

State Intervention into the Lives of Single Mothers and Their Children: Toward a Resolution of Maternal Autonomy and Children's Needs

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I. Introduction

Hester Prynne was condemned as an adulteress and forced to wear the scarlet letter "A"; a "mark of shame."¹ Times have changed since Nathaniel Hawthorne wrote his fictitious work about the Puritan code. Women are no longer sent to jail nor ostracized by their communities for bearing a child "out-of-wedlock." By 1960, five percent of all births were to single women.² Today, almost one-fourth of all births are to single women.³ This article explores the ramifications of the increase in nonmarital births, examines various judicial and legislative responses, analyzes several policy approaches to this social phenomena and proposes a system designed to include the interests of all those involved. Single mothers and their children present unique challenges to the social welfare system, the legal system and society as a whole. The challenge is not necessarily to find a solution, for that implies that there is a problem, and it is counterproductive to assume a prob-

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1. Nathaniel Hawthorne, *The Scarlet Letter* 50 (Running Press 1986) (1850).

Semantics, whether in a classic work or a law review article are of great significance. The language used to describe the child born to a mother who is not married to the biological father has gone through several phases. Though "bastardy" laws are still on the books in some states, the term is generally no longer used. "Illegitimate" has been replaced by the term "out-of-wedlock" and some scholars and authors are now using the term "nonmarital" child. The author uses the term nonmarital, though she is not completely comfortable with it. See Esther Wattenberg, *Establishing Paternity for Nonmarital Children*, Public Welfare, Summer 1987, at 9, 10.

2. Bureau of the Census, U.S. Dep't of Commerce, Statistical Abstract of the United States 1977 61 (98th ed. 1977).

3. U.S. Bureau of the Census, U.S. Dep't of Commerce, Statistical Abstract of the United States 1989, 66 (109th ed. 1989).

lem as the initial step.⁴ Rather, the challenge is to accept the reality that the all-American, nuclear family is *not* the norm. There is an urgent need to devise policies that support and strengthen all families, however they may be comprised.

Various factors explain the exponential increase in the number of nonmarital births. They include: a decrease in the stigma associated with nonmarital births, an increase in nonmarital conception, an increase in the age at marriage, and the large number of "baby boomers" passing through their teens and twenties.⁵

The decreasing stigmatization of women's behavior is a positive by-product of the passage of time. It is, nonetheless, true that the increasing number of births, as a result of this destigmatization, has been partially responsible for the dramatic and troubling increase in the number of women and children living in poverty. Indeed, the level of childhood poverty in the United States is deplorable, with twenty percent of all children living in extreme poverty.⁶ The statistics are even more shocking for nonmarital children, with fifty-eight percent of these children living in poverty.⁷ Women head the vast majority of these poverty-level households.⁸

No single factor is responsible for the impoverished status of so many of the households headed by single women. Interruption

4. If families headed by single women are regarded as "problems," then elimination of the problem would be the most obvious solution. Elimination of households headed by single women is, however, neither appropriate nor practical. Indeed, the household headed by a single woman is the fastest-growing family type. Paul Klauda, *Peek Shows Gains for State, Shifting Makeup of Metro Area*, *Minneapolis Star Tribune*, Apr. 19, 1990, at 1A, 8A, col. 2 (citing advance data from 1990 census report).

5. Ann Nichols-Casebolt, *Paternity Adjudication: In the Best Interests of the Out-of-Wedlock Child*, 67 *Child Welfare J.* 245, 248 (1988).

6. Arlene Saluter, Bureau of the Census, U.S. Dep't of Commerce, Current Population Reports, Series P-23, No. 163, *Changes in American Family Life 25* (1989). Twenty percent of *all* children in the United States are living in poverty. For black and Hispanic children, the poverty rates are even more startling: 45% of black children and 39% of Hispanic children are in poverty. *Id.* For children living in households headed by single women the poverty level is shocking. Forty-six percent of white children, 68% of black children, and 70% of Hispanic children who live in single female headed households are living in poverty. *Id.*

7. Victoria Schwartz Williams & Robert Williams, *Identifying Daddy: The Role of the Courts in Establishing Paternity*, 28 *The Judges' J.*, Summer 1989, at 41 (citing Bureau of the Census, U.S. Dep't of Commerce, Current Population Reports, Series P-23, No. 152, *Child Support and Alimony: 1985* (1987) [hereinafter *Census Report*]).

8. Almost 90% of all households headed by a single person are headed by women. Saluter, *supra* note 6, at 16. Forty-six percent of all households headed by women live in poverty. *Id.* at 24. For households headed by black or Hispanic women, the poverty rate is 60%. *Id.*

of education for child rearing, the lack of jobs with competitive wages,⁹ the lack of affordable day care,¹⁰ wage discrimination in the workplace¹¹ and the fact that the burden of child-rearing often falls entirely on the mothers, are all factors that contribute to this poverty. The reality is that most noncustodial fathers with dependent children do not contribute to the support of their children. According to the latest Bureau of the Census data *only eleven percent* of never-married mothers receive any child support payments.¹²

Policymakers must recognize the impact of this phenomena on the lives of women and children. We need nationwide policies and practices designed to mitigate and alleviate the burdens placed upon families headed by single women. It is critical that these policies be responsive and well-informed.

Just as there are many factors contributing to the challenge single mothers present, so are there numerous possible solutions. Undoubtedly, one of the most significant contributing factors is the lack of paternal involvement and support. While it is not possible to legislate emotional attachment, it is possible to enforce the financial duty that parents owe their children. Establishment of paternity is important because it is a necessary prerequisite for a support order.¹³ It is estimated that paternity is established in only twenty-five to thirty percent of all nonmarital births.¹⁴

Establishment of paternity confers benefits other than financial support upon the child. For instance, the child may gain access to an otherwise inaccessible medical history.¹⁵ Additionally,

9. Marian Wright Edelman, *Families in Peril* 74 (1987).

10. Michael Harrington, *The New American Poverty* 202 (1984).

11. Mary Corcoran, Greg Duncan & Martha Hill, *The Economic Fortunes of Women and Children: Lessons from the Panel Study of Income Dynamics*, in *Women and Poverty* 7, 9-14 (Barbara Gelpi ed. 1986).

12. Williams, *supra* note 7, at 41. Fewer than 18% of never-married mothers had an enforceable order for child support compared to 68% of divorced or separated mothers. Nichols-Casebolt, *supra* note 5, at 249. Having a child support order does not guarantee payment. Enforcement procedures are improving, but many fathers still do not pay the ordered support amount. The most recent Census Bureau study on alimony and support payments indicates that, of the 4.4 million women with an enforceable order for support, only 48% received the entire payment owed, 26% received partial payment and 26% received no support at all. Census Report, *supra* note 7, at 1.

13. Office of Child Support Enforcement, U.S. Dep't of Health and Human Services, *A Guide to Initiating a Paternity Consent Process* 6 (1989) [hereinafter *Initiating Paternity Consent*].

14. Williams, *supra* note 7, at 3; Wattenberg, *supra* note 1, at 10 (citing information from the Office of Child Support Enforcement, U.S. Dep't of Health and Human Services, Rockville, Maryland).

15. Wattenberg, *supra* note 1, at 10.

the child is entitled to Social Security benefits,¹⁶ veteran's¹⁷ and worker's compensation dependent benefits,¹⁸ possible inclusion in health insurance coverage,¹⁹ rights of inheritance and other survivor benefits²⁰ as well as psychological and social benefits.²¹

In most jurisdictions, if a child is born to a woman who is married, the child is presumed to be the child of the woman and her husband.²² If a child is born to a woman who is not married, there is no presumption of paternity. Procedures to establish the paternity of a nonmarital child vary from state to state. All states have a judicial procedure for establishing paternity, the overwhelming number of which are civil in nature.²³ In addition, many states allow for the establishment of paternity through administrative hearings or through voluntary acknowledgment.²⁴ Paternity also may be legally established by the subsequent marriage of the biological parents of a nonmarital child.²⁵

The establishment of paternity, however, is not a cure-all nor is it without serious negative aspects. Establishing paternity raises

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.*

20. Anne Poulin, *Illegitimacy and Family Privacy: A Note on Maternal Cooperation in Paternity Suits*, 70 Nw. U.L. Rev. 910, 920 (1976).

21. Wattenberg, *supra* note 1, at 10. The establishment of paternity is beneficial to others as well. Mothers of nonmarital children may receive monetary support. Fathers of nonmarital children also benefit in that they may be entitled to physical and legal custody and visitation rights. See generally Carol Donovan, *The Uniform Parentage Act and Nonmarital Motherhood by Choice*, 11 Rev. L. & Soc. Change 193, 204-07 (1982). In addition, the father of a nonmarital child who has acknowledged paternity must be given notice, and has the opportunity to request sole custody, in the event that the mother decides to terminate her parental rights and put the child up for adoption. *Id.* The grandparents of the child may also be entitled to visitation rights. Finally, society benefits by having more children who are supported by their natural parents, by having children with a stronger sense of identity and by sending a message that all parents have a duty towards their children. *Id.*

22. See, e.g., Unif. Parentage Act § 4, 9B U.L.A. 298-99 (1973).

23. See generally Williams, *supra* note 7, at 4. Though previously conducted in the criminal courts, most jurisdictions now conduct paternity adjudications through a civil process. See Note, *The Burden of Proof in a Paternity Action*, 25 J. Fam. L. 357, 357-58 (1986) (authored by Carol Browning). However, the proceedings have retained some elements of a criminal proceeding, such as the right to a trial by jury and the indigent defendant's right to counsel. See Williams, *supra* note 7, at 4. The federal Family Support Act of 1988 requires that all states implement a simple civil process for voluntary acknowledgment of paternity and a civil procedure for the adjudication of paternity in contested cases. See *infra* notes 134-37 and accompanying text.

24. See generally Initiating Paternity Consent, *supra* note 13. These acknowledgements are known as a Declaration of Parentage, Acknowledgment of Paternity or Affidavit of Legitimation. See, e.g., *id.* at 53, 71-72.

25. Unif. Parentage Act § 4, 9B U.L.A. 298-99 (1973).

significant questions about family autonomy and an individual's right to equal protection.²⁶ In order to establish paternity, the government must intrude into highly protected areas of life.²⁷ The question that must be addressed is: to what extent is that intrusion desired? The values that shape the answer to this question also play a primary role in other decisions that balance maternal and child rights. In our increasingly complex world, these values are gaining in import and impact.

This article focuses on the allowable extent of intrusion. Three different levels of intervention, from the most to the least intrusive, will be explored. The first part of the article examines the system as it currently operates.²⁸ The second part focuses on a model characterized by high levels of government intervention.²⁹ The third part examines a model characterized by low levels of government intervention.³⁰ After evaluating the strengths and weaknesses of each model, a new alternative will be presented and discussed.³¹ This new model proposes a radical restructuring of commonly held notions of both familial life and public assistance. Such restructuring is necessary in order to eliminate the crisis facing so many of our nation's children and their families.

II. Three Models of Intervention

A. Model One: The Current Situation

At present, government intervention into the lives of single mothers and their children for the purpose of establishing paternity is predicated upon that family's application for and receipt of public assistance benefits through the Aid to Families with Dependent Children (AFDC) program. The government's interest in a child's paternity is aroused only if a single mother applies for welfare. If a single mother does not apply for AFDC, the government remains essentially disinterested and uninvolved. Non-public assistance mothers also may avail themselves of the services offered by the local Child Support Enforcement offices,³² but gov-

26. See *infra* notes 138-214 and accompanying text. See also Donovan, *supra* note 21; Poulin, *supra* note 20.

27. See *infra* notes 161-71 and accompanying text.

28. See *infra* notes 32-224 and accompanying text.

29. See *infra* notes 225-53 and accompanying text.

30. See *infra* notes 254-61 and accompanying text.

31. See *infra* notes 262-70 and accompanying text.

32. The federal Child Support Enforcement Program, Title IV-D of the Social Services Act, was created by Congress in 1975. Pub. L. No. 93-647, § 101(a), 88 Stat. 2337, 2351-60 (1975) (codified as amended at 42 U.S.C.A. § 651 (1988)). See *infra* notes 102-21 and accompanying text. The Program's purpose is the enforcement and collection of child support. Non-AFDC mothers are provided assistance in en-

ernment intervention in those cases occurs only at the mother's request and initiation. The federal government has recognized, to a certain degree, the importance of paternity adjudication. Since 1975, it has conditioned receipt of AFDC benefits upon maternal cooperation in establishing the paternity of all nonmarital children.³³

1. History of the AFDC Program

- a. *Legislative History of the Aid to Families with Dependent Children Program*

The AFDC program was created in 1935 as part of the Social Security Act.³⁴ Originally known as Aid to Dependent Children (ADC), the Act was intended primarily to aid widows and their children.³⁵ The rationale underlying the Act was that widows and their children fell into poverty through no fault of their own, but rather due to some cruel fate that took away their husbands and fathers.³⁶ They were the so-called "deserving poor."³⁷

The current AFDC program is a federal program which provides matching funds to the states.³⁸ Participation by the states is voluntary, but if a state chooses to participate, it must adhere to the regulations set forth by the federal government.³⁹ This type of

forcing and collecting support on the theory that, without the income from the child support, they might be forced to rely upon public assistance. Office of Child Support Enforcement, U.S. Dep't of Health and Human Services, *Essentials for Attorneys in Child Support Enforcement* xx-xxi (Mark Reynolds ed. 1986) [hereinafter *Essentials for Attorneys*].

33. Child Support Enforcement Act of 1975, Pub. L. No. 93-647, § 101(a), 88 Stat. 2337, 2351-60 (1975) (codified as amended at 42 U.S.C.A. § 651 (1988)). See *infra* notes 102-21 and accompanying text.

34. Social Security Act of 1935, Pub. L. No. 74-271, 49 Stat. 531 (1935).

35. See William Simon, *Rights and Redistribution in the Welfare System*, 38 Stan. L. Rev. 1431, 1492 (1986).

36. *Id.*

37. *Id.* Women who were divorced or separated and unmarried mothers, especially unmarried black mothers, were considered inherently unworthy. This prejudiced position neither began nor ended in 1935. The ADC program was modeled, in many respects, after state plans to provide aid and pensions to mothers with dependent children. A study conducted by the Children's Bureau in the early 1930s revealed that 82% of the aid given to mothers went to widows and that 96% of all recipients were white. Ruth Sidel, *Women and Children Last: The Plight of Poor Women in Affluent America* ch. 4 (1986). See also Winifred Bell, *Aid to Dependent Children*, 1-56 (1965).

38. Diann Dawson, *The Evolution of a Federal Family Law Policy Under Title IV-A of the Social Security Act—The Aid to Families with Dependent Children Program*, 36 Cath. U.L. Rev. 197, 197-98 (1986).

39. All fifty states as well as the District of Columbia, Guam, Puerto Rico and the Virgin Islands, currently participate in the AFDC program. See Office of Family Assistance, U.S. Dep't of Health and Human Services, *Characteristics of State*

financing design is known as "cooperative federalism."⁴⁰ The program's legislative history reveals that Congress did not intend strong federal regulation and intervention.⁴¹ Rather, Congress left the specific details of implementation and operation to the states and left with the states the primary authority to legislate and regulate in the area of family law.⁴² The initial federal eligibility requirement was originally set forth by the Social Security Act of 1935. The Act specified only that the child had to be deprived of parental support or care because of death, continued absence from the home, or physical or mental incapacity of a parent.⁴³ In 1939, Congress added the requirement that the child be "needy."⁴⁴ Subsequent federal enactments required recipients to meet this two-pronged test of need and dependency in order to be eligible for benefits.

The first federal intervention into the area of child support enforcement came in 1950 with the Notification of Law Enforcement Officials (NOLEO) amendment to the Social Security Act.⁴⁵ This provision was directed at state welfare agencies that were providing AFDC to children who had been abandoned or deserted by a parent.⁴⁶ NOLEO required such agencies to notify the appropriate law enforcement officials of the abandonment.⁴⁷

Federal efforts to enforce child support continued. In 1965, Congress enacted a law allowing the use of Social Security records to locate absent parents.⁴⁸ This was followed by the 1967 Social Security Amendments⁴⁹ which required that each state establish a single agency for the purpose of determining paternity and collect-

Plans for Aid to Families with Dependent Children Under Title IV-A of the Social Security Act (1989 ed.).

40. *King v. Smith*, 392 U.S. 309, 316 (1967).

41. See Dawson, *supra* note 38, at 197.

42. *Id.* at 197-98. The enumerated powers clause in art. I, § 8, cl. 18 of the Constitution, restricts congressional action to those subject areas actually specified or enumerated in the Constitution. Those subject areas include such things as war and defense, interstate and foreign commerce, and the postal system. U.S. Const. art. I, § 8. Congress, however, has indirectly used its budgetary and appropriations powers to allow federal intervention and legislation in the family law area.

43. Social Security Act, Pub. L. No. 74-271, ch. 531, § 406, 49 Stat. 620, 629 (1935) (codified as amended at 42 U.S.C.A. § 606 (1988)).

44. Social Security Act Amendments of 1939, ch. 666, § 403, 53 Stat. 1360, 1380 (1939) (codified as amended at 42 U.S.C. § 606 (1982)).

45. Act of Aug. 28, 1950, ch. 809, § 321(b)(10), 64 Stat. 477, 550 (1950) (codified as amended at 42 U.S.C.A. § 602(a)(11) (1988)).

46. *Id.*

47. *Id.*

48. Act of July 30, 1965, Pub. L. No. 89-97, § 340, 79 Stat. 286, 411 (1965) (codified as amended at 42 U.S.C.A. § 1306 (1988)).

49. Act of Jan. 2, 1968, Pub. L. No. 90-248, § 211, 81 Stat. 821, 896-97 (1968) (codified as amended at 42 U.S.C.A. § 602(a) (1988)).

ing support payments from deserting parents.⁵⁰ The 1967 amendments also gave the individual states access to Internal Revenue Service records by court order.⁵¹ These additions to the Social Security Act suggest a subtle but increasing role for the federal government in the family law arena. The cooperative federalism financing scheme ensured a captive audience, and the escalating expenditures, necessitated by the increasing numbers of needy and dependent children, impelled federal involvement.

b. Judicial Interpretation of the Social Security Act's Provisions Regarding Aid to Families with Dependent Children

Several states, of their own volition, raised the standards of eligibility for AFDC benefits.⁵² In essence, these states sought to condition AFDC benefits on maternal cooperation in naming the father of the nonmarital child and initiating a paternity suit.⁵³ If the mothers refused, their benefits, and/or their children's benefits were subject to termination.⁵⁴

Early case law concerning compelled maternal cooperation indicates that it was not possible to deny benefits to an uncooperative mother because such measures added to the eligibility require-

50. *Id.*; 1974 U.S. Cong. Code and Admin. News 8148.

51. Act of Jan. 2, 1968, Pub. L. No. 90-248, § 211(b), 81 Stat. 821, 897 (1968) (repealed by Act of Jan. 4, 1975, Pub. L. No. 93-647, § 101(c)(8), (f), 88 Stat. 2360, 2361 (1975)). The access to governmental records to locate absent parents is now set forth in 42 U.S.C.A. § 653 (1988), and information may be requested from records maintained by "any of the departments, agencies, or instrumentalities of the United States or of any State." *Id.* at § 653(e).

52. These states included West Virginia, Illinois, New York, Connecticut, Oregon and California.

53. See, e.g., N.Y. Soc. Serv. Law § 132-a(3) (McKinney 1983) and N.Y. Comp. Codes R. and Regs., tit. 18, § 351.2(e)(2)(iv) (1988).

The regulation read, in pertinent part:

When an applicant for or recipient of public assistance willfully . . . refuses to cooperate by furnishing information or aid to the local child support enforcement unit in . . . establishing paternity, the social services official shall not provide . . . assistance or care for such applicant or recipient for so long as such cooperation is withheld.

Id.

54. Very few of the cases refer to the reasons given by mothers of nonmarital children for refusing to cooperate with the government's efforts to establish the paternity of their children. According to Welfare Department personnel in Connecticut in the early 1970s, the greatest deterrent is "fear of being beaten up by the identified father[s]." *Child Support and the Work Bonus: Hearings on S. 1842 and S. 2081 Before the Senate Comm. on Finance*, 93d Cong., 1st Sess. 182 (1973) [hereinafter *Child Support Hearing*] (statement of Elizabeth Spalding, National Task Force on Marriage and Family Relations and Divorce, National Organization for Women).

ments set by Congress.⁵⁵ The issue of maternal cooperation was litigated in the late 1960s and continued into the 1970s.⁵⁶ In *Doe v. Shapiro*,⁵⁷ the United States District Court for the District of Connecticut invalidated a state welfare department regulation which terminated welfare payments to nonmarital children if the mother refused to disclose the father's name.⁵⁸ The court invalidated the regulation because it created an additional eligibility requirement for receipt of AFDC benefits.⁵⁹ The court stated:

Under the Social Security Act, a child is eligible for and entitled to AFDC assistance if he is both "needy" and "dependent." A child is "needy" if he "does not have the income and resources sufficient to assure economic security" when measured against standards of need established by the individual states. . . . A child is "dependent" if a parent is continually absent from the home. . . . These are the *only two eligibility requirements* which Congress has imposed⁶⁰

The court invalidated the Connecticut regulation because it conflicted with the governing federal statute. Thus, the court did not reach the constitutional issues the plaintiffs raised. The plaintiffs had challenged the regulation on fourteenth amendment self-incrimination grounds.⁶¹

The Connecticut Welfare Department amended the regulation to terminate only the benefits of the mother and not those of the child in the event the mother refused to cooperate in establishing the paternity of the beneficiary child.⁶² This amendment also was invalidated by the court as "[having] the same vice as the original."⁶³ Though the regulation was directed toward the mother, the court recognized that the deleterious impact also would fall upon the child.⁶⁴

Similar regulations requiring maternal cooperation as a condition for the receipt of public assistance were challenged in other

55. See, e.g., *Doe v. Shapiro*, 302 F. Supp. 761 (D. Conn. 1969), *appeal dismissed*, 396 U.S. 488, *reh'g denied*, 397 U.S. 970 (1970); *Doe v. Swank*, 332 F. Supp. 61 (N.D. Ill.), *aff'd sub. nom.*, *Weaver v. Doe*, 404 U.S. 987 (1971); *Doe v. Lavine*, 347 F. Supp. 357 (S.D.N.Y. 1972).

56. It is interesting to note that it was not until the mid-1960s, with the advent of federally funded legal aid to the poor, that the AFDC program became the subject of litigation. Barbara Sard, *The Role of the Courts in Welfare Reform*, in *Women as Single Parents* 169 (Elizabeth Mulroy ed. 1988).

57. *Doe v. Shapiro*, 302 F. Supp. 761 (D. Conn. 1969).

58. *Id.* at 767-68.

59. *Id.* See also *supra* text accompanying notes 43-44.

60. 302 F. Supp. at 764 (emphasis added) (quoting 42 U.S.C. § 606(a)).

61. *Id.* at 762-63.

62. See *Doe v. Harder*, 310 F. Supp. 302, 303 (D. Conn. 1969), *appeal dismissed*, 399 U.S. 902 (1970).

63. 310 F. Supp. at 303.

64. *Id.*

states.⁶⁵ In *Doe v. Swank*,⁶⁶ the plaintiff challenged an Illinois regulation that denied aid to a nonmarital child if the mother refused to cooperate in naming the father. The regulation mandated that, if a mother wanted public assistance for a child less than two years of age whose paternity had not been established, the mother was required to cooperate with the state's attorney in initiating a paternity action on the child's behalf.⁶⁷ If the mother refused to cooperate, both the mother and the child were ineligible for aid.⁶⁸ The plaintiff in *Doe v. Swank* challenged this regulatory provision, asserting that it was "inimical to rights secured by the fifth, ninth and fourteenth amendments."⁶⁹ The court, citing the Connecticut case *Doe v. Shapiro*,⁷⁰ reiterated that under AFDC the eligibility for aid requirements are met if the child is both needy and dependent.⁷¹ No other prerequisite was authorized. The court in *Doe v. Swank* declared the Illinois regulatory provision void on statutory grounds and, as a result, never reached the constitutional issues raised in the claim.⁷² The United States Supreme Court affirmed the decision.⁷³

65. See, e.g., *Meyers v. Juras*, 327 F. Supp. 759 (D. Or. 1971); *Taylor v. Martin*, 330 F. Supp. 85 (N.D. Cal. 1971), *Doe v. Swank*, 332 F. Supp. 61 (N.D. Ill. 1971).

66. 332 F. Supp. 61 (N.D. Ill. 1971).

67. *Id.* at 62. The Illinois Department of Public Categorical Assistance Manual stated:

As a condition of initial or continuing eligibility the Illinois Public Aid Code provides the parent or other person having custody of a child on whose behalf he is applying for or receiving [public assistance] must request the Attorney General (State's Attorney for Cook County) file action for enforcement of such remedies as the law provides for fulfillment on the support obligation of the absent parent of such child. Absent parent includes the legal parent or father of a child born out of wedlock, whether or not his paternity has been legally established.

Illinois Department of Public Categorical Assistance Manual § 1259.1, quoted in *Doe v. Swank*, 332 F. Supp. 61, 62 (N.D. Ill. 1971).

68. *Id.*; see 332 F. Supp. at 62.

69. *Id.* at 62. The fifth amendment states that "no person . . . shall be compelled . . . to be a witness against himself." U.S. Const. amend V. The ninth amendment states that "the enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." U.S. Const. amend. IX. The fourteenth amendment states that "no State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 2. Note that the Constitution does not expressly assert that there is a right to privacy. This penumbral right was firmly recognized in *Griswold v. Connecticut*, 381 U.S. 479 (1965).

70. 302 F. Supp. 761 (D. Conn. 1969).

71. *Doe v. Swank*, 332 F. Supp. at 63.

72. *Id.*

73. *Weaver v. Doe*, 404 U.S. 987 (1971). See also *Doe v. Flowers*, 364 F. Supp. 953 (N.D. W. Va. 1973), *aff'd.*, 416 U.S. 922 (1974) (West Virginia statute that required maternal cooperation in naming the father of child born out of wedlock as a condition for receipt of AFDC benefits declared invalid as it imposed additional eligibility requirements that were contrary to the wishes of Congress).

Several years later, in *Doe v. Norton*,⁷⁴ the Connecticut courts had yet another chance to consider the constitutionality of compelling mothers to disclose the names of the putative fathers of their nonmarital children. Women who had nonmarital children brought a class action against the Commissioner of Welfare of the State of Connecticut.⁷⁵ The Connecticut legislature was undaunted by judicial thwarting of its attempts to require women to reveal the names of the fathers of their nonmarital children⁷⁶ and had passed another statute mandating such a disclosure.⁷⁷ This statute made refusing to divulge the name of the father punishable by up to one year in prison and a \$200 fine.⁷⁸ The plaintiffs asserted that the statute conflicted with the provisions of the Social Security Act in that incarceration of an unwed mother would not be in the best interests of the dependent child.⁷⁹ They also claimed that the statute violated their fundamental rights to due process, equal protection, and privacy⁸⁰ and that the classification of unwed mothers should be subject to strict judicial scrutiny.⁸¹

The *Norton* court divided the members of the class action into two separate and distinct classes: unwed mothers and nonmarital children.⁸² The court rationalized this division, saying that "some of the interests which the mothers urge relating to the subject matter of this action are neither typical of nor congruent with the interests of their children, but actually conflict with them in several respects."⁸³ The court not only justified dividing the class, but also upheld the further separation of the mothers from the children as a result of the incarceration, declaring, "[w]hile the incarceration of a contemptuous mother may not always be in her child's best interest, this does not establish any irreconcilable con-

74. *Doe v. Norton*, 356 F. Supp. 202 (D. Conn.), *op. supp.* 365 F. Supp. 65 (D. Conn. 1973), *prob. juris. noted*, 415 U.S. 912 (1974), *vacated*, *Roe v. Norton*, 422 U.S. 391 (1975), *on remand*, *Doe v. Maher*, 414 F. Supp. 1368 (D. Conn. 1976), *vacated*, *Maier v. Doe*, 432 U.S. 526 (1977).

75. *Doe v. Norton*, 356 F. Supp. 202, 203 (D. Conn. 1973).

76. *See supra* text accompanying notes 57-64.

77. Conn. Gen. Stat. § 52-440(b) (1972) (transferred to 46b-169 (1979)).

78. *Id.*; *Doe v. Norton*, 356 F. Supp. 202, 203 (D. Conn. 1973).

79. *Doe v. Norton*, 365 F. Supp. at 71. Both the plaintiffs and the court took the position that the United States Supreme Court's ruling in *King v. Smith*, 392 U.S. 309 (1968), was the guiding principle. In *King*, the Supreme Court stated that, with regard to dependent children, "[the] protection of such children is the paramount goal of AFDC." *Doe v. Norton*, 365 F. Supp. at 71 (quoting *King*, 342 U.S. at 325).

80. *Id.* at 69.

81. *Id.* at 78.

82. *Id.* at 69. The court undertook this division on its own motion. *Id.*

83. *Id.*

flict between the two acts."⁸⁴

In all the earlier cases, the courts had held that AFDC benefits could not be denied to either a mother or her child due to the mother's refusal to establish paternity.⁸⁵ The court in *Doe v. Norton* decided otherwise. The *Norton* court relied, in part, on a regulation adopted by the Department of Health, Education and Welfare (HEW) in 1973 which affirmed that a *child* may not be denied benefits, but which allowed denial of benefits to the mother or other caretaker who refused to cooperate in establishing paternity.⁸⁶ In addition, the court was not convinced that the plaintiffs' constitutional rights had been violated.⁸⁷ The court stated: "the legal semantics in which they have dressed their particular views about morality, propriety, and psychology do not furnish any constitutional or statutory basis for striking down Connecticut's statute."⁸⁸ Before the Supreme Court could hear the *Norton* appeal in September of 1975,⁸⁹ a new amendment was added to the Social Security Act's provision regarding Aid to Families with Dependent Children. This new federal amendment required maternal cooperation in establishing the paternity of nonmarital children as a condition for eligibility to receive AFDC.⁹⁰ The United States

84. *Id.* at 73. The two Acts referred to are the Social Security Act and the Connecticut Statute. The AFDC Act begins with a statement of purpose which reads:

For the purpose of encouraging the care of dependent children in their own homes or in the homes of relatives by enabling each State to furnish financial assistance and rehabilitation and other services, as far as practicable under the conditions in such State, to needy dependent children and the parents or relatives with whom they are living to help maintain and strengthen family life and to help such parents or relatives to attain or retain capability for the maximum self-support and personal independence consistent with the maintenance of continuing parental care and protection

42 U.S.C.A. § 601 (1988). The court did not detail how this purpose could be facilitated while the mother was incarcerated.

85. See cases cited *supra* note 65.

86. *Doe v. Norton*, 365 F. Supp. at 72 n.8 (citing 45 C.F.R. § 223.90(b)(4) (1973)).

87. *Id.* at 69.

88. *Id.*

89. *Roe v. Norton*, 422 U.S. 391 (1975) (vacating the opinion of the district court).

90. The amendment to the Social Security Act, known as the Child Support Amendment, stated that:

A State plan for aid and services to needy families with children must . . . (26) provide that, as a condition of eligibility for aid, each applicant or recipient will be required . . . (B) to cooperate with the State (i) in establishing the paternity of a child born out of wedlock with respect to whom aid is claimed, and (ii) in obtaining support payments for such applicant and for a child with respect to whom such aid is claimed, or in obtaining any other payments or property due such applicant or such child . . . and that, if the relative with whom a child is living is found to be ineligible because of failure to comply with the requirements of subparagraphs (A) and (B) of this paragraph, any aid

Supreme Court remanded *Norton* to the District Court to reconsider the Connecticut statute in light of the new federal amendment.⁹¹

c. *The Child Support Amendments of 1975 to the Social Security Act and Maternal Cooperation*

The Child Support Amendment of 1975 was part of the larger Child Support Enforcement Act.⁹² Despite reservations about the federal government's heavy involvement in what was traditionally state domain, President Ford signed the bill into law on January 4, 1975.⁹³

The Child Support Amendment was more far-reaching than anything that the federal government had previously adopted. Title IV-D, the part of the AFDC statute dealing with child support and establishment of paternity,⁹⁴ requires each participating state to establish a separate agency whose sole purpose is to administer the Child Support Enforcement Act.⁹⁵ The Child Support Amend-

for which such child is eligible will be provided in the form of protective payments as described in section [606(b)(2) of this title] Social Services Amendments of 1974, Pub. L. No. 93-647, § 101(c)(5), 88 Stat. 2337, 2359-60 (1975) (codified as amended at 42 U.S.C.A. § 602 (1988)).

91. *Roe v. Norton*, 422 U.S. 391, 393 (1975).

92. The Child Support Enforcement Act, Pub. L. No. 93-647, 88 Stat. 2337 (1975).

93. Margaret Malone, Congressional Research Service, Lib. Cong. Rep. No. 84-796 EPW, *The Child Support Enforcement Amendments of 1984* at 2 (Oct. 25, 1984) (noting that President Ford "observed that certain provisions 'go too far by injecting the Federal Government into domestic relations,'" and that there were "serious privacy and administrative issues . . ."). President Ford's reluctance is intriguing since in 1949, as a young representative, he introduced the first legislation that dealt with the absent parent's failure to provide support for his or her dependent children. See 121 Cong. Rec. 26,542 (1975) (statement of Sen. Sam Nunn). His bill, known as the "Run-Away Pappy Bill," allowed for enforcement of support orders in the federal courts and made it a crime for persons to travel across state lines for the purpose of avoiding support obligations. *Id.* See also H.R. 4580, 81st Cong., 1st Sess., 95 Cong. Rec. 5927 (1949). Ford introduced similar bills for the next eight years but with no success. *Id.* 121 Cong. Rec., *supra*. He introduced a child support enforcement bill as late as 1973. H.R. 2309, 93d Cong., 1st Sess., 119 Cong. Rec. 1639 (1973). When he introduced his bill he stated:

[This bill] would make child support orders enforceable in Federal courts. It would bring Federal authority to bear on the problem of nonsupport by husbands and fathers who shirk their parental responsibilities.

Passage of my bill will give legal sanction to the moral and social obligations every husband has to take care of his family. 119 Cong. Rec. 1618 (1973) (statement of Rep. Ford). He clearly was in favor of legislation that would provide federal power to enforce child support orders. See *id.*

94. See 42 U.S.C.A. §§ 661-666 (1980).

95. *Id.* at § 652. These agencies are called, appropriately enough, "IV-D agencies" and are governed by certain statutory requirements set forth in the Child Support Enforcement Act.

ment also stipulated that any person receiving AFDC benefits must assign to the IV-D agency all rights to support that they have from another person.⁹⁶

The Child Support Enforcement Act was born of a sentiment among federal legislators that the individual states were not adequately collecting child support payments. This inadequacy was especially troubling in light of the 1967 amendments which allowed the states great discretion and independence.⁹⁷ The Act's legislative history reflects a strong, recurrent theme of perceived fiscal crisis coupled with a breakdown in the American family. The perception among legislators was that the welfare system was costing the federal government more each year; that it was subject to fraud and abuse;⁹⁸ that it provided improper incentives for "improper" behavior;⁹⁹ and that it needed substantial modification. The remarks of Nebraska Senator Curtis regarding AFDC, the most suspect of all welfare programs, illustrate this perception:

This program [AFDC], the Nation's largest cash assistance program, has grown alarmingly in recent years

. . . .

[M]any of these are truly needy families, caught in a spiral of economic difficulty and dependency through no fault of their own.

Careful and detailed analysis of the AFDC program, however, reveals there are many defects in the Social Security Act itself which cause high-income people to be eligible for welfare, which have created loopholes enabling certain individuals to manipulate the system, and which permit opportunities for fraud and laxity¹⁰⁰

The governmental interest in establishing the paternity of nonmarital children increases as the number of children receiving AFDC increases. In cases where paternity can be established, the burden of support shifts from the government to the father. The growing concern about rising AFDC expenditures is reflected in the increasing intervention of the federal government. The series

96. Pub. L. No. 93-647, § 101(c)(5), 88 Stat. 2337, 2359 (codified as amended at 42 U.S.C.A. § 602(a)(26)(A) (1988)).

97. *See supra* text accompanying notes 50-51.

98. *See* 121 Cong. Rec. 7,696 (1975) (statement of Rep. Edwards from Alabama) ("AFDC is the Nation's costliest welfare program, as well as the program most subject to abuse.").

99. Legislators believed the provision of AFDC benefits actually motivated young single women to bear children out of wedlock. *See, e.g.*, 121 Cong. Rec. 14,394 (1975) (statement of Rep. Daniel from Virginia speaking on the need for national welfare reform) ("[AFDC] also encourages single women and unmarried couples to have children by awarding large financial bonuses for the first child, with lesser inducements for additional children.").

100. 121 Cong. Rec. 13,942 (1975) (statement of Sen. Curtis.)

of amendments to the Social Security Act since its inception demonstrates the decline of federalism, at least as applied to the implementation of AFDC. Concurrent with decreasing federalism is a decline in maternal discretion. As the federal government mandates states' behavior and procedures, the choices available to beneficiary-mothers decreases. The rationales underlying the Child Support Amendment of 1975 manifest this decline.

The balance between the discretion to be afforded the single mother in raising her child and the interests of the state has seldom been fully considered. The issue of mandatory establishment of paternity and maternal cooperation did arise during congressional deliberation both before and after passage of the Child Support amendments.¹⁰¹ In 1973, Congress held hearings before the Senate Committee on Finance to consider child support and the work bonus.¹⁰² The bill under consideration contained provisions for mandatory establishment of paternity as a precondition for AFDC. Natalie Heineman, president of the board of directors of the Child Welfare League objected to this requirement.¹⁰³ Ms. Heineman expressed general support for the bill, but stated that there were several provisions that caused grave concern.¹⁰⁴ Regarding mandatory establishment of paternity and the stopping of payments to recalcitrant mothers, she noted:

If a mother, for whatever reason, is considered not to be cooperating in this manner (and in some instances she may have good reasons which may be in the child's best interest) she will not be eligible for AFDC and the child will be deprived of assistance. We do not believe this is sound policy.¹⁰⁵

Heineman further stated that most mothers cooperate when given notification and information regarding their rights.¹⁰⁶ Under the provisions of the bill, mandatory establishment of paternity was imposed only upon children receiving AFDC. In non-AFDC cases, a mother of a nonmarital child could decide to establish paternity if, in her judgment, it was in her or her child's best interests. Ms. Heineman stated that before the state forces establishment of paternity for AFDC families, there should be some avenue whereby this same discretion could be employed.¹⁰⁷

Senator Curtis asked Ms. Heineman why she was "opposed to

101. See, e.g., *supra* note 94.

102. Child Support Hearing, *supra* note 54.

103. *Id.* at 118, 119-21 (statement of Natalie Heineman).

104. *Id.* at 119.

105. *Id.* at 120.

106. *Id.*

107. *Id.*

requiring fathers to support their own children?"¹⁰⁸ She explained that that was not her position. Later testimony from Jean Rubin, also from the Child Welfare League, suggested that there were instances in which the father is "abusive, alcoholic, mentally distraught, where it would be dangerous to have the father around"¹⁰⁹ In those instances, Ms. Rubin said, "there should be some protection left as to whether it is in the best interest of the child to have the father involved."¹¹⁰ The committee chairperson, Senator Long, replied:

[O]ur proposal in that situation would be simply to say that we will pay the mother welfare, but the father has to settle with us, and we want to know who he is. . . . And if he wants to wage war on somebody, let him wage war on the U.S. Government, not on the child or on the mother. We are willing to defend ourselves from alcoholic or brutal fathers, but we do think that he ought to be made to make a contribution, and that is why we think he ought to deal with the Government and not the mother. She is not going to get any help from him directly—about the most she is likely to get is a good beating out of it, and we do not want that to happen.¹¹¹

The legislation that ultimately passed as Title IV-D contained the provision for mandatory establishment of paternity. Within several months, new bills were proposed to amend the recently amended Social Security Act.¹¹² The House of Representatives approved legislation that retained the establishment of paternity, but added, "unless . . . it is against the best interests of the child to do so."¹¹³ This amendment, notably, did not pass the House without debate. One of the Representatives was quite vocal in his opposition. He thought it unfair that the United States' taxpayers were getting "socked" because "professional welfarists [were claiming] blanket amnesty" and refusing to cooperate in establishing paternity.¹¹⁴ He said that the provision considering the best interests of the child appeared to be a "wide-open loophole."¹¹⁵ Representative Fraser, from Minnesota, supported the amendments.¹¹⁶ He noted that the HEW regulations that had been developed to implement the Child Support Enforcement Program allowed for an exception to mandatory cooperation only in instances of forcible rape

108. *Id.* at 122.

109. *Id.* at 124 (statement of Jean Rubin).

110. *Id.*

111. *Id.*

112. See, e.g., *supra* note 90 and accompanying text.

113. H.R. 8598, 94th Cong., 1st Sess., 121 Cong. Rec. 23,695, 23,696 (1975).

114. 121 Cong. Rec. 23,698 (statement of Rep. Bauman).

115. *Id.*

116. *Id.* (statement of Rep. Fraser). Donald Fraser is currently the Mayor of Minneapolis, Minnesota.

and incest.¹¹⁷ The HEW regulations that were eventually codified stated that:

The IV-D agency need not attempt to establish paternity in any case involving incest or forcible rape, or in any case in which legal proceedings for adoption are pending, if, in the opinion of the IV-D agency, it would not be in the best interests of the child to establish paternity.¹¹⁸

The regulations designate seven circumstances as acceptable exceptions for refusal to cooperate.¹¹⁹ These include when the child is the result of rape, incest, or adoption, or where physical harm to the child or the mother is likely to result if the mother were to cooperate, or where there is significant risk of emotional harm to either the child or the mother.¹²⁰ Several years after the implementation of this regulation, sixty-six percent of the exceptions were due to the threat of physical harm to the parent or caretaker, or to the child.¹²¹

d. Post-1975 Changes in the AFDC Program

Most of the changes to the AFDC program since 1975 have strengthened the involvement of the federal government and increased the expectations of the individual states. The driving force behind these changes is money. Policymakers are concerned about both the inadequate financial status of single mothers and the inadequate funds available to support the AFDC program.

By the early 1980s, it had become increasingly apparent that the increase in the number of single households headed by women meant poverty for millions of women and children. The most significant rate of increase of single-parent households has been among never-married mothers.¹²² The increase in households headed by women who never married was 377% between 1970 and 1983.¹²³ In 1981, approximately four million of the eight million women who were single heads of households were entitled to receive child support payments from the fathers of their children.¹²⁴ Only forty-seven percent of these women received the full amount of child support and twenty-eight percent received nothing at

117. *Id.* See 45 C.F.R. § 232.43 (1990).

118. 45 C.F.R. § 303.5(b) (1990).

119. 45 C.F.R. § 232.43 (1990).

120. *Id.* These are known as the "good cause" exceptions. See also Ruthellen Mulberg, AFDC: Good Cause Claims for Refusing to Cooperate in Establishing Paternity on Securing Child Support, Social Security Bulletin, May 1983, at 7.

121. *Id.*

122. *Id.*

123. Essentials for Attorneys, *supra* note 32, at xx.

124. Malone, *supra* note 93, at 4.

all.¹²⁵ Taxpayers ended up paying the money owed by the men who were not supporting their children.

In 1984, Congress enacted major legislation designed to amend the Child Support Enforcement Act¹²⁶ and "bring the absent parent back into involvement with the financial support of their children."¹²⁷ The 1984 amendments further enlarged the scope of federal involvement in enforcing child support. The amendments required mandatory income withholding,¹²⁸ required the Internal Revenue Service to withhold federal tax refunds from persons who were in arrears in their child support payments,¹²⁹ and required each state to set up expedited procedures for obtaining and enforcing child support with the option of using these proceedings for adjudication of paternity.¹³⁰ The amendments also extended the statute of limitations for establishing paternity to eighteen years. Thus a paternity suit could be brought against a putative father at any time up until the "child" was eighteen years of age.¹³¹

President Reagan commanded a study of the welfare system in his 1986 State of the Union Address.¹³² Legislators and policy-makers soon realized that the 1984 amendments did not sufficiently remedy the problems for needy children and further amended the Child Support Enforcement Program. Senator Lloyd Bentsen, the chairperson of the Senate Committee on Finance, introduced a hearing on the reform of welfare and the Child Support Enforcement System by saying:

At a time when the stock markets are booming and millions of Americans are prospering, there is also a deeply troubling undercurrent in our society. One-quarter of our children live with a single parent. Twenty percent of the babies in America are born to unwed mothers. In an ocean of prosperity, one-fifth of our children live on barren islands of poverty. The number of children receiving Aid to Families with Dependent Children has more than tripled over the past generation. . . . We are looking for answers that will help us strengthen fami-

125. *Id.*

126. Child Support Enforcement Amendments of 1984, Pub. L. No. 98-378, 98 Stat. 1305 (1984) (codified as amended in scattered sections of 42 U.S.C.).

127. 130 Cong. Rec. E1234 (1984) (extension of statement of Sen. Simpson).

128. Pub. L. No. 98-378, § 3(b), 98 Stat. at 1306 (codified at 42 U.S.C.A. § 666(a)(1) (1988)).

129. *Id.* at § 11(d), 21(a)-(c), 98 Stat. at 1318, 1322-24, (codified at 42 U.S.C.A. § 664(a)(2)(A) (1988)).

130. *Id.* at § 3(g), 98 Stat. at 1306 (codified at 42 U.S.C.A. § 666(c) (1988)).

131. *Id.* at § 3(b), 98 Stat. at 1306 (codified at 42 U.S.C.A. 666(a)(5) (1988)).

132. Carmen Solomon, Congressional Research Service, Lib. Cong. Rep. No. 88-702 EPW, *The Family Support Act of 1988: How it Changes the Aid to Families with Dependent Children (AFDC) and Child Support Enforcement Programs 1* (Nov. 7, 1988).

lies, build a more stable social order, and provide elements of opportunity for millions of Americans.¹³³

To alleviate the poverty of households headed by single women and the concomitant burden their care imposes on the taxpayers, Congress drafted the Family Support Act of 1988.¹³⁴ The purpose of the Act was to revise the AFDC program to emphasize work, child support, and family benefits in an effort to avoid long-term dependence on welfare.¹³⁵ The Act also strengthened governmental involvement in establishing paternity by increasing both the federal assistance to the states and the standard for the number of paternities that must be established each year.¹³⁶ The arguments in favor of the 1988 Act were remarkably similar to the arguments for the earlier Acts. Governor Michael Castle, Head of the Governors' Task Force on Welfare Reform, appeared before the Senate Committee on Finance and stated:

Paternal identification is another interesting area. They say that only 12 percent of the current AFDC recipients have been able to identify the fathers of the children involved—or have been willing to, or whatever it may be. Well, clearly that has to change. I think we have to have some generally young men in this country understand that, if they are going to be fathers, they basically are going to have an eighteen year contract, with the State involved in that contract, to help support the children who are theirs.¹³⁷

2. Defects of the Current Practices of Aid to Families with Dependent Children Program

a. *Maternal Cooperation and the Right to Privacy*

The current practice requires maternal cooperation in establishing the paternity of nonmarital children. Advocates of this practice argue that it serves the state's goal of minimizing its welfare expenditures. The question must be: at whose expense is this goal being met? Little inquiry has gone into the trade-offs and detriments of this policy, even though constitutional problems are inherent in the mandatory scheme of maternal cooperation as currently applied.

The assumption that the right to privacy is conditional is one

133. *Welfare Reform: Hearings Before the Senate Finance Committee*, 100th Cong., 1st Sess. 4-5 (1987) [hereinafter *Welfare Reform Hearings*] (statement of Sen. Bentsen).

134. Family Support Act of 1988, Pub. L. No. 100-485, 102 Stat. 2343 (1988).

135. *Welfare Reform Hearings*, *supra* note 133, at 26-27.

136. Family Support Act of 1988, Pub. L. No. 100-485, 102 Stat. 2343, 2350 (1988).

137. *Welfare Reform Hearings*, *supra* note 133, at 27.

of the most problematic aspects of maternal cooperation. The right to privacy was legally recognized as far back as 1765 when the English Lord Camden wrote: "It is not the breaking of his doors, and the rummaging of his drawers, that constitutes the essence of the offense; but it is the invasion of his indefeasible right of personal security, personal liberty . . ." ¹³⁸ More than 150 years later, Supreme Court Justice Brandeis described the right to protect one's private life against governmental intrusion as "the right to be let alone—the most comprehensive of rights and the right most valued by civilized men."¹³⁹

As important as the concept of privacy is, it is neither explicitly mentioned nor defined in the Constitution. The right to privacy, especially as related to sexuality and reproduction, has, like many of other substantive rights, been teased out of the words of the Constitution and molded into its present shape.¹⁴⁰

The Supreme Court provided the legal foundation for the "discovery" of this right to privacy in *Skinner v. Oklahoma*.¹⁴¹ The Court in *Skinner* invalidated a statute that authorized the sterilization of persons twice convicted and sentenced to prison for certain crimes.¹⁴² The Court wrote: "[w]e are dealing here with legislation which involves one of the basic civil rights of man. Marriage and procreation are fundamental to the very existence and survival of the race."¹⁴³

More than twenty years later, the United States Supreme Court "discovered" the right to privacy in *Griswold v. Connecticut*.¹⁴⁴ The statute in question in *Griswold* made it a crime to dispense medical information and advice regarding contraception.¹⁴⁵ The statute also made it illegal for married couples to use contraceptives.¹⁴⁶ The Supreme Court held the statute unconstitutional because it violated a "relationship lying within the zone of privacy created by several fundamental constitutional guarantees."¹⁴⁷ As the Court explained, "specific guarantees in the Bill of Rights have

138. *Entick v. Carrington*, 19 How. St. Tr. 1029, 1066, 95 Eng. Rep. 807 (1765).

139. *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis J., dissenting).

140. The following discussion is not intended to be comprehensive. There is a plethora of cases and scholarship dealing with privacy. The topic goes beyond the scope of this article.

141. 316 U.S. 535 (1942).

142. *Id.* at 536. The crimes were those deemed to be "felonies involving moral turpitude . . ." *Id.*

143. *Id.* at 541.

144. 381 U.S. 479 (1965).

145. *Id.* at 480. Violation of the statute was punishable by a fine and up to one year in prison. *Id.*

146. *Id.*

147. *Id.* at 485.

penumbras, formed by emanations from those guarantees that help give them life and substance. Various guarantees create zones of privacy."¹⁴⁸

The Court later extended this right to privacy to cover the privacy interests of nonmarried persons in *Eisenstadt v. Baird*.¹⁴⁹ The Court held that "[i]f the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusions into matters so fundamentally affecting a person as the decision whether to bear or beget a child."¹⁵⁰

A year after *Eisenstadt*, the Court issued its landmark ruling in the case of *Roe v. Wade*.¹⁵¹ *Roe v. Wade* held that a woman's right to have an abortion was guaranteed by the Constitution.¹⁵² This result was based on the right of personal privacy.¹⁵³ The majority opinion began its legal analysis by noting that "[t]he Constitution does not explicitly mention any right of privacy."¹⁵⁴ It further stated that the doctrine of privacy has constitutional roots in the first, fourth, fifth, ninth, and fourteenth amendments, as well as in the penumbras of the Bill of Rights.¹⁵⁵

It is not clear what effect the Court's recent holding in *Webster v. Reproductive Health Services*¹⁵⁶ will have on the doctrine of privacy. The majority opinion in *Webster* stated that "[t]o the extent indicated in our opinion, we would modify and narrow *Roe* and succeeding cases."¹⁵⁷ The *Webster* decision has the potential to cut short a woman's right to have an abortion.¹⁵⁸ It does not appear, however, that the plurality modified the right to have an abortion by modifying the right to privacy, as would be expected under traditional notions of precedent and jurisprudential interpretation. Justice Blackmun, in a dissent joined by Justices Bren-

148. *Id.* at 484 (citation omitted).

149. 405 U.S. 438 (1972).

150. *Id.* at 453 (emphasis in original).

151. 410 U.S. 113 (1973).

152. *Id.* at 154.

153. *Id.* at 153. ("This right of privacy . . . is broad enough to encompass a woman's decision whether or not to terminate her pregnancy.").

154. *Id.* at 152.

155. *Id.* (citations omitted).

156. 109 S. Ct. 3040 (1989).

157. *Id.* at 3058.

158. There are several mechanisms through which this decision could curtail a woman's constitutionally guaranteed right to have an abortion. They include: granting to the individual states the option to legislate restrictions which prevent state employees and state facilities from performing or assisting abortions, requiring viability testing after 20 weeks of gestation, eliminating the trimester distinctions and holding that the state's interests can be compelling at any time.

nan and Marshall, harshly criticized the plurality for avoiding the issue of privacy. He wrote:

The plurality opinion is far more remarkable for the arguments that it does not advance than for those that it does. The plurality does not even mention, much less join, the true jurisprudential debate underlying this case: whether the Constitution includes an "unenumerated" general right to privacy as recognized in many of our decisions, . . . and, more specifically, whether and to what extent such a right to privacy extends to matters of childbearing and family life¹⁵⁹

Since the Court did not address the privacy issue, one assumes that the privacy doctrine remains intact.¹⁶⁰ Thus, while the *Webster* decision struck a severe blow for reproductive freedom, at least in principle, the doctrine of privacy was upheld.

The Court in *Roe v. Wade* stated that "only personal rights that can be deemed 'fundamental' or 'implicit in the concept of ordered liberty,' . . . are included in this guarantee of personal privacy."¹⁶¹ The questions then become: Is the right of a woman to decide whether or not to reveal to the state the man with whom she had sexual intercourse a protected interest? Is the right of a woman to decide whether or not to legally establish the paternity of her child a fundamental right? Is the right of a mother to choose the make-up of her family implicit in the concept of ordered liberty?

The Supreme Court, while averring to a unified philosophy of familial protection, has been inconsistent in its decisions.¹⁶² While certain cases uphold the rights of families against intervention by the government,¹⁶³ others disavow the rights of families to be pro-

159. *Webster v. Reproductive Health Services*, 109 S. Ct. 3040, 3072 (1989) (Blackmun, J., dissenting) (citations omitted).

160. The distinction between the right to privacy and the right to an abortion becomes blurred in practice. The Court holds that the decision of whether or not to bear a child is a private one that a woman and her physician can make. Once she makes that decision, however, the Court indicates that the states can do whatever they wish to impede her from acting on her decision. The end result, for the woman, is the same as if the Court had held that she could not make the decision.

161. *Roe v. Wade*, 410 U.S. at 152 (citation omitted) (quoting *Palko v. Connecticut*, 302 U.S. 319, 325 (1937)).

162. For an insightful and thorough analysis of the Supreme Court and the family, see Martha Minow, *We, the Family: Constitutional Rights and American Families*, in *The Constitution and American Life* 299 (David Thelen ed. 1988).

163. See, e.g., *Moore v. City of East Cleveland*, 431 U.S. 494 (1977) (constitutional protections granted to "non-traditional" extended families); *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (rights of Amish parents to educate their own children); *Loving v. Virginia*, 388 U.S. 1 (1967) (antimiscegenation statute struck down as violative of right to choose whom to marry); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (right of married couples to buy contraceptives); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925) (right of parents to send children to a private school of parents' choice);

tected against governmental intervention and intrusion.¹⁶⁴ The Court has "recognized 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 . . . [and the Court has] consistently acknowledged a private realm of family life which the state cannot enter."¹⁶⁵ Taken as a whole, the cases indicate that there are certain familial interests and familial choices that the Court will protect.

"Family," as a descriptive term, is nebulous and undoubtedly means different things to different people at different times. Normatively, "family" refers to a man and a woman, married to each other, and their children—the American nuclear family. However, as anyone familiar with the realities of American life can attest, this has never been the only form of family that exists. Increasingly, families consist of parents with adopted children, stepchildren and surrogate children; of divorced and separated parents and their children; of childless couples; and of homosexual couples with children from previous marriages or conceived via artificial insemination.¹⁶⁶ The United States Census Bureau defines a family as "two or more persons related by birth, marriage or adoption who reside in the same household."¹⁶⁷ The Court of Appeals of New York recently held that the term "family" encompasses homosexual life partners and not just those related by blood or the law.¹⁶⁸ As Gloria Steinem states, "[f]amily is content, not form."¹⁶⁹

Whether an unmarried woman and her child will be afforded protection as a "family" will, of course, ultimately be determined by the courts. In light of present census figures, only the most patriarchal and paternalistic courts could find that twenty-five percent of all children being born are not being born and raised in families. For most of these children, Mom is family.

The requirement that a mother who needs AFDC benefits must reveal the man with whom she had sexual intercourse vio-

Meyer v. Nebraska, 262 U.S. 390 (1923) (right of parents to choose to educate children in non-English language).

164. See, e.g., Prince v. Massachusetts, 321 U.S. 158 (1944) (parental freedom limited by state's *parens patriae* authority).

165. Moore v. City of East Cleveland, 431 U.S. at 499 (1977) (citations omitted).

166. See Jerrold Footlick, *What Happened to the Family?* Newsweek Special Edition, Winter/Spring 1990, at 15 (special edition on the twenty-first century family) [hereinafter Newsweek Special Edition].

167. *Id.* at 18.

168. Braschi v. Stahl Assoc. Co., 74 N.Y.2d 201, 543 N.E.2d 49, 544 N.Y.S.2d 784 (1989) (construing the term "family" as applied to the state's rent-control laws).

169. Newsweek Special Edition, *supra* note 166, at 11.

lates her fundamental rights to privacy and familial autonomy. The Supreme Court has consistently held that a right to privacy is implicit in the guarantees of the Constitution.¹⁷⁰ The right to privacy protects a variety of interests relating to sexuality, procreation and the rearing of children. This protection should extend to the right of a woman to choose the design of her family.¹⁷¹

b. Maternal Cooperation and the Right to Equal Protection

Requiring maternal cooperation in paternity actions as a condition for receiving AFDC benefits is further tarnished because it violates the fourteenth amendment's equal protection clause.¹⁷² The states are guilty of grossly unequal treatment when they require only those women who need AFDC to relinquish their constitutionally protected rights. Though the practice of exchanging constitutional rights for governmental largesse is somewhat condoned by the Supreme Court, it is nonetheless reprehensible.¹⁷³

The modern welfare state is markedly different from the state envisioned by the framers of the Constitution. Today the range of government programs, practices and benefits extends to virtually every citizen in the country and to many aspects of life. Our notions of the essence of benefits have grown and changed as the population of beneficiaries has grown and changed. Governmental largesse is no longer viewed as a charitable, gratuitous act of giving.¹⁷⁴ Rather, it is seen as the responsibility of the government and the entitlement of the recipient.¹⁷⁵ The significance of this reinterpretation is that recognition of public assistance as an

170. See, e.g., *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747 (1986); *Carey v. Population Services Int'l*, 431 U.S. 678 (1977); *Roe v. Wade*, 410 U.S. 113 (1973) and cases cited *supra* note 163.

171. The right to privacy extends to interests beyond those mentioned here. For instance, there is a substantial body of law revolving around the privacy protections that the fourth amendment grants to persons involved in criminal proceedings. See, e.g., *Katz v. United States* 389 U.S. 347 (1967).

172. The fourteenth amendment states:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State 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.

173. See *infra* notes 175-76 and 199-211 and accompanying text.

174. See *supra* notes 35-37 and accompanying text.

175. See, e.g., *Goldberg v. Kelly*, 397 U.S. 254, 262 n.8 (1970) ("It may be realistic today to regard welfare entitlements as more like 'property' than a 'gratuity'."); see also Charles Reich, *The New Property*, 73 Yale L.J. 733 (1964).

entitlement includes the recognition that these benefits must be administered under the rubrics of due process and equal protection.¹⁷⁶

The first question that must be addressed under an equal protection analysis is whether or not the act in question classifies persons.¹⁷⁷ Requiring maternal cooperation in the initiation of paternity suits as a condition of receiving AFDC benefits creates two classes: never-married single mothers and married or once-married mothers.¹⁷⁸

If a classification exists, the second part of equal protection analysis involves determining whether or not the classification is applied to a suspect class,¹⁷⁹ and/or whether the classification limits the ability of persons within that classification to exercise a fundamental right.¹⁸⁰ The Supreme Court has defined classifications based on race, alienage, and national origin as suspect.¹⁸¹ The Court does not consider gender and wealth-based classifications suspect, but rather quasi-suspect.¹⁸² Accordingly, these gender and wealth-based classifications are not subject to strict scrutiny, but rather to intermediate and rational-basis scrutiny.¹⁸³ While government distinctions between unmarried mothers do not involve a traditional suspect class,¹⁸⁴ they do involve the ability to exercise fundamental rights—the right to privacy and familial au-

176. The Court has never said that there is an absolute right to welfare benefits. Rather, once a governmental unit decides to provide assistance, the Constitution mandates that the benefits be distributed in accordance with constitutional protections. See *Goldberg v. Kelly*, 397 U.S. 254 (1970).

177. See *Shapiro v. Thompson*, 394 U.S. 618, 627 (1969).

178. The Child Support Enforcement Act of 1975, Pub. L. No. 93-647, § 101(a), 88 Stat. 2337, 2351-60 (codified as amended at 42 U.S.C.A. § 651 (1988)), may create a classification between unmarried mothers who need AFDC and unmarried mothers who do not need AFDC. See also *infra* note 184.

179. See *Korematsu v. United States*, 323 U.S. 214, 216 (1944).

180. John Nowak, Ronald Rotunda & J. Nelson Young, *Constitutional Law* 531 (3d ed. 1986).

181. *Id.*

182. *Id.*

183. *Id.* The strict scrutiny standard of review was set forth in *United States v. Carolene Product Co.*, 304 U.S. 144, 152 n.4 (1938) and *Roe v. Wade*, 410 U.S. 113, 155 (1973) ("Where certain 'fundamental rights' are involved, the Court has held that regulation limiting these rights may be justified only by a 'compelling state interest,' . . . and that legislative enactments must be narrowly drawn to express only the legitimate state interests at stake.") (citations omitted). The intermediate level of review falls in between the strict scrutiny and rational relationship tests. See Nowak, Rotunda & Young, *supra* note 180, at 531.

184. An argument can be made that this classification does have a disparate impact on women of color though on its face, the regulation is race-neutral. The classification has a disparate impact because black and Hispanic women who are single parent heads of households are more likely to be living in poverty than white women. Sixty percent of families headed by black or Hispanic women are in poverty

tonomy.¹⁸⁵ Because the classification burdens fundamental rights, it should be subject to heightened scrutiny.

That the classification restricts the exercise of a fundamental right, however, is not, in and of itself, a sufficient basis for invalidating the classification. If the state can show that the classification serves an overriding or compelling governmental interest, it will be upheld.¹⁸⁶ Here, the classification could serve two conceivable state interests: 1) the state's interest in conserving fiscal resources, and 2) the state's interest, as *parens patriae*, in the best interests of nonmarital children.

i. The State's Interest in Preserving Fiscal Resources

The state's interest in the state treasury is not insignificant. Virtually every mention of welfare reform is coupled with a statement about the need to constrict the flow of money from the state coffers to welfare recipients.¹⁸⁷ In 1948, 25 out of every 1000 children were receiving AFDC benefits.¹⁸⁸ In 1973, this number had increased almost five times with 113 out of every 1000 children receiving benefits under AFDC.¹⁸⁹ Eligibility qualification had shifted from parental death to parental absence, either because of divorce or, increasingly, because there had not been a marriage. A 1973 estimate of the governmental savings as a result of establishing paternity and support orders was forty million dollars per week.¹⁹⁰ Taking into consideration the expected rate of collection, the amount is still twenty-eight million dollars per week.¹⁹¹ This amount would be significantly larger if calculated with present user and collection rates.¹⁹²

as compared to 39% of white women heading single parent households. Census Report, *supra* note 7, at 24.

Obviously the poorer the family, the greater the need for AFDC. Approximately 40% of all AFDC families are black and another 15% are Hispanic families. White families comprised just 40% of all families on AFDC. U.S. Dep't of Health and Human Services, *Characteristics and Financial Circumstances of AFDC Recipients 1* (1987). Two classes result: one class of predominantly white women who do not need to apply for AFDC and another comprised predominantly of black and Hispanic women who must apply.

185. See *supra* notes 139-71 and accompanying text.

186. This is the strict scrutiny standard of review. See *supra* note 183.

187. See *supra* notes 97-100 and accompanying text.

188. *Essentials for Attorneys, supra* note 32, at xxii.

189. *Id.*

190. See Poulin, *supra* note 20, at 922.

191. *Id.*

192. Although the potential amount to be collected from the previously non-paying parents would be significant, it is important to note that the government is much more successful in collecting payments for non-welfare cases than for AFDC cases.

The governmental potential for saving is coupled with its ill-disguised distaste for AFDC.¹⁹³ The program and its participants are maligned and criticized incessantly. The recipients are treated with suspicion, disdain and outright hostility.¹⁹⁴ Yet, the level of benefits is inadequate to provide support at even the level of poverty. In fact, only one state in the entire country provides benefits above the poverty level.¹⁹⁵ The level of benefits, in real dollars, has declined steadily for the past twenty years. In 1960, the maximum AFDC grant of the median state provided sixty-three percent of the poverty level; by 1985 the maximum grant in the median state had dropped to forty-three percent of the poverty level.¹⁹⁶

Though the state may have an interest in preserving its fiscal resources, the Supreme Court, in *Shapiro v. Thompson*,¹⁹⁷ has held that the "saving of welfare costs cannot justify an otherwise invidious classification."¹⁹⁸ Mandating the establishment of pater-nity for all nonmarital children receiving AFDC may save the government money. It does so, however, only by invidiously invading the constitutional rights of poor women. AFDC is not a gift. It is something to which poor women and children are entitled. The *Shapiro* rationale would protect rights of non-married mothers applying for AFDC. However, *Shapiro* has been weakened by subsequent cases, such as *Dandridge v. Williams*.¹⁹⁹ According to the dissent, the majority opinion represents "the Court's emasculation of the Equal Protection Clause as a constitutional principle applicable to the area of social welfare administration."²⁰⁰ The Court in

193. See generally Harrington, *supra* note 10 (reassessing the state of poverty in the nation with the view that changes in government policies have eroded the anti-poverty campaign of the 1960s).

194. *Id.* at 26-29.

195. That state is Alaska. Sidel, *supra* note 37, at 85.

196. *Id.* at 87 (based on figures for a family of four).

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

198. *Id.* at 633. In *Shapiro*, the Court held that a one-year residency requirement for receipt of AFDC benefits was unconstitutional. *Id.* at 627. Justice Brennan, the author of the opinion, wrote:

We recognize that a State has a valid interest in preserving the fiscal integrity of its programs. It may legitimately attempt to limit its expenditures, whether for public assistance, public education, or any other program. But a State may not accomplish such a purpose by invidious distinctions between classes of its citizens. It could not, for example, reduce expenditures for education by barring indigent children from its schools. Similarly, in the cases before us, appellants must do more than show that denying welfare benefits to new residents saves money.

Id. at 633.

199. *Dandridge v. Williams*, 397 U.S. 471 (1970).

200. *Id.* at 508. (Marshall, J. with Brennan, J. dissenting).

Dandridge upheld a Maryland statute that imposed a ceiling on the maximum grant allowable, regardless of family size and need.²⁰¹ The Court imposed only a rational relationship/reasonable basis test,²⁰² but noted that if this case had involved a freedom guaranteed by the Bill of Rights, the result might have been different.²⁰³

The Court further muddled the precedents set in *Goldberg v. Kelly*²⁰⁴ and *Shapiro v. Thompson*²⁰⁵ in the 1971 case of *Wyman v. James*.²⁰⁶ In *Wyman*, a welfare recipient refused to allow a social worker to visit her home and, subsequently, her benefits were terminated.²⁰⁷ The *Wyman* Court upheld a provision of New York's AFDC regulations requiring home visits by a caseworker as a condition for continued eligibility.²⁰⁸ The majority found that the home visit was not a fourth amendment "search" and, therefore, there was no constitutional violation.²⁰⁹

Justice Douglas' dissent perceived the "central question [as] whether the government by force of its largesse has the power to 'buy up' rights guaranteed by the Constitution. But for the assertion of her constitutional right, [the AFDC recipient] . . . would have received the welfare benefit."²¹⁰ Justices Marshall and Brennan, in a separate dissent, objected to the majority opinion's implicit holding that a welfare recipient waives her right to constitutional protection by accepting welfare benefits.²¹¹

No decision dealing with welfare rights is entirely on point with respect to the relationship between the state's fiscal interests and the requirement of maternal cooperation in paternity proceedings. If the Court recognized the fundamental privacy rights inherent in the paternity issue, it would reiterate its holding in *Shapiro v. Thompson*.²¹² A decision consistent with *Shapiro* would hold that a state's interest in conserving money cannot over-

201. *Id.* at 486-87.

202. *Id.* at 485-87.

203. *Id.* at 484.

204. 397 U.S. 254 (1970).

205. 394 U.S. 618 (1969).

206. *Wyman v. James*, 400 U.S. 309 (1971).

207. *Id.* at 313-14.

208. *Id.* at 326.

209. *Id.* at 316-18. The Court stated, assuming arguendo that the home visit were a search, it was "reasonable" and, hence, not a violation of the fourth amendment. *Id.* at 318. One observer of *Wyman* has written: "This reasoning seems again to suggest that governmental involvement in the welfare recipient's financial existence justifies governmental participation in other aspects of the recipient's life." Poulin, *supra* note 20, at 929-30.

210. 400 U.S. at 328 (Douglas, J., dissenting) (footnote omitted).

211. *Id.* at 338 (Marshall, J. and Brennan, J., dissenting).

212. 394 U.S. 618 (1969).

ride a woman's constitutionally protected rights of privacy and familial autonomy. Similarly, an analysis of the economics behind the paternity requirement would show that it meets neither the strict scrutiny standard nor the intermediate level of review. The purpose of requiring maternal cooperation is to establish the paternity of the nonmarital child so that a support order can issue relieving the state of its burden of payment. Since no evidence is produced that the man who is ultimately adjudged the father has either the resources²¹³ or the inclination to pay support,²¹⁴ the paternity requirement is overinclusive and violates the equal protection clause.

The state's budgetary concerns are not unimportant, but the constitutional rights of women cannot be ransomed as payment for much-needed benefits. Money may make the world go round but it makes a poor motivator for social welfare programs. In a recent interview, Pulitzer prize winner Toni Morrison identified the problem:

I don't think a female running a house is a problem, a broken family. It's perceived as one because of the notion that a head is a man.

Two parents can't raise a child any more than one. You need a whole community—everybody—to raise a child. The notion that the head is the one who brings in the most money is a patriarchal notion, that a woman—and I have raised two children, alone—is somehow lesser than a male head. Or that I am incomplete without the male. This is not true.

....

... But we [society] don't want to pay for it.

I don't think anybody cares about unwed mothers unless they're black—or poor. The question is not about morality, the question is money. That's what we're upset about. We don't care whether they have babies or not.²¹⁵

ii. Protecting the Best Interests of Children

The requirement of maternal cooperation in paternity pro-

213. It is more than likely that the fathers of nonmarital children whose mothers are seeking and eligible for AFDC are not men in the higher socioeconomic classes, but rather men who are in the lower socioeconomic classes. The underage, underemployed, and unemployed are probably disproportionately represented in this group of fathers. Indeed, if the putative father were a high income earner (the kind that would behoove the state to adjudicate as the father) it would make more sense for the mother to attempt to obtain support from him rather than to go through the dehumanizing process of AFDC.

214. Granted, mechanisms for enforcing support orders are improving, *see supra* notes 23-25 and accompanying text, but the reality is that most fathers do not pay support. *See supra* note 12 and accompanying text.

215. Bonnie Angelo, *Time*, May 22, 1989, at 122.

ceedings is underinclusive as applied to the state's interest in promoting the best interests of nonmarital children. If the state were truly committed to the best interests of children, it would adopt and implement policies that increased the numbers of children for whom paternity is established out of the whole population of nonmarital children—not merely the population who apply for AFDC.²¹⁶

The rationales a state adopts to bind men to AFDC women and their children are inherently sexist, patronizing, and objectionable. There is considerable evidence regarding the benefits that accrue to children who have had their paternity established.²¹⁷ During the debates on the Child Support Enforcement Act of 1975, attention focused on the advantages that flow from paternal involvement in the lives of young children. According to one senator:

In the studies on delinquency and crime, it is found that the presence of father is vital to the mental health of youngsters. It maintains a crucial part of the socialization of children in that they learn to accept restraints on their behavior, and it is the father that is most likely to impose those restraints.

In early years, male and female children tend to develop dependency on [the] mother. Later, the father is better qualified than the mother to pry them loose from this dependency²¹⁸

When arguments of this nature are used to support the state's compelling interest, they lose much of their persuasiveness. Regulations predicated on the assumptions of the glory of the father within a nuclear family are outdated and fail to consider the realities of life in the United States today. The enforced nuclear family is foreign to many Native American cultures as well as to some African Americans living in urban areas. What worked for Ozzie and Harriet and Ward and June in the 1950s will not work in the 1990s.

If there is a compelling state interest in having fathers involved with children, the state's compelling goal should be to promote adjudicating the paternity of all nonmarital children. Yet, the bulk of the state's efforts are focused on establishing paternity only for children receiving AFDC. Though other mothers of nonmarital children may receive assistance from the county district attorney's office or office of child support enforcement, it often is only at their initiative and if the county has the resources

216. See *infra* notes 225-53 and accompanying text.

217. See *supra* notes 21, 23-25 and accompanying text.

218. 120 Cong. Rec. 1,745 (1974) (inserted by Sen. Thurmond).

to do so. Since only thirty percent of nonmarital children have their paternity adjudicated under the present system,²¹⁹ many children are living with less than what they should have. Finally, there are less onerous ways of establishing paternity than threatening loss of welfare benefits.²²⁰ For all of the above reasons, requiring maternal cooperation in paternity proceedings as a condition for receipt of AFDC benefits is patently unconstitutional.

It is germane at this point to consider two points that become obvious from this discussion. The first is that this normative constitutional analysis is inappropriate. As one constitutional scholar has pointed out, substantive strategies are "covertly value-laden."²²¹ Allowing the courts to determine which rights are fundamental and which are not is particularly dangerous. It is especially dangerous when the rights at issue are those of women, minorities, and poor persons, all groups whose political power is tenuous.²²² The traditionally white male and upper class Supreme Court Justices have had a notoriously difficult time empathizing with the lives of others not similarly situated.²²³

The second point is that even assuming, *arguendo*, that the requirement of maternal cooperation is constitutional, it does not syllogistically follow that it is a *good* policy. The purposes of AFDC are to provide aid to the mother and child so that the mother can raise the child.²²⁴ Parenting is hard work. It is especially difficult when resources as elementary as money are scarce. The present system makes it even more difficult. These policies say to the mother, from the start of her mothering career, "We don't trust your judgment, you clearly don't know what is best for

219. See *supra* text accompanying note 14.

220. See *infra* notes 254-59 and notes 262-70 and accompanying text.

221. Paul Brest, *The Fundamental Rights Controversy: The Essential Contradictions of Normative Constitutional Scholarship*, 90 Yale L.J. 1063, 1065 (1981).

222. The Supreme Court's decision in *Webster v. Reproductive Health Services*, 109 S. Ct. 3040 (1989), for example, illuminates the precariousness of the situation.

223. See e.g., *Harris v. McRae*, 448 U.S. 297, 316 (1980) (upholding the federally enacted Hyde Amendment which severely restricted the use of Medicaid funding for abortion. The Court in a 5-4 decision stated: "[t]he financial constraints that restrict an indigent woman's ability to enjoy the full range of constitutionally protected freedom of choice are the product not of governmental restrictions on access to abortions, but rather of her indigency."); *Geduldig v. Aiello*, 417 U.S. 484, 496 n.20 (1974) (in upholding a state health insurance program that did not cover pregnancy, the Court stated: "[t]he California insurance program does not exclude anyone from benefit eligibility because of gender but merely removes one physical condition—pregnancy—from the list of compensable disabilities. While it is true that only women can become pregnant, it does not follow that every legislative classification concerning pregnancy is a sex-based classification . . .").

224. See *supra* note 84.

you and your child." The best programs for providing assistance to mothers are those that provide more than just money, including: individual programs that inspire confidence in the mother's ability to be a good parent, programs that empower mothers, programs that say to the mothers, "We trust you to raise this child."

B. Model II: Universal Intervention

"Speak, woman!" said another voice, coldly and sternly, proceeding from the crowd about the scaffold. "Speak; and give your child a father!"²²⁵

The preceeding analysis demonstrates that the current practice of requiring maternal cooperation as a prerequisite to the receipt of AFDC benefits is replete with constitutional violations. The practice creates two categories of persons: those whose constitutional rights remain intact and those who must sacrifice their rights to provide for the basic needs of their children. A system that does not categorize persons but rather is universally applied to *all* mothers who give birth to nonmarital children is an obvious, equitable alternative. Such a system would eliminate the division and discrimination against mothers who require public assistance. This model, by design and necessity, would involve a high level of governmental intervention into the lives of families. In this model, adjudicating the paternity of *all* nonmarital children is actively pursued by the state and supporting mechanisms are set up for enforcement. This approach would make adjudicating paternity the norm; all mothers would establish the paternity of their children, much like all drivers must get a driver's license. The governmental intervention could take many different forms, but would most probably begin as soon as possible after the birth of the nonmarital child. For instance, government workers²²⁶ would be stationed in hospitals and begin paternity proceedings immediately following the birth. With this approach, the government's goal of establishing paternity for all nonmarital children would supersede the wishes of the mother. The increasing accuracy of tests used to establish paternity makes the universal adjudication of paternity for all nonmarital children much more of a possibility than has ever been entertained by policymakers.

1. The Advantages of Universal Intervention

This model is arguably the most closely aligned with the

225. Hawthorne, *supra* note 1, at 54 (directed to Hester Prynne).

226. These workers could be social workers, persons from the Office of Child Support Enforcement or county attorneys.

child's best interests, especially his or her financial interests. While it is not in all children's interest to have their paternity adjudicated,²²⁷ it is in the best interests of most children. The assumption that establishing paternity is in the best interests of nonmarital children would become a rebuttable presumption,²²⁸ rather than an exception.²²⁹ Universal adjudication of paternity would further benefit the nonmarital child by increasing the equality, or sense of sameness, between nonmarital children and marital children.²³⁰

This model of universal intervention is appealing because it does not discriminate against mothers of nonmarital children on the basis of their need to receive AFDC benefits. Since the constitutional infringements²³¹ are applied evenly to all mothers, the state's compelling interest argument becomes more palatable. Accordingly, the possible equal protection challenges are weakened considerably and the policy stands on a more certain foundation.

The policy message that universal adjudication of paternity communicates to fathers and families is a positive one. The implicit message of paternal duty should make it more difficult for fathers to evade their responsibilities to their children. The policy message that all fathers have an inescapable responsibility for their children applies to all children, not just those born to single mothers. Potentially positive ramifications would be that avoidance of child support payments becomes less acceptable and paternal involvement with children increases.²³² Furthermore, if both men and women were cognizant of their unavoidable duties toward potential offspring, perhaps they would be more careful when making the decision to become parents in the first place.

227. See *supra* notes 54, 109-11 and accompanying text.

228. The presumption that paternity adjudication was in the child's best interests would be rebuttable only in extreme circumstances such as rape and incest.

229. The current practices surrounding adjudication of paternity, discussed above, operate more as an exception than the rule with only approximately 30% of all nonmarital children having their paternity legally established. See *supra* note 14 and accompanying text.

230. Much progress has been made toward this end in the United States over the past two decades. Statutory changes and common law decisions have eradicated much of the overt discrimination against "illegitimates" that was quite common in the recent past. See, e.g., Harry Krause, *Illegitimacy: Law and Social Policy* (1971); Comment, *Equal Protection for Illegitimates: A Consistent Rule Emerges*, 1980 B.Y.U. L. Rev. 142 (authored by Scott Isaacson).

231. The constitutional right to privacy discussed *supra* notes 138-71 and accompanying text also is invaded in this model.

232. This clearly is the trend at present. Evidence of this trend includes the phenomena of automatic income withholding, retention of tax returns for delinquent support payments, and paternal leave.

This could be especially important for minors.²³³

Finally, universal adjudication of paternity is conceivably in the best interests of the state in that the state is relieved, to a certain degree, of some of the burden of supporting and caring for minor children. The burden will not be completely eliminated, however, since there are fathers who are unable to contribute to the support of their families.²³⁴ Expenses associated with the increased costs of establishing paternity and enforcing compliance with child support orders may also reduce the savings to the state.

2. The Disadvantages of Universal Intervention

For all of its benefits, the universal intervention model is not completely free of constitutional violations. Although the violations are not as pronounced as in the current system, universal establishment of paternity actually increases, not decreases, the violations of the rights to privacy and familial autonomy. As discussed, these rights are not absolute²³⁵ and can be co-opted in the event of a compelling state interest. Yet, when the state is not directly supporting the nonmarital child and is unlikely to assume that obligation, the interests of the state do not rise to the level of compelling interests. The possibility of future welfare expenditure is not a sufficient justification to condone routine invasions into the lives of single women and their children. This argument brings one back full circle toward the compulsory determination of the paternity of children who are receiving public assistance. Again, however, the result is violation of equal protection under the fourteenth amendment.²³⁶ Furthermore, it is likely that the procedures developed for universal adjudication of paternity will not be universally applied.²³⁷ Unequal treatment, though less apparent, will nonetheless still be practiced.

The universal adjudication of paternity, without regard for

233. The argument is not being made that the best solution to the increasing numbers of nonmarital children is to convince unmarried persons not to have children. This perspective is parochial, paternalistic, and hopelessly outdated. The reality is that single women will continue to give birth to children and that there is an increasingly important need for policies to protect the interests of all of those involved. With this caveat in mind, it can still be said that deterring unmarried minors from becoming parents is a good idea.

234. These fathers would include those who are unemployed, underemployed, disabled, or incarcerated.

235. See *supra* text accompanying note 186.

236. See *supra* notes 172-215 and accompanying text.

237. See *infra* notes 246-52 and accompanying text for a discussion and analysis of legislation enacted in Wisconsin. The Wisconsin legislation was designed and intended to adjudicate the paternity of all nonmarital children, but is, in fact, creating a two-tiered system based on receipt of public assistance.

the wishes of the mother, tends to place the mother and the child in an adversarial relationship in which the interests of the mother are pitted against the interests of the child.²³⁸ Our standard model of conflict resolution is based on this adversarial model in which the winner takes all. This confrontation may be appropriate in a tort action or a criminal trial, but it is implicitly flawed when applied to families. Families must work together, not against each other. An adversarial system predisposes resolution of conflicts between mother and child to less than satisfactory results.

This battle of conflicting and competing rights is recognizable in many other legal conflicts between mother and child and the results are equally disturbing. Too often, the result is maternal subrogation to her fetus and/or child. This maternal subrogation is illustrated in the framing of the current abortion debate. The debate has moved away from arguments based on the maternal right to privacy of *Roe v. Wade*,²³⁹ and toward arguments that emphasize fetal rights, as in *Webster*.²⁴⁰ This maternal subrogation ultimately relegates women to incubator or baby-machine status. It can be further witnessed in the so-called "cocaine baby" arguments and legislation,²⁴¹ court-ordered caesarean section deliveries,²⁴² fetal surgery and blood transfusions,²⁴³ and the elimination of employment choices for women because of their biological ability to bear children.²⁴⁴

Universal establishment of paternity is additionally troublesome in that it is inflexible and assuming. It limits lifestyle choices and allows for the creation of inappropriate and even dangerous unions,²⁴⁵ rather than clarifying and providing a helpful and fluid framework for the modern family. Compulsory establishment of paternity imposes upon lesbian mothers and co-parents

238. See *supra* notes 82-84 and accompanying text.

239. 410 U.S. 113 (1973).

240. 109 S. Ct. 3040 (1989).

241. See, e.g., *In re Ruiz*, 27 Ohio Misc. 2d 31, 500 N.E.2d 935 (Ohio Ct. App. 1986); Judith Johnson, *Minnesota's "Crack Baby" Law: Weapon of War or Link in a Chain?*, 8 Law & Inequality 485 (1990); Note, *Unborn Child: Can You Be Protected?*, 22 U. Rich. L. Rev. 285 (1988) (authored by Heather White); Note, *Maternal Rights and Fetal Wrongs: The Case Against the Criminalization of "Fetal Abuse"*, 101 Harv. L. Rev. 994 (1988).

242. See, e.g., *In re A.C.*, 533 A.2d 611 (D.C. 1987); Janet Gallagher, *Prenatal Invasions & Interventions: What's Wrong with Fetal Rights*, 10 Harv. Women's L.J. 9 (1987). See also Johnson, *supra* note 241, at 503-08.

243. See, e.g., *Mercy Hosp. v. Jackson*, 62 Md. App. 409, 489 A.2d 1130 (1985), vacated, 306 Md. 566, 510 A.2d 562 (1986).

244. See, e.g., *International Union, United Automobile, Aerospace and Agricultural Implement Workers of America v. Johnson Controls, Inc.*, 886 F.2d 871 (7th Cir. 1989), cert. granted, 110 S. Ct. 1522 (1990).

245. See *supra* note 54.

a heterosexual model of the family. A host of problems arises within the context of artificial insemination. If universal establishment of paternity is the rule, where does that leave the child conceived via this method? Does the donor have an irrefutable right to anonymity? Once exceptions are created, it will be difficult, if not impossible, to draw the line.

The rationale behind the policy of forcing adjudication of paternity in all instances is itself suspect. It is paternalistic. It assumes that a woman and her children are incomplete as a family and that a single mother is incapable of raising children without extreme forms of governmental intervention. Moreover, the policy fails to take into consideration the fact that some "families" should not be formed; for example, families should not be formed when children are the result of rape, incest, physical or emotional abuse, or when there is evidence of chemical dependency, a complete absence of judgment (i.e. putative father is a serial murderer), and a variety of other imaginable situations. Should a "family" be created between a prostitute, her child and her customer? The benefits to the child are minimal at best and, more likely than not, the relationship would be destructive for the child.

3. One State's Attempt at Universal Adjudication of Paternity

The above discussion is relevant to Wisconsin's newly implemented policy of establishing paternity.²⁴⁶ Wisconsin has adopted pioneering child support legislation that goes beyond anything that the federal government has yet attempted. The legislation includes certain provisions relating to the establishment of paternity. One provision states:

The attorney designated . . . shall commence an action under this section on behalf of the state within 6 months after receiving notification . . . that no father is named on the birth certificate of a child who is a resident of the county if paternity has not been adjudicated . . .²⁴⁷

The revolutionary element of this law is that it requires the state to initiate paternity suits to establish the paternity of all children born out of wedlock, regardless of receipt of public assistance. Representative Tom Loftus, author of the legislation, stated that the law "has as its foundation that every child born in Wisconsin has a legal right to a father."²⁴⁸ He added that: "[c]hildren with-

246. Wis. Stat. Ann. § 767.45 (West Supp. 1989).

247. Wis. Stat. Ann. § 767.45 (6m) (West Supp. 1987).

248. Address by Representative Tom Loftus before the National Child Support Enforcement Association (Aug. 22, 1988).

out legal fathers have started down a slippery slope that leads to poverty. Our new paternity law is a radical departure in that the interests of the child will become equal, *if not paramount*, to the interests of the natural parents."²⁴⁹

Maternal subrogation is an improper basis for family policy. The Wisconsin legislation is additionally disturbing because it runs afoul of the equal protection guarantees of the fourteenth amendment.²⁵⁰ The legislation is being interpreted by district attorneys to initiate only suits only on behalf of children whose mothers are receiving AFDC. The state is in the process of compiling a list of all children without a father's name on their birth certificates. These lists are to be sent to the appropriate district attorneys who will, in turn, notify the mothers that they can use the services of the office to establish the paternity for their nonmarital children.²⁵¹ The state will *not* initiate a paternity action if the mother does not contact the office. When an attorney working with the program was asked if she would initiate actions for nonmarital children who were not receiving public assistance in the event the mother did not desire such an action, the attorney responded, "Oh no, that would be too onerous of an invasion."²⁵² The implication is that it is an onerous invasion of the privacy rights of mothers who do not need AFDC. However, if a mother requires state assistance to provide for her children, it is expected, and accepted, that her privacy rights are conditional and not entitled to constitutional protection. This is convincing evidence that the universal model of paternity adjudication is constitutionally infirm.

The theoretical state interests become less compelling when the state is under no obligation for support. The supposition is that each woman and child, without a man, represent potential state liabilities, thus justifying the intrusion. The circumstances have been presented in such a way that they lend themselves to this result. The argument, as it has been framed, puts mothers at odds with their children, rather than encouraging mothers to do what is best for their *families*. This is partly due to a reluctance to view a single mother and child(ren) as a family. Without a legally established relationship involving a man, they are perceived as incomplete. Additionally, the mothers of nonmarital children are assumed to be selfish and unable to comprehend the benefits

249. *Id.* (emphasis added).

250. See *supra* notes 172-214 and accompanying text.

251. This notification had not yet been drafted when the author last spoke with the administrators of the program in Wisconsin. Telephone interview with an administrator in the Wisconsin District Attorney's Office.

252. *Id.*

that can accrue to a child for whom paternity is established.²⁵³ The policies result in top-down mandates of expected behavior. They fail to empower mothers to make choices that foster their autonomy and self-respect.

Many legislators express concern, even outrage, that so many of the nation's children are living a life of poverty which necessitates public assistance. They are even more outraged by the fact that the government must pay for and support these impoverished children. Their indignation about this imposed fiscal responsibility impels them toward the current policies and practices and serves to rationalize any type of intervention. As the budget deficit grows and federal assistance to the states dwindles, an argument for fiscal conservatism, even fiscal radicalism, becomes easier for policymakers to justify and for the people to accept. The inquiry must continue to focus on whether or not "money" is an appropriate foundation upon which to base national policies and definitions of fundamental rights.

C. *Model III: Minimal Intervention*

"I will not speak!" answered Hester, turning pale as death . . .
 "And my child must seek a heavenly Father; she shall never
 know an earthly one!"²⁵⁴

Women declined to reveal the fathers of their children long before Hester Prynne chose to keep secret the identity of the Reverend Mr. Dimmesdale.²⁵⁵ Since the methods of determining paternity discussed earlier are riddled with constitutional violations, it is worthwhile to consider another approach. This final approach involves a minimum of governmental intervention and emphasizes the autonomy of the mother. It is a libertarian perspective. The single mother would make the decision as to whether or not she wants to have the father of her child legally established. The ultimate control of both the composition and the direction of the family would rest with the mother. Welfare benefits would be granted to those who show need. The "good cause" exceptions²⁵⁶ would be very liberally construed and granted in the event that the mother did not want to go ahead with the action.

253. An equally unflattering picture seems to have been painted of the fathers of the nonmarital child. The assumption that men who father children outside of marriage are notorious responsibility dodgers is far more prevalent than any consideration of the economic realities of many young fathers.

254. Hawthorne, *supra* note 1, at 54 (Hester Prynne in response to the public inquiry as to her child's father).

255. *Id.*

256. See *supra* note 119-21 and accompanying text.

1. The Advantages of the Libertarian Model

The libertarian model has several distinct advantages. The most significant advantage is that the constitutional rights to privacy, family autonomy, and equal protection are sustained. This is a marked improvement over both the current practice and the universal approach detailed above. The libertarian approach is more in accord with American distaste for governmental intervention and invasion and the sanctity of the individual.

The libertarian approach also has the advantage of empowering the mothers of nonmarital children. The state's trust and reliance on the mother's judgment has the potential to infuse her with a sense of power and a belief that she is capable of raising the child. This empowerment is one of the strongest features of this option. Rather than discounting the mother, libertarianism entrusts her with the upbringing and care of the child. This is particularly important for welfare mothers, who are generally regarded with suspicion.²⁵⁷ They are assumed to be fraudulent and incapable of managing their own lives, let alone the lives of their children. The libertarian approach is a much-needed step in the other direction.

The libertarian approach offers the additional benefit of eliminating the adversarial conflict between mother and child. The mother and her child are not pitted against each other in a contest to determine whose rights will reign superior. A program that will stop the slippery slide to maternal subrogation is a move in a positive direction.

Finally, the libertarian model offers a more expansive and realistic definition of the family, rather than the antiquated assumption that the nuclear heterosexual family is the only true manifestation of a family. This approach does not assume that all women without men are destined to live their lives in economic despair and poverty. Although it is true that women and children are disproportionately poor,²⁵⁸ there are women with children who are capable of surviving without the state or a man. The manner in which the phenomenon is framed dictates the paths that can be chosen. For example, if women and children in poverty were viewed as being poor not because they are incapable of surviving without men, but rather, because the necessary social support mechanisms²⁵⁹ are nonexistent, the issue looks entirely different.

257. See *supra* notes 97-100 and accompanying text.

258. Sixteen percent of all families live in poverty as compared to 46% of families headed by women. Census Report, *supra* note 7, at 24.

259. These include such things as full and equal political participation, competi-

With this perspective, one can readily conceive of a system that would allow women the freedom and autonomy to choose the composition and direction of their families.

2. The Disadvantages of the Libertarian Model

While the libertarian model has much to offer, it also has disturbing shortcomings. Its greatest detriment is that some nonmarital children will not receive the same legal and economic benefits as children with parents who are married to each other. Some children also will not have the social, psychological, and emotional benefits that they would have had if they knew with certainty the identity of their fathers. This shortcoming, in and of itself, may be sufficient to rule out the libertarian approach as a model for paternity adjudication; it may not be in the child's best interests. It is, however, preferable to avoid a situation in which the interests of the child dictate the interests of the mother. The interests of all the parties must be taken into consideration.

Another significant, and perhaps equally fatal, disadvantage is that under the libertarian approach, the state will be responsible for the economic support of more children than it would be under the alternative models. This is a direct result of establishing nonmarital paternity for fewer fathers with sufficient economic resources. Under the libertarian model, more fathers would be able to avoid parental support obligations.²⁶⁰ Given the intense hostility generated when taxpayers are asked to support other people's children²⁶¹ and policymakers' passionate distaste for AFDC, the libertarian model will most likely remain an academic suggestion.

III. A Proposal for Reform

While each of the three models of intervention possess some desirable characteristics, all possess unacceptable defects. A radical new vision is needed together with a radical restructuring of the best approach to the phenomena of single women and their children.

In a perfect world, adjudication of paternity would be the cultural norm, rather than the exception, and the vast majority of nonmarital children would have their paternity legally established.

tive wages, job opportunities outside of the pink-collar ghetto, safe housing and child care.

260. Equally disadvantageous is that some of the fathers, such as those who have no idea that they have fathered a child and who are not adjudicated as the fathers, will not be able to share in the joys of parenthood.

261. See *supra* text accompanying notes 108-15.

This would put nonmarital children on an even footing with children born to married parents and would give them the benefits to which they are entitled. A perfect system also would foster a sense of psychological and psychosocial security for the nonmarital children and their parents. Society would benefit by the reduction of public assistance payments and, perhaps more importantly, by having parents who are responsible to and for their children. This proposal has ramifications much broader than the paternity arena alone.

Three values would influence the policy programs: choice, maternal and familial empowerment, and retention of privacy and dignity. Trust and responsibility are the values that must be conveyed to single mothers. A program set up with these values in mind will avoid a system in which the mother and the child are adversaries. The present adversarial format is an inherently inappropriate and ineffective system for resolving the conflicts and tensions that may exist between a mother and her child.

The new system must facilitate and strongly encourage the mother to establish paternity, while at the same time allowing her to retain individual privacy, dignity, and choice. The goal is to reach a point where mothers say, "I want to have my child's paternity established because I know how important it is and this is one thing that I can give my child."²⁶² A further goal is getting fathers to recognize that determining paternity and paternal obligation is not something that they can avoid, and that they can take pride in their responsibility and role in fostering the next generation.

This is not idealistic rhetoric. It is, admittedly, somewhat foreign to our notions of current practice. The first step is to educate and intervene months, perhaps years, earlier, rather than waiting until the children are born and their mothers are applying for public assistance. With a situation of such magnitude—one-quarter of all the children born each year—there is no longer time for piecemeal attempts. Universal education and promotion of the benefits and the necessity of establishing paternity, through all possible avenues, is desperately needed. These avenues include: schools, especially high schools; health clinics, including those offering prenatal

262. One researcher has found, in the course of interviewing teenaged mothers that once they learn of the benefits that flow from establishment of paternity, mothers are often enthusiastic and believe that this is one thing that they can actually give their children. Teenage mothers are often without resources and cannot give their children all of the things that they would like to give. This provides them with one mechanism for doing so. Series of interviews with Esther Wattenberg (1988-89); See also Wattenberg, *supra* note 1.

services; and hospitals and social service agencies.²⁶³ The advertising executives in this country are wizards at marketing the most inane of products; it is reasonable to believe they can also market the idea of choosing to establish the paternity of nonmarital children.

Through this market inundation and education, we can give to nonmarital parents all the tools that they need to make an informed *choice*. It simply is not acceptable, nor consistent with our long-held notions of parental autonomy and privacy, to attempt to achieve universal establishment of paternity through a governmental mandate. We owe it to the children of this country to try to do what is best for them. We owe it to the parents of this country to do it with the greatest amount of respect and concern for constitutional protections. We owe it to the women of this country to halt maternal subrogation.

Hospitals are one obvious avenue of education. They also provide a similar model of informed consent. The mother and father are most likely to be present together at the hospital.²⁶⁴ Studies show that the longer the period of time that elapses after birth, the less likely the mother will pursue establishment of paternity.²⁶⁵ Although hospitals routinely provide education regarding the newborn infant and the availability of social services, few make any effort to inform the parents about establishing paternity. Some states require the father to acknowledge the child in order to have the father's name listed on the birth certificate.²⁶⁶ These acknowledgment forms, such as a Declaration of Parentage, may be provided by the hospital if the hospital is so inclined.²⁶⁷ A

263. It would be possible to undertake a major media campaign using television, radio, billboards and bus stops for public service messages.

264. Nichols-Casebolt, *supra* note 5, at 252.

265. Three recent studies examining the relationships between young, unmarried parents found that during pregnancy 84% of the fathers of the unborn children had a continuing relationship with the mother; 26 months after the birth of the child 64% of the parents were in contact and that three years after the child's birth only a little more than half, 55%, of the mothers were in contact with the fathers. Williams, *supra* note 7, at 5.

266. See, e.g., Alaska Stat. § 18.50.160 (1989); Colo. Rev. Stat. § 25-2-112(3) (1990); Del. Code Ann. tit. 16, § 3133(b) (1989); Fla. Stat. § 382.013(6)(b) (1990); Ga. Code Ann. § 31-10-9(c)(2) (1989); Mass. Gen. L. ch. 46, § 13 (1990); Nev. Rev. Stat. § 440.280 (1989); Tex. Health & Safety Code Ann. § 192.005(a)(3) (Vernon 1990); Va. Code Ann. § 32.1-257(D) (1989).

267. The author encountered several hospitals which refuse to offer even this basic service. One such hospital in a large, northern Minnesota city is run by Catholic nuns who apparently do not want to support or encourage, in any way, the birth of the nonmarital child. Perhaps things have not changed so significantly since the days of Hester Prynne and the Puritans.

sampling²⁶⁸ of the major hospitals in the Minneapolis-Saint Paul metropolitan area showed that all of the hospitals contacted made available the Declaration of Parentage and provided the necessary services of a notary public. Yet, only one hospital provided written information to the parents about establishing paternity and this information emphasized the financial liability that the father was likely to incur, with little emphasis on the benefits to the child.²⁶⁹

Clinics and various health care providers, offering services to women and children, are another avenue of education and information. The goal here is similar to that of hospitals: to provide information, education, and support sufficient to allow mothers to make informed decisions.

Once a mother makes an informed choice that it is in her family's best interest to have the paternity of her nonmarital children established, it is imperative that the vehicle for doing so is not overly burdensome or intimidating. Various localities are experimenting with simplified paternity proceedings that substantially reduce the usual problems of backlog, time, and expense.²⁷⁰

Mothers will not always choose to establish the paternity of their children. But they remain the most aware of their unique situations and the best able to judge whether or not it is in their family's best interest to have the paternity of their nonmarital children legally adjudicated. There may be stubborn mothers who refuse to accept the implications of not pursuing establishment of paternity. This is the price that the proposed model imposes. This price is smaller than the price of allowing the constitutional rights of women to be routinely abridged. This price is smaller than the price to be paid by all women as it consistently becomes more acceptable to have maternal rights and interests subrogated to the interests of children and even fetuses.

IV. Conclusion

The fact that twenty-five percent of the nation's children are born to single women means policymakers must respond to the urgent needs of these women and children. The sheer number of children born to single women is at an extremely critical point, demanding well-informed and well-intended policies on poverty. The interests of mothers, fathers, children and society alike must be

268. A list of hospitals contacted is on file with Law & Inequality.

269. The information is provided by the Hennepin County Medical Center in Minneapolis, Minnesota.

270. Ideas for streamlining and improving paternity proceedings are many and outside the scope of this article.

considered and intertwined. The new policy must respect the constitutional rights of the parents and reflect a passionate concern about the needs of children. All of this must be accomplished within the fiscal constraints of the social welfare system. The procedures for implementation are vitally important. Even more important is the rationale underlying the procedures. We can no longer accept a system based upon antiquated notions of women's subordination and a patriarchal family, or upon a belief in the supremacy of the state budget over and against the rights of those who have few resources.