Michigan Journal of Race and Law

Volume 1

1996

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INTRODUCTION

Is welfare the problem or the solution? The longstanding conundrum of political economy[1] was posed anew and with urgency by Charles Murray two decades ago and has dominated discourse on welfare policy ever since. According to Murray, the design of federal non-insurance-based income support programs for the poor—in particular, the program known as Aid for Families with Dependent Children (AFDC)[2]—has undermined its own aim of reducing material want chiefly through two effects: by reducing work effort and readiness and by making it easier to avoid marriage and to bear children out of wedlock.[3] Murray's critics have focused mainly on the contention that welfare encourages extramarital childbearing and have sought to show that poor women's decisions to reproduce or marry are not influenced by the availability or level of benefits.[4] According to critics, the primary sources of these patterns of behavior lie elsewhere: in dim economic prospects for unskilled labor; in complex demographic and social changes within the community at large; in the general diminution in restraint, sexual responsibility, and moral standards; in racism; and in the widespread abatement of the stigma and social disapprobation attached to extramarital motherhood and illegitimate birth.[5]

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1. *See, e.g.*, Alexis de Tocqueville, *Memoir on Pauperism*, *reprinted in* 70 PUB. INTEREST 102 (1983).

2. 42 U.S.C. §§ 601-615 (1988). The AFDC program provides benefits to poor families with minor children deprived of parental support or care by the death, continued absence, or incapacity of a parent. *See* 42 U.S.C. § 606(a); 45 C.F.R. § 233.90(a)(1) (1995).

3. *See* CHARLES MURRAY, LOSING GROUND (1976); Charles Murray, *No, Welfare Isn't Really the Problem*, 84 PUB. INTEREST 3 (1986); Charles Murray, *Does Welfare Bring More Babies?*, 115 PUB. INTEREST 17 (1994).

4. *See, e.g.*, Robert Greenstein, *Losing Faith in 'Losing Ground,'* NEW REPUBLIC, Mar. 25, 1985, at 12, 13; CHRISTOPHER JENCKS, RETHINKING SOCIAL POLICY 79-91 (1992); MICHAEL B. KATZ, THE UNDESERVING POOR 153-65 (1989); THEODORE R. MARMOR ET AL., AMERICA'S MISUNDERSTOOD WELFARE STATE 104-14 (1990).

5. *See, e.g.*, MYRON MAGNET, THE DREAM AND THE NIGHTMARE: THE SIXTIES' LEGACY TO THE UNDERCLASS (1996) (arguing that inner city problems are largely cultural and a negative consequence of the liberal sixties); ANDREW HACKER, TWO NATIONS: BLACK AND WHITE, SEPARATE, HOSTILE, UNEQUAL (1992) (pointing to increased unemployment, greater use of drugs, and higher numbers of people in prison as partial explanations for high pregnancy rates among Black teenagers); William Julius Wilson & Kathryn M. Neckerman, *Poverty and Family Structure*, *in* FIGHTING POVERTY: WHAT WORKS AND WHAT DOESN'T 18-25 (Sheldon H. Danziger & Daniel H. Weinberg eds., 1986) (arguing that the rise in out-of-wedlock births is a social trend largely independent of the availability of welfare benefits); *see also* WILLIAM JULIUS WILSON, THE TRULY DISADVANTAGED (1987) (finding a direct relationship between the rise in Black, female-headed households and the increase in

Since Murray wrote *Losing Ground*, marriage rates have continued to decline and illegitimacy rates to skyrocket, especially among minorities, the uneducated, and the poor.[6] Concern about these trends has fueled pressure from some quarters to recast welfare law to reduce putatively perverse effects on family structure and reproductive behavior.[7] Some commentators, including Charles Murray, William J. Bennett, and Charles Krauthammer, have suggested that only draconian measures will reverse these alarming trends.[8] They have advised the complete withdrawal of cash benefit payments to poor families consisting of an unmarried mother with children born out of wedlock.[9]

Black male joblessness); David Frum, *It's Big Government, Stupid*, COMMENTARY 29 (1994) (asserting that government welfare programs were created, in part, to reduce the need to rely on family members and so have naturally led to a breakdown in family stability); Christopher Jencks & Kathryn Edin, *Do Poor Women Have a Right to Bear Children?*, 20 AM. PROSPECT 43, 48-52 (1995) (emphasizing that the shortage of good jobs and good husbands makes government-supported single parenthood an attractive option for many women).

6. The out-of-wedlock birth rate stands at 68% among Blacks and 25% among Whites. 141 CONG. REC. H3712-13 (daily ed. Mar. 23, 1995) (statement of Andrea Seastrand); Ed Rubenstein, *The Economics of Crime: The Rational Criminal*, VITAL SPEECHES, Oct. 15, 1995, at 19-21; Dorian Friedman, *U.S. News: The Flawed Premise of Welfare Reform*, U.S. NEWS & WORLD REP., Sept. 11, 1995, at 32. The incidence varies dramatically by income and education. *See* ARLENE F. SALUTER, U.S. BUREAU OF CENSUS, CURRENT POPULATION REPORTS, POPULATION CHARACTERISTICS, MARITAL STATUS, AND LIVING ARRANGEMENTS 36 (1993) (stating that in 1992, 23% of children born to families with income under $5000 were born out of wedlock, compared to fewer than 1% of children born to families with income greater than $50,000); *id.* (fewer than 1% of children born to women with a graduate degree were born out of wedlock, whereas 36% of children born to women without a high school diploma were born out of wedlock); *see also infra* note 159 and accompanying text.

7. *See* Charles Murray, *The Coming White Underclass*, WALL ST. J., Oct. 29, 1993, at A14.

8. *See id.*; *see also* Charles Murray, *What to Do About Welfare*, 98 COMMENTARY 26 (Dec. 1994); Charles Krauthammer, *Subsidized Illegitimacy*, WASH. POST, Nov. 19, 1993, at A29; William J. Bennett, *The Best Welfare Reform: End It*, WASH. POST, Mar. 30, 1994, at A19.

