt of benefits and ending the status of AFDC as a federal "entitlement," transforming it into "block grants" which give states license to deny cash assistance altogether to some or all families.<sup>5</sup>

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caseworkers to develop "individual responsibility plans" which families must sign. Pub. L. No. 104-193, sec. 103, § 108(b). These plans will contain "employment goals" and "obligations" which the family must follow or risk the reduction of benefits by "such amount as the state considers appropriate." *Id.* For a cogent argument that courts should apply the same contract law concepts to conditions placed on welfare benefits in this manner, see Charles R. Bogle, "Unconscionable" Conditions: A Contractual Analysis of Conditions on Public Assistance Benefits, 94 COLUM. L. REV. 193 (1994).

5. Pub. L. No. 104-193, sec. 103, §§ 401(b) (denial of entitlement) and 408(a)(7) (five-year time limit). The Act also allows states to set a shorter time limit than five years; the time limit applies only to benefits received as an adult, and the state may (but is not required to) exempt a family from time limits by reason of "hardship" or if a member of the family has "been battered or subjected to extreme cruelty." *Id.* sec. 103, § 408(a)(7)(C). However, when combined, these exceptions may equal no more than 20% of the state's total caseload. *Id.* sec. 103, § 408(a)(7)(C)(ii). Although a state can exempt a family on grounds of hardship, "hardship" is not defined, nor is there a specification of when domestic abuse must have occurred in order to exempt a family from time limits, nor of who determines the veracity of an abuse claim. If the abuse must be proven in court, the vast majority of victims will be missed. See RUTH SIDEL, *WOMEN AND CHILDREN LAST*, 45 (rev. ed. 1992) (stating that very few domestic abuse claims result in arrest); Kathleen J. Ferraro, *Cops, Courts, and Woman Battering*, in *VIOLENCE AGAINST WOMEN: THE BLOODY FOOTPRINTS* 165, 171-72 (Pauline B. Bart & Eileen Geil Moran eds., 1993) (finding that many guilty offenders find ways to intimidate and manipulate women to drop charges). Considerably more than 20% of AFDC recipients have experienced domestic abuse. See, e.g., RANDY ALBELDA ET AL., *THE WAR ON THE POOR* 46 (1996); see also *infra* note 29 and accompanying text.

Currently, roughly 82% of AFDC recipients at any point in time will receive more than five years of benefits over their adult lives. See U.S. HOUSE OF REPRESENTATIVES COMM. ON WAYS AND MEANS, *WHERE YOUR MONEY GOES: THE 1994-95 GREEN BOOK* 441-42 (1994) [hereinafter 1995 GREEN BOOK]. Although typical stays on AFDC are short, roughly half of families who leave the program return. Total lifetime AFDC receipt averages six years. ALBELDA ET AL., *supra*, at 60-61. The five-year limit will therefore impact large numbers of families.

It is important to note, however, that only approximately 35% of people who begin to draw benefits during a given year will receive five years or more of benefits. The percentage of long-term AFDC recipients is high at any point in time, but low compared to the total number of women and children who receive support from the program at some point. See 1995 GREEN BOOK, *supra*, at 442. The Center for Popular Economics illustrates the dynamic this way:

Imagine a 10-bed hospital in which 6 of the beds are occupied through the year by chronically ill patients who do not leave the hospital. The other 4 beds, though, are occupied by patients who stay just 1 month. . . . At any one time, 60% [of the ten people] in the hospital . . . will be there the entire year; but only 6 of the 54 who pass through, or 11% spend the entire year there.

ALBELDA ET AL., *supra*, at 60.

As a means of challenging these draconian policies, the Fourteenth Amendment, at first glance, seems an unusual vehicle for protecting mothers and children from having their means of support cut off.<sup>6</sup> Since the early 1970s, the Supreme Court has been unremittingly hostile to equal protection claims by the poor,<sup>7</sup> par-

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6. Some commentators have suggested that "workfare" programs are vulnerable to a Thirteenth Amendment challenge as they are largely indistinguishable from forms of peonage that the Supreme Court has struck down as involuntary servitude. See generally Cynthia A. Bailey, *Workfare and Involuntary Servitude—What You Wanted to Know But Were Afraid to Ask*, 15 B.C. THIRD WORLD L.J. 285 (1995) (comparing "workfare" with peonage arrangements outlawed by the Supreme Court in the early 20th century); Julie A. Nice, *Welfare Servitude*, 1 GEO. J. ON FIGHTING POVERTY 340 (1994) (comparing "workfare" with various types of impermissible servitude and arguing that it constitutes both physical and legal coercion). Some lower courts, however, have with little explanation upheld "workfare" against such challenges. See, e.g., *Ballentine v. Sugarman*, 344 N.Y.S. 2d 39 (N.Y. App. Div. 1973) (upholding state statute requiring "work relief" recipients to participate in work projects in order to receive assistance); *Dublino v. Department of Soc. Servs.*, 348 F. Supp. 290, 297 (W.D.N.Y. 1972) (upholding state's work rules requiring employable welfare recipients to report to the state for employment referrals before receiving assistance checks).

In contrast, time limits and withdrawal of entitlement appear less vulnerable to a Thirteenth Amendment attack because, although forcing labor is an explicit goal of the measures (see *infra* note 223 and accompanying text), the means may not amount to the "physical or legal coercion" that the Rehnquist Court has ruled necessary to support an involuntary servitude claim. See *United States v. Kozminski*, 487 U.S. 931, 944, 951 (1988). Although intuitively policies affecting the need to feed oneself and one's children should qualify as "physical coercion," a court might decide that this sort of coercion is intrinsic to the capitalist system. Furthermore, the government may claim that the mere placement of a time limit on a benefit, such as unemployment compensation, has never been held to violate the Thirteenth Amendment.

The threat that a child of a parent whose benefits have been cut off could be placed in foster or institutional care may amount to legal coercion, but the strength of this link depends upon the laws of the various states. This argument is hampered by the fact that policies of removing children from indigent families were common in the late 19th and early 20th centuries. See MARILYN IRVIN HOLT, *THE ORPHAN TRAINS* (1992); TRATTNER, *supra* note 2. However, the modern constitutional doctrine of parental rights developed after these policies were discontinued, and subsequent case law provides strong protections against involuntary removal of children from their parents' homes. See *infra* Part II.A.

The parental rights and equal protection arguments developed *infra* also apply to "workfare," and a freestanding fundamental rights claim is possible to the extent that such programs force parents to involuntarily place their children in day care and interfere with the right to set one's own balance between employment and childrearing. Other portions of the Act, such as its exclusion of legal aliens from assistance, invite separate Fourteenth Amendment attacks distinct from those discussed in this article. See Pub. L. No. 104-193, Title IV (to be codified as amended in scattered sections of 8, 26 and 42 U.S.C.).

7. See *Kadrmas v. Dickinson Pub. Schs.*, 487 U.S. 450 (1988) (upholding user fee for busing to public school); *Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252 (1977) (upholding exclusionary zoning); *Warth v. Seldin*, 422 U.S. 490 (1975) (denying low-income plaintiffs standing to challenge exclusionary zoning); *United States v. Kras*, 409 U.S. 434 (1973) (upholding filing fee to

ticularly where welfare benefits are involved.<sup>8</sup> In the context of current federal law, however, time limits on AFDC and denial of entitlement status raise a two-part Fourteenth Amendment claim: discriminatory distribution of government benefits in violation of the Equal Protection Clause which, in turn, implicates the fundamental liberty rights of parents in raising their children, as guaranteed by the Due Process Clause.<sup>9</sup>

The vast majority of AFDC recipients are single mothers with the sole responsibility for their children's upbringing.<sup>10</sup> These

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declare bankruptcy); *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973) (upholding differential funding of schools based on district property wealth); *James v. Valtierra*, 402 U.S. 137 (1971) (allowing communities to require referendum approval of low-income housing, although a previous case had held similar referendum on housing built pursuant to Fair Housing Act unconstitutional).

Earlier cases, however, invalidated discrimination on the basis of poverty. See *Shapiro v. Thompson*, 394 U.S. 618 (1969) (invalidating residency requirements for AFDC); *Harper v. Virginia Bd. of Elections*, 383 U.S. 663 (1966) (invalidating poll tax for state elections); *Douglas v. California*, 372 U.S. 353 (1963) (mandating free counsel for indigent in criminal appeals); *Griffin v. Illinois*, 351 U.S. 12 (1956) (striking filing fees for criminal appeals on grounds they denied equal justice to poor); *Edwards v. California*, 314 U.S. 160 (1941) (invalidating "Okie law" criminalizing bringing indigents into state). The Burger Court distinguished these cases as involving "fundamental interests" in voting, travel and criminal due process.

8. See *Maier v. Roe*, 432 U.S. 464 (1977) (upholding state law preventing Medicaid funding of elective abortions for indigent); *Harris v. McRae*, 448 U.S. 297 (1980) (extending *Maier* to medically necessary abortions); *Ortwein v. Schwab*, 410 U.S. 656 (1973) (upholding filing fee to protest reduction in benefits); *Jefferson v. Hackney*, 406 U.S. 535 (1972) (upholding state's setting AFDC levels far lower than benefits for elderly or disabled); *Dandridge v. Williams*, 397 U.S. 471 (1970) (upholding cap on AFDC benefits regardless of family size).

Almost all the cases that strike conditions on receipt of public assistance on constitutional grounds involve established fundamental rights or suspect classifications. See *Califano v. Westcott*, 443 U.S. 76 (1979) (gender); *New Jersey Welfare Rights Org. v. Cahill*, 411 U.S. 619 (1973) (out of wedlock childbirth); *Graham v. Richardson*, 403 U.S. 365 (1971) (alienage); *Goldberg v. Kelly*, 397 U.S. 254 (1970) (procedural due process); *Shapiro*, 394 U.S. 618 (interstate travel); but see *United States Dep't of Agric. v. Moreno*, 413 U.S. 528 (1973) (invalidating rule denying food stamps to households containing unrelated individuals). Importantly, all these cases involved the absolute denial of benefits, similar to what time limits would impose, as opposed to reduced levels or conditions. See *infra* note 119 and accompanying text for a discussion of this distinction.

9. "No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1. See also U.S. CONST. amend. V (applying due process guarantees to federal law: "[no person shall] be deprived of life, liberty, or property, without due process of law"). The Fifth Amendment has been held to incorporate the Fourteenth Amendment's equal protection standard against the federal government. See *Bolling v. Sharpe*, 347 U.S. 497, 500 (1954). See *infra* Parts II.A and III.A for the development of these constitutional rights through case law.

10. Single parents head 87.7% of AFDC households. See 1995 GREEN BOOK, *supra* note 5, at 401.

women are responsible not only for putting food on the table and roofs over the heads of their children but also for caring for them during illnesses, advocating for their interests in dealing with schools and other bureaucracies, maintaining discipline and safety and passing on religious and ethical values. Prior to the latest wave of welfare "reforms," single parents had at least some choice in striking a balance between these competing demands. A mother who felt that her children needed her supervision full-time could decide to go on AFDC rather than work outside the home, although this choice would frequently result in a considerable reduction in their standard of living.<sup>11</sup> (As a practical matter, and contrary to the stereotype, most recipients draw AFDC out of necessity rather than choice.<sup>12</sup> The Supreme Court, however, has

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11. The government has heavily, and deliberately, skewed the choice against AFDC by maintaining benefits at extremely low levels. See 1995 GREEN BOOK, *supra* note 5, at 364, 367. Even minimum wage, if earned full-time, year-round and in combination with the Earned Income Tax Credit, amounts to considerably more than AFDC for a typical family of three; child care costs and other work-related expenses, however, frequently negate the difference. ALBELDA ET AL., *supra* note 5, at 58. In the context of abortion, the Supreme Court has held that the state may use its coercive power to skew choices in the exercise of privacy rights in order to promote its own values. See, e.g., *Planned Parenthood v. Casey*, 505 U.S. 833, 859-61 (1992) (affirming a state's right to encourage women to choose childbirth rather than abortion); accord *Harris v. McRae*, 448 U.S. 297, 315 (1980); *Maher v. Roe*, 432 U.S. 464, 474-76 (1977).

12. In order to qualify for AFDC, a family must have an income less than the grant amount, which was 38% of the poverty level in the median state in 1994. 1995 GREEN BOOK, *supra* note 5, at 367-70. In the late 1960s, federal law mandated that "employable" AFDC recipients be placed into jobs, with training, health care, transportation and child care offered. PIVEN & CLOWARD, *supra* note 2, at 382-83. At that time, only 10% of recipients were deemed "employable," and only one in five of those were successfully placed into jobs. *Id.* This low success rate likely resulted from the lack of jobs and the inability of caseworkers to recognize the many reasons why work outside the home is impractical for many AFDC recipients; these reasons range from chronic illness that fails to rise to the level of disability to the time-consuming demands of child-rearing and survival on a sub-poverty-level income. See *infra* notes 124-25 and accompanying text.

Moreover, fewer women likely receive AFDC by choice today than in the 1960s, given that the real value of AFDC benefits has plummeted 47% in the median state since 1970. See 1995 GREEN BOOK, *supra* note 5, at 377. Virtually all AFDC mothers indicate a desire to work outside the home, at least part-time, and surveys show, in fact, that most do out of sheer need. See, e.g., Kathryn Edin & Christopher Jencks, *Reforming Welfare*, in *RETHINKING SOCIAL POLICY* 205-21 (Christopher Jencks ed., 1992). Some mothers, however, feel that their children's need to have them at home outweighs any benefit that could be gained through job training programs or through working outside the home for long hours. Benjamin L. Weiss, *The Word from Above, the Voice from Below: Contrasting Priorities in Fighting Single Parent Poverty* 43-44 (1994) (unpublished B.A. *summa cum laude* thesis, University of Minnesota (Minneapolis)) (on file with author).

rejected the suggestion of a constitutional claim to assistance based on need.<sup>13</sup>)

The Supreme Court has repeatedly held that parents themselves have the fundamental right to make the most important choices affecting their children's upbringing.<sup>14</sup> Precedent seems to clearly indicate that the government cannot require mothers to work outside the home on pain of criminal sanctions or the threat of loss of their children. With time limits or outright denial of benefits, however, most single mothers will no longer have the option of caring for their children at home. Rather, after five years of benefits or upon first losing a husband, a mother will be forced to choose among limited alternatives: to enter a waged labor market characterized by part-time, temporary and/or poverty-wage jobs, likely depriving her of virtually all contact with her children if waged work can be found at all;<sup>15</sup> to marry or cohabit with a man

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13. *Dandridge v. Williams*, 397 U.S. 471, 487 (1970) (holding that the Constitution grants no fundamental right to subsistence).

14. See, e.g., *Moore v. City of East Cleveland*, 431 U.S. 494 (1977) (finding that a grandmother has a right to live with two grandchildren who are cousins); *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632 (1974) (concluding that a teacher has right to continue working while pregnant); *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (stating that Amish parents have the right not to send their child to school after eighth grade); *Stanley v. Illinois*, 405 U.S. 645 (1972) (holding that an unwed father has a right to custody of his children after their mother's death); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925) (holding that parents have a right to choose private school for their children); *Meyer v. Nebraska*, 262 U.S. 390 (1923) (stating that parents have a right to teach their children foreign language). For a discussion on the issue of governmental intrusion versus the failure to subsidize such rights, see *infra* notes 112-28 and accompanying text.

15. Part-time and temporary jobs are the fastest-growing sector of the labor market, currently accounting for one-quarter of all jobs. KEVIN PHILLIPS, *THE POLITICS OF RICH AND POOR* 21 (1990). The number of workers involuntarily employed only part-time increased 178% from 1970 to 1993. *AMERICA'S NEW WAR ON POVERTY* 81 (Robert Lavelle ed., 1995). In 1992, 18% of full-time, year-round workers earned too little to raise their families out of poverty, a 50% increase since 1979. *Id.* In 1991, nearly half of all employed women earned a wage too low to raise a family of three out of poverty after day care costs, even if working full-time and year-round. ALBELDA ET AL., *supra* note 5, at 67. In 1993, the Children's Defense Fund of Minnesota calculated that a single mother in the Minneapolis-St. Paul metropolitan area with two children, ages 4 and 7, working a full-time job paying the average wage received by graduates of Minnesota's job training program for AFDC recipients, would come out \$542 short of expenses every month. *Many Families Leave AFDC But Can't "Make It," YOU SHOULD KNOW* Children's Defense Fund—Minnesota, Sept. 1993, at 1.

Given these circumstances, most mothers would need to take a second job, part-time, simply to keep up with housing and child care costs, depriving them of virtually all contact with their children. The government may defend this dilemma as a consequence of having additional children while on AFDC. But this defense is unconvincing when it is considered that a woman can exhaust her five years irrespective of whether or not she actually had children during the time that she was on AFDC. Because the limit is cumulative over the mother's lifetime, she

capable of supporting her and the children;<sup>16</sup> to give up her children; or to resort to a life of destitution and uncertain dependence on relatives, charity and crime, with the likely result of loss of children to protective services. In this situation, a mother has effectively lost the ability to exercise her fundamental rights under the Constitution.

The major weakness of this argument is the line of Supreme Court cases that hold that the government need not subsidize the exercise of a fundamental right.<sup>17</sup> However, the government already grants one group of single mothers, those eligible for Social Security Survivor Insurance (SI), a subsidy to exercise their parental rights. This group includes widows with children and divorced mothers whose former husbands have died.<sup>18</sup> The government is drawing a line between two classes of women and children based

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could have had the child during a period of employment or marriage between two spells on AFDC.

16. Leaving aside the constitutional issues involving marriage as a fundamental right beyond interference by the state, *see e.g.*, *Zablocki v. Redhail*, 434 U.S. 374 (1978) (striking down a state statute requiring certain groups of people to obtain a court order permitting them to marry), finding a gainfully employed man is often an unrealistic prospect for long-term poor women, particularly for African-American women in urban ghettos. *See WILLIAM JULIUS WILSON, THE TRULY DISADVANTAGED* 63-92 (1987). A woman could potentially enter a cooperative arrangement with another single mother, caring for both sets of children while the other mother worked outside the home, or perhaps each working a job and caring for the other's children in their off hours. However, the low pay of many jobs available to single mothers makes it unlikely that the employed mother would want to support two families, and the model of coordinating job hours carries too many practical difficulties to function as a large-scale national policy. Such arrangements also depend on mothers having significant social ties, which are difficult to maintain among poor families which move frequently and may lack access to telephones and cars. *See, e.g.*, *AMERICA'S NEW WAR ON POVERTY*, *supra* note 15, at 121 (citing Census Bureau statistics that 18.5% of poor households lack phones); Weiss, *supra* note 12, at 31 (finding that AFDC recipients report moving very frequently due to inability to keep up with rent and other factors).

17. *See Harris v. McRae*, 448 U.S. 297 (1980) (stating that the federal government need not fund medically necessary abortions); *Maher v. Roe*, 432 U.S. 464 (1977) (holding that states need not fund elective abortions for poor women). For full discussion of this point, *see infra* notes 112-28 and accompanying text.

18. If a husband has worked long enough and recently enough to be "fully and completely" insured by Social Security, on his death, his widow or surviving divorced spouse and children are eligible for SI. 42 U.S.C.A. §§ 402(d)(3), 416(h)(3)(A)(I) (West 1994). To be eligible, a child normally must have either lived with or been supported by the father; this is presumed except where a father's biological child is born out of wedlock. *Id.* Such a child can still draw SI if s/he can produce the father's acknowledgment of paternity in writing, or if a court decreed paternity or ordered child support. *Id.* A child can draw SI on the death of a step-father if s/he lived with him for nine months prior to his death. *Id.* § 416(e)(2).

A mother may draw SI if she has "in her care" an SI-eligible child under age 16 that is hers by biology or adoption. *Id.* § 402(g)(1). A child can receive SI until age 18, or later if still enrolled in elementary or secondary school. *Id.* § 402(d)(1)(B)(i).



solely on their prior relationship to a man, allocating the mother's freedom of choice—as well as cash grants which provide the very necessities of life—according to a classification system that appears on its face to be blatantly irrational. By challenging the government's choice—subsidizing only one group of single mothers—under the Equal Protection Clause, AFDC recipients can avoid the threshold question of whether the government must subsidize exercise of the right to any group of mothers at all. Moreover, the fact that a fundamental right is at stake, even where the government has no obligation to actively facilitate its exercise, heightens the scrutiny with which a court will evaluate the classification of mothers and children.<sup>19</sup>

The purpose of this Note is to develop this legal challenge to the government's punitive policies of selectively denying subsistence to women and children.<sup>20</sup> Part I provides a hypothetical illustration to clarify the equal protection issue. Part II examines the Supreme Court's case law on parents' liberty rights under the Constitution and explains how AFDC cutoffs affect these constitutionally protected interests. Part III.A surveys the equal protection case law surrounding issues of welfare and family composition as well as the different standards of review that a court could ap-

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19. See, e.g., *Rosenberger v. Rector and Visitors of Univ. of Virginia*, 115 S.Ct. 2510 (1995) (applying strict judicial scrutiny to unequal subsidy of free speech); *Zablocki v. Redhail*, 434 U.S. 374 (1978) (applying strict scrutiny because a statutory classification affected the fundamental right to marry); *Shapiro v. Thompson*, 394 U.S. 618 (1969) (applying strict scrutiny to classification affecting fundamental right to interstate travel); *Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 621 (1969) (applying strict scrutiny to classifications affecting voting rights).

20. To the extent possible, this Note is intended to suggest a legal theory with a realistic chance of success. Thus, I distinguish a number of Supreme Court cases which I feel were wrongly decided rather than arguing for overruling them. I also base my attack on welfare "reform" on its likely effects rather than on a pure legal theory or moral or philosophical argument. This Note is written from a standpoint of immediate damage control; I do not analyze or attempt to remedy the social conditions that produce the need for public aid for parents and children or the political conditions that have produced enthusiasm for a brutally punitive welfare policy. A non-exhaustive list of works particularly helpful in understanding these issues includes: THERESA FUNICIELLO, *TYRANNY OF KINDNESS* (1993) (exposing the prejudice faced by AFDC recipients and the role of the social service industry in preventing meaningful solutions to poverty); MICHAEL B. KATZ, *THE UNDESERVING POOR* (1989) (analyzing factors shaping changes in AFDC ideology from the 1960s to the 1980s); DOUGLAS S. MASSEY & NANCY A. DENTON, *AMERICAN APARTHEID* (1993) (examining how racial segregation produces urban poverty and social dislocation); PIVEN & CLOWARD, *supra* note 2 (analyzing social welfare history in class terms); PATRICIA J. WILLIAMS, *THE ROOSTER'S EGG* (1995) (discussing the intersecting roles of race and gender in shaping AFDC policy); Nancy Fraser & Linda Gordon, *Contract Versus Charity: Why Is There No Social Citizenship in the United States?* *SOCIALIST REV.*, July-Sept. 1992, 45-67, 459 (analyzing social welfare history in gender terms).

ply to the AFDC-SI distinction. Part III.B evaluates the two forms of benefit denial under two standards of review suggested by the fundamental rights case law: (a) the Court's test for state interference in parental rights articulated in *Prince v. Massachusetts*<sup>21</sup> and *Wisconsin v. Yoder*,<sup>22</sup> and (b) the "undue burden" test applied to privacy rights in *Planned Parenthood v. Casey*.<sup>23</sup> The *Prince-Yoder* test posits that parental rights are fundamental, thus functioning as a form of strict judicial scrutiny, and the "undue burden" standard appears to approximate an intermediate level of scrutiny. Any issues not discussed under these specific tests are addressed in the context of rational basis review. Part III.C assumes this worst-case scenario of the Court's total rejection of the fundamental right claim and evaluates the AFDC-SI distinction under rational basis review.

### I. The AFDC-Survivor Insurance Distinction Illustrated

In designing welfare programs for needy children and their parents, the government allocates two sets of interests. The first is the means of survival; the second is the freedom of parents to set the balance between parental supervision and day care in their children's upbringing.<sup>24</sup>

Although falling wages have required many two-parent families to have two wage earners, many such families still retain some measure of flexibility in meeting their parental responsibilities. Some two-parent families can arrange work schedules so that one parent is always home; others can arrange time with children at a cost of a lower standard of living by having one parent voluntarily stay home or work only part-time. Mothers in these situations, therefore, retain some degree of parental rights over their children's upbringing. By nature, single mothers lack these rights in the absence of a source of income outside the labor market, which AFDC cutoffs deny.<sup>25</sup> Under a time-limited welfare plan, most

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21. 321 U.S. 158 (1944). See *infra* text accompanying notes 71-75.

22. 406 U.S. 205 (1972). See *infra* text accompanying notes 73-75.

23. 505 U.S. 833 (1992). See *infra* text accompanying notes 202-06.

24. See *infra* Part II for a detailed discussion of the Supreme Court's treatment of parents' liberty rights and the effect AFDC cutoffs have on these rights. Naturally, a spectrum of possible child care arrangements exists, with a middle range entailing leaving one's children with friends or relatives for varying degrees of compensation. The basic premise that forced labor requires parents and children to involuntarily spend time apart, however, does not change when the substitute care is in a more intimate setting rather than a commercial or state-run day care center.

25. Outside of employment, the major alternative to AFDC is support payments from the child's father. Inadequate child support enforcement is a signifi-

single women simply have no option but to work outside the home, perhaps after a grace period of a few years.<sup>26</sup>

Within the class of single mothers, however, the government has singled out one group to retain its rights of parental choice. The new "welfare reform" law neither places time limits on nor ends the entitlement status of the SI program, which allows widows, surviving divorced wives and children of workers insured through Social Security to collect significantly higher benefits, with fewer restrictions, than AFDC.<sup>27</sup> Under the new federal "reforms," whether a divorced woman is left without a choice as to how to raise her children, and whether the children are left with no means of support, will depend entirely on whether her husband happens to die within five years of the divorce.<sup>28</sup>

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cant cause of AFDC receipt: "In 1991, only 56% of custodial mothers were awarded child support payments, and only half of [those] received the full amount due." ALBELDA ET AL., *supra* note 5, at 50. One survey of divorced fathers found that two-thirds spent less monthly on child support than on their car payments, and that more than half were delinquent in their child support even though their car payments were up-to-date. *Id.*

However, according to one researcher, collecting 100% of the child support ordered would only cut AFDC by 25%. *Id.* at 51. Many fathers of children on AFDC simply lack the money to pay any meaningful support. *See id.* Also, after the first \$50, women receiving AFDC are required to sign their child support rights over to the state, and even after the mother leaves AFDC, the state retains the initial right to collect any arrears. *Id.* For other means of support available to some single mothers, see *infra* note 26.

26. Some single mothers will manage to retain parental choice rights because of adequate income from rents and other property or specialized government programs such as veterans' benefits. The first category is a wealth classification not defined by government action, see *supra* note 7, and thus immune from an equal protection challenge. A court could distinguish veterans' benefits and other specialized pensions as contractual obligations on the part of the government. Single mothers receiving disability benefits for themselves or their children, of course, are materially different in their situations from women receiving either AFDC or SI. The relatively small number of children whose caregiver's support derives from Social Security Old Age Insurance present a closer case, but again, one can argue that there are greater material differences between a retiree and an AFDC parent than between a divorcee with a living husband and a divorcee whose husband subsequently died.

27. For a wife and her children to be eligible for SI, the worker must have worked in Social Security-insured jobs for a certain number of years, including roughly half of the three years before death. See 1995 GREEN BOOK, *supra* note 5, at 5-8. For the other eligibility requirements of SI, see *supra* note 18. While AFDC is reduced by one dollar per dollar of earned income, SI is reduced on a sliding scale, allowing up to \$8040 of earned income in 1994 with no reductions. 1995 GREEN BOOK, *supra* note 5, at 19; see also *infra* note 124 (discussing further the dollar for dollar reduction of AFDC). In 1993, a family of three on SI received from \$780 to \$2301 per month in benefits, averaging \$1527. See 1995 GREEN BOOK, *supra* note 5, at 37. In 1994, an AFDC family the same size would receive \$366 per month in the median state, plus \$295 in food stamps. *Id.* at 366-67.

28. An equal protection claim centered on the AFDC-SI distinction could be brought by children as well as by parents, as children have equally little control

To illustrate the consequences of the distinction between SI and time-limited welfare benefits, imagine two fictional married couples in the year 2010: Frank and Eleanor Anderson and Harold and Phyllis Brown. Both husbands are employed at jobs paying the national median wage and fully covered by Social Security. Both wives have high school diplomas and are on their second marriages; each fled an abusive husband after giving birth to a child and spent a year on welfare before marrying their current husbands.<sup>29</sup>

One evening, neither Mr. Anderson nor Mr. Brown returns from work. The next day, both women receive calls from divorce lawyers; their husbands have left them for younger women. Shortly thereafter, both women discover they are pregnant. Six months later, seeking to avoid child support authorities pursuing delinquent payments,<sup>30</sup> Mr. Anderson and Mr. Brown drive off together with their paramours for the Mexican border. En route, the slightly intoxicated driver careens into a telephone pole. Mr. Anderson is killed in the crash. Mr. Brown, however, survives, gets the car repaired during his hospital stay and completes his run for the border.

Mrs. Anderson and her children immediately apply for SI, to which they have an entitlement. Mrs. Anderson decides to stay home with her infant. Her grant is enough to cover necessities, although she can afford few luxuries. When Mrs. Anderson's youngest child begins school, she takes a part-time job that corresponds with school hours. When her oldest daughter, who receives benefits because she was supported by her stepfather,<sup>31</sup> takes up with a boyfriend Mrs. Anderson distrusts, Mrs. Anderson cuts back on her work hours in order to keep an eye on her. Mrs. Anderson draws SI for herself for 16 years and receives a grant for her youngest child until he graduates high school.

After draining her savings during several futile attempts to collect child support, Mrs. Brown realizes that she has no choice

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over whether their father is alive.

29. A University of Michigan study found that in 45% of current and former AFDC families surveyed, either the mother or the children had suffered repeated domestic abuse. Frances Fox Piven & Richard A. Cloward, *The Contemporary Relief Debate*, in *THE MEAN SEASON* 45, 98 n.22 (Fred Block et al. eds., 1987). Other studies place the figure at over 50%. ALBELDA ET AL., *supra* note 5, at 46; see also WILLIAMS, *supra* note 20, at 7 (citing studies showing that approximately 60% of all poor women, and 50% of women in homeless shelters, are poor because they fled abusive relationships).

30. For a discussion of the frequency of child support delinquency, see *supra* note 25.

31. See *supra* note 18.

but to apply for welfare — even if she did not feel that her newborn needed her at home, the jobs she can find do not pay enough for day-care.<sup>32</sup> Mrs. Brown is lucky — she has no entitlement to aid, but her application happens to be processed the day before the state's quota is reached. Mrs. Brown receives a monthly grant at 38% of the poverty level, reduced by one dollar for every dollar she brings in.<sup>33</sup> Most of her time is spent navigating charity bureaucracies, with her baby in her arms.<sup>34</sup> After two years, a social worker informs her that she needs to do 20 hours per week of "community service" work. Fortunately, however, the Supreme Court invalidates this section of the 1996 "welfare reform" law on Thirteenth Amendment grounds before Mrs. Brown's benefits are cut for noncompliance.<sup>35</sup>

The real problems begin after four years on welfare. The state had job training programs, but Mrs. Brown could not participate because she never made it to the top of the waiting list for subsidized child care.<sup>36</sup> Now, Mrs. Brown's benefits are due to run out, and her youngest child is still not old enough to start school. Mrs. Brown manages to find a poverty-level job and works double shifts to cover housing and day-care costs, but has to miss three weeks of work when her entire family catches the illness her youngest child brought home from his unsanitary day-care center.<sup>37</sup> When she returns, she is fired. Ineligible for any benefits

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32. Employed mothers of preschool children pay more for child care in an average month than a minimum-wage worker earns in a week, and child care costs erase the earnings advantage of a minimum-wage job plus the Earned Income Tax Credit over AFDC. ALBELDA ET AL., *supra* note 5, at 53, 58. Combined with excessive housing costs, unsubsidized child care is simply impossible to afford for single parents working only one job. See *infra* note 125.

Half of all women workers earn wages lower than \$6.67 per hour, the amount necessary to raise a family of three out of poverty and pay day care costs for one child when working full-time, year-round. ALBELDA ET AL., *supra* note 5, at 67. The average entry-level wage for women with high school diplomas is just over \$6.00. AMERICA'S NEW WAR ON POVERTY, *supra* note 15, at 86.

33. See *supra* notes 11 and 27 and *infra* note 124.

34. See *infra* note 125.

35. See *supra* notes 4 and 6.

36. A recent New York Times article estimated that welfare "reform" would add 300,000 children to the "tens of thousands" in New York City who meet the income requirement for subsidized child care but do not receive it. Joe Sexton, *Welfare Mothers and Informal Day Care: Is It Up to Par?* N.Y. TIMES, Oct. 14, 1996, at B1.

37. The federal child care block grant proposed in 1995 would have eliminated the requirement that states enforce minimal health and safety standards for publicly funded child care. ALBELDA ET AL., *supra* note 5, at 53. Wisconsin has already received a federal waiver to abolish all quality standards for day-care programs associated with welfare "reform." Ruth Conniff, *Cutting the Lifeline: The Real Welfare Fraud*, PROGRESSIVE, Feb. 1992, at 25, 27. Moreover, between 60%

except food stamps,<sup>38</sup> the family is evicted and relocates to a homeless shelter. Mrs. Brown's oldest daughter, who had brought her boyfriend home every day after school while her mother was at work, announces she is pregnant; her state does not give assistance to unwed teenage mothers, and Medicaid will not pay for an abortion.<sup>39</sup>

Mrs. Brown is unable to find another job after being fired; there is plenty of competition from other mothers who have exhausted their welfare benefits. The family's allotted time in the shelter expires and they move to another. The Brown children are unable to go to school for lack of clothes and a permanent address.<sup>40</sup> Eventually, a social worker notices the children's plight and gets them removed from Mrs. Brown's custody on the grounds that she is not providing for their basic needs.<sup>41</sup>

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and 90% of family day-care homes—the most common type of child care—are unregulated. EDWARD F. ZIGLER & MARIA FINN STEVENSON, *CHILDREN IN A CHANGING WORLD* 238 (Vicki Knight et al. eds., 2d ed. 1993).

38. The food stamp program remains an entitlement under the Act, but these benefits may be reduced. Rev. Chris Morton, *Harmful Welfare Reform Bill*, STAR TRIB. (Minneapolis), Aug. 1, 1996, at A18. For example, in Minnesota the Act will reduce food stamp benefits on average from 80 cents to 66 cents per person per meal. *Id.*

39. Medicaid can fund only a subset of medically necessary abortions under a federal law known as the Hyde Amendment, which the Supreme Court upheld in *Harris v. McRae*, 448 U.S. 297 (1980).

40. Although some cities have made progress in educating homeless children, most school districts still use permanent addresses to determine a child's residence. See, e.g., *Martinez v. Bynum*, 461 U.S. 321 (1983) (upholding requirement of district residence that acted to exclude citizen child living apart from alien parents). Most schools also have minimum standards for students' attire, such as requiring students to wear shoes. For example, the St. Paul Public Schools' policy on student dress states: "Bare feet are not acceptable according to public health rules." Board of Educ., St. Paul, Minn., Student/Dress Code 504 (1974). The Minneapolis Public Schools allow individual schools to set "acceptable minimum standards for student dress," but otherwise leave the decision to students and parents except in case of an "obvious health hazard." Pub. Schs. Minneapolis, Minn., Student/Dress Policy 5460 (1984). Some schools are likely to classify bare feet as an "obvious" hazard, either because of concern for students or fear that a child's cut foot could lead to lawsuits against the school.

As far back as the 1930s, writers noted that social pressures could effectively force poorly-dressed children out of school even if they were allowed to attend. See JOHN STEINBECK, *THE GRAPES OF WRATH* 435-36 (Penguin Books 1986) (1939). As a practical matter, in Minnesota and many other parts of the country, a child who lacked shoes, long pants or a coat would likely miss much of the school year due to a physical inability to walk all the way to school or to wait for the school bus in winter.

41. Some states remove children from their families solely on grounds that the family is homeless or has inadequate housing, a practice likely to become more common as large numbers of mothers encounter the prospect of never attaining adequate income. See *infra* notes 107-09 (discussing the implications of placing children in foster care). The foster care system itself may create barriers to reunification of a family thus separated. See *id.*

The distinction between SI and AFDC has here allowed a single stroke of luck to direct previously identical families into tragically different situations. Although this result would seem to match any common definition of the word "irrational," the Supreme Court's record of extreme deference to Congress on issues of social welfare<sup>42</sup> indicates that denying children the very necessities of life on an essentially random basis might not constitute sufficient grounds to overturn the "welfare" reform law. The law of equal protection, however, provides another basis for requiring the Court to closely scrutinize the relationship between the classification of parents and children and the putative goals of welfare "reform": the legislation selectively denies women such as Mrs. Brown the right to raise her children and make the basic decisions involving her children's upbringing.<sup>43</sup>

## II. Parents' Rights Under the Constitution

### A. *Development of the Doctrine*

The Supreme Court first recognized the Fourteenth Amendment right to privacy, now most closely associated with birth control and abortion, in a pair of cases in the 1920s. In *Meyer v. Nebraska*,<sup>44</sup> the Court struck down a state statute forbidding the teaching of foreign languages to elementary school children. In *Pierce v. Society of Sisters*,<sup>45</sup> the Court invalidated a law requiring children to attend only public schools. Both cases were decided on substantive due process grounds, i.e., that the laws in question intruded on the "liberty" guaranteed by the Due Process Clause.<sup>46</sup> The *Meyer* court concluded that the liberty interest, "[w]ithout doubt," included the right to "establish a home and bring up children"<sup>47</sup> and "the power of parents to control the education of their own [children]."<sup>48</sup> This power derived from "the relation between

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42. See *supra* note 8 and *infra* notes 129-44 and accompanying text.

43. The Court has repeatedly held that parents have certain basic rights in the upbringing of their children which constitute fundamental interests protected against unnecessary government interference. This is discussed in the next section.

44. 262 U.S. 390 (1923).

45. 268 U.S. 510 (1925).

46. *Pierce* was also decided partially on substantive economic due process grounds, i.e., that the law deprived private schools of property interests in their business. *Id.* at 535.

47. *Meyer*, 262 U.S. at 399.

48. *Id.* at 401.

individual and State . . . upon which our institutions rest."<sup>49</sup> *Pierce* simply followed *Meyer* to hold that the Due Process Clause granted parents the "liberty . . . to direct the upbringing and education of children under their control."<sup>50</sup>

*Meyer* and *Pierce* have served as the basis for a wide range of privacy rights under the Constitution, including the fundamental right to heterosexual marriage,<sup>51</sup> the right to freedom from forced sterilization,<sup>52</sup> the right to contraception<sup>53</sup> and the right to abortion.<sup>54</sup> The Supreme Court, however, has referred to the facts of *Meyer* and *Pierce* in dicta more than it has developed the rights they established. The next key case in developing the *Meyer-Pierce* line was *Stanley v. Illinois*,<sup>55</sup> which declared that parents have an interest in the "companionship, care, custody, and management" of their children that "undeniably warrants deference" absent a "powerful countervailing interest."<sup>56</sup> *Stanley* dealt with the

49. *Id.* at 402. The Court wrote:

In order to . . . develop ideal citizens, Sparta assembled the males at seven into barracks and intrusted [sic] their subsequent education and training to official guardians. Although such measures have been deliberately approved by men of great genius, their ideas touching the relation between individual and State were wholly different from those upon which our institutions rest; and it hardly will be affirmed that any legislature could impose such restrictions upon the people of a State without doing violence to both letter and spirit of the Constitution.

*Id.* This passage would appear to doom the plans of welfare "reformers" such as Mickey Kaus to remove children from the homes of mothers who would not (or could not) work outside the home and place them in orphanages to be inculcated with the "work ethic." See Kaus, *supra* note 3, at 32-33. However, orphanages still existed at the time of the *Meyer* decision, although they were not favored. See, e.g., HOLT, *supra* note 6, at 173; TRATTNER, *supra* note 2, at 108-09.

50. *Pierce*, 268 U.S. at 534-35.

51. See, e.g., *Turner v. Safley*, 482 U.S. 78 (1987) (invalidating a rule restricting marriage of prisoners); *Zablocki v. Redhail*, 434 U.S. 374 (1978) (invalidating a law forbidding marriage without court order for a state resident owing child support); *Loving v. Virginia*, 388 U.S. 1 (1967) (striking down a law prohibiting interracial marriages).

52. The Court established freedom from sterilization as a general principle in *Skinner v. Oklahoma*, 316 U.S. 535 (1942) (invalidating statute providing for sterilization of certain criminals).

53. The Court relied on *Meyer* and *Pierce* to declare a right of married couples to contraception in *Griswold v. Connecticut*, 381 U.S. 479 (1965). It extended that right to unmarried individuals in *Eisenstadt v. Baird*, 405 U.S. 438 (1972), and to minors in *Carey v. Population Serv. Int'l*, 431 U.S. 678 (1977).

54. *Roe v. Wade*, 410 U.S. 113, 152-53 (1973), established the right to abortion in part as an extension of *Meyer* and *Pierce*, and the Court reaffirmed both that right and the validity of those cases in *Planned Parenthood v. Casey*, 505 U.S. 833, 852-65 (1992) (striking a requirement that a woman seeking abortion notify her husband, but upholding a 24-hour waiting period and other restrictions).

55. 405 U.S. 645, 651 (1972).

56. *Id.*



"custody" aspect, invalidating a state law that presumed that unwed fathers were unfit.<sup>57</sup> *Stanley* also established that the Constitution does not "[refuse] to recognize those family relationships illegitimized by a marriage ceremony."<sup>58</sup>

The Court further developed the right to custody in *Santosky v. Kramer*,<sup>59</sup> in which it held that the state must prove long-term neglect by clear and convincing evidence, as opposed to a mere preponderance of the evidence, in order to terminate parental rights consistent with procedural due process. The *Santosky* Court ruled that "[t]he fundamental liberty interest of natural parents in the care, custody, and management of their child does not evaporate simply because they have not been model parents . . . ."<sup>60</sup> In other words, *Santosky* not only held parents' interests to be fundamental, requiring invasions of those interests to be narrowly tailored to a compelling state interest, but established that the Constitution protects more than just traditionally favored types of families.<sup>61</sup>

The Court has also ruled that unwed fathers have a right to block a mother's attempt to put their child up for adoption, but the state has no duty to provide fathers with notice if they have not supported or had contact with the child.<sup>62</sup> The Court had already

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57. *Id.* at 646. As a result of this law, Stanley's children, whom he intermittently lived with and supported from birth but whose mother he had never married, were declared wards of the state upon their mother's death. *Id.*

58. *Id.* at 651.

59. 455 U.S. 745 (1982).

60. *Id.* at 753. The Court expressly rejected the state's claim "that a parental rights termination proceeding [did] not interfere with a fundamental liberty interest." *Id.* at 754 n.7. However, the Court had held the previous year that the interest was not so fundamental as to require appointment of counsel for all hearings to terminate parental rights. See *Lassiter v. Department of Soc. Servs.*, 452 U.S. 18 (1981).

61. The Court did reach an outer limit in its protection of diverse family types in *Michael H. v. Gerald D.*, 491 U.S. 110 (1989). Michael sought visitation rights with a child he had fathered with a woman married to Gerald, and advocated striking a state law that presumed the husband of the mother to be a child's father. *Id.* Though Michael had lived with the child for a brief period before the mother reconciled with Gerald, the Court held that nothing in American tradition required constitutional protection for "adulterous" fathers. *Id.* at 131. *Michael H.* can be seen as an extension of the cases holding that raising a child, rather than biology, creates the constitutional tie and that the child's custodial parents have the right to define the family unit. See *infra* notes 62-65 and accompanying text; see also Judith T. Younger, *Responsible Parents and Good Children*, 14 LAW & INEQ. J. 489, 506 (1996). In *Planned Parenthood v. Casey*, 505 U.S. 833, 852-53 (1992), the Court explicitly rejected the implication that *Michael H.* limited constitutional protection only to family types favored by tradition.

62. See *Caban v. Mohammed*, 441 U.C. 380 (1979) (establishing the basic right of an unwed father to block a mother's attempt to put child up for adoption). In *Lehr v. Robertson*, 463 U.S. 248 (1983), the Court stated that "[w]hen an unwed

held in *Smith v. Organization of Foster Families*<sup>63</sup> that biology was not the factor triggering constitutional protection of the custody interest, citing the rights of adoptive parents as an example. In *Smith* the Court established the source of parental rights, explaining that the liberty interest in family privacy derived from "intrinsic human rights, as they have been understood in 'this Nation's history and tradition,'" and further stating that these freedoms were "older than the Bill of Rights."<sup>64</sup> The Court used this reasoning to hold that foster parents did not share the substantive due process rights of natural and adoptive families, because what parental rights they had derived from a "knowingly assumed contractual relation with the State" rather than from the ancient sources of other parental liberties.<sup>65</sup>

The same year, the Court reaffirmed the historical justification for protecting the rights of the family in *Moore v. City of East Cleveland*,<sup>66</sup> when it invalidated an ordinance which prevented a child from living with his grandmother, uncle and cousin. Reasoning that extended family members were often involved in the types of child-rearing decisions at issue in *Meyer* and *Pierce*, the Court in *Moore* extended the fundamental rights of families to cover these relationships as well as acknowledging a right to define the family unit.<sup>67</sup>

The Court does not appear to have defined parents' "companionship" interests under *Stanley* in any way distinct from their "custody" interest. The closest it has come is articulating a right of "intimate association" in *Roberts v. United States Jaycees*.<sup>68</sup> Justice Brennan wrote:

[B]ecause the Bill of Rights is designed to secure individual liberty, it must afford the formation and preservation of certain kinds of highly personal relationships a substantial measure of sanctuary from unjustified interference by the State . . . . [C]ertain kinds of personal bonds have played a

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father demonstrates a full commitment to the responsibilities of parenthood . . . his interest in personal contact with his child acquires substantial protection. . . . But the mere existence of a biological link does not merit equivalent constitutional protection." *Id.* at 261.

63. 431 U.S. 816, 842-44 (1977).

64. *Id.* at 845 (quoting *Moore v. City of East Cleveland*, 431 U.S. 494, 503 (1977), and *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965)).

65. *Id.*

66. 431 U.S. 494 (1977) (plurality opinion). The plurality theorized that consonance with tradition was the reason why *Meyer* and *Pierce*, alone of the decisions of their era, survived the demise of the substantive due process doctrine. *Id.* at 501 n.8.

67. *Id.* at 498-99, 504.

68. 468 U.S. 609, 618 (1984).

critical role in the culture and traditions of the Nation by cultivating and transmitting shared ideals and beliefs . . . . [I]ndividuals draw much of their emotional enrichment from close ties with others. Protecting these relationships from unwarranted state interference therefore safeguards the ability independently to define one's identity that is central to any concept of liberty.<sup>69</sup>

Justice Brennan identified "[t]he personal affiliations that exemplify these considerations" as "those that attend the creation and sustenance of a family—marriage, . . . childbirth, . . . the raising and education of children, . . . and cohabitation with one's relatives."<sup>70</sup> Brennan made these remarks in a negative context, however, in distinguishing them from the Jaycees' desire to exclude women from their organization, and the Court has since done nothing to define the limits of the doctrine.

The *Stanley* interests most directly traceable to *Meyer* and *Pierce*, those in the "care and management" of children, have had the sketchiest elaboration. In *Prince v. Massachusetts*,<sup>71</sup> the Court upheld the conviction of a Jehovah's Witness under child labor laws for allowing her niece, with whom she lived, to distribute religious literature. Justice Rutledge recognized that *Meyer* and *Pierce* had respected a "private realm of family life which the state cannot enter," but held that "[a]cting to guard the general interest in a youth's well-being, the state as *parens patriae* may restrict the parent's control by requiring school attendance, regulating or prohibiting the child's labor and in many other ways."<sup>72</sup> The Court, however, narrowed the apparent breadth of *Prince* in *Wisconsin v. Yoder*,<sup>73</sup> which upheld the right of Amish parents to withdraw their children from school after the eighth grade on grounds of religion and parental rights. *Yoder* held that "the power of the parent . . . may be subject to limitation under *Prince* if it appears that parental decisions will jeopardize the health or safety of the child, or have a potential for significant social burdens."<sup>74</sup> The facts of *Yoder* indicate that parental control is broad indeed, despite Chief Justice Burger's emphasis on the unique aspects of Amish culture

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69. *Id.* at 618-19.

70. *Id.* at 619 (citations omitted).

71. 321 U.S. 158 (1944).

72. *Id.* at 166 (footnotes omitted). The Court stated that "[a]mong [the] evils most appropriate for such action are the crippling effects of child employment." *Id.* at 168.

73. 406 U.S. 205 (1972).

74. *Id.* at 233-34.

which prevented its children's lack of education from causing "significant social burdens."<sup>75</sup>

A final case that bridges the gap between parental and reproductive rights is *Cleveland Board of Education v. LaFleur*,<sup>76</sup> which invalidated a school district regulation that laid teachers off upon their fifth month of pregnancy and prevented them from returning to work for at least three months after giving birth. *LaFleur* stated that "freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment."<sup>77</sup> Thus, the Court cast the issue in terms of individual choice. On its facts, *LaFleur* also guaranteed the right of a woman to choose her own balance between employment responsibilities and the demands of pregnancy,<sup>78</sup> a balance which could easily be extended to decisions concerning childrearing. *LaFleur*, however, was decided on a due process theory that the Court later abandoned, although *LaFleur*—along with *Stanley*, which used similar logic—is still valid precedent.<sup>79</sup>

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75. *Id.* at 234. The facts of *Yoder* could distinguish it from the case of welfare cutoffs because *Yoder* involved issues of religious freedom and cultural preservation. *Id.* The main thrust of the opinion, however, emphasized the Amish parents' rights over their children's upbringing.

The Court has read *Yoder* somewhat more narrowly in holding that it does not grant parents the right to send their children to racially segregated private schools. See *Runyon v. McCrary*, 427 U.S. 160, 177 (1976). *Runyon* involved the competing interests of the African-American children's right to attend those schools and of African-American parents' right to direct their own children's education. *Id.* at 176. In the case of AFDC cutoffs, the state lacks any such interest compelling enough to override the parental rights of mothers. See *infra* Part III.B and III.C.

76. 414 U.S. 632 (1974).

77. *Id.* at 639-40.

78. *Id.* at 642-43.

79. In the same term, the Court decided *Geduldig v. Aiello*, 417 U.S. 484 (1974) (holding that pregnancy was not a suspect classification and did not implicate gender discrimination). Congress later statutorily overruled *Geduldig*, amending Title VII of the Civil Rights Act of 1964, Pub. L. No. 95-555 (codified as amended 42 U.S.C.A. § 2000(e) (West 1994)). The *LaFleur* majority, however, avoided *Geduldig* by ruling that the ordinance created a presumption that pregnant women were too disabled to work without offering any opportunity to refute it, thus violating the procedural due process right to a hearing. *LaFleur*, 414 U.S. at 640. In *Stanley v. Illinois*, 405 U.S. 645, 650 (1972), the Court used similar logic in invalidating the presumption that unwed fathers were unfit parents, although it also used equal protection logic in distinguishing unmarried fathers from unmarried mothers and married parents. In *Weinberger v. Salfi*, 422 U.S. 749 (1975), however, the Court upheld eligibility classifications for Social Security on the ground that under rational basis review, generalized rules were appropriate if the difficulties of individual determinations, in Congress' mind, outweigh the benefits. Subsequently, the Court ignored the irrebuttable presumption doctrine in upholding mandatory retirement ages and welfare restrictions. See, e.g., *Lyng v.*

Despite the lack of specifics in this line of cases, one is struck by the broad, uncompromising language in which members of the Court from William Brennan to Warren Burger embrace the doctrine of parental rights, despite its lack of mention in the Constitution. Justice White wrote in *Stanley* that

the interest of a parent in the companionship, care, custody, and management of his or her children 'come[s] to this Court with a momentum for respect lacking when appeal is made to liberties which derive merely from shifting economic arrangements' . . . . The rights to conceive and to raise one's children have been deemed 'essential,' . . . 'basic civil rights of man,' . . . and '[r]ights far more precious . . . than property rights.'<sup>80</sup>

Other Supreme Court cases have made similar declarations: "The history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition."<sup>81</sup> This role is "basic in the structure of our society."<sup>82</sup> *Lassiter* declared it 'plain beyond the need for multiple citation' that the parental interest "is an interest far more precious than any property right."<sup>83</sup> "[C]ertain intimate human relationships must be secured against undue intrusion by the State because of the role of such relationships in safeguarding the individual freedom that is central to our constitutional scheme."<sup>84</sup>

Despite the lack of specific case law and the Supreme Court's antipathy to the poor, it is quite possible that there is room for the rights of welfare mothers under the breadth of these words.

### *B. Application of Parental Rights to Welfare "Reform"*

The Supreme Court has put weighty language behind the interests of parents and children, but so has every politician in America. The Court has left no doubt that the scope of that language includes single mothers and parents whose lifestyles are not

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Castillo, 477 U.S. 635 (1986) (upholding presumption for food stamp eligibility purposes that parents, children and siblings living together buy and prepare food together); *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307 (1976) (per curiam) (upholding mandatory retirement age for police officers).

80. *Stanley*, 405 U.S. at 651.

81. *Wisconsin v. Yoder*, 406 U.S. 205, 232 (1972).

82. *Moore v. City of East Cleveland*, 431 U.S. 494, 503 n.12 (1977) (quoting *Ginsberg v. New York*, 390 U.S. 629, 639 (1968)).

83. *Santosky v. Kramer*, 455 U.S. 475, 758-59 (1982) (citing *Lassiter v. Department of Soc. Servs.* 452 U.S. 18 (1981)).

84. *Roberts v. United States Jaycees*, 468 U.S. 609, 617-18 (1984).

considered "model" by society at large.<sup>85</sup> The question is whether the substance of the language will extend to protection, at least in the abstract, of a single mother's right to choose not to work outside the home.<sup>86</sup>

The idea of broad parental rights of choice is supported by *Meyer*, *Pierce*, *Yoder* and most on point, *LaFleur*. The right at issue here is the mirror image of *LaFleur*: logic would suggest that if the state lacks the power to prevent a mother from working outside the home, it also lacks the authority to force her into such employment.<sup>87</sup> The implication of *LaFleur* is that a woman has the constitutional freedom to choose her own balance between childbearing—and by extension, childrearing—and employment, or at least to make the choice between full-time occupation with one or the other.

Despite the clear language of *LaFleur*, framing the issue in terms of choice sounds rather radical in the context of current judicial politics. The present Supreme Court has used "history and tradition"<sup>88</sup> as a guide to what privacy interests are protected, with some odious results.<sup>89</sup> One cannot, however, dispute that tradition

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85. See *supra* notes 55-61 and accompanying text.

86. For a discussion of the separate question of government subsidization of the right to choose to stay at home with one's children, see *infra* notes 109-26 accompanying text.

87. On the same principle, a state under most circumstances can neither prevent pregnancy through sterilization, nor bar its prevention through contraception. Compare *Skinner v. Oklahoma*, 316 U.S. 535 (1942) (barring forced sterilization as a general principle) with *Griswold v. Connecticut*, 381 U.S. 479 (1965) (acknowledging a fundamental right of married couples to use contraceptives). Similarly, while the state must provide procedural safeguards to prevent erroneous termination of parental rights under *Santosky*, it also must work to prevent erroneous assumption of parental duties. See *Little v. Streater*, 452 U.S. 1 (1981) (requiring states to pay for blood tests in paternity suits where the state is trying to enforce support for a child on AFDC and where alleged father is indigent).

The government may claim that economic circumstances rather than state action have forced single mothers into the workplace. This argument can be refuted on its face to some extent by noting the role of government policy in creating and maintaining poverty, see *infra* notes 121-26 and accompanying text, and that in some situations, such as where the mother's poverty leads to the loss of her child to foster care, the state is unequivocally involved in the deprivation of rights. However, the argument is largely irrelevant in this case because the instant challenge is to a *selective* deprivation of the fundamental right according to a statutory classification which the state inarguably created.

88. *Moore v. City of East Cleveland*, 431 U.S. 494, 503 (1977).

89. See, e.g., *Bowers v. Hardwick*, 478 U.S. 186 (1986) (upholding a statute criminalizing consensual sodomy). The Court rejected *Hardwick's* privacy challenge on the grounds that the Constitution had no tradition of protecting "the fundamental right of homosexuals to engage in sodomy." *Id.* at 190. Similar slavish adherence to tradition would dictate upholding racial segregation.

supports the idea of mothers staying home with their children.<sup>90</sup> The Court writes that its "decisions establish that the Constitution protects the sanctity of the family precisely *because* the institution of the family is deeply rooted in this Nation's history and tradition."<sup>91</sup> This logic has protected caretaking roles from the unwed father to the grandmother from most state intervention. In this context, even a judge who insists on using "the teachings of history"<sup>92</sup> as a guide to constitutionality could hardly allow Congress or a state to outlaw the role of stay-at-home mother for most unmarried women.<sup>93</sup>

Whatever the source of the rights, *Yoder*, *Meyer* and *Pierce* establish that within broad limits, parents have the primary authority to choose the style of their children's "care and management."<sup>94</sup> Logically, the right to decide how much time one's child should spend under direct parental supervision, and how much time can safely be spent in whatever day care is available, should flow from the right to decide how much, or what kind, of education the child needs.<sup>95</sup> The chance of jeopardizing the child's future as a result of the mother's decision to stay at home with him or her full-time seems far less than that from the denial of education allowed in *Yoder*.<sup>96</sup>

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90. I do not intend to downplay the oppression that forced women into the role of full-time caregiver over the centuries, nor to imply that the family forms that allowed for this role were ever shared across all classes. See generally STEPHANIE COONTZ, *THE WAY WE NEVER WERE: AMERICAN FAMILIES AND THE NOSTALGIA TRAP* 155-63 (1992). Although only some families are able to afford placing mothers in a full-time caretaking role, that lifestyle has a long tradition as ideal which will be difficult for a tradition-minded judge to ignore. I believe that full-time parenting should be available as an option for at least one parent in all families, whether supported by tradition or not.

91. *Moore*, 431 U.S. at 503 (emphasis added).

92. *Id.*

93. *Id.* at 504. A judge might note that the ideal of the stay-at-home mother was never a reality on any large scale for the poor, see COONTZ, *supra* note 90, before the inception of mothers' pensions, the predecessor to AFDC. Even considering the Supreme Court's hostility to wealth discrimination claims, however, see *supra* notes 7-8, a judge would have difficulty explaining why these rights should differ along class lines given the Court's broad language about the traditional importance of family rights.

94. *Stanley v. Illinois*, 405 U.S. 645, 651 (1972).

95. See *supra* note 15. One right that *Meyer*, *Pierce* and *Yoder* implicate even more directly is the right to make decisions related to a child's education. This could be important in states that allow parents to educate children at home, providing a ground for an equal protection claim that AFDC time limits deny virtually all single-parent families the explicit state-granted right to home-school children. See, e.g., MINN. STAT. § 120.101 (7)(6) (1996) (allowing parents to educate their children if they comply with reporting requirements).

96. See *infra* notes 190-95 and accompanying text.

Moreover, among the explicit rights guaranteed between parents and children are "companionship"<sup>97</sup> and "intimate association."<sup>98</sup> These rights, in combination with the aforementioned rights of personal choice, should allow a parent to choose, within reason, the amount of time spent in their children's company.<sup>99</sup> Furthermore, as a practical matter, a single parent moving from AFDC into the job market would likely need to work so many hours that virtually all opportunity to associate with her child would be lost.<sup>100</sup> The purpose of the intimate association doctrine is to facilitate the definition of a child's identity, a development "that is central to any concept of liberty[.]"<sup>101</sup> It should therefore be difficult to justify state policies that prevent a defined group of parents from spending any significant amount of time in intimate association with their children.

The parental right most commonly identified in the case law is custody, which implicates time limits or denial of AFDC benefits in two ways.<sup>102</sup> One question not answered in current welfare "reform" proposals is what happens to the children of mothers who cannot find work, or work-related essentials such as child care, when benefits are denied or exhausted after five years. State child protection services are currently not equipped to deal with large classes of parents entirely unable to provide their children with the necessities of life.<sup>103</sup> A likely result is that many children will

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97. *Stanley*, 405 U.S. at, 645.

98. See *supra* notes 68-70 and accompanying text.

99. For practical reasons, it is probable the Court will not want to grant two-parent families a fundamental right to have *both* parents stay home with the children and receive public support. Although it would appear fair, and consonant with traditional ideals, to grant a right to "intimate association" equal to the equivalent of one parent at home full-time, this could lead to a fear of major judicial interference in the economic structures which often produce a need for both parents to work outside the home. In defining this right under the Fourteenth Amendment, however, the Court would only be prohibiting conduct that could be characterized as "state action." In the litigation described here, the Court need only recognize that the right exists in the abstract, i.e., that Congress or a state could not, for example, pass a law requiring all mothers, or all single mothers, to work outside the home on pain of criminal sanctions in order to trigger strict scrutiny. See *supra* note 19.

100. See *supra* note 15. These rights could also be litigated from the opposite direction, advocating for a child's right to associate with his or her parent, but children's rights to associate with parents have not been well-defined by the courts. See Gilbert A. Holmes, *The Tie That Binds: The Constitutional Rights of Children to Maintain Relationships With Parent-Like Individuals*, 53 MD. L. REV. 358 (1994).

101. *Roberts v. United States Jaycees*, 468 U.S. 609, 619 (1984).

102. See *infra* notes 107-09 and accompanying text.

103. Courts in New York and Illinois have found those states to engage in a practice of removing children from their parents due solely to homelessness or



be removed from their parents and placed in either foster care or institutions.<sup>104</sup> Even without reference to the equal protection issue, this should violate *Stanley's* presumption of parental fitness<sup>105</sup> and the broad due process rights established in *Santosky*.<sup>106</sup> *Stanley*, on its facts, prohibits using marital status as a surrogate for fitness to parent; poverty is hardly a marker of greater unfitness than the abuse and neglect the Santosky children allegedly suffered.<sup>107</sup> Because the parental custody interest is a fundamental

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substandard housing, without first attempting to provide housing-related services as a preventive measure. See, e.g., *Norman v. Johnson*, 739 F. Supp. 1182 (N.D. Ill. 1990); *Martin A. v. Gross*, 524 N.Y.S.2d 121 (Sup. Ct. 1987), *aff'd*, 546 N.Y. App. Div. 1989). Even though in those cases the failure to provide preventive services violated applicable law, the practice is likely to become more widespread when large numbers of single mothers are left with no realistic prospect of ever receiving enough income to pay for housing. Also, although *Norman* and *Martin A.* did not directly address constitutional issues, the preventable removal of a child by protective services should constitute the state action necessary to support a Fourteenth Amendment parental rights claim distinct from the equal protection issue detailed in this Note.

104. See *supra* note 103.

105. See *supra* notes 55-58 and accompanying text.

106. See *supra* notes 59-60 and accompanying text.

107. See *supra* notes 59-61 and accompanying text. In supporting the current welfare reform, the government may try to distinguish *Stanley* and *Santosky* on the ground that they involved permanent legal termination of parental rights on the state's initiative. In the case of welfare time limits or other denial of benefits, the state could claim that it is only removing children temporarily to give parents time to improve their circumstances, or until the children are old enough not to need day care. Moreover, many parents whose benefits have expired are likely to place their children in foster care themselves, rather than waiting for the state to intervene. The state could argue that it is not responsible for these women's decisions.

The only difference between *Stanley* and *Santosky* and the situations described above, however, is formal. Some foster care placements may be "voluntary" in the sense that it is the mother who takes the initiative, but the state has unilaterally placed her in a situation of having no other realistic choice. The standard for the degree of state coercion that prevents an action from being voluntary is vague and depends on the totality of the circumstances. See *Schneekloth v. Bustamonte*, 412 U.S. 218, 226 (1973) (finding that consent in a search and seizure demonstrated voluntariness). For a discussion of the state's role in creating and maintaining poverty, see *infra* notes 120-26 and accompanying text.

Furthermore, when a mother faces the prospect of only part-time, temporary, or poverty-wage employment for which she must compete against millions of other women in the same situation, as well as the rest of the unemployed population, see *supra* note 15, she is likely to see little practical difference between "temporary" foster care and legal termination of parental rights. If her children reach majority before she improves her circumstances enough to reclaim them, her custodial rights are effectively terminated. In the meantime, she loses her rights to her children's companionship, care and management without ever receiving the due process required by *Santosky*. See *supra* notes 59-61 and accompanying text. The children in foster care are actually worse off than if their mother's rights had been legally terminated because they cannot be adopted.

The placement of children in foster care also brings the mother into the case-

right, any state attempts to advance competing interests must be narrowly tailored. One need not look hard for less intrusive means of promoting children's best interest than depriving presumptively competent parents of custody in a quasi-criminal proceeding.<sup>108</sup>

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work system, which can result in a "voluntary" placement becoming involuntary after social workers begin to scrutinize the family's living conditions. See LOUISE ARMSTRONG, OF 'SLUTS' AND 'BASTARDS': A FEMINIST DECODES THE CHILD WELFARE DEBATE 76, 340 n.1 (1995) (describing as "far from unusual" an account in Congressional testimony of a mother who placed her children in foster care upon emergency surgery, then recovered to find the placement had become court-ordered due to her "crowded" living conditions). Social workers have near-total discretion to assign "conditions" for the reunion of the family, which may not reflect the family's economic needs or even be feasible. See, e.g., *id.* at 119, 322 (telling of a mother who was told to hold a job as condition of children's return and to attend numerous meetings with social workers during working hours). See also Martin A. v. Gross, 524 N.Y.S.2d 121 (Sup. Ct. 1987), *aff'd*, 546 N.Y.S.2d 75 (App. Div. 1989), and Norman v. Johnson, 739 F. Supp. 1182 (N.D. Ill. 1990) (finding states engaged in the removal of children due to parents' homelessness when state provided no housing assistance).

Finally, the interests in "companionship, care, custody and management" of one's children set forth in *Stanley v. Illinois*, 405 U.S. 645, 651 (1972), are not necessarily separable. They are interrelated components of a parent's right to direct her children's upbringing in the absence of wrongdoing or significant risk of harm to the child. The custody right has been the focus of most cases because it is easily litigated. Permanent loss of legal custody is a more obvious deprivation than temporary loss of companionship or choice among types of education, but the difference is one of degree, not overall effect. From the child's viewpoint, there remains a question whether the state can deprive children of "intimate association" with their mother in the absence of abuse or avoidable neglect on her part. See generally Holmes, *supra* note 100.

108. Not only does cash assistance not infringe on parental rights, but it costs less for government than foster or institutional care for children. Minnesota currently pays foster parents a basic rate of \$377 per month for one pre-teen child without special needs. See 1995 GREEN BOOK, *supra* note 5, at 611. In comparison, the child's mother would have received \$437 in AFDC for both the child and herself. *Id.* at 610. History also demonstrates the relatively low cost of cash assistance: In 1870, New York spent \$109.59 per year for each almshouse resident, compared to \$8.96 for each recipient of cash relief. PIVEN & CLOWARD, *supra* note 2 at 3, 12 n.9.

A more expensive option for states would be to guarantee job placement through public service employment, but this could interfere with other parental rights by forcing single parents to place children in day care. Although the mother's economic circumstances obviously play a role, see *infra* notes 111-26 and accompanying text, it is difficult to argue against state action when the state provides jobs as an explicit alternative to subsidizing the mother's choice to remain at home. Although the Court has allowed state and federal governments to subsidize childbirth but not abortion, the government in those cases claimed an interest in preserving the potential life of the fetus. See *Maier v. Roe*, 432 U.S. 464 (1977) (upholding state's right to subsidize medical expenses for childbirth and pregnancy but not abortion). Cf. *Harris v. McRae*, 448 U.S. 297 (1980) (holding that medically necessary abortions are not required to be funded by the state). Here, the government lacks any substantiated interest to balance against the mother's rights. See *infra* note 115 and Parts III.C and III.D.

For mothers whose benefits have been terminated, the alternatives to giving up one's children are unrealistic to expect on a large scale. Heterosexual marriage

Moreover, in divorce cases, some states' "best interests of the child" standard appears to contain a bias against mothers who work outside the home. In several recent, highly publicized decisions, judges in New York, Michigan, Mississippi and the District of Columbia have used maternal employment as a reason to grant custody to fathers.<sup>109</sup>

In these states, a mother whose husband does not have the resources, or seeks custody after refusing, to pay child support, faces an impossible situation in custody disputes, particularly if she has ever received AFDC before. The Court makes a presumption against her if she places the child in day care, but she has no option to raise the child at home. Once again, she would be likely to lose the child on grounds that have nothing to do with her "fitness." This situation could be particularly damaging for children since at least forty-five percent of current and former AFDC recipients are victims of repeated domestic abuse.<sup>110</sup> Given a choice between an allegedly abusive father and a mother with a

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is a fundamental constitutional right, and although government has the right under *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), to use its power to influence personal choices, the choice to marry still requires that a partner be available. See *supra* note 15; see also *infra* notes 202-06 and accompanying text. Similarly, sharing resources with friends or relatives depends on the existence of social networks that may not exist. See *supra* notes 14-16 and accompanying text. If a preponderance of evidence indicating permanent neglect, as in *Santosky*, is not enough to deprive a parent of her rights, a state certainly could not constitutionally take a child away based solely on the mother's lack of relatives. See *supra* notes 59-61.

Even if the court denies facial challenges to time limits and loss of entitlement, states' failure to fund job training and child care at adequate levels could serve as evidence that states, in the application of the laws, were not taking adequate steps to preserve parents' rights to custody of their children after their benefits expired. Parents would need to seek joint liability for state and federal governments for the deprivation of rights, since the federal government would be setting the time limits, the state government would be administering its particular program, and both would be providing inadequate funding for other options.

109. In the most notorious of these cases, a Michigan judge denied custody to a mother who intended to place her child in long-term day care while she attended college. *Ireland v. Smith*, 542 N.W.2d 344 (Mich. Ct. App. 1995), *aff'd as modified* by, 547 N.W.2d 686 (Mich. 1996) (circuit court order unpublished). The father's job prospects were considerably bleaker, but his mother had promised to care for the child. This decision was recently reversed on appeal. *Id.* In New York a judge reversed two lower court rulings to award custody to an unemployed father rather than an unemployed mother, despite the father's repeated refusal to pay child support. Alice Steinback, *Custody Wars, Career vs. Children: Women Face Difficult Choice*, BALTIMORE SUN, Mar. 13, 1995, at 1D (discussing recent court decisions granting custody of children to fathers because mothers were employed). A District of Columbia Superior Court Judge denied custody to a senate aide on the ground that she worked too many hours. *Id.* A Mississippi flight attendant whose schedule required her to be away from home some evenings lost custody to a husband with a nine-to-five job. *Id.*

110. See *supra* note 29.

strong chance of losing her children to foster care or an orphanage within five years, it is impossible to predict what kinds of tragic decisions judges may make.<sup>111</sup>

The major problem with the argument that AFDC time limits intrude on fundamental childrearing rights is that the government can claim that the mother's economic circumstances, rather than state action, have caused the deprivation. Thus, it can characterize the action as merely choosing to not provide a government benefit facilitating the exercise of a right. The precedent for this claim would be *Maher v. Roe*<sup>112</sup> and *Harris v. McRae*,<sup>113</sup> where the Court held that the government had no constitutional obligation to fund abortions for the poor, even though abortion was a fundamental right and, in *McRae*, medically necessary.

The first response to this argument is that withholding benefits can be intrusive indeed when it results in mothers' loss of children to the state.<sup>114</sup> The second is that *Maher* and *McRae* dealt within the unique context of abortion and involved the government's freedom to balance its interest in the life of the fetus against the mother's fundamental right.<sup>115</sup> In the AFDC context

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111. It is possible that the state's role in placing a mother in this sort of vicious circle would qualify as the state action necessary to support a claim of deprivation of custody rights independent from the equal protection argument. However, because the mother's economic status is also a factor in the deprivation of custody, the state action is less clear than in the case of loss of a child to protective services. See *supra* notes 103-07 and accompanying text.

112. 432 U.S. 464 (1977).

113. 448 U.S. 297 (1980).

114. See *supra* notes 103-13 and accompanying text. In response to loss of custody, the government may argue that it has simply changed the nature of the liberty interest at stake. See, e.g., *Atkins v. Parker*, 472 U.S. 115 (1985) (finding that the legislative change in benefit structure does not violate due process because state determines property interest in the first place). There are two simple responses to this argument. First, according to *Smith*, 542 N.W.2d at 344, parental rights are not in fact legislatively determined, but predate the Constitution itself. See *supra* note 66 and accompanying text. It can therefore be argued that any policy that intrudes on parental custody rights, in particular, is necessarily a positive imposition even if it comes in the form of withholding a benefit. Second, family law is a traditional state responsibility in which the federal government cannot intrude, even on the doubtful premise that the Constitution grants it the power to do so, without a clear statement of intent to alter the federal-state balance of power. See, e.g., *Gregory v. Ashcroft*, 501 U.S. 452 (1991) (holding that Congress cannot intrude into areas traditionally reserved for states without a clear statement of intent to do so).

115. The equal protection argument in *McRae* centered on the funding of medically necessary procedures other than abortion, to which the Court responded that "[a]bortion is inherently different from other medical procedures, because no other procedure involves the purposeful termination of a potential life." 448 U.S. at 325. Stating that Congress has a "legitimate interest in protecting the potentiality of human life," *id.* at 324 (citing *Roe v. Wade*, 410 U.S. 113, 162 (1973)), the Court

by contrast, the state has few interests to balance against the mother's right, and the means toward achieving those interests are significantly removed from the statutory classification at issue.<sup>116</sup>

Moreover, the Court has sometimes required the government to pay for the exercise of fundamental rights, even in the area of privacy. For example, the Court has required states to waive filing fees for indigents seeking a divorce, on the ground that marriage is a fundamental right and the state monopolizes the means of dissolving it.<sup>117</sup> The Court subsequently restricted that holding to cases in which the state legally, rather than practically, preempted all private means of exercising the right.<sup>118</sup> Nevertheless, this demonstrates that *Maher* and *McRae* have limits. Additionally, the Court has been typically more supportive of challenges to laws that wholly deny welfare payments which are the sole means of survival, as opposed to merely lowering benefit levels or placing restrictions or conditions.<sup>119</sup>

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wrote that "Congress has established incentives that make childbirth a more attractive alternative than abortion for persons eligible for Medicaid. These incentives bear a direct relationship to the legitimate congressional interest . . ." *Id.* at 325. While characterizing complete deprivation of funding for indigent patients as an "incentive" to make childbirth "more attractive" is an understatement at best, it cannot be denied that this so-called "incentive" promoted the state's asserted interests much more effectively than AFDC cutoffs do. See *infra* Parts III.B and III.C.

116. See *infra* Parts III.B and III.C. *Maher* and *McRae* could also be described as involving a state interest in not requiring citizens morally opposed to abortion to pay for it with their tax dollars. This argument appears quite weak when abortion is defined as a fundamental right, and in the context of other uses of tax dollars that large numbers of citizens find morally offensive, such as the building of new weapons of mass destruction. The government can hardly assert a similar interest in support of refusing aid to poor families, since every Western religion requires aid for the poor. See, e.g., *Matthew* 19:21 (stating that, "[I]f you want to be perfect, go sell what you have and give to the poor . . ."); *Isaiah* 58:7 and *Matthew* 25:35 (commanding the faithful to feed the hungry, clothe the naked and take in the homeless); 1995 WORLD ALMANAC 737 (giving of alms is one of the five major duties of Islam).

117. See *Boddie v. Connecticut*, 401 U.S. 371, 375-76 (1971).

118. See *Kadrmas v. Dickinson Pub. Sch.*, 487 U.S. 450, 460-61 (1988). Although the state holds the only practical means of preserving the parental rights of single mothers, it also held the only practical means by which the plaintiffs in the abortion cases, which were decided after *Boddie*, could exercise their rights. As in the instant case, the Court in *Maher* and *McRae* blamed the deprivation of rights on economic circumstances rather than a states' action. See *infra* note 119.

119. Compare *Dandridge v. Williams*, 397 U.S. 471 (1971) (upholding cap on benefits regardless of family size), and *Jefferson v. Hackney*, 406 U.S. 535 (1972) (upholding lower benefits for AFDC families than for equally poor elderly and disabled), with *Shapiro v. Thompson*, 394 U.S. 618 (1969) (holding that states cannot deny AFDC to non-residents), and *Memorial Hosp. v. Maricopa County*, 415 U.S. 250 (1974) (same for medical care). See also *Califano v. Westcott*, 443 U.S. 76, 85 (1979) (states cannot deny two-parent AFDC benefits on basis of gender); *United States Dep't of Agric. v. Moreno*, 413 U.S. 528 (1973) (holding that the federal gov-

In addition, despite the Supreme Court's unwillingness to address this fact, the government has played a role in creating the poverty it now claims as an excuse for interfering in the parental rights that have been held to predate the nation itself.<sup>120</sup> Government action has shaped the number, quality and remuneration of jobs available, as well as the necessary supports for families in the labor market.<sup>121</sup> Federal and state governments have played a major part in determining the location of people and jobs,<sup>122</sup> as

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ernment cannot deny food stamps to households containing unrelated individuals); *New Jersey Welfare Org. v. Cahill*, 411 U.S. 619 (1973) (finding that states cannot deny non-AFDC welfare benefit to children born out of wedlock); *Graham v. Richardson*, 403 U.S. 365 (1971) (stating that states cannot deny AFDC to aliens); *Goldberg v. Kelly*, 397 U.S. 254 (1970) (stating that a hearing is required prior to cutoff of benefits). Compare *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973) (finding that states can provide two-tier system of education to poor), with *Plyler v. Doe*, 457 U.S. 202 (1982) (holding that a state cannot deny education to children of illegal aliens). The Court explicitly noted the difference between absolute and relative deprivation in distinguishing *Moreno* from *Lyng v. Castillo*, 477 U.S. 635, 639 n.3 (1986), in which the Court upheld restrictions on food stamp recipients' ability to qualify as multiple households.

The Act does not abolish or place time limits on food stamps for families with children, so families who exhaust their time limits will still have some access to food. See *supra* note 38. Food stamps, however, cannot pay for clothing or housing, which are as necessary to survival as food.

120. See *supra* notes 63-64 and accompanying text. The Court stated in *McRae* that "although government may not place obstacles in the path of a women's exercise of her freedom of choice, it need not remove those not of its own creation. Indigency falls in the latter category." 448 U.S. at 316. See also *Maher*, 432 U.S. at 474.

121. For example, the federal government failed to raise the minimum wage throughout the 1980s, allowing it to fall far below the poverty level. See ALBELDA, ET AL., *supra* note 5, at 66; 1995 WORLD ALMANAC 151 (showing that minimum wage did not increase between 1981 and 1990). Federal reserve policy directly influences unemployment rates, and the federal government often works to maintain a minimum rate of unemployment in order to curb other economic problems such as inflation. See Peter B. Edelman, *The Next Century of Our Constitution: Rethinking Our Duty to the Poor*, 39 HASTINGS L.J. 1, 46 (1987); ALBELDA ET AL., *supra* note 5, at 78 (finding that current Federal Reserve policy manipulates interests rates to maintain unemployment above 5%). Trade policies, such as the North American Free Trade Agreement (NAFTA), encourage businesses to use foreign rather than domestic labor. See, e.g., Jim Hightower, *NAFTA—We Don't Hafta!* UTNE READER, July-Aug. 1993, at 97, 99 (interviewing economists who admit NAFTA is projected to cause net job loss in the United States, and stating that 55% of corporate executives surveyed planned to shift production to Mexico). The Government's decision to allow largely unregulated market actors to control the distribution of health care and child care has left many parents unable to take employment even when jobs can be found.

122. Government policy during the two world wars lured workers to the city to fill war jobs, then made little allowance for these workers after the wars. Edelman, *supra* note 121, at 45. After World War II, federal agricultural policies emphasized large agri-businesses over small farms, driving some farmers to the city and leaving others trapped in rural poverty. *Id.* During the 1950s, the Bureau of Indian Affairs set up a relocation program to encourage Native Americans to move from reservations to cities, but took no responsibility for migrants thereafter. See

well as in denying poor children the quality of education they need to improve their labor market positions.<sup>123</sup> Federal and state governments have designed welfare programs that defeat recipients' efforts to escape poverty through gradual accumulation of resources,<sup>124</sup> with benefit levels so low as to preclude any thought of long-term measures to improve one's situation.<sup>125</sup> Thus, when a mother is placed in the position of having to give up her children or place them in any available day care against her will, the government has done far more to facilitate the intrusion into her parental rights than merely failing to pay for their exercise.<sup>126</sup>

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ROBERT N. CLINTON ET AL., *AMERICAN INDIAN LAW* 158 (3d ed. 1991). Meanwhile, federal and state governments actively supported the growth of suburbs while openly supporting racial segregation in housing, thereby trapping African-Americans in inner cities while jobs followed federally-subsidized highways. See MASSEY & DENTON, *supra* note 20 at 17-59.

123. Edelman, *supra* note 121, at 45-46. Differential funding of schools in wealthy and poor districts is but one example, as is the use of teaching and evaluation methods geared toward the wealthy. See generally JONATHAN KOZOL, *SAVAGE INEQUALITIES* 164, 206-10 (1991) (depicting results of differential funding); WILLIAM RYAN, *EQUALITY* 121-37 (1981) (describing educational practices that perpetuate class differences). Government also helps maintain poverty by limiting access to higher education, e.g., through cuts in student aid; by contrast, universities in most European countries do not even charge tuition for undergraduate education. See ORGANIZATION FOR ECON. COOPERATION & DEV., *FINANCING HIGHER EDUC.: CURRENT PATTERNS* 38-42, 50 (1990).

124. AFDC mandates all-or-nothing dependence by reducing benefits one dollar for every dollar recipients earn in the labor market. See *supra* note 2. This results from an affirmative decision by Congress in 1981 to revoke a provision allowing AFDC recipients to keep one-third of earned income plus \$30. Edelman, *supra* note 121, at 15. AFDC recipients report having food stamps reduced upon receiving financial aid for higher education and being forced to sell cars, bought during periods of employment and necessary for finding and maintaining jobs, in order to qualify for aid. Weiss, *supra* note 12, at 24.

125. On an immediate level, insufficient benefits force mothers to spend enormous amounts of time obtaining necessities through charity bureaucracies, often without benefit of cars, telephones, or child care. Weiss, *supra* note 12, at 24. Furthermore, excessive costs, dangerous conditions and unscrupulous landlords make housing particularly difficult to retain for AFDC families, most of whom do not receive housing assistance. See *infra* note 182; Weiss, *supra* note 12, at 31-33. Mothers spend considerable time searching for affordable housing in a market with a shortage, then moving, searching charities for necessities abandoned for lack of a car to move them, and dealing with school bureaucracies to continually re-enroll their children. Weiss, *supra* note 12, at 31-33. As a result, very little energy remains for education or training, and those mothers who do enroll in training programs often drop out when a family crisis arises to take priority. *Id.* at 30-36. The federal government's virtual abandonment of its housing programs during the 1980s exacerbated these problems. Federal funds for low-income housing were cut by over 80% during the decade. See Children's Defense Fund, *Homeless Families and Children: Key Facts* (1990) (unpublished, on file with author).

126. Peter Edelman takes a different approach in proposing a right to subsistence, arguing that the government's creation of a class of long-term poor amounts to differential treatment of this group under the Equal Protection Clause. Edelman, *supra* note 121, at 43, 46-48. He admits, however, that the Supreme Court's

The strongest factor distinguishing *Maher* and *McRae* from the case of welfare time limits and benefit denials, however, is that as long as SI exists, there is no longer a question of whether the government *should* subsidize the exercise of the parental rights at issue. The federal government has already allocated funding for the right to choose one's own parenting style to one group of single mothers.<sup>127</sup> A long line of cases holds that if government does choose to provide a benefit, it may not allocate it in a discriminatory manner even if it had no obligation to provide the benefit in the first place.<sup>128</sup> Under these circumstances, the question be-

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requirement of proof of discriminatory intent would be difficult to overcome. *Id.* Edelman observes that a number of other government actions have contributed, in a more subtle way, to the problem of poverty, noting various issues in the structure of corporate, contract and criminal law. *Id.* at 44-45.

127. See *supra* note 18 and accompanying text.

128. See *Rosenberger v. Rector and Visitors of Univ. of Virginia*, 115 S. Ct. 2510, (1995) (barring state university from denying religious publication access to general funding for student publications); *Lamb's Chapel v. Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993) (preventing school district from excluding a religious group where non-religious groups were allowed to discuss the same subject); *Widmar v. Vincent*, 454 U.S. 262 (1981) (preventing state university from excluding a student religious group from campus facilities available to other student groups); *Califano v. Westcott*, 443 U.S. 76 (1979) (preventing government from denying AFDC benefits for unemployed fathers in two parent families to unemployed mothers); *Graham v. Richardson*, 403 U.S. 365 (1973) (preventing denial of AFDC to resident aliens); *Sherbert v. Verner*, 374 U.S. 398 (1963) (barring state from denying unemployment compensation to an applicant who left job for religious reasons); *Douglas v. California*, 372 U.S. 353 (1963) (requiring state to provide legal counsel to poor in criminal appeals to avoid excluding indigent from generally available appellate review); *Speiser v. Randall*, 357 U.S. 513, 518 (1958) (preventing state from denying general tax exemption to individuals who refused to sign loyalty pledge); *Griffin v. Illinois*, 351 U.S. 12 (1956) (striking state filing fees for criminal appeals that effectively excluded indigent from benefit generally available to other accused).

These cases demonstrate that all constitutional limitations, whether equal protection, free exercise, free speech or due process, apply to the distribution of government benefits not required by the Constitution itself. The Court specifically denied the ability of the government to discriminate in the AFDC context in *Westcott*, 443 U.S. at 85 (rejecting the notion "that welfare benefits are a 'privilege' not subject to the guarantee of equal protection"), and *Graham*, 403 U.S. at 374, 375 (stating that equal protection does not turn on description of benefit as "right" or "privilege," and state's conservation of welfare budget does not justify invidious discrimination).

This is related to, but distinct from, the doctrine of unconstitutional conditions, which states that government cannot place a condition on a benefit so as to penalize the exercise of a fundamental right. See, e.g., *Sherbert*, *supra* (invalidating denial of unemployment insurance to Seventh-Day Adventist who refused to work on Saturday for religious reasons since the benefit was conditioned on giving up right to religious expression); *Shapiro v. Thompson*, 394 U.S. 618 (1969) (striking welfare residency requirements which forced choice between welfare and right to travel). The Supreme Court has never consistently applied the unconstitutional conditions doctrine, and in some cases, has weakened it. See, e.g., *Maher v. Roe*, 432 U.S. 464 (1977) (upholding law conditioning Medicaid on not



comes not whether the government must subsidize the right, but for whom it chooses to do so.

### III. The Equal Protection Clause and Discrimination Among Single Parents

#### A. *Equal Protection Case Law*

In the hypothetical example of the Andersons and Browns above,<sup>129</sup> the death of a deadbeat father proved the saving grace of the Anderson family. Because the federal government distinguishes among classes of single mothers and children based purely on their former relationship to a man, Phyllis Brown lost her means of support, her home and, ultimately, her children.<sup>130</sup> This section surveys the Supreme Court case law under which Mrs. Brown and her children must argue for the unconstitutionality of this distinction.

The distinction between SI and AFDC received some constitutional support from two Supreme Court decisions, but both are easily distinguished from the case of AFDC cutoffs. In *Califano v. Boles*,<sup>131</sup> a five-Justice majority upheld the rule limiting adult eligibility for SI to widows and surviving divorced spouses. The deceased worker in *Boles* had fathered a child out of wedlock; the child qualified for benefits, but his mother did not.<sup>132</sup> Justice Rehnquist reasoned that, although the original purpose of SI was "to permit women to elect not to work and to devote themselves to care of children . . ."<sup>133</sup> the benefit to children of the mother's receipt of SI was "incidental" because the mother's benefits are "distinct" from the children's benefits.<sup>134</sup> The relevant distinction was thus between classes of mothers, not of children born in or out

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exercising right to abortion); *Wyman v. James*, 400 U.S. 309, 317-18 (1971) (upholding rule conditioning AFDC on allowing caseworker to visit home, potentially violating Fourth Amendment). For an excellent analysis of this issue, see Bogle, *supra* note 4, at 196-12.

A court would likely hold that time limits avoid the unconstitutional conditions doctrine because they are not an explicit condition or a specific exclusion based on exercise of a right. The benefit is simply defined as temporary, and receipt in no way depends on whether or how a mother chooses to exercise her parental rights. The important issue is that other single mothers do not have to worry about the temporary nature of their benefits.

129. See *supra* Part I.

130. *Id.*

131. 433 U.S. 282 (1979).

132. *Id.*

133. *Id.* at 288 (quoting *Weinberger v. Wiesenfeld*, 420 U.S. 636, 648 (1975)).

134. *Id.* at 294.

of wedlock, therefore requiring only rational basis review.<sup>135</sup> Rehnquist found the limitation to widows and divorced women rational in light of the statute's purpose of "provid[ing] persons dependent on the wage earner with protection against the economic hardship occasioned by the loss of the wage earner's support."<sup>136</sup> In deciding how to fulfill this purpose, Congress could rationally conclude that widows and divorced women were more likely to be dependent on the father of their children than women who had never been married.<sup>137</sup> Rehnquist brushed aside the fact that divorced women could qualify whether or not their husband had ever supported them, finding rationality even though the legislative change that allowed divorced women to collect with no showing of support had been an "incidental" byproduct of legislation meant to help older widows.<sup>138</sup>

*Boles* itself sets out some of the factors that distinguish it from the case of welfare cutoffs. The Court felt no need to examine the distinction between children born in and out of wedlock be-

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135. Statutes that classify children according to their birth in or out of wedlock were, for several years, reviewed under a higher standard before *Boles*. See, e.g., *Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164 (1972) (invalidating law denying workmen's compensation to worker's out-of-wedlock children). The Court, however, did not agree on a standard of review for such classifications until 1988. See *Clark v. Jeter*, 486 U.S. 456 (1988) (stating that "legitimacy" classifications are reviewed under heightened judicial scrutiny).

136. *Boles*, 443 U.S. at 288 (quoting *Califano v. Jobst*, 434 U.S. 47, 50 (1977) (citing *Mathews v. DeCastro*, 429 U.S. 181, 185-86 (1976))).

137. *Id.* at 288-92.

138. *Id.* at 291-92. Congress dropped the support requirement for the benefit of older women divorced after 20 years or more as a housewife who often found it difficult to reenter the labor market. *Id.* Under previous Social Security rules, such women had to demonstrate that they received support from their husbands; this disqualified women in states that did not allow alimony or women who had accepted property settlements in lieu of alimony. *Id.* Accordingly, Congress dropped the support requirement, retaining a requirement that widows without children have been married to their husbands for 20 years (now reduced to 10). *Id.* Mothers of SI-eligible children had never been subject to the marriage duration requirement, and such mothers were "not even mentioned" in the committee reports on the 1972 amendment. *Id.* at 292 n.9; see also 42 U.S.C.A. § 402 (g)(1) (West 1994) (granting eligibility for SI to "[t]he surviving divorced spouse and every surviving divorced parent . . . of an individual who died a fully or currently insured individual . . ."). 42 U.S.C. § 416(d)(2) defines "surviving divorced wife" as "a woman who is divorced from an individual who had died, but only if she had been married to the individual for a period of 10 years immediately before the date that divorce became effective." By contrast, 42 U.S.C. § 416(d)(7) defines "surviving divorced parent" as equivalent to either a "surviving divorced mother" or "surviving divorced father" as defined in previous subsections; 42 U.S.C. § 416(d)(3) defines "surviving divorced mother" as "a woman divorced from an individual who has died, but only if . . . she is the mother of his son or daughter" by birth or adoption. Thus, there is no durational marriage requirement for SI as long as there is a dependent child.

cause the classification, in its view, lacked a "substantial disparate impact" on a particular group of children.<sup>139</sup> To make such a claim, "it is necessary to show that the class which is purportedly discriminated against consequently suffers significant deprivation of a benefit or imposition of a substantial burden."<sup>140</sup> One could hardly argue that children deprived of the very means of survival, based solely on whether their father is alive or dead, are not "substantially" impacted or "significantly" burdened.<sup>141</sup> Moreover, whatever the relation of the benefit scheme to its original purpose, welfare time limits function to determine which parents risk losing their fundamental right to custody of their children.<sup>142</sup>

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139. *Boles*, 443 U.S. at 294.

140. *Id.* at 295.

141. One can gain some insight into the likely circumstances of single-parent families deprived of government aid by looking at the situations of two-parent families with no wage earner before the Family Support Act of 1988, Pub. L. No. 100-485, 102 Stat. 2343, when such families could receive AFDC in only a handful of states. Journalists and photographers documenting the growth of homelessness in the 1980s frequently noted two-parent families living in cars or in campgrounds. See, e.g., DALE MAHARIDGE, *JOURNEY TO NOWHERE* 112-17, 162-64 (2d ed. 1996) (1982 account originally published 1985); STEPHEN SHAMES, *OUTSIDE THE DREAM* 28-31 (1991) (photos 1985); JIM HUBBARD, *AMERICAN REFUGEES* 64-67 (1991) (photos 1988-89). Single mothers may end up even worse off than these families, particularly after five years in the enforced poverty of AFDC, because they may be less likely to own cars or tents at the time of loss of housing.

Journalist Maharidge interviewed an unemployed construction worker whose family at the time was living out of a 1966 Chevrolet and seeking work picking fruit. Maharidge, *supra*, at 162. The father reported that the family had survived the previous winter by eating out of dumpsters, with the result that one of the children became seriously ill. *Id.* (The father, who was illiterate, had not applied for welfare due to the "hassle." *Id.*) Another Maharidge book contains photographs of three children who lived in a hobo camp near Sacramento for several weeks in 1989 with their mother and father, an unemployed lumberman from the Pacific Northwest; the children are pictured unwashed, barefoot and without jackets in a time period identified as February or March. DALE MAHARIDGE, *THE LAST GREAT AMERICAN HOBO* 31, 140-45 (1993) (photos 1989).

142. Apparently, no argument was made in *Boles* that the right to choose to stay home with one's children was fundamental. Also, despite all the Court's talk about how programs as large as Social Security do not need to "filter[r] out those, and only those, who are in the factual position which generated the congressional concern reflected in the statute," *Weinberger v. Salfi*, 422 U.S. 749, 777 (1975), the rationality of Congress' current set of distinctions among mothers is open to debate (and has not been fully litigated). See *infra* Parts III.B and III.C. Rehnquist emphasized in *Boles* that Congress intended Social Security to remain a "contributory insurance plan" and that "general welfare objectives are addressed through public assistance legislation." *Boles*, 443 U.S. at 296. Courts should be less willing to allow such a sloppy definition of rationality when such a safety net, for many women and children, will no longer exist. See *infra* note 246 for a discussion of the myth of the "contributory" nature of Social Security.

The Supreme Court upheld disparities in benefit levels between AFDC and Social Security in *Jefferson v. Hackney*,<sup>143</sup> but that case only discussed differences in the amount of aid to the aged, the disabled and AFDC families. If the parties brought up the similarity between AFDC and SI recipients, it was not mentioned in Justice Rehnquist's opinion. Once again, the case dealt only with the difference between more and less money, not with whether a group, e.g., those affected by welfare time limits, was to be cut off with no means of support whatsoever.<sup>144</sup>

The Court in *Jefferson* rejected the contention that differences between AFDC and Social Security reflected bias against the greater non-white population receiving AFDC, eliminating one of the two bases for strict judicial scrutiny.<sup>145</sup> The second basis, a

143. 406 U.S. 535 (1972). The state granted the aged 100% of its calculated standard of need and the disabled 95%, but AFDC families only 75%. *Id.* at 537 n.3.

144. See *supra* notes 119-20 and accompanying text.

145. Several years after *Jefferson*, the Court placed the burden on plaintiffs to prove intent to discriminate on the basis of race in *Washington v. Davis*, 426 U.S. 229 (1976), and *Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252 (1977).

Although the Court denied the significance of the racial disparities between AFDC and SI, *Jefferson*, 406 U.S. at 545-49, the disparities go a long way toward explaining the disparate treatment. Both AFDC and Social Security were originally restricted to whites, Social Security by excluding from coverage jobs most commonly held by African-Americans and AFDC by discriminatory application of "suitable home" requirements. See GORDON, *supra* note 2, at 5, 45-46. The modern conservative attack on "welfare" began at the same time as availability of legal services for the poor increased and liberal courts struck down AFDC restrictions, with the result that large numbers of impoverished African-Americans were finally able to receive AFDC. *Id.* at 5; see also JILL QUADAGNO, *THE COLOR OF WELFARE* 117-34 (1994).

Many rightist "welfare" commentators are explicit in their racism. Charles Murray, who popularized the notion of abolishing AFDC in 1984 in *Losing Ground*, also argues in *The Bell Curve* that blacks are less intelligent than whites. RICHARD J. HERRNSTEIN & CHARLES MURRAY, *THE BELL CURVE* 276-95, 301-15 (1994) (claiming neither environment nor test bias explains IQ differences between whites and African-Americans); *id.* at 22-23 (accepting IQ as a measure of intelligence); *id.* at 317-40 (explaining black-white social inequalities in terms of IQ). "Workfare" advocate Mickey Kaus defends his draconian proposals by describing AFDC recipients as an "underclass"; he then claims that "[i]t's simply stupid to pretend that the underclass is not mainly black," and that he would not want his children attending school with "welfare children." MICKEY KAUS, *THE END OF EQUALITY* 106, 108-09 (1993).

African-Americans are overrepresented on AFDC, comprising 37.3% of recipients; 39% are non-Hispanic white. See 1995 GREEN BOOK, *supra* note 5, at 410. The *Green Book* does not give racial data for Social Security recipients, highlighting the racialized nature of AFDC discussion. See *id.* at 34-37. African-Americans are likely to be underrepresented on Social Security, compared to their shares of the population, because they often have less consistent work histories. See *id.* at 1096 (showing African-Americans to be unemployed at twice the rate of whites).

fundamental interest at stake, could not apply because a previous case had denied the fundamental right to welfare aid.<sup>146</sup> Intermediate judicial scrutiny, in which a classification must be "substantially" related to an "important" state interest,<sup>147</sup> applies in the presence of "certain forms of legislative classification, [which] while not facially invidious, nonetheless give rise to recurring constitutional difficulties."<sup>148</sup> This standard has normally been applied to classifications based on gender or out-of-wedlock childbirth.<sup>149</sup> While one of the stated aims of proponents of punitive welfare "reform" is to discourage "illegitimacy,"<sup>150</sup> the time limits do not distinguish between children born in and out of wedlock. The Court generally relies on distinctions stated on the face of laws,<sup>151</sup> although in one case, it invalidated a regulation that discriminated by family type as a thinly disguised "illegitimacy" classification.<sup>152</sup>

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As noted, AFDC was designed to allow a certain subclass of white single mothers to stay home with their children. See *supra* note 2. Historically, very few African-American mothers have had the luxury to parent their children full-time, and those who did where apt to be accused of laziness as early as the post-Civil war period. See COONTZ, *supra* note 90, at 239-41. That the recent attack on AFDC began when it extended to African-Americans for the first time implies that many Americans prefer the nineteenth century ideal of the white woman working in her own kitchen and the black woman working in somebody else's; this in turn reflects society's unwillingness to recognize the equal rights of African-American parents and the equal needs of African-American children. See generally Dorothy E. Roberts, *The Value of Black Mothers' Work*, 26 CONN. L. REV. 871 (1994).

146. *Dandridge v. Williams*, 397 U.S. 471, 487 (1970) (holding that the Constitution guarantees welfare recipients only procedural safeguards). See *infra* Part III.B for an equal protection analysis incorporating the theory of fundamental rights detailed in Part I.

147. *Clark v. Jeter*, 486 U.S. 456, 461 (1988).

148. *Plyler v. Doe*, 457 U.S. 202, 217 (1982).

149. The Court established the intermediate scrutiny standard of review for "illegitimacy" classifications in *Clark*, 486 U.S. at 461.

150. The Act lists among its purposes the "prevent[ion] and reduc[tion of] the incidence of out-of-wedlock pregnancies and establish[ment of] annual numerical goals for preventing and reducing the incidence of these pregnancies." Pub. L. No. 104-193, sec. 103, § 401(a)(3). Its "findings" section includes a panoply of statistics about the alleged ill effects of single parenthood, occasionally distinguishing between children of divorce and children born out-of-wedlock (never addressing any other factors), and concluding that it is "the sense of the Congress that prevention of out-of-wedlock pregnancy and reduction in out of wedlock birth are very important Government interests and the policy contained in part A of title IV of the Social Security Act (as amended by section 103(a) of this Act) is intended to address the crisis." *Id.* sec. 101(10).

151. See, e.g., *Personnel Admin. of Massachusetts v. Feeney*, 442 U.S. 256, 273 (1979) (requiring proof of intent to discriminate against women where distinction on face of statute was between veterans and non-veterans).

152. See *New Jersey Welfare Rights Org. v. Cahill*, 411 U.S. 619, 621 (1973) (holding that equal protection is denied when benefits for poor families are denied to children born out of wedlock). The New Jersey program at issue gave extra

Where a fundamental right or traditionally suspect classification is lacking, the Court reviews most social welfare legislation, as well as most distinctions based on household type, under rational basis review.<sup>153</sup> Although it is technically a single test—rational relationship to a legitimate state interest—rational basis review has been applied in two ways. In some cases, the Court adopts an extremely deferential test, essentially upholding any regulation for which it can imagine a reason.<sup>154</sup> In other cases, however, the Court applied a substantive rational basis test by examining the fit between the stated purpose and effect of a classification, often taking into account the interests of those whom the classification disadvantages.<sup>155</sup>

In *United States Department of Agriculture v. Moreno*,<sup>156</sup> the Court struck down a rule denying food stamps to households containing unrelated individuals. The law's author had intended it to

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benefits to working poor households "composed of two adults of the opposite sex ceremonially married to each other who have at least one minor child . . . of both, the natural child of one and adopted by the other, or a child adopted by both." *Id.* at 619 (citation omitted). Thus, the law denied benefits to children born to unmarried parents unless the children had been adopted by their stepparents or a married couple, or unless the children's parents married after the children's birth.

153. See, e.g., *Lyng v. Castillo*, 477 U.S. 635, 638 (1986) (holding that "[c]lose relatives are not a 'suspect' or 'quasi-suspect' class" and that a regulation must "directly and substantially" interfere with family living arrangements" in order to burden a fundamental right). The Court used rational basis review to uphold the food stamp program's definition of "household," which counted parents, children and siblings living together as single households while groups of more distant relatives counted as separate households unless they bought and prepared food together. *Id.* at 643.

154. For example, the Court used this form of rational basis review to uphold varying benefit levels for the elderly, the disabled and AFDC families. See *Jefferson v. Hackney*, 406 U.S. 535 (1972). In *Dandridge v. Williams*, the Court wrote:

In the area of economics and social welfare, a State does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect. If the classification has some reasonable basis, it does not offend the Constitution simply because the classification 'is not made with mathematical nicety or because in practice it results in some inequality' . . . . 'A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it.'

397 U.S. 471, 485 (1970) (citations omitted).

155. See e.g., *Romer v. Evans*, 116 S.Ct. 1620 (1996) (invalidating a state constitutional amendment prohibiting antidiscrimination ordinances from protecting gays and lesbians); *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432 (1985) (striking down a city ordinance requiring a special permit to build a group home for the mentally retarded); *Plyler v. Doe*, 457 U.S. 202 (1982) (invalidating a state law denying public education to children of illegal immigrants); *United States Dep't. of Agric. v. Moreno*, 413 U.S. 528 (1973) (striking down a rule which denied food stamps to households containing unrelated individuals); *Eisenstadt v. Baird*, 405 U.S. 438 (1972) (invalidating a law prohibiting distribution of contraceptives to unmarried persons).

156. 413 U.S. 528, 529 (1973).

deny food stamps to "hippies" and "hippie communes,"<sup>157</sup> but as Justice Brennan wrote for the majority, "if the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest."<sup>158</sup> While "hippies" could evade the law by buying and preparing food separately, "AFDC mothers who try to raise their standard of living by sharing housing" were losing their eligibility.<sup>159</sup> Thus, in practice, the law was overbroad and did not affect the group of persons it was meant to reach.

The Court in *Moreno* invalidated the law on rational basis grounds without reaching the issue of whether it infringed on rights of privacy and association.<sup>160</sup> It took a similar approach in *Eisenstadt v. Baird*,<sup>161</sup> invalidating on rational basis grounds a state law making it a felony to distribute contraceptives to unmarried individuals while explicitly avoiding a decision on the extent of privacy rights.<sup>162</sup> Justice Brennan wrote that if access to contraception was a fundamental right, it derived from inherent individual privacy rights which could not be restricted by marital status. Conversely, even if distribution of contraceptives was an "evil" the state could bar, the evil was identical for married and unmarried persons, so exempting married couples solely based on their marital status was irrational.<sup>163</sup> The significance of *Eisenstadt* to the AFDC/SI distinction is that classifications based on marital status must have a rational basis beyond merely deifying the marriage relationship.<sup>164</sup>

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157. *Id.* at 537.

158. *Id.* at 534.

159. *Id.* at 537 (quoting the explanation proffered by the California Director of Social Welfare).

160. *Id.* at 528.

161. 405 U.S. 438 (1972).

162. *Id.* at 447 n.7 (concluding that if the statute "impinge[d] upon fundamental freedoms . . . the statutory classification would have to be not merely *rationally related* to a valid public purpose but necessary to the achievement of a *compelling* state interest," but concluding that the law failed to satisfy even the more lenient rational basis standard) (citations omitted).

163. *Id.* at 453-54. The Court noted that although a single person could not purchase contraceptives for use in premarital sex, a married person could legally use them for adultery. *Id.* at 449.

164. Thus, the law presuming that a mother's husband is the father of her child promotes interests in administrative convenience and in the integrity of the existing family unit. See, e.g., *Michael H. v. Gerald D.*, 491 U.S. 110, 113 (1989). See also *supra* note 61. Differential tax classifications of married couples and unmarried individuals may also serve valid administrative interests. See, e.g., 26 U.S.C.A. §§ 1(a), 1(c) (West 1994) (establishing different income tax structures for married couples and unmarried individuals).

While *Eisenstadt* and *Moreno* arguably involved privacy rights, the Court in *City of Cleburne v. Cleburne Living Center*<sup>165</sup> applied substantive rational basis review to a pure equal protection claim. *Cleburne* invalidated a zoning provision which required a special use permit for a group home for mentally retarded persons; the city did not require such a permit for a boarding or fraternity house with the same number of residents.<sup>166</sup> Justice White explicitly denied that mental retardation was a "quasi-suspect" classification calling for heightened scrutiny, but found that none of the city's reasons justified singling out the mentally retarded except for the unsubstantiated fears of local property owners.<sup>167</sup> Justice White responded that "[p]rivate biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect."<sup>168</sup> In other words, even rational basis review does not allow disadvantaging a group for its own sake.

The Court explicitly reaffirmed this idea in *Romer v. Evans*,<sup>169</sup> which invalidated a Colorado constitutional amendment denying gays and lesbians coverage under any anti-discrimination statute, regulation, or ordinance in the state. The Court regarded the "sheer breadth" of the disability imposed by the amendment,<sup>170</sup> "divorced from any factual context," as evidence that it was "a classification of persons undertaken for its own sake, something the Equal Protection Clause does not permit."<sup>171</sup> In the process, the Court noted that even though it had previously upheld statutes with tenuous justifications, to survive rational basis review a stat-

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The Supreme Court has not heard challenges to laws criminalizing adultery and sex between unmarried people following *Eisenstadt*, 405 U.S. at 438, but has implied such laws' constitutionality in dicta on grounds of state interests in promoting commonly accepted notions of morality. See *Bowers v. Hardwick*, 478 U.S. 186, 195-96 (1986). The marital status distinction differentiating AFDC from SI, however, does not serve similar purposes; no morality distinction can be made between the conditions of having a living or a dead ex-husband.

165. 473 U.S. 432 (1985).

166. *Id.*

167. *Id.* at 442-47. Race, alienage, religion and national origin are "suspect classifications" under the Constitution because they are "so seldom relevant to the achievement of any legitimate state interest that laws grounded in such considerations are deemed to reflect prejudice and antipathy." *Id.* at 440. Laws that distinguish on these grounds are subject to "strict judicial scrutiny," meaning that to survive an Equal Protection challenge, they must be "narrowly tailored" to the achievement of a "compelling" state interest. See *supra* note 139-46 and accompanying text. Other classifications, such as those based on gender and out-of-wedlock birth, are "quasi-suspect" and subjected to somewhat less strict standards. See *supra* note 147 and accompanying text.

168. *Id.* at 448 (quoting *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984)).

169. 116 S. Ct. 1620 (1996).

170. *Id.* at 1627.

171. *Id.* at 1629.



ute must be "narrow enough in scope and grounded in sufficient factual context for us to ascertain that there existed some relation between the classification and the purpose it served."<sup>172</sup>

The Court used similar justifications and techniques in *Plyler v. Doe*,<sup>173</sup> which invalidated a Texas law excluding illegal alien children from public education. The Court had previously declared education not to be a fundamental right,<sup>174</sup> and illegal immigrants could not be a suspect class because their very presence in this country was a crime. Children of illegal immigrants, however, like children born out of wedlock, could "affect neither their parents' conduct nor their own status."<sup>175</sup> Moreover, denial of education led to the possibility of creating an illiterate "underclass" which has the potential to become a great burden on society. Because of the "costs to the Nation and to the innocent children who are its victims,"<sup>176</sup> the Court proceeded from a "presumption that denial of education to innocent children is not a rational response to legitimate state concerns."<sup>177</sup> Justice Brennan's majority opinion then invalidated the law by illustrating the lack of congruence between the policy and the states' asserted reasons.<sup>178</sup>

Much of Justice Brennan's reasoning in *Plyler* applies to the case of time limits on AFDC. Justice Brennan wrote that in evaluating the rationality of a policy, "[w]e cannot ignore the significant social costs borne by our Nation when select groups are denied the means to absorb the values and skills upon which our social order rests."<sup>179</sup> Brennan had previously written the *Roberts v. United States Jaycees* opinion highlighting the key role of parental association in transmitting these values.<sup>180</sup> Also significantly, as the Browns' hypothetical indicates, under time-limited welfare, children whose parents cannot find employment and who are not removed from their homes by the state will frequently be unable to

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172. *Id.* at 1627.

173. 457 U.S. 202 (1982).

174. *See* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 35 (1973).

175. *Plyler*, 457 U.S. at 220 (quoting Trimble v. Gordon, 430 U.S. 762, 770 (1977)).

176. *Id.* at 224.

177. *Id.* at 224 n.21. This presumption reversed the usual allocation of the burden of proof in rational basis review, in which "those attacking the rationality of the legislative classification have the burden 'to negative every conceivable basis which might support it.'" *F.C.C. v. Beach Communications, Inc.*, 508 U.S. 307, 314-15 (1993) (quoting *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 364 (1973)).

178. *Plyler*, 457 U.S. at 230.

179. *Id.* at 221.

180. 468 U.S. 609, 617-20 (1984).

attend school. Despite some progress in educating homeless children, most school districts use fixed addresses in determining residence, and also require that children have certain articles of clothing, such as shoes.<sup>181</sup> Because most AFDC dollars are used for housing,<sup>182</sup> benefit cutoffs will throw large numbers of children into a transient lifestyle making educational continuity, if not attendance, impossible.

Justice Brennan concluded in *Plyler* that "[i]f the State is to deny a discrete group of innocent children the free public education that it offers to other children residing within its borders, that denial must be justified by a showing that it furthers some substantial state interest."<sup>183</sup> The Court in other contexts has treated complete denial of AFDC benefits with the same solicitude as denial of education,<sup>184</sup> and like the law in *Plyler*, AFDC cutoffs completely deny these basic necessities to a discrete group of children as a method of punishing their parents.<sup>185</sup> The rationality of the

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181. See *supra* note 40. Anecdotal accounts reveal more subtle barriers to the education of extremely poor children. In one reported incident in California, it took a year to convince the local school board to create a school bus stop at a state park in which twelve homeless families with 35 children lived more or less permanently. SHAMES, *supra* note 141, at 31. In another, children who lived in a New York "welfare hotel" after leaving an abusive father were unable to bathe regularly because their bathtub (as well as the toilet) was stopped for months at a time; they frequently missed school due to embarrassment at their uncleanness. *Id.* at 66.

182. Of 13.8 million renter households with incomes low enough to qualify for federal housing assistance, nearly 10 million receive no assistance at all. ALBELDA ET AL., *supra* note 5, at 39. As of 1987, "only 29 percent of poor renter households received any type of federal, state or local housing subsidy." MICHAEL SHERRADEN, ASSETS AND THE POOR 245 (1991). In Minnesota, only one in three AFDC families received a housing subsidy in 1991. *Minnesota AFDC Grants Don't Meet Children's Basic Needs, YOU SHOULD KNOW...* (Children's Defense Fund—Minnesota), Mar. 1991, at 1. In 1991, the average monthly cost of a "decent" one-bedroom apartment in the Minneapolis-St. Paul metropolitan area was 4% more than the entire AFDC grant for a family of two. *Id.* Nationally, in 1990, roughly half of all poor renters spent over 70% of their income for housing. Children's Defense Fund, *supra* note 125, at 1.

183. *Plyler*, 457 U.S. at 230.

184. See, e.g., *Goldberg v. Kelly*, 397 U.S. 254 (1970) (mandating procedural due process such as a prior hearing before cutting off benefits); *Shapiro v. Thompson*, 394 U.S. 618 (1969) (invalidating durational residency requirements for AFDC).

185. *Plyler* could be read to create an entirely separate Equal Protection claim against punitive welfare reforms: AFDC time limits discriminate among groups of children based on their parents' characteristics in a way that appears likely to relegate them to a subordinate caste. Although the deprivation of education here is more attenuated than in *Plyler*, it is aggravated by the loss of access to any kind of permanent housing and the effects of malnutrition. See *supra* notes 40, 181. The effects of extreme poverty on children's life chances are easy to document empirically. For summaries, see NATIONAL CTR. FOR CHILDREN IN POVERTY, FIVE MILLION CHILDREN: A STATISTICAL PROFILE OF OUR POOREST YOUNG CITIZENS (1990); ZIGLER & STEVENSON, *supra* note 37, at 12, 406-08, 484-85 (1993). These

state's asserted interests will be examined in the following sections.

*B. The Unconstitutionality of AFDC Cutoffs: Fundamental Rights Analysis*

The standard under which a court will review AFDC time limits, and the elimination of the individual entitlement to AFDC while SI remains an entitlement, depends on whether a court accepts that the fundamental rights of parents encompass a right to choose to raise children full-time in lieu of paid employment. If the court finds that no fundamental right exists, the difference in treatment between recipients of AFDC and SI will likely receive rational basis review.<sup>186</sup> If the right to choose the balance between parental supervision and day care for one's own children is held to follow from case law, however, the review of its selective deprivation may come under one of two specialized standards: either the strict scrutiny standard for impositions on parental rights from *Wisconsin v. Yoder*<sup>187</sup> or the "undue burden" standard for privacy rights in *Planned Parenthood v. Casey*,<sup>188</sup> which may have superseded it.<sup>189</sup>

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effects should create a presumption against the laws. *Plyler*, 457 U.S. at 227-30.

The Supreme Court distinguished the "unique circumstances" of *Plyler* in *Kadrmas v. Dickinson Pub. Sch.*, 487 U.S. 450, 460 (1988), in which it upheld a user fee for school for busing. The opinion noted that the user fee did not have the direct effect of creating an educational underclass, as with the absolute denial of education in *Plyler*, although the Court took pains to point out that state law allowed the fee to be waived. *Id.* at 459-60. In the case of time limits, there is no provision for mercy except the capped hardship and domestic abuse exemptions, nor is there any requirement that all families receive some form of assistance in the absence of an entitlement to cash aid. *See supra* note 5. The *Kadrmas* Court also distinguished *Plyler* on the ground that the user fee did not punish children for their parents' illegal conduct, as did the *Plyler* alienage distinction. *Id.* at 459. Welfare cutoffs, by contrast, punish children on the basis of a parental characteristic—long-term poverty—which is not even a crime. Despite the *Kadrmas* Court's apparent desire to limit the substantive holding of *Plyler* to its facts, the Court has since not directly weakened the *Plyler* method of heightened rational basis review.

186. *See, e.g.*, *Romer v. Evans*, 116 S. Ct. 1620, 1627 (1996) ("If a law neither burdens a fundamental right nor targets a suspect class, we will uphold the legislative classification so long as it bears a rational relation to some legitimate end.").

187. 406 U.S. 205 (1972).

188. 505 U.S. 833 (1992).

189. Neither of these standards have been applied in the equal protection context, nor, indeed, in any context beyond the decisions that established them. It is possible that a court would instead apply the traditional strict scrutiny analysis used in equal protection cases involving other fundamental rights such as voting and criminal due process. *See, e.g.*, *Shapiro v. Thompson*, 394 U.S. 618 (1969) (right to travel); *Harper v. Virginia Bd. of Elections*, 383 U.S. 663 (1966) (right to vote); *Douglas v. California*, 372 U.S. 353 (1963) (right to counsel). This is particularly likely if the court challenge revolves around a women's loss of custody of

*Yoder* involved a First Amendment religious free exercise claim, but Chief Justice Burger's majority opinion relied on parental rights precedent to formulate its test: "[T]he power of the parent, even when linked to a free exercise claim, may be subject to limitation . . . if it appears that parental decisions will jeopardize the health or safety of the child, or have a potential for significant social burdens."<sup>190</sup> Burger clarified the test somewhat by distinguishing *Yoder* from *Prince v. Massachusetts*,<sup>191</sup> which upheld the conviction of a Jehovah's Witness under child labor laws for allowing a niece in her care to distribute literature: "This case . . . is not one in which any harm to the physical or mental health of the child or to the public safety, peace, order, or welfare has been demonstrated or may be properly inferred."<sup>192</sup>

Empirical evidence provides no support for the contention that a woman's decision to stay home with her child has any ill effects on her children's mental health, and certainly no claim can be made based on their physical health or safety. Where children's academic test scores are used as a measure of well-being, analysts have found that the important factor is not whether a mother works outside the home, but whether her employment status is by choice.<sup>193</sup> Meanwhile, evidence suggests that day care can have both positive and negative effects on child development, and the positive effects do not so clearly outweigh the negatives as to establish a clear reason to overcome parental rights.<sup>194</sup> Even scholars who feel that day care *per se* can be beneficial agree that low-quality care harms children's development, and that the present system cannot assure reasonable quality care for all children.<sup>195</sup>

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her children as a result of having exhausted her benefits, because the fundamental right to custody under *Stanley* and *Santosky*, see *supra* notes 55-61 and accompanying text, has been more definitively established than other parental rights. Because Part III.C argues that the distinction between AFDC and SI fails rational basis review, a separate section dealing with this issue is not included.

190. *Yoder*, 406 U.S. at 233-34.

191. 321 U.S. 158 (1944).

192. *Id.* at 230.

193. See Sandra Scarr & Marlene Eisenberg, *Child Care Research: Issues, Perspectives and Results*, 44 ANN. REV. PSYCHOL. 613, 621 (1993).

194. For summaries of research on the possible effects of day care, see SELMA FRAIBERG, *EVERY CHILD'S BIRTHRIGHT* (1977) (very negative); DAVID A. HAMBURG, *TODAY'S CHILDREN* (1992) (generally positive); SANDRA SCARR, *MOTHER CARE/OTHER CARE* (1984) (positive); Scarr & Eisenberg, *supra* note 193 (generally positive); L. ALAN SROUFE & ROBERT G. COOPER, *CHILD DEVELOPMENT* 230-32 (1988) (generally positive); ZIGLER & STEVENSON, *supra* note 37 (equivocal); Jay Belsky, *The "Effects" of Infant Day Care Reconsidered*, 3 EARLY CHILDHOOD RES. Q. 235 (1988) (generally negative); K. Alison Clarke-Stewart, *Infant Day Care: Malignant or Malignant?*, 44 AM. PSYCHOLOGIST 266 (1989) (generally positive).

195. SCARR, *supra* note 194, at 179-81; ZIGLER & STEVENSON, *supra* note 37, at

Moreover, some parents, particularly those living in crime-ridden neighborhoods, have legitimate reasons for wanting to supervise school-aged as well as preschool children. For example, studies of eighth-graders have shown lack of parental supervision during after-school hours to be the most positive predictor of alcohol and drug abuse.<sup>196</sup> Latch-key status has also been associated with lower academic performance and school attendance, residential fires (a major issue among poor families living in inadequate housing), and teenage pregnancy resulting from after-school access to empty houses.<sup>197</sup> To the extent that children in poor areas are more likely than other children to encounter or participate in neighborhood violence, parental supervision is more likely than parental employment to protect their safety and the public "safety, peace, order and welfare."<sup>198</sup>

Under the *Yoder* test, then, the only possible justification for interfering in parental rights is to prevent "significant social burdens."<sup>199</sup> Although some might characterize stay-at-home mothers and their children as a "burden" because of the public money spent on their support, in *Yoder* the term referred to the long-term burdens on society that result when children do not receive education.<sup>200</sup> According to *Yoder*, Amish children who are withdrawn from school after eighth grade would not amount to such burdens as long as they stayed within the Amish culture.<sup>201</sup> When one compares the social burdens of supporting mothers and children today to those resulting in the long term from stunted development because of poor-quality day care, latch-key related school

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35, 238. Unregulated home-based day care is the least expensive variety; one 1995 study found that only 9% of such homes provided "good quality" care, while one-third actually damaged the children's developmental progress. Sexton, *supra* note 36, at B1.

196. ZIGLER & STEVENSON, *supra* note 37, at 481.

197. *Id.* at 21, 481.

198. *Wisconsin v. Yoder*, 406 U.S. 205, 233-34 (1972). Theresa Funicello, a former AFDC recipient and welfare rights organizer, writes that these are very real concerns to poor single mothers in deciding whether to work outside the home:

[T]here were many women who got off welfare to work at jobs that didn't pay enough to change anything about their material condition. They lived in the same neighborhoods, the same dismal apartments. I knew several who had gotten off welfare when their children turned school age, only to return when the children entered puberty and the local drug dealers became such a menace that the mothers were willing to subject themselves once again to the constant humiliation and limitless abuses of the welfare, the lesser of two ghoulish evils.

FUNICIELLO, *supra* note 20, at 75.

199. *Yoder*, 406 U.S. at 234.

200. *Id.* at 224.

201. *Id.* at 235.

performance declines and increases in drug use and teenage pregnancy, one sees that the government has advanced no reason compelling enough to override AFDC mothers' fundamental right to parent.

The *Yoder* test has apparently not been applied since the decision itself, and the Supreme Court may have replaced it with the "undue burden" analysis of *Planned Parenthood v. Casey*.<sup>202</sup> *Casey* applied the "unique burden" test to restrictions on abortion, but because the Court reaffirmed the right to abortion as a privacy right related to the *Meyer-Pierce* line of cases,<sup>203</sup> the analysis may extend to those cases as well. In their plurality opinion, Justices O'Connor, Souter and Kennedy stated that an "undue burden" is imposed when a state regulation has the "purpose or effect" of placing a "substantial obstacle" in the path of a woman seeking an abortion.<sup>204</sup> The language of their test makes it unlikely that time-limited welfare or discriminatory denial of benefits to women who are ineligible for SI could survive:

A statute with this purpose is invalid because the means chosen by the State to further the interest in potential life must be calculated to inform the woman's free choice, not hinder it. And a statute which, while furthering the interest in potential life or some other valid state interest, has the effect of placing a substantial obstacle in the path of a woman's choice cannot be considered a permissible means of serving its legitimate ends . . . . What is at stake is the woman's right to make the ultimate decision, not a right to be insulated from all others in doing so.<sup>205</sup>

*Casey* leaves the extent of the undue burden standard unclear; the Court used it to invalidate a rule requiring married women to notify their husbands of their decision to have an abortion, but sustained a 24-hour waiting period, despite its substantial effect on poor and rural women.<sup>206</sup> If a court finds the right to choose one's own parenting balance to be as fundamental as the right to abortion and applies the undue burden standard, however, it is difficult to imagine that AFDC cutoffs could be upheld under the language above. In no sense do such cutoffs "inform" a woman about her ultimate decision whether to work outside the home and place her child(ren) in day care; they completely extinguish the right to choose absent a material change in circumstances on the

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202. 505 U.S. 833, 876-79 (1992).

203. *Id.* at 849, 853.

204. *Id.* at 877.

205. *Id.*

206. *Id.* at 885-87 (waiting period); *id.* at 887-98 (spousal notification).

order of marriage. While the Court was unsympathetic to the plight of the poor in sustaining the 24-hour waiting period, the rule imposed practical hardships but did not constitute complete legal abolition of the right for the women concerned, which is what welfare cutoffs impose.

The government may attempt to evade responsibility for the deprivation of rights by depicting it as a consequence of the mother's status as a single parent, arguing that denial of aid thereby advances a state interest in encouraging marriage.<sup>207</sup> AFDC time limits and the loss of entitlement status, however, do not advance the interest directly enough to survive heightened scrutiny. The prospect of the loss of the mother's parental rights is unlikely to deter a father from abandoning a family or forcing its breakup through abuse. In practice, moreover, the woman's right is the same whether she is married to her partner, whether her children are born in or out of wedlock, and even whether or not her partner is a man. In other words, the right to choose one's own parenting balance is not allocated based on a requisite measurable level of traditional family values, but merely according to whether the home contains another adult.<sup>208</sup> Furthermore, mothers are not the only parties affected by the state's attempts at promoting marriage. Where rights of parental association are involved, there is

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207. One of the Act's explicit purposes is promoting marriage. Pub. L. No. 104-93, sec. 103, § 401(a)(2). The findings section also includes considerable rhetoric about the importance of marriage to society. *Id.* sec. 101(1)-(2).

The mother's economic status is also a necessary factor in the government's argument. As noted *supra* notes 120-25, the government is not innocent in the creation of poverty. Whatever their theoretical cause, however, the government's actions in practice amount to a unique deprivation of rights that, according to the Court, predate the Constitution itself. *See supra* note 64 and accompanying text. If these facts were held to constitute state action for Fourteenth Amendment purposes, the government would also carry the burden of demonstrating a "compelling" reason why it is more important for single mothers to work outside the home than mothers supported by their husbands. *See, e.g., Carey v. Population Serv. Int'l*, 431 U.S. 678, 686 (1977) (finding that regulation burdening fundamental right may be justified only by compelling state interests). *Eisenstadt v. Baird* implies that distinctions based on marital status can rarely survive even rational basis review, and also establishes that Fourteenth Amendment privacy rights exist in the individual, not in the marital relationship. 405 U.S. 438, 453 (1972). The parental rights case law also defeats any claim of marriage as a prerequisite to the right. *See, e.g., Stanley v. Illinois*, 405 U.S. 645 (1972) (upholding the parental rights of an unwed father); *see also* Part II.A and text accompanying notes 61-62 (discussing cases involving the rights of non-custodial fathers in adoptions).

208. The deprivation of this right is also insufficiently tailored to promote "work ethics," since the right is the same whether the mother's partner's means of support is employment, government benefits such as Social Security or income from property.

no functional difference in the needs of children in single-parent and two-parent families. In the words of Justice Douglas: "The rights asserted here involve the intimate, familial relationship between a child and his own mother. . . . Why should the illegitimate child be denied rights merely because of his birth out of wedlock?"<sup>209</sup>

The justification of promoting marriage is also defeated by the central premise of this article: within the class of single mothers, the government draws a distinction between single mothers as a whole and those eligible for SI. This privileged class comprises widows and surviving divorced ex-spouses of a deceased worker who have children under sixteen in the home who are eligible for benefits.<sup>210</sup> The government also privileges a class of children of single mothers comprised of those whose father has at some point died.<sup>211</sup> If the court agrees that fundamental rights, of parents or children, are at stake, the government will have to demonstrate that this distinction is a narrowly tailored means to advance a compelling state interest.<sup>212</sup> The state will not meet this burden, because the distinction between SI and AFDC recipients is so arbitrary as to render it doubtful that the government can even demonstrate a rational basis for it.

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209. *Levy v. Louisiana*, 391 U.S. 68, 71 (1968) (invalidating a state statute denying children born out of wedlock the right to recover for the mother's wrongful death).

210. Children are eligible until age 18 or beyond if they are still in secondary school or disabled. 1995 GREEN BOOK, *supra* note 5, at 5-6. Widows and stepchildren must have lived with the deceased husband for at least, respectively, one year and nine months prior to his death. 42 U.S.C.A. 416(b)(2), (e)(2) (West 1994). In *Weinberger v. Salfi*, 422 U.S. 749 (1975), the Supreme Court upheld this rule as rational in light of its purpose of preventing women from entering into "sham marriages" for the purpose of collecting benefits on her husband's imminent death. *Id.* at 779-81. See *supra* note 18 for other eligibility requirements.

That not all widows and surviving divorced spouses are eligible for SI, because some husbands are not covered by Social Security, may appear to diminish the usefulness of the equal protection claim for the poorest of AFDC recipients. A court could possibly order that SI be extended only to divorced spouses of workers eligible for Social Security, or that the time limit statute be enjoined only with respect to that population. This solution, however, would preserve the basic irrationality of the original claim because it would still classify women and children based solely on the characteristics of their husbands and fathers.

211. See *supra* note 18.

212. See, e.g., *Carey*, 431 U.S. at 686.



C. *The Unconstitutionality of AFDC Cutoffs: Rational Basis Analysis*

If the court does not find a fundamental right at stake, it will decide the equal protection issue under rational basis review.<sup>213</sup> As noted above, this review has tended to take two forms. Although several welfare-related precedents applied a toothless, deferential standard,<sup>214</sup> the case of AFDC time limits and loss of entitlement has many features in common with those cases which used the more substantial standard and actually examined the relationship of the challenged regulation to the state's asserted interests.<sup>215</sup> First of all, unlike the cases that have upheld variations in benefit levels<sup>216</sup> but like several cases where restrictions on benefits have been invalidated,<sup>217</sup> the regulation at issue involves an absolute deprivation, as opposed to a mere reduction, of "welfare aid upon which may depend the ability of the families to obtain the very means to subsist—food, shelter, and other necessities of life."<sup>218</sup> Second, like the regulation in *Moreno*<sup>219</sup> and *Eisenstadt v.*

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213. As a threshold issue, the government may argue that rational basis review eliminates the equal protection problem by requiring the SI eligibility standards to be read in isolation from the welfare bill, on the principle that "it is no requirement of equal protection that all evils of the same genus be eradicated or not at all." *Railway Express Agency Inc. v. New York*, 336 U.S. 106, 110 (1949). This kind of formalistic approach is absurd on a policy level because government could then justify virtually any classification by separating the categories into separate statutes. The law invalidated in *Plyler*, for example, would have been legal as long as it was separate from the statute authorizing public education in Texas. *Plyler v. Doe*, 457 U.S. 202 (1982) (invalidating state law barring children of illegal aliens from public schools).

The Supreme Court has often looked at laws in the context of the complete statutory scheme when applying heightened scrutiny. See, e.g., *Terry v. Adams*, 345 U.S. 461 (1953) (striking electoral scheme which left true power in hands of white-only organization). In *Rubin v. Coors Brewing Co.*, 115 S. Ct. 1585, 1592-93 (1995), the Court stressed the "irrationality" of a statute prohibiting display of alcohol content on beer labels in the context of laws requiring such display for other forms of liquor, although the Court did apply heightened scrutiny because of the commercial speech aspect of the case. *Id.* at 1589. In the prototypical rational basis case of *Dandridge v. Williams*, 397 U.S. 471, 486 (1970), the Court used the context of other statutes to bolster its finding of rationality.

214. See, e.g., *Jefferson v. Hackney*, 406 U.S. 535 (1972) (upholding disparities in amounts paid to the elderly, disabled and families on AFDC); *Dandridge*, 397 U.S. at 471 (upholding maximum grant regardless of family size).

215. See *supra* note 153.

216. See *supra* note 214.

217. See, e.g., *Shapiro v. Thompson*, 394 U.S. 619 (1969) (invalidating a one-year residency requirement for AFDC); *Goldberg v. Kelly*, 397 U.S. 254 (1970) (striking down a regulation which allowed benefits to be terminated for alleged fraud without a prior hearing). See *supra* note 119 for additional cases.

218. *Shapiro*, 394 U.S. at 627. Justice Brennan, who wrote for the majority in *Shapiro*, added in *Goldberg* that public assistance "is not mere charity, but a means to 'promote the general Welfare, and secure the Blessings of Liberty to our-

*Baird*,<sup>220</sup> AFDC benefit cutoffs implicate concerns related to rights of privacy and association, even if not explicitly covered under the case law. Third, like the law overturned in *Plyler*,<sup>221</sup> time limits and selective denials of entitlement discriminate among children who have no control over their status or their parents' behavior. Fourth, also like the *Plyler* rule, these welfare "reforms" will potentially relegate those children who come out on the wrong end of the distinction to an underclass status likely (although with slightly less certainty than the denial of education in *Plyler*) to significantly impact their chances of reaching their full potential, and will produce major burdens on society through charity and crime.<sup>222</sup>

The state will likely assert interests in two categories: reasons for burdening AFDC recipients and reasons for privileging SI recipients. The reasons advanced for imposing special burdens on AFDC recipients are the same as those given for welfare "reforms" in general, and amount to variations on three themes: (1) discouraging unwed childbirth and single parenthood, (2) saving money, and (3) discouraging long-term "dependency" on government benefits, both as a cost-saving measure and to inculcate a "work ethic" in parents and children.<sup>223</sup>

None of these justifications explain why the state should privilege one group of single mothers above the rest. The statutory scheme can hardly relate to deterring single parenthood when divorced women who voluntarily left their husbands are eligible for SI if the husband dies afterwards, while women whose husbands have abandoned them, and thus have as little choice in the matter as widow, must resort to AFDC. Moreover, a large percentage of the "voluntary" decisions of women to become single parents, at

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selves and our Posterity.'" *Goldberg*, 397 U.S. at 265.

219. *United States Dep't of Agric. v. Moreno*, 413 U.S. 528 (1973).

220. 405 U.S. 438 (1972).

221. 457 U.S. at 202.

222. *Cf. Plyler*, 457 U.S. at 223-24.

223. The stated purpose of the cash assistance portion of the Act is: to increase the flexibility of states in operating a program to be designed to (1) provide assistance to needy families so that children may be cared for in their own homes or in the homes of relatives; (2) end the dependence of needy parents on government benefits by promoting job preparation, work, and marriage; (3) prevent and reduce the incidence of out-of-wedlock pregnancies and establish annual numerical goals for preventing and reducing the incidence of these pregnancies; and (4) encourage the formation and maintenance of two-parent families.

Pub. L. No. 104-193, sec. 103, § 408(a)(7)(C)(II). These purposes correspond more or less exactly with those identified in the text except for the first, which is simply the original purpose behind AFDC. *See supra* note 2.

least among the AFDC population, results from domestic abuse;<sup>224</sup> the state can hardly claim a "legitimate interest" in deterring these women from leaving potentially life-threatening situations. Whatever the value of its interest in encouraging couples to marry and discouraging divorce, the government would be hard-pressed to explain how this interest is rationally related to distinguishing between classes of divorced women and children based on whether their husbands and fathers have died within five years of the divorce.

The state may claim a valid interest in deterring unwed childbirth, rather than single parenthood per se. This argument fails when one notes that 45% of periods of AFDC receipt begin with a divorce or separation, while only 30% begin with a birth to an unmarried woman.<sup>225</sup> This makes the burdened class of AFDC recipients, like that of households excluded from food stamps in *Moreno*, extremely overinclusive; the time limit would "incidentally" affect a class of families 50% greater than the group of families that the law was meant to target. In any event, social science has found no support for the contention that AFDC has any causal effect on single-parent births.<sup>226</sup>

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224. At least 45% of women and children on AFDC have suffered repeated domestic abuse. See *supra* note 29 and accompanying text.

225. See 1995 GREEN BOOK, *supra* note 5, at 451. The remaining AFDC spells begin with loss of income; 9% are "other or unidentified." *Most Families on AFDC Are Small, Have One Parent*, *supra* note 3, at 1-2. In Minnesota, 58% of parents on AFDC are currently or formerly married. *Id.*

Moreover, divorced or separated mothers outnumber never-married mothers among both short-term and long-term AFDC recipients. See 1995 GREEN BOOK, *supra* note 5, at 410-11. Only at the level of over 15 years of continuous AFDC receipt do never-married mothers outnumber divorced or separated mothers, comprising 2.2% of the AFDC population compared to 1.8%. *Id.* The Congressional findings in the Act state that a higher percentage of never-married mothers than divorced mothers "received" AFDC—"nearly 1/2" compared to "1/5"—but do not indicate whether this refers to AFDC receipt at a given point in time or over a lifetime. Pub. L. No. 104-193, sec. 101 (9)(B). The difference between these two measures is highly significant. See *supra* note 5. Notably, Congress does not claim that never-married mothers, except those who give birth as teenagers, remain on AFDC longer than divorced mothers. If the above statistic represented point-in-time data, this fact would likely explain it entirely.

While SI could be construed as discouraging unwed births among women who currently receive it, because the benefit is not adjusted upward for children who do not belong to the deceased father, no argument can be made that the time limits on AFDC have any bearing on whether or not a woman has additional children. See *supra* note 210. A five-year lifetime limit does not distinguish between a woman with one pre-existing child and a woman who gives birth to five more within the time of receipt or subsequently. Moreover, no evidence exists for any correlation between AFDC benefits levels and unwed births. See *infra* note 226.

226. Geographical variation in AFDC levels does not produce corresponding variations in either unwed or teenage childbirth. For example, New Jersey's

From the child's point of view, the unwed childbirth justification amounts to nothing more than an illegitimacy classification, which the Supreme Court has explicitly held to violate equal protection in the context of benefits for poor families.<sup>227</sup> This distinction, furthermore, is both overbroad and underinclusive.<sup>228</sup> Children born out of wedlock can be eligible for SI while many "legitimate" children must resort to AFDC; similarly, many children of divorced parents are eligible for SI, while children in a single-parent family because of the death of their father, can end up on AFDC.<sup>229</sup> Because classifications disadvantaging "illegitimate"

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AFDC benefit package is 58% higher than Mississippi's, but the two states have equal rates of single parenthood. *ALBELDA ET AL.*, *supra* note 5, at 42. Furthermore, Mississippi and Alabama, which have the lowest AFDC levels in the country, have some of the highest rates of teenage pregnancy and the largest AFDC families on average. *Id.* at 42, 44. Other countries, such as Canada, have provided higher benefits with far lower rates of unwed childbirth. *Id.* at 44.

Temporal comparisons also defeat the hypothesis that AFDC causes unwed childbirth. The number and percentage of families headed by never-married mothers increased more than tenfold between 1970 and 1992. See 1995 GREEN BOOK, *supra* note 5, at 1111. The real value of combined AFDC and food stamp benefits, however, peaked in 1972 and had fallen 27% by 1990. See PIVEN & CLOWARD, *supra* note 2, at 372. Studies, with the notable exception of those commissioned by right-wing think tanks such as the Heritage Foundation, have found that New Jersey's "family caps," which deny increased aid to mothers who give birth while on AFDC, have no effect on birth rates. *ALBELDA ET AL.*, *supra* note 5, at 44; JAMES CARVILLE, *WE'RE RIGHT, THEY'RE WRONG* 28 (1996).

Conservatives typically point to the dramatic increase in reported rates of single parenthood since the 1960s as evidence that the anti-poverty measures of that era produced massive increases in unwed childbirth. See, e.g., CHARLES MURRAY, *LOSING GROUND* 124-34 (1984). However, much of the change can be attributed to the public repression of the fact of single motherhood from the 1930s to the 1950s. See GORDON, *supra* note 2, at 33. Before courts struck down the restrictions that had prevented African-Americans from receiving AFDC, black single mothers typically had little choice but to live with their parents, where they were not counted as separate households by the census. *Id.* One-third of the officially recorded growth in single parent families between 1940 and 1970 resulted from an increase in independent living arrangements. See Piven & Cloward, *supra* note 29, at 55-57. Moreover, between 1981 and 1983, the Census Bureau changed its coding procedures to identify unmarried mothers living with their parents; the recorded number of such mothers doubled in those two years. *Id.* at 32. In short, the apparent increase in single parenthood is largely attributable to increased public notice of a previously hidden phenomenon.

227. See *New Jersey Welfare Rights Org. v. Cahill*, 411 U.S. 619, 621 (1973) ("[T]here can be no doubt that the benefits extended under the challenged program are as indispensable to the health and well-being of illegitimate children as to those who are legitimate.").

228. Cf. *Romer v. Evans*, 116 S. Ct. 1620, 1628 (1996) (invalidating provision as "at once too narrow and too broad").

229. SI provides several ways that a deceased wage earner's out-of-wedlock child could draw SI. See *supra* note 18. Similarly, if a mother with an out-of-wedlock child married a wage earner at least nine months before his death, both could draw SI even if the stepfather never adopted the child. See *supra* note 210. A child of married parents whose father was too young or too inconsistently em-

children, or subgroups thereof, must be substantially tailored to an important state interest,<sup>230</sup> the combination of over- and underinclusiveness in the AFDC/SI distinction would doom it regardless of the value of the state's interest and regardless of whether such sloppy tailoring could be held "rational" if applied only to parents.<sup>231</sup>

As for the state's other interests, "a concern for the preservation of resources standing alone can hardly justify the classification used in allocating those resources."<sup>232</sup> The stated interest simply begs the question: Congress must still demonstrate some reason for its distinction between SI and AFDC recipients beyond "a bare . . . desire to harm a politically unpopular group."<sup>233</sup> The claim that eliminating long-term "dependency" on AFDC saves money does not explain the lack of concern about long-term receipt of SI, nor about SI eroding the "work ethics" of its recipients.<sup>234</sup>

Conservative proponents of punitive welfare "reforms" have developed the "work ethic" thesis to a high degree by postulating that AFDC is responsible for creating an "underclass" of mainly nonwhite long-term recipients, whose children continue the cycle

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ployed to be fully and currently insured by SI could end up on AFDC after the father's death. See 1995 GREEN BOOK, *supra* note 5, at 5.

230. See *supra* notes 147-49 and accompanying text. Placing all "legitimate" children and some born out of wedlock on the other side of a line from other "illegitimate" children is also impermissible. See, e.g., *Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164 (1972) (invalidating worker's compensation rule requiring children born out of wedlock to have been acknowledged by father in order to recover for his injury); *Jimenez v. Weinberger*, 417 U.S. 628 (1974) (striking rule barring "illegitimate" children from collecting Social Security as dependent of disabled father unless he lived with, supported, or had subsequently legitimated them, or state law permitted them to inherit).

231. SI can be distinguished from AFDC in that a never-married woman can never draw SI for herself, but the fact that a divorced or widowed woman can end up on either side of the line means that the distinction could not rationally be viewed as an incentive to marry. 42 U.S.C.A. § 402(g)(1) (West 1994) (limiting SI to the "surviving spouse and every surviving divorced [spouse]" of a worker). Redrawing the distinction along married vs. never-married lines is still irrational because it requires two decisions to start a marriage, and the state is unlikely to influence a man's behavior by the knowledge that should he abandon his wife, or drive her away with abuse, she could draw unlimited SI rather than five years of AFDC.

232. *Plyler v. Doe*, 457 U.S. 202, 227 (1982).

233. *United States Dep't of Agric. v. Moreno*, 413 U.S. 528, 534 (1973).

234. To the extent that AFDC has greater disincentives on paid employment than SI, it is because the rules of AFDC, unlike SI, do not allow recipients to combine the benefit with waged income. See *supra* note 2. Women on AFDC thus have no incentive to seek labor that does not pay wages substantially greater than AFDC grant levels, and work-related transportation and child care costs often destroy the difference. See *Many Families Leave AFDC But Can't "Make It," supra* note 15.

of dependency.<sup>235</sup> Even assuming that this argument is valid for some, time limits and wholesale elimination of entitlements are draconian in their overinclusion.<sup>236</sup> The assumption behind this idea, moreover, have repeatedly been empirically discredited.<sup>237</sup> Not only is most AFDC use short-term,<sup>238</sup> but studies have found that only one out of five girls raised in families highly dependent on AFDC are themselves highly dependent as adults, while 64% of these girls did not draw AFDC at all.<sup>239</sup> Girls from families with some AFDC receipt as children were more likely to draw AFDC as adults than girls who had never received AFDC,<sup>240</sup> but the girls who had never received AFDC were also less likely to have grown up poor, thus diminishing their chances of poverty in later life.<sup>241</sup> Once again, conservatives give no explanation for exempting SI from this analysis.

Rather than trying to explain its interest in AFDC cutoffs per se, the government may claim that SI was designed for the narrow purpose of minimizing the economic dislocation to a woman when her husband dies.<sup>242</sup> The Supreme Court found this claim to be "rational" in *Boles*, despite the statute's overinclusiveness in allowing benefits to women who had received no support from their

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235. See, e.g., KAUS, *supra* note 145; MURRAY, *supra* note 145. For an excellent summary and refutation of these arguments, see KATZ, *supra* note 20, at 124-236 (1989). These arguments have been used in minimally modified form since the 1820s and applied to every immigrant group that had not yet assimilated with the majority. See TRATTNER, *supra* note 2, at 51-53.

236. Cf. *Romer*, 116 S. Ct. at 1627 (holding that an enactment's effects extend irrationally far beyond advancing claimed state interests, allowing implication of animus as motivation); *Moreno*, 413 U.S. at 537 (finding a law invalid as burdening very large number of individuals beyond those intended to be affected).

237. Social welfare historian Michael B. Katz spends four pages recounting a fraction of the social science evidence that refutes the scientific basis for Charles Murray's, *Losing Ground*. KATZ, *supra* note 20, at 153-56.

238. "One out of four of all U.S. citizens experiences [AFDC] for at least a short period in a decade. Only one out of fifty receives at least half their income from welfare for eight years or more." FUNICIELLO, *supra* note 20, at 59. Moreover, "[i]f welfare were a lifelong 'disease,' there would be as many or more teenagers on welfare as children under five (because birth rates are declining)." *Id.* Instead, 40.8% of children on AFDC are under age five and 73% are under twelve. *Id.*

239. "High" levels of dependency meant receiving AFDC for three consecutive years during the period of study. 1995 GREEN BOOK, *supra* note 5, at 447-49. Women from highly dependent families were not more likely to draw AFDC than those from families with less constant AFDC receipt. *Id.* African-American women from highly dependent families, moreover, were significantly less likely to become highly dependent than white women from similar background. *Id.* A different study came up with a figure of 25% of daughters of AFDC recipients drawing AFDC as adults. ALBELDA ET AL., *supra* note 5, at 82.

240. See 1995 GREEN BOOK, *supra* note 5, at 447-49.

241. ALBELDA ET AL., *supra* note 5, at 82.

242. See *Califano v. Boles*, 443 U.S. 282, 288-89 (1979).

husbands since their divorce, and despite evidence that Congress had made the distinction inadvertently.<sup>243</sup> At the same time, however, SI is extremely underinclusive in ignoring those women experiencing economic dislocation from abandonment by their husbands or those fleeing from abuse. Even recognizing the maxim that state regulation need not solve all aspects of a problem at once,<sup>244</sup> Congress has yet to advance any rational reason why abused or abandoned women should receive only temporary and discretionary benefits while women whose husbands have died are entitled to collect benefits for as long as they remain single parents. Congress has similarly not explained why divorced women whose husbands have died should have greater latitude than other single mothers in deciding how to raise their children, or how the interest in helping some women to weather economic dislocation is furthered by other women losing their children to the state.

From the children's viewpoint, the economic dislocation is the same when a father abandons the family without paying child support as when the father dies; to a child whose father dies years after his parents have divorced, the benefits amount to nothing more than a windfall. To be sure, Congress may be perfectly rational in determining that living fathers are more likely to pay child support than dead ones. However, children whose mothers never asked for or needed child support in the first place, or whose dead fathers do in fact provide support in the form of inheritances or life insurance policies, retain an entitlement to draw SI, while those whose living fathers do not or cannot afford to pay child support still lose all welfare support, if they were allowed any to begin with, after five years. An explanation that rational basis review does not require complete precision will not likely explain to the Brown children why they should be rendered homeless and taken from their mother simply because their father made it to Mexico alive.<sup>245</sup>

The government may try to justify its SI exemption by shifting its focus from women and children to male workers, explaining that SI was designed to reward work by ensuring that a worker was secure in the knowledge that his wife and children would be provided for if he died.<sup>246</sup> This argument again fails when one con-

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243. See *supra* notes 131-38 and accompanying text.

244. See *supra* note 2. But cf. *Eisenstadt v. Baird*, 405 U.S. 438, 454 (1972) (stating that underinclusion in remedying "evils" perceived by the state can be "invidious").

245. See *supra* notes 29-43 and accompanying text.

246. Related to this issue is the contention that SI is different from AFDC be-

siders that a divorced woman may draw SI with no indication as to whether her husband wished to support her.<sup>247</sup> A man who abandons his wife, or abuses her until she leaves him, and then fails to pay child support, probably does not gain much peace of mind from the knowledge that, if he dies, his children will receive SI rather than AFDC.

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cause it is a "contributory" program in which workers "earn" benefits for their families, while AFDC is essentially a publicly-run charity funded by "other people's" tax dollars. This is ultimately a sexist argument resting on a failure to recognize the traditional labor of women in raising children as valid work deserving of recognition and compensation. See Fraser & Gordon, *supra* note 20. By comparison, the state-level predecessors of AFDC were called mothers' pensions, meant as a parallel to veterans' pensions, in recognition the service to the country that mothers perform in childrearing. See GORDON, *supra* note 5, at 72.

On a practical level, this distinction is nothing more than a fiction. Social Security is a direct transfer payment program; workers do not pay into individual insurance accounts saved up until the need strikes, but into a general fund from which money is dispersed to the retired, the disabled and SI-eligible families. 1995 GREEN BOOK, *supra* note 5, at 2. The Social Security tax is collected separately from general income and sales taxes, and it is far more regressive, as income above \$60,000 [1994 figure] is not taxed. *Id.* at 3. The difference, however, is purely a matter of accounting.

While the amount of monthly benefits varies according to the worker's previous earnings, the total amount of money that a retiree, widow or surviving child can draw from Social Security bears no relation to the amount paid in. See GORDON, *supra* note 2, at 5; Fraser & Gordon, *supra* note 20, at 61. For example, for Social Security purposes, a worker could be "fully and currently insured" if he worked and paid into Social Security throughout the six consecutive quarters after his 21st birthday. 1995 GREEN BOOK, *supra* note 5, at 8. A worker can become fully insured for life by working 40 quarters. *Id.* Thus, if a fully insured worker dies at age 22 years, six months, his wife and newborn child could collect SI for 16 and 18 years respectively, as could the wife and child of a 50-year-old man who became fully insured for life at age 31 and never worked since. In either case, the families will collect far more than the worker ever paid in.

In any event, although the distinction between "contributory" and "noncontributory" programs seems to carry great political weight, it is unclear how this could support statutory distinctions between mothers and children for constitutional purposes. Although SI may have been designed to resemble private life insurance programs that occasionally provide an ex-wife with a windfall on her ex-husband's death, the federal government is bound by constitutional requirements of rationality that private insurance companies do not face. Preserving the "contributory" facade of a particular transfer program hardly appears to be a state interest of enough magnitude to justify depriving families whose ostensible "contributor" happens to be alive of their sole means of survival, or parents of their fundamental child rearing rights.

247. Courts have traditionally placed strong presumptions behind a husband's obligation to support his wife and children, and it is possible that a presumption of intent to support could be drawn from these cases. See, e.g., *Shine v. Shine*, 802 F. 2d 583, 583 (1st Cir. 1986) (holding that alimony obligations are not discharged under bankruptcy laws absent explicit statutory mention). However, this does not explain why the ex-husband's death should raise the amount of support, or transform a temporary discretionary benefit into a permanent entitlement. In most states, a woman on AFDC may retain only \$50 in child support above and beyond her grant; the rest goes to reimburse the state for the AFDC costs. 1995 GREEN BOOK, *supra* note 5, at 336-37.



Even if the government were to narrow SI to include only widows and divorced women whose husbands actually paid support, the type of support a woman received would still turn entirely on her husband's behavior. Either distinction, in the end, rewards or punishes a woman based entirely on her ability to predict whether their husband is more likely to die than to abandon or abuse her years after the marriage. Whatever the value of such accurate precognition to those who possess it, it is questionable as a legitimate state interest on which to base a social policy with such consequences for innocent third parties: the children of the families. No distinction, other than luck, separates child recipients of SI from those receiving AFDC. At this level, the distinction becomes entirely arbitrary—in other words, irrational, and hence a violation of the Equal Protection Clause.

### Conclusion

The current movement for AFDC time limits and elimination of entitlement is fueled by ignorance and prejudice.<sup>248</sup> In a just world, educating the public about the facts of AFDC would suffice to bury these misconceptions. In this world, however, the courts are often the last resort when prejudice overtakes majoritarian institutions.<sup>249</sup> The Fourteenth Amendment suggests two interrelated grounds for overturning these policies. The jurisprudence under the Due Process Clause suggests that AFDC cutoffs constitute an unwarranted imposition on parents' right to make fundamental choices about the "care and management" of their children, including the necessary degree of association with them; in some cases, these policies would interfere with the basic right to physical custody. Because only single parents are asked to forfeit their parental rights, and one select group of single parents—those eligible for SI—is exempted from any question of loss of these fundamental rights or of income necessary for survival, AFDC time limits and selective denials of entitlement should be invalidated under the Equal Protection Clause.

SI provides a far better model for dealing with single parent poverty than AFDC. SI provides an income floor sufficient to pro-

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248. See WILLIAMS, *supra* note 20, at 2-14, 170-81 (analyzing the racial and gender ideologies driving AFDC discourse).

249. See *United States v. Carolene Prods. Corp.*, 304 U.S. 144, 152 n.4 (1938) (identifying prejudice as a "special condition" triggering a need for heightened scrutiny); see also *Romer v. Evans*, 116 S. Ct. 1620 (1996) (invalidating Colorado referendum provision excluding gays and lesbians from coverage of antidiscrimination laws); *Reitman v. Mulkey*, 387 U.S. 369 (1967) (invalidating California referendum provision granting right to racial discrimination in housing).

vide most of its recipients with a decent standard of living; by minimizing the stress of poverty and freeing its recipients from the time-consuming chores of survival on an inadequate income,<sup>250</sup> it maximizes the time and energy parents have available for caring for children and working to improve their own circumstances. The flexible structure of SI recognizes that single parents' duties to their children may make it impractical to work full-time outside the home, at the same time allowing them to bring in extra money in the part-time jobs that characterize the modern economy without penalty. Even full-time work is not an all-or-nothing proposition, as SI provides a cushion of security if it becomes necessary to cut back.

By casting the issue in terms of AFDC versus SI, therefore, the ideal would be for a judge to remedy the unconstitutional features of welfare "reform" by enjoining the government to expand SI to include all children in single-parent households.<sup>251</sup> More

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250. See *supra* note 125.

251. No lesser distinction would erase the basic irrationality of classifying children according to the characteristics of their parents. Redefining SI to include all children of dead fathers would destroy the program's "contributory" facade and solve nothing. Expanding SI to all children with widowed or divorced mothers would create an illegitimacy classification which would not be substantially tailored to any important state interest. See *supra* note 230 and accompanying text. A judge could conceivably shrink SI to include only those children whose father died while the parents were still together, but their situation does not differ measurably from children who have been abandoned or whose mothers have left abusive situations. However, this might be constitutional under the doctrine that Congress need regulate only one step at a time. See *supra* note 213 and accompanying text.

It is possible to redefine SI to include a few defined categories of single parent families: (1) those produced by the death of a parent, (2) by abandonment and (3) by abuse. Abuse and abandonment, however, are not always easily defined concepts. Moreover, to avoid an illegitimacy classification, one would have to extend these benefits to unwed couples where the father had lived with the child. This is probably one point at which a limited SI could stop.

However, if a couple, married or not, did separate voluntarily and the father supported the children and later died or stopped contributing, the mother could make a claim that she was dependent on that support. This in turn raises the question of how much support from the father should then be necessary to trigger SI, and the fact that SI eligibility rests completely with the father. The next step is couples who separate voluntarily but where the father never pays support, although asked; the next is those where the father cannot pay support because he simply lacks the money. See *supra* note 25.

At this point, we are left with two types of families outside of SI: those where the mother voluntarily left the father for some reason short of abuse and refused or did not ask for support from a father ready, willing and able to provide it, and those where the father was never in the picture at all. A legislature may be able to justify providing these groups with lesser benefits under rational basis review, but it could not exclude them entirely or impose time limits without facing questions of parental rights and distinguishing among children based solely on their parents'

likely, the judge would strike the time limits and elimination of entitlement in the recent Act but hold that differing benefit levels and conditions were permissible under *Jefferson*,<sup>252</sup> essentially returning to the status quo of AFDC. The underlying problems of miserly AFDC benefit levels and entrapping rules would still exist, however, so the drive for reform would continue. Since even the current Congress would probably be reluctant to abolish all federal aid for children including SI, the constitutional prohibitions on punitive measures would likely channel future welfare reform in more constructive directions.<sup>253</sup>

If courts were governed entirely by precedent and logic, the Supreme Court should have little trouble finding a parental right, and no trouble invalidating the AFDC/SI distinction on equal protection grounds. Unfortunately, courts have political agendas, and several of the decisions relied on in this article were by narrow majorities of now-retired Justices with views quite different from many members of the current Supreme Court. Even though winning this case would be far from certain in the current political climate, bringing it would be well worth the effort given the possi-

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actions.

One may observe that this Note has said little about two-parent families with no means of support, and that such families are functionally little different from one-parent families where the noncustodial parent is willing to pay support but lacks the resources. These families must receive support as well; there is no rational reason to penalize children for having fathers decent enough to stick around in tough times. Although a flat benefit cutoff is impermissible because it would force the separation of families where fathers could not find work, in this kind of family it might be reasonable to impose job training requirements.

252. *Jefferson v. Hackney*, 406 U.S. 535 (1972) (upholding different benefit levels for elderly, disabled and AFDC families).

253. An enlightened court could hold the rules which reduce AFDC by one dollar for each dollar a recipient earns in the labor market to amount to an impermissible invasion of rights of parental choice, because in practice they force an all-or-nothing decision between full-time employment and pure AFDC subsistence. See *supra* notes 2 and 124. At a minimum, any serious welfare reform should provide universal access to health care and affordable housing. Besides job creation, reform that emphasizes employment must provide an adequate child care system and other measures to make the workplace friendlier to parents. While an SI-type income support system could blunt the impact of the explosion of low-paying, part-time and temporary jobs, a comprehensive anti-poverty strategy should force business to provide jobs on which a worker can support a family without government help, rather than socializing the human costs generated by its drive for profits.

Evidence suggests that providing jobs in which a single worker can support a family will contribute toward solving the problems of the inner city, including its high rates of single parenthood. See WILSON, *supra* note 16, at 63-108. A comprehensive attempt to deal with these problems, however, requires dealing with the forces that perpetuate racial segregation, which in turn concentrates poverty and amplifies the attendant social disruptions, feeding a cycle of decline. See generally MASSEY & DENTON, *supra* note 20.

bility of preventing immeasurable losses to the well-being, the potential and perhaps the lives of millions of children.<sup>254</sup>

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254. This is not merely hyperbole. In 1890, muckraking journalist Jacob A. Riis reported that institutions called "baby-farms" placed newspaper advertisements offering cash to place the children of indigent unwed mothers up for adoption. JACOB A. RIIS, *HOW THE OTHER HALF LIVES* 147-48 (Dover Publications 1971) (1901). The "baby-farms" then fed the children sour milk and drugs to keep them quiet and allowed them to starve to death, with inexperienced doctors called in to record a false cause of death. *Id.* Even assuming this sort of institutionalized murder does not arise, newspapers already report instances of infanticide or extreme neglect by extremely poor mothers. *See, e.g.,* WILLIAMS, *supra* note 20, at 179 (telling of a twelve-year-old mother in Brooklyn housing project throwing her newborn down a trash chute). Such instances can only increase as more and more children are forced into deeper and deeper poverty. Moreover, the violent crime, homelessness and malnutrition that will inevitably result from withdrawal of cash assistance will only cause additional childhood deaths, already more common in Harlem than in Bangladesh. *Id.* at 175.