9. *See supra* note 7. Murray focuses on single-parent families formed through out-of-wedlock birth rather than divorce; he is mainly concerned in his work with the causes and effects of illegitimacy, which he calls the "single most important social problem of our time," Murray, *supra* note 7. This article also focuses primarily on illegitimacy, rather than marital breakup. That is because this article is about welfare policy. Illegitimacy rather than divorce is the most important source of single-parent families among the population of welfare recipients. That in part reflects the fact that marriage rates have fallen to very low levels among the poor. In 1992, of the total population of AFDC recipient households with one adult, 48% were households in which the single parent had never been married, as opposed to 11% in which the parents were divorced or legally separated, and 11.7% in which the parents were not yet legally separated or divorced. STAFF OF HOUSE COMM. ON WAYS AND MEANS, 103D CONG., OVERVIEW OF ENTITLEMENT PROGRAMS 409 tbl.10-31 (1994) [hereinafter 1994 GREEN BOOK]. Moreover, unmarried mothers are overrepresented among long-term AFDC recipients. The average number of years on AFDC is 4.37 for widowed

Despite much hand-wringing among politicians over the corrosive effects of existing welfare programs on traditional family life, federal lawmakers have never seriously considered enacting the radical proposals of Charles Murray and friends directly into federal law. This caution is understandable: even apart from the political fallout of such a move, there would, at least in the short run, be considerable human cost and upheaval among the poor, who have developed habits and expectations geared to a quite different and more forgiving rule. Shortly before this article went to press, however, Congress passed, and President Clinton signed into law, the Personal Responsibility and Work Opportunity Reconciliation Act of 1996.[10] The statute's preamble states that "prevention of out-of-wedlock pregnancy and reduction in out-of-wedlock birth are very important Government interests." The Act goes on to assert that "the policy contained in [the statute] is intended to address the crisis" of out-of-wedlock childbearing. The statute abolishes the federal AFDC entitlement program and replaces it with block grants to the states, which can be used to fund cash benefits for poor families under specified conditions. For example, teenage mothers who receive benefits must live with their parents or a legal guardian, mothers must establish their children's paternity, states may deny additional benefits for children born while on welfare, parents of children receiving benefits must meet work requirements, and states must limit eligibility for cash benefits to five years.[11] Apart from these restrictions, the Act refrains from establishing eligibility requirements for cash disbursements under the state block grant programs. Although the limits of the states' discretion to depart from preexisting eligibility requirements have yet to be established and are likely to be subject to future litigation, the law appears to give states considerable leeway to "experiment" with imposing new and creative limits on eligibility as part of a broader effort to reduce the illegitimacy rate and strengthen traditional family life.

It is possible to conceive of three main approaches to manipulating income supports in the hopes of influencing marital and childbearing behavior. One is the plan Charles Murray suggests: cutting off existing welfare benefits for single-parent families. Since most two-parent families do not now receive federal income

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recipients, 4.9 for divorced recipients, 6.8 for separated recipients, and 9.33 for unmarried recipients. *See id.* at 443 tbl.10-44.

10. *See* H.R. 3734, 104th Cong. (1996); *see also* Greg McDonald, *President Signs "Historic" Welfare Reform Measure*, HOUSTON CHRON., Aug. 23, 1996, at A1; Francis X. Clines, *Clinton Signs Bill Cutting Welfare: States in New Role*, N.Y. TIMES, Aug. 23, 1996, at A1.

11. *See* H.R. 3747, tit. I, § 103.

support,[12] that approach would be tantamount to a dramatic reduction in direct cash grants to the poor. Another possible approach is to provide cash grants to poor families on a "family-neutral" basis—that is, to establish something like a "guaranteed income" program for families without demanding any particular marital or legal relationship among family members. Finally, the government can choose to extend benefits selectively to (some or all) intact, two-parent families while refusing to supply cash to all the rest.

Although I will have something to say about all three options in this article, it is the last approach on which I focus. This essay seeks to explore in a preliminary way some questions that would be raised by the adoption of such a program. The initial issue raised by the proposal is: does the government ever have any legitimate business favoring some family forms over others? The first-pass answer would appear to be "yes." The law recognizes marriage, restricts it to persons of the opposite sex (at least for now),[13] and confers upon married couples comparative rights and privileges—although fewer than have been enjoyed in the past.[14] The more difficult questions are: what exactly is the nature of the government's interest in promoting certain types of family life, and what are the limits on the forms that the favoritism may take? Specifically, what is the place of "family policy" in the design of benefits programs for the poor? May,

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12. Some married couples with children were eligible to receive money under the federal AFDC-U program, which provides cash benefits to intact families with one unemployed parent. 1994 GREEN BOOK, *supra* note 9, at 326. As of October 1, 1990, states operating AFDC programs were also required to offer AFDC-U. *Id.* As of 1994, all 50 states were operating AFDC programs. *Id.* at 324. AFDC-U was abolished by the new welfare reform legislation.

13. *See, e.g.*, Mark Strasser, *Domestic Relations Jurisprudence and the Great, Slumbering Baehr: On Definitional Preclusion, Equal Protection, and Fundamental Interests*, 64 FORDHAM L. REV. 921 (1995) (arguing that statutes prohibiting same-sex marriages are unconstitutional); Barbara J. Cox, *Same-Sex Marriage and Choice-of-Law: If We Marry in Hawaii, Are We Still Married When We Return Home?*, 1994 WIS. L. REV. 1033 (same); Anthony C. Infanti, Baehr v. Lewin: *A Step in the Right Direction for Gay Rights?*, 4 LAW & SEXUALITY 1 (1994) (same).

14. *See, e.g.*, Jana Singer, *The Privatization of Family Law*, 1992 WIS. L. REV. 1443, 1447-56 (explaining how traditional law sharply distinguished between married and unmarried couples and how that distinction has begun to break down); Carl E. Schneider, *Moral Discourse and the Transformation of American Family Law*, 83 MICH. L. REV. 1803, 1819-21 (1985) (discussing how the decline in moral discourse in family law has contributed to changing mores on the benefits of marriage); Mary Ann Glendon, *Marriage and the State: The Withering Away of Marriage*, 62 VA. L. REV. 663, 698 (1976) (discussing how social factors have contributed to the withdrawal of the legal system from the regulation of marriage); *see also* David D. Haddock & Daniel D. Polsby, *Family as a Rational Classification*, 74 WASH. U. L.Q. 14, 37-38 (1996) (suggesting that the state has a legitimate interest in promoting marriage and the formation of traditional families because nontraditional families are unstable and produce negative externalities that are imposed on the community).

or should, the government seek to "privilege" certain family arrangements over others when formulating welfare policy and handing out government largesse? What is the justification for doing so? Is there any reason to believe that such measures will accomplish their stated purpose? How certain must we be that such programs will work before we can "rationally" adopt them?

The answers to these questions are dauntingly complex. A full analysis requires consideration of such issues as the proper scope for state action in a liberal, democratic state, the relationship of law and morality, the reach of the constitutional doctrines of equal protection and the right to privacy, and the problem of unconstitutional conditions. As discussed below, the analysis also forces consideration of empirical (or at least experiential) questions concerning the facts of social life, behavioral psychology, and the interplay of law and social norms. Plenary consideration of all issues is, of course, beyond the scope of this article. My objective here is much more modest: to set out some of the questions that are raised by the government's attempts to establish rules at the intersection of family law and welfare policy, and to suggest how some of those questions ought to be analyzed.

My discussion takes as its starting point the obscure per curiam Supreme Court opinion in *New Jersey Welfare Rights Organization v. Cahill*.[15] *Cahill* is unique in confronting the Court with a state statute that based qualification for cash welfare benefits on conformity to a narrowly defined, traditional "two-parent family" model.[16] Although the Court's opinion in *Cahill* is short and far from comprehensive, it nevertheless is revealing of broader methods of judicial analysis, which in turn reflect general ways of thinking about the relationship of government benefits programs to social trends and individual behavior. I begin by dissecting the views and assumptions underlying the Court's approach in *Cahill* and in the cases upon which the Court relies in *Cahill*. I attempt to criticize those views and assumptions as based on an impoverished and distorted picture of social reality and on a misunderstanding of the role the government may play—and must inevitably play—in shaping that reality. In so doing, I do not purport to offer a comprehensive solution to the host of thorny

15. 411 U.S. 619 (1973) (per curiam), *aff'g* 349 F. Supp. 491 (D.N.J. 1972).

16. The Court has, of course, decided many cases in which the determination of eligibility for benefits, or the amount of benefits granted, turned on some aspect of the biological or legal relationship among family members. *See, e.g.*, Sullivan v. Stroop, 496 U.S. 478 (1990); Califano v. Boles, 443 U.S. 282 (1979); Califano v. Jobst, 434 U.S. 47 (1977); Mathews v. Lucas, 427 U.S. 495 (1976); Jimenez v. Weinberger, 417 U.S. 628 (1974); United States Dep't of Agric. v. Moreno, 413 U.S. 528 (1973). None of these cases, however, considered statutes that imposed as stringent and "traditional" a restriction on eligibility as the statute at issue in *Cahill*.

doctrinal or theoretical problems that arise whenever democratic governments attempt to restrict the categories of eligibility for government largesse. In particular, this is not an attempt to offer a new approach to the famous problem of "unconstitutional conditions."[17] Nor do I claim to supply anything like a complete analysis of the status of legislation that elevates one moral point of view over others within the democratic liberal state. Rather, my discussion is aimed at revealing conceptual flaws in both judicial analysis and scholarly commentary concerning legislative attempts to shape individuals' reproductive behavior and patterns of family affiliation. The analysis of judicial doctrine sets the stage for a broader discussion of the issues raised by attempts to influence behavior through the specific device of selectively directing government benefits to certain types of families.

The focus of the doctrinal discussion will be on the courts' failure (which reflects a broader flaw in judicial and scholarly thinking in the areas of family law and sexual "privacy") to take proper account of the interaction of law with informal social norms and expectations. In particular, I will discuss the tendency to ignore or discount social harms flowing from individual conduct in the arena of sexuality and family life, and explore the relationship between that tendency and the idea that if such harms exist, they are "socially constructed"—that is, they spring from perverse legal rules rather than from autonomous, extralegal forces. The behavioral sources of the harms need not be eliminated because the harms can always be abated by devising and adopting the right remedial social policies. Using what I argue is a less distorted and more realistic framework for analysis, I tentatively conclude that restricting welfare benefits to "favored" family forms can be justified in light of current social realities and projected effects. Encouraging persons to bear children within the context of the two-parent family is important because (1) out-of-wedlock childbearing causes social

17. As Lynn Baker has stated, "In the case of welfare benefits . . . *any* 'eligibility requirement'—even a showing that one's income is below the government-established 'poverty' level—is arguably a 'condition' on receipt of the benefit." Lynn A. Baker, *The Prices of Rights: Toward a Positive Theory of Unconstitutional Conditions*, 75 CORNELL L. REV. 1185, 1189 (1990). For a discussion of the unconstitutional conditions problem, see Michael W. McConnell, *The Selective Funding Problem: Abortions and Religious Schools*, 104 HARV. L. REV. 989 (1991); Seth F. Kreimer, *Allocational Sanctions: The Problem of Negative Rights in a Positive State*, 132 U. PA. L. REV. 1293 (1984); Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413 (1989); Richard A. Epstein, *Unconstitutional Conditions, State Power, and the Limits of Consent*, 102 HARV. L. REV. 4 (1988); *see also* Brooks R. Fudenberg, *Unconstitutional Conditions and Greater Powers: A Susceptibility Approach*, 43 UCLA L. REV. 371 (1995); Jonathan Romberg, *Is There a Doctrine in the House? Welfare Reform and the Unconstitutional Conditions Doctrine*, 22 FORDHAM URB. L.J. 1051 (1995).

harm; and (2) the government is inherently limited in its ability to compensate for the harms flowing from extramarital births. Moreover, selectively withholding cash benefits is a justifiable method of attempting to decrease the incidence of that harm. I argue that important determinants of out-of-wedlock childbearing are extralegal, and depend on economic factors enhanced and shaped by relatively autonomous norms of social life. The best way to minimize the number of single-parent families is to avoid undermining preexisting social conventions and practices that buttress the traditional family. A selective subsidy might be an effective way to accomplish this purpose, and is superior to a formally more evenhanded approach, such as a "guaranteed income," which treats all family forms alike. A realistic understanding of the dynamics of normative constraints on reproductive behavior and family formation supports the conclusion that guaranteed incomes encourage the abandonment of the two-parent family norm, whereas selective subsidies are more likely to preserve the two-parent pattern.

I. *NEW JERSEY WELFARE RIGHTS ORGANIZATION V. CAHILL*

In *Cahill*,[18] the Supreme Court was called upon to decide whether the New Jersey "Assistance to Families of the Working Poor" (AFWP) program violated the Equal Protection Clause of the Fourteenth Amendment of the Constitution. The state program, enacted by the New Jersey legislature in 1971, coincided with the state's abandonment of the federal-state program known as AFDC-U—the part of AFDC providing benefits to families with children in which the primary breadwinner is unemployed.[19] The program functioned as a supplement to AFDC, which continued in operation in New Jersey. The AFWP program provided for income supplements to families with children "when independent sources of income are inadequate for family support."[20] The program was entirely state-financed, and eligibility was restricted to defined categories of families. Specifically, benefits were limited to families consisting of "a household composed of two adults of the opposite sex ceremonially married to each other who have at least one minor

18. 411 U.S. 619 (1973).

19. *See supra* note 12; New Jersey Welfare Rights Org. v. Cahill, 349 F. Supp. 491, 493 n.1 (D.N.J. 1972); *see also Amending the "Assistance to Families of the Working Poor Act": Public Hearing on Assembly Bill No. 1201 Before the New Jersey Legislature, Assembly, Institutions and Welfare Comm.*, at Index 3 (1972) (statement of Ann Klein, assemblywoman).

20. *New Jersey Welfare Rights*, 349 F. Supp. at 493.

child . . . of both, the natural child of one and adopted by the other, or a child adopted by both."[21]

The program was challenged in federal court by a group of ineligible poor families in New Jersey. Before the district court, the plaintiffs argued, among other things, that the provision was invalid because it discriminated against illegitimate children without adequate justification.[22] The court noted that, whatever its effect, the classification in the statute was not expressly "directed at illegitimate children but rather the whole living unit."[23] It nevertheless felt constrained to deal with the Supreme Court decisions striking down

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21. N.J. STAT. ANN. § 44:13-3(a) (West 1971) (repealed 1977). The statute provided, in pertinent part:

> There is hereby enacted by the State of New Jersey a program of assistance to be known as "Assistance to the Families of the Working Poor" [AFWP], which shall benefit all of the citizens of New Jersey meeting the eligibility provisions . . . .
>
> . . . .
>
> "Assistance to the Families of the Working Poor" means the financial assistance and other services to be extended under this act to those families residing in New Jersey which consist of a household composed of two adults of the opposite sex ceremonially married to each other who have at least one minor child under the age of 18 residing with them, who shall be either the natural child of both, the natural child of one and adopted by the other, or a child adopted by both . . . .

§§ 44:13-2 to -3(a).

22. In its initial complaint, and before the district court, the New Jersey Welfare Rights Organization argued that the AFWP discriminated against illegitimate children and that it also distinguished without justification between married and unmarried persons. The statute was also claimed to discriminate against Blacks because Black cohabiting couples were less likely to be married, and Black children were less likely than Whites to live in families in which the parents were married to each other. *See New Jersey Welfare Rights*, 349 F. Supp. at 494-95, 498 (citing to Complaint at Counts 7, 10 (filed July 15, 1971, and amended at pretrial conference Dec. 15, 1971)).

The plaintiffs abandoned the racial discrimination argument following the district court's decision, and reframed their remaining arguments before the Supreme Court to focus on the appropriate level of scrutiny under the Equal Protection Clause and on the rationality of the statutory distinctions in light of the State's purpose in enacting a needs-based welfare program. The questions posed to the Court included whether "the State [may] attempt to promote marriage by denying welfare benefits to unmarrieds and their illegitimate children"; whether "the facts elicited a[t] trial substantiate the state rationale that the statute in question will promote more stable marital relationships"; and whether "the classification in question require[s] a mere showing of reasonableness . . . or a 'stricter scrutiny.' " Jurisdictional Statement at 5-6, New Jersey Welfare Rights Org. v. Cahill, 411 U.S. 619 (1973) (No. 72-6258).

23. *New Jersey Welfare Rights*, 349 F. Supp. at 497.

state laws that made distinctions between illegitimate and legitimate children.[24]

The district court stated that the Supreme Court had "recognized the legitimate interest of a state to attempt to preserve and strengthen traditional family life."[25] The court noted that in most of the cases in which that goal had been asserted as the rationale for disfavoring illegitimate children or their relatives, the Supreme Court had found that the measure at issue failed to promote the stated interest because it could not be expected to reduce or prevent illegitimate births.[26] Thus, the general pattern the Court followed in the cases was to make a finding that there was no "rational relationship" between admittedly valid ends—reducing illegitimacy and promoting marriage—and the means selected to achieve those ends. For example, in *Glona v. American Guarantee & Liability Insurance Co.*,[27] the Court explained that:

> we see no possible rational basis . . . for assuming that if the natural mother is allowed recovery for the wrongful death of her illegitimate child, the cause of illegitimacy would be served. It would, indeed, be farfetched to assume that women have illegitimate children so that they can be compensated in damages for their death.[28]

The Court made a similar point in *Weber v. Aetna Casualty & Surety Co.*, stating that "it [cannot] be thought here that persons will shun illicit relations because the offspring may not one day reap the benefits of workmen's compensation."[29]

There were, however, at least two additional themes in the illegitimacy cases cited by the district court in *Cahill* that were given almost no attention by that court. In *Levy v. Louisiana*,[30] the Supreme Court did not rely on the assertion of a lack of connection between chosen means (denying the illegitimate child an enforceable right)

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24. *Id.* at 495. The cases decided prior to *Cahill* included *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164 (1972) (striking down a law that denies unacknowledged illegitimate children the right to recover workmen's compensation benefits of the natural father); *Glona v. American Guarantee & Liability Insurance Co.*, 391 U.S. 73 (1968) (invalidating a state law barring the natural mother from recovering for the wrongful death of her illegitimate child); and *Levy v. Louisiana*, 391 U.S. 68 (1968) (striking down statute denying illegitimate children recovery for wrongful death of the mother). *See also* Labine v. Vincent, 401 U.S. 532 (1971) (upholding state law giving illegitimate children fewer rights than legitimate children to inherit intestate).

25. *New Jersey Welfare Rights*, 349 F. Supp. at 496.

26. *Id.*

27. 391 U.S. 73 (1968).

28. *Id.* at 75.

29. *Weber*, 406 U.S. at 173.

30. 391 U.S. 68 (1968).

and the state's goal (discouraging illegitimacy). Rather, the Court explained that the statute was irrational because the circumstances of a child's birth has no obvious bearing on "the nature of the wrong allegedly inflicted on the mother."[31] The Court noted that the children in the case, "though illegitimate," were "dependent on [the mother],"[32] and thus suffered a concrete loss from her death. Implicit in the Court's discussion is the assumption that the wrongful death statute had the single purpose of compensating dependent third parties for the loss of the decedent. If a loss was suffered, then compensation was in order. In light of this logic, the exclusion of illegitimates made no sense. The *Weber* Court picks up this theme in striking down a bar to an unacknowledged illegitimate child's recovery of a father's workmen's compensation benefits. There, the Court stated that "[a]n unacknowledged illegitimate child may suffer as much from the loss of a parent as a child born within wedlock or an illegitimate later acknowledged,"[33] implying that there could be no valid reason to deny compensation in the face of such comparable suffering.

A second theme or line of argument in the illegitimacy cases decided before *Cahill* also fails to appear in the district court's analysis. In addition to the two types of "irrationality" already identified—the lack of behavioral effect of the exclusion, and the lack of a conceptual connection between the exclusion and the statute's ultimate purpose—the Supreme Court identifies a third, which was first noted by Justice Brennan in his dissent in *Labine v. Vincent*:[34] statutes that give illegitimate children fewer legal rights than legitimates can be regarded as "punish[ing] illegitimate children for the misdeeds of their parents."[35] This theme is also taken up in *Weber*. There, the Court acknowledged that "[t]he status of illegitimacy has expressed through the ages society's condemnation of irresponsible liaisons beyond the bonds of marriage,"[36] but added that:

> visiting that condemnation on the head of an infant is illogical and unjust. Moreover, imposing disabilities on the illegitimate child is contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing. Obviously, no child is responsible for his birth and penalizing the

31. *Id.* at 72.
32. *Id.*
33. *Weber*, 406 U.S. at 169.
34. 401 U.S. 532, 541 (1971) (Brennan, J., dissenting).
35. *Id.* at 557.
36. *Weber*, 406 U.S. at 175.

> illegitimate child is an ineffectual—as well as an unjust—way of deterring the parent.[37]

There is some obscurity in the final sentence of this statement, but it is possible to speculate on what the Court means: the rule at issue is "ineffectual" because it cannot reasonably and in actual fact be expected to operate as a deterrent. The implication is that a penalty directed at the child cannot possibly be effective in practice because the child, who has no control over the circumstances that trigger the penalty, cannot act to avoid it. That point appears distinct from a recognition of the unfairness or injustice of penalizing children for circumstances over which they have no control.

The district court in *Cahill* focused neither on whether the challenged classification advanced the statute's primary "needs-based" purpose, nor on the seeming unfairness of "visiting the sins of the fathers on the sons." Rather, it decided that, unlike the rules at issue in *Levy*, *Glona*, and *Weber*, the New Jersey statute was not marred by the "lack of any relationship between the classification . . . made and the interest sought to be advanced."[38] The state was entitled to take measures to "preserve and strengthen traditional family life."[39] Indeed, as the district court pointed out, the law already favored the marital state by according privileges to its participants and requiring "exacting procedures before a family can be broken by divorce."[40] According to the court, these measures had a functional justification: "[a] living arrangement which does not have the aura of permanence that is concomitant with a ceremonial marriage often does not provide the stability necessary for the instillment of those norms within the individual necessary for proper social behavior."[41]

The court found that the AFWP advanced the ends of stabilizing the traditional marital bond by providing a "subsidy" for traditional family life. "The AFWP subsidizes families," stated the court, adding that:

> [t]he State has determined that it only wants to subsidize what it considers to be legitimate families, ones where the likelihood is greater for the instillment of proper social norms. It is certainly both a proper and a compelling state interest to refuse to subsidize a living unit which may lead

37. *Id.*
38. New Jersey Welfare Rights Org. v. Cahill, 349 F. Supp. 491, 496 (D.N.J. 1972).
39. *Id.* at 497.
40. *Id.*
41. *Id.*

> to the state of anomie and which violates its laws against fornication and adultery.[42]

The court cast aside the objection that the AFWP eligibility restriction was not the "wisest method of promoting family stability"[43] because it would fail to have the intended effect, or even backfire (i.e., put an added strain on unwed couples who, but for the lack of state financial support, might have stayed together). The court pointed to the evidence presented during the brief trial that a flurry of marriages among beneficiaries had followed the enactment of the new program.[44]

The Supreme Court reversed the district court's decision, striking down the New Jersey program as a violation of the constitutional right to the equal protection of the laws. Without defining the terms "legitimate" or "illegitimate," or explaining precisely how the program worked, the Court accepted at face value that the statute "in practical effect . . . operates almost invariably to deny benefits to illegitimate children while granting benefits to those children who are legitimate."[45] While acknowledging the validity of the statutory purpose to "preserve and strengthen family life," the Court relied on its decisions in *Weber*, *Levy*, and the then recently decided case of *Gomez v. Perez*[46] to identify several flaws that infected the New Jersey law. First, the Court quoted in full the passage from *Weber* that speaks of penalizing the illegitimate child as "an ineffectual—as well as unjust—way of deterring the parent."[47] Repeating themes from *Levy* and *Weber*, the Court also explained that distinctions based on circumstance of birth made no sense in light of the principal purpose of the statute—which was to provide for the "well-being and health" of needy children.[48]

The decision in *Cahill*, which was per curiam, suffers from haste and superficiality. From the point of view of conventional constitutional doctrine, the decision is vulnerable on a number of counts. In contrast with the trilogy of illegitimacy cases upon which the Supreme Court relies, the eligibility criteria in the AFWP are primarily

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42. *Id.*

43. *Id.*

44. *Id.*

45. New Jersey Welfare Rights Org. v. Cahill, 411 U.S. 619, 619-20 (1973) (per curiam).

46. 409 U.S. 535 (1973). In *Gomez*, the Court decided that a state may not recognize a judicially enforceable right to a natural father's support for legitimate children, while denying that same right to illegitimate children. By the term "illegitimate," the Court in that case appeared to mean children born out of wedlock. *See id.* at 536-37.

47. *New Jersey Welfare Rights*, 411 U.S. at 620 (quoting Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164, 175 (1972)).

48. *Id.* at 621.

familial, not individual: they rest on the marital status of the parents, in combination with the legal or biological relationship of the parents to the children. The Court in *Cahill* paid little attention to the "fit" between the "suspect" category of illegitimate children and the classification created by the statute, nor did it address whether the purpose or intent of the New Jersey AFWP was to put illegitimate children at a disadvantage.[49]

The doctrinal defects in the Court's analysis are of some consequence. *Cahill* casts into doubt the constitutional soundness of welfare programs that confine benefits to two-parent families by suggesting that such programs might impermissibly "discriminate" against illegitimate children. A closer look, however, reveals a rather complex scheme for determining who was "in" and who "out" of the category of those eligible for benefits under the New Jersey statute in *Cahill*. The scheme does not suggest that the decision to require a particular relationship between parents, and between parents and children, should be taken as manifesting some type of legislative animus against illegitimate children.

First, the statute is significantly overinclusive and somewhat underinclusive. It is overinclusive because it disqualifies many families consisting exclusively of legitimate children—for example, families formed through remarriage following divorce, where the only children present are the legitimate product of a previous marriage who are not in a position to be adopted by the stepparent (because the natural ex-spouse has not relinquished parental rights). Secondly, the statute is also arguably underinclusive because it grants benefits to some families with illegitimate children present in the household. The Supreme Court completely overlooked the statutory language stating that there must be at least one minor child living with the married couple, which child must be adopted by, or be the natural child of, each member of the parent couple. An eligible household could therefore include other children born out of wedlock (e.g., to the wife by a man other than her husband prior to her marriage), although the family might receive a lesser amount

49. At the time of the *Cahill* decision, the law had not yet gelled on the question of whether the test of an equal protection violation, in the absence of a facially discriminatory classification, was one of effect or intent. *Washington v. Davis*, 426 U.S. 229 (1976), established that a neutral classification is invalid only if there is a finding of intent to discriminate, thus shifting the focus to the question of how a plaintiff could prove discriminatory purpose. Subsequent cases indicated that a "close fit" between the classification at issue and the suspect category would count as circumstantial evidence of intent. *See* Arlington Heights v. Metropolitan Hous. Corp., 429 U.S. 252 (1977).

than if all children qualified.[50] Thus, the statute arguably does not exclude all illegitimate children from sharing in state largesse under the program.[51]

The Court also ignored the fact that whether a statute designed along the lines of the AFWP treats legitimate and illegitimate children differently depends on state law governing the status of children born out of wedlock and on the avenues for changing that status through legitimation procedures. If there were mechanisms in New Jersey in 1971 by which children born out of wedlock could gain legal rights against their natural father, regardless of his marriage to the mother, that were similar to those enjoyed by fully legitimate children,[52] then the effect of the statute would be to

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50. It is not entirely clear from the courts' opinions in the case or from the parties' briefs exactly how the level of benefits was calculated under the New Jersey program, but the record suggests that only a qualifying child was included in the family unit for the purpose of calculating benefit amounts. N.J. STAT. ANN. § 44:13-8 (West 1971) (repealed 1977).

51. Neither the courts nor the parties specifically addressed the implications of the statutory language suggesting that no more than one child in the family need meet the qualifying criteria. At one point, the district court reports the plaintiffs' arguing that the statute "requires that the family must be one in which both parents are in the home, are ceremonially married to each other, and in which both parents are the natural or adoptive parents of *children* in the home," New Jersey Welfare Rights Org. v. Cahill, 349 F. Supp. 491, 493 (D.N.J. 1972) (emphasis added), which implies that all children must meet the criterion. Although it is possible that New Jersey applied the statute in this manner, I have discovered nothing else in the record to indicate this.

52. The statute in New Jersey in 1971 governing legitimacy did not expressly provide for such a mechanism. The statute stated only that any child born out of wedlock could be legitimated by the subsequent marriage of his or her natural parents and their recognition and treatment of the child as their own. The newly legitimated child was to enjoy the same rights and privileges as children born in wedlock. The statute appears to leave open the possibility, however, that rights to inherit from the father could be established through acknowledgment by the father under preexisting common law. *See* N.J. STAT. ANN. § 9:15-1 (West 1960) (repealed 1983).

Under state law generally up to the 1970s, legitimacy was defined primarily "by reference to the marital status of the child's parents, at the time of the child's birth." HARRY D. KRAUSE, ILLEGITIMACY: LAW AND SOCIAL POLICY 10-11 (1971) [hereinafter KRAUSE, ILLEGITIMACY]. Various legal disabilities attached to a child born to an unmarried mother. *Id.* at 11-13. Until recently, state statutes governing "legitimation" varied widely in form and in operation, ranging from "procedures resulting in full legitimation, thus providing equality with legitimate children, to arrangements for 'partial' legitimation" with graduated effects on rights to support or inheritance. *Id.* at 19-20; *see also* HARRY D. KRAUSE, CHILD SUPPORT IN AMERICA, THE LEGAL PERSPECTIVE at chs. III, IV (1981) [hereinafter KRAUSE, CHILD SUPPORT IN AMERICA]. A number of mechanisms were available for the "legitimation" of the child—the most important being the natural father's subsequent marriage to the mother. Other measures for full or partial "legitimation" included an official acknowledgment of paternity on the part of the father (which could be written or oral, depending on the state) or a court-declared acknowledgment of paternity as the result of a paternity action. *See* HARRY D. KRAUSE, FAMILY LAW IN A NUTSHELL 144-45

exclude an even greater number of legitimate (in the sense of "legitimated") children from serving as a qualifying child. In other words, a family consisting of a single mother with a child born out of wedlock who is subsequently legitimated by the natural father might nevertheless fail to qualify for benefits, because the parents are not married to each other, or the mother is married to someone else. In light of these observations, the statute looks less and less like one intended to favor legitimate over illegitimate children, and more like one directed at a rather different purpose.

Finally, the "fit" between the statutory classification and the category of illegitimacy depends on how that category is defined. The Supreme Court never makes clear what the Court itself means by "illegitimacy" in the context of its analysis under the federal Constitution. Is it synonymous simply with the fact of being born out of wedlock, regardless of subsequent events? Or does it refer to contemporaneous legal status—a status that can be a function of the child's or parents' subsequent actions, and the significance and consequences attached to those actions under state law. If discrimination against illegitimates is synonymous with less favorable treatment of children born out of wedlock (rather than of the

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(1977); KRAUSE, CHILD SUPPORT IN AMERICA, *supra*. The simple identification of the natural father, or cohabitation with him, did not necessarily "legitimate" the child in the sense of putting that child on a legal par with a child born to the father's marital union.

At the time *New Jersey Welfare Rights Org. v. Cahill*, 411 U.S. 619 (1973), was decided, state rules regarding the status of children born out of wedlock, and the processes of "legitimation," were not uniform. *See* KRAUSE, ILLEGITIMACY, *supra*, at ch. I. For a 1981 update, see KRAUSE, CHILD SUPPORT IN AMERICA, *supra*. In response to a number of Supreme Court rulings, states have since moved in the direction of equalizing the status of children born in and out of wedlock by invalidating virtually every legal distinction between illegitimate and legitimate children, save those that flow from different presumptions of paternity and from the practical difficulties of identifying the natural father of some extramarital children. *See* HARRY D. KRAUSE, FAMILY LAW IN A NUTSHELL 167-70 (1995). Illegitimate children without an identifiable father still necessarily have fewer legal rights simply because there is no man against whom the rights can be readily asserted. *Id.* at 164-65. Once the father is identified and paternity established under state law, however, the child is usually fully "legitimated," in the sense that he is placed on par with a child born in wedlock with respect to virtually all rights and obligations between parent and child. *See* KRAUSE, ILLEGITIMACY, *supra*, at ch. I; *see also* HARRY D. KRAUSE, FAMILY LAW IN A NUTSHELL at ch. 11 (1986). Inheritance rights are one exception to this proposition. *See* Labine v. Vincent, 401 U.S. 532, 534 (1971) (holding that, in the context of inheritance law, states could discriminate against those born out of wedlock).

In 1973, the National Conference of Commissioners on Uniform State Laws promulgated The Uniform Parentage Act. *See, e.g.*, N.J. STAT. ANN. § 9:17-38 (West 1993 & Supp. 1996). This Act seeks to establish that all children and all parents have equal rights with respect to each other, regardless of the marital status of the parents, and also provides a procedure for establishing parentage in disputed cases. *Id.* As of 1993, 18 states had adopted versions of the Act, including New Jersey's "New Jersey Parentage Act" of 1983. *See id.*

smaller group who ultimately fail to be fully legitimated), the AFWP is overinclusive, because it permits many such children to serve as a qualifying child.[53] Indeed, if the state's assumed motive for a law were its disapproval of out-of-wedlock childbearing as such and its desire to punish children born under those circumstances, one would expect the law to accord less favorable treatment to children based on status at birth alone. Yet this is precisely what the AFWP does not do. Rather, it grants benefits to many families containing children born out of wedlock, provided they are "legitimated" in a certain manner *and* their parents marry. It is most plausible to describe the statute as seeking to encourage both marriage as such and the establishment of legal responsibility by both members of a married couple for any children in their household.[54]

In their zeal to strike down the law, the Court ignored these aspects of the law's operation. The record in the case is devoid of any indication that the parties paid much attention to them, either. The Court's inadequate analysis casts an unnecessary shadow over the prospects for similar programs in the future—that is, programs in which the entitlement scheme endeavors to promote traditional family patterns by creating distinctions that coincide only very roughly with the category of "illegitimacy." To be sure, the Court's illegitimacy cases may still pose a formidable obstacle to governmental attempts to adopt welfare benefits programs that discriminate overtly against illegitimate children. Examples might be statutes that categorically deny benefits to children born out of wedlock, while granting benefits to all other children. But *Cahill* shows that it is possible to design benefits programs that use the government's spending power to try to create illegitimacy-discouraging and marriage-promoting incentives without precisely targeting illegitimate children in this way.

II. TRADITIONAL FAMILY LIFE AND LEGITIMATE STATE PURPOSES: THE COURT'S INCOMPLETE VISION

Taking the New Jersey statute in *Cahill* as a starting point, we shift focus to the larger question of whether programs that fit the general pattern of the AFWP are a legitimate exercise of the state's legislative power. Put in more doctrinal terms, are such programs

53. For example, it allows the payment of benefits to a family containing a child born out of wedlock to a woman who subsequently marries a man, other than the natural father, who then adopts the child.

54. For an additional discussion of why the New Jersey legislature established the precise requirements of natural parenthood or adoption for *each* member of the married couple in the AFWP, see *infra* discussion at 514-15.

"rationally related to some legitimate state purpose"? There are three main elements to this inquiry: identifying the possible justifications for the law; deciding whether the government may seek to accomplish those ends; and determining whether there is reason to believe that the programs in question will actually advance their stated purposes. The Court in *Cahill* purported to address those questions, but did so inadequately by reiterating a series of legal and analytical maneuvers borrowed largely from the illegitimacy cases upon which it so heavily relied. The next section will be devoted to examining the Court's reasoning in the illegitimacy cases leading up to *Cahill*, and to analyzing the faulty vision that prevented the Court from coming to grips with the real issues in those cases. The discussion will conclude with suggestions for a different approach to the issues raised by the cases—one that is more favorable to the view that government benefits can and should be confined to "favored family forms."

A. *The Illegitimacy Cases: Atomistic Discourse and the Disregard of Mediating Norms*

The illegitimacy cases exemplify an analytical method that I term "atomistic discourse." The method consists of conducting doctrinal analysis by breaking down the elements of the law at issue—as well as its purposes and effects—into the simplest possible components, and then considering those components in artificial isolation. When legal analysis implicates questions of the effects of legal rules on human behavior—as it so often does—"atomistic discourse" takes the form of a highly individualistic approach to human motivation and social interaction. That approach looks at the impact of human choice and legal rules one person at a time, and gives short shrift to collective dynamics or to the long-term social effects of incremental shifts in incentives and expectations that might be brought about by changes in the law.

"Atomistic" legal analysis is marked by a refusal to acknowledge the possible existence or influence of informal or extralegal social norms. The cases relied upon in *Cahill*, for example, show an almost complete disregard for social convention as an independent force. As a consequence, the Court never addresses how informal customs, conventions, and mores might influence behavior, how they interact with legal rules, or whether the law has any obligation or reason to respect those social realities. To some extent, these omissions are understandable. In part they are a function of the types of challenges leveled against the laws at issue, which are grounded in the perceived violation of the rights of particular individuals. This context surely contributes to the courts' focus on the

law's effects on individuals abstracted from their social context. That focus, however, creates serious distortions in reasoning and conclusions.

1. Atomistic Discourse and the Supreme Court's Illegitimacy Cases

In its illegitimacy jurisprudence, the Supreme Court manifests the narrowness of its analytic focus in a number of different ways. First, the Court customarily posits a simple or unitary purpose for the statutory scheme at issue, thus insuring that any aspect of the scheme that advances some secondary, unrelated purpose will be found to be "irrational." Second, the rule under scrutiny is considered in legal isolation. The Court gives remarkably little attention to what might be termed legal synergy: that is, the way in which a particular rule might interact in a complex way with a range of other legal measures to shore up social institutions or to encourage what is thought to be a desirable social pattern. The Court seems totally unaware that the law at issue might be only one component of a larger legal scheme consisting of rules designed to work together and reinforce each other.

Third, the universe of analysis is a socially isolated one. The influence of the particular rule at issue is assessed without considering the multifarious, complex social setting on which the rule is brought to bear, or how changing the law might contribute over the long run to the alteration of that social setting. Finally, little or no weight is given to the statute's symbolic significance in signaling governmental support for social conventions that modulate or regulate behaviors.[55]

The tendency to find a singular, unitary purpose for a statute or rule is illustrated by the Court's decisions in *Levy v. Louisiana*,[56] *Glona v. American Guarantee & Liability Insurance Co.*,[57] *Weber v. Aetna Casualty & Surety Co.*,[58] and *Gomez v. Perez*,[59] and is carried forward in the *Cahill* case. In all these cases, the differential treatment for illegitimate children (or, in the case of *Cahill*, for some families containing

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55. This corresponds to one aspect of what Cass Sunstein terms the expressive function of the law. *See* Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021, 2025-29 (1996) (describing some laws as serving to convey the message that certain behaviors or states of affairs are desirable, admirable, or valuable in themselves).

56. 391 U.S. 68 (1968).

57. 391 U.S. 73 (1968).

58. 406 U.S. 164 (1972).

59. 409 U.S. 535 (1973).

illegitimate children) is found inconsistent with the unitary purpose the Court identifies, thus obviating any discussion of whether there might be some secondary goals at work. In *Levy*, for example, the Court implied that the right of recovery for a mother's wrongful death was a function of, and served as compensation for, a child's loss of a person upon whom he was dependent.[60] By implication, the dependency was a necessary and sufficient condition for recovery, and birth status could not rationally be given any independent significance. In *Gomez*, the Court characterized the Texas scheme as creating "a judicially enforceable right on behalf of children to needed support from their natural fathers,"[61] thus expressing a judgment that the purpose of the statute was to provide for the material needs of biological offspring—a purpose incompatible with the exclusion of impoverished illegitimate children. In *Weber*, the Court stated that "[a]n unacknowledged illegitimate child may suffer as much from the loss of a parent as a child born within wedlock,"[62] thus suggesting that the legislative purpose of the workmen's compensation scheme at issue was to compensate dependents or relatives in a manner strictly proportional to their material need. Finally, in *Cahill*, the per curiam Court justified its decision by stating that "there can be no doubt that the benefits extended under the challenged program are as indispensable to the health and well-being of illegitimate children as to those who are legitimate,"[63] indicating that providing material support to poor children was the sole and overriding purpose of the New Jersey program and the sole benchmark for the "rationality" of any aspect of its design.[64]

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60. *Levy*, 391 U.S. at 72.

61. *Gomez*, 409 U.S. at 538.

62. *Weber*, 406 U.S. at 169.

63. New Jersey Welfare Rights Org. v. Cahill, 411 U.S. 619, 621 (1973).

64. In this respect, the Supreme Court's *Cahill* decision is in keeping with the analytic method adopted by the Court in many of its prior attempts to divine the congressional purpose behind a broad spectrum of statutory and regulatory restrictions placed on eligibility for welfare payments and in-kind benefits: the Court first identifies an exclusive "needs-based" rationale for the program and then tests every condition against that purpose. *See, e.g.*, King v. Smith, 392 U.S. 309, 318-20 (1968) (holding that the "man in the house" rule disqualifying women for AFDC payments based on unmarried cohabitation bears no relationship to the material needs of household); United States Dep't of Agric. v. Moreno, 413 U.S. 528, 533-34 (1972) (holding that relatedness of household members is irrelevant to members' need for food subsidies); Jimenez v. Weinberger, 417 U.S. 628, 636 (1974) (holding that the fact of being an illegitimate child born after the onset of a parent's disability has no bearing on actual dependency and need for benefits). *But see* C.K. v. Shalala, 883 F. Supp. 991, 1014 (D.N.J. 1995) (upholding New Jersey's "family cap" regulation that denies any increase in AFDC payments to families for additional children born out of wedlock, on the rationale that encouraging responsible and thoughtful reproductive decision making is a legitimate "secondary" goal of the statutory design).

This analytic method displays a tunnel vision that arbitrarily rules out the possibility that a statutory scheme can have multiple, or "composite," legislative purposes. Those purposes can be quite eclectic: on the one hand, forestalling starvation or destitution; on the other, preserving—or at least not subverting—certain relational norms of behavior that support larger social patterns and institutions.

How might the Court have conceived of the purposes of some of the statutes at issue in the illegitimacy cases? One commentator has suggested goals stated in conditional forms: for example, in *Levy* or *Glona*, the legislature may have sought "to compensate . . . for wrongful death . . . to the extent that compensation does not sanction relationships that have never been legally formalized."[65] The statutory designs in *Levy* and *Glona* appear tailored to that end. Thus, the proper question in *Levy* and *Glona* was not whether the statutory limitations on recovery for illegitimate children accorded with a preselected statutory purpose: those very limitations revealed and helped to define that purpose. The only valid question was whether the composite purpose was one the state could advance in the manner in which it attempted to do so.

The Court's refusal to acknowledge that the purpose of the illegitimacy statutes might have been a composite of eclectic elements also shows a disregard of the realities of "pluralistic" group politics in forging legislative goals. Whether from self-interest or because of disparate theories of the public good, the constituencies involved in shaping the statutes at issue could well have differed in their legislative agendas.[66] With respect to the New Jersey AFWP at issue in *Cahill*, for example, some groups may have been concerned primarily with alleviating poverty and eliminating material want, while others were intent on minimizing the perverse behavioral effects that

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65. Aleta Wallach & Patricia Tenoso, *A Vindication of the Rights of Unmarried Mothers and Their Children: An Analysis of the Institution of Illegitimacy, Equal Protection, and the Uniform Parentage Act*, 23 U. KAN. L. REV. 23, 40 n.76 (1974); *see also* Carl E. Schneider, *State Interest Analysis in Fourteenth Amendment "Privacy" Law: An Essay on the Constitutionalization of Social Issues*, 51 LAW & CONTEMP. PROBS. 79, 92 (1988) (criticizing the Court's equal protection jurisprudence by stating that "[p]roblems . . . also arise when the Court assesses each of a statute's several purposes without considering the ways in which the legislature must moderate its pursuit of one goal in order to serve others as well"); Note, *Legislative Purpose, Rationality, and Equal Protection*, 82 YALE L.J. 123 (1972) (commenting that the legislative purpose of the statute in *Eisenstadt v. Baird*, 405 U.S. 438 (1972), was not to make contraceptives available as such, but to provide them only to the extent that their availability would not encourage premarital sex).

66. *See, e.g.*, ROBERT A. DAHL, WHO GOVERNS? (1961); Sullivan, *supra* note 17, at 1468-73 (noting the role of pluralistic interest groups in attaching conditions to government largesse).

cash benefits programs might generate. Such concerns are familiar: the possibility of detrimental effects on work effort[67] or on the willingness to marry before having children.[68] It would hardly be surprising if the intersection of these agendas produced a compromise that restricted cash benefit eligibility in a manner designed to abate some of the adverse consequences of government largesse. The question of whether such restrictions would "work"—that is whether they would have the intended effects—has some bearing on their rationality,[69] but raises concerns entirely different from those at issue in deciding whether a particular restriction is *consistent* with the legislative purpose. In sum, there is no reason to rule out the possibility that the ordinary processes of legislative compromise and logrolling would issue forth statutory schemes (such as the limitations on benefits program—as in *Cahill*—or the limitations on a judicially enforceable right of recovery—as in the illegitimacy cases) with diverse and multiple purposes.

"Atomism" also infects the Court's judgment of the "rationality" of the rules at issue in the illegitimacy cases by distorting its analysis of the rules' effectiveness—that is, of whether the state statutes at issue will actually work to accomplish the subsidiary goal of discouraging illegitimacy. The Court's main ploy on this point has been to treat the entire question of behavioral effect as a legal question, rather than as an empirical question for social science.[70] Even apart from that defect, however, the Court also takes too narrow a view of the possible impact of legal rules on social choice. Justice Harlan adumbrates this line of analysis in his dissent in *Glona*:[71] each rule should be assessed as part of a broader scheme. The scheme consists of a pattern of rules and restrictions, often in diverse areas of the law, that work together to support, maintain, or elevate one set of social expectations above others. The result amounts to a form of

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67. *See* SAR A. LEVITAN, PROGRAMS IN AID OF THE POOR 136 (1990) (noting a concern with effect of the welfare programs on work effort, and emphasizing the need for welfare programs to encourage self-support in addition to providing cash or goods and services); LAWRENCE M. MEAD, BEYOND ENTITLEMENT: THE SOCIAL OBLIGATIONS OF CITIZENSHIP 69-90 (1986) (arguing that work must be enforced among welfare recipients, as disadvantaged individuals are unlikely to work regularly unless they are required to do so); *see also* Robert A. Moffitt, *The Effect of a Negative Income Tax on Work Effort: A Summary of the Experimental Results, in* WELFARE REFORM IN AMERICA: PERSPECTIVES AND PROSPECTS 209-29 (Paul M. Sommers ed., 1982) (providing results of experiments showing that the negative income tax reduces work effort).

68. *See supra* note 3 and accompanying text.

69. See *infra* note 156 and accompanying text (discussing efficacy).

70. *See infra* note 119 and accompanying text.

71. Glona v. American Guar. & Liab. Ins. Co., 391 U.S. 73, 76-82 (1968) (Harlan, J., dissenting).

legal synergy in which the whole is more than the sum of its parts.[72] The influence of each part of the scheme cannot be readily teased out, measured, assessed, or demonstrated. Laws work together. Each rule might plausibly be considered "irrational" if scrutinized in isolation; but if every rule were subject to that treatment in turn, the entire structure would collapse.[73] Yet the Court takes virtually no account of the dynamics of legal synergy, in which each piece makes its contribution to maintaining the structure as a whole.

In a much broader sense as well, the cases ignore the interaction of the legal whole with the social reality in the form of "extralegal" social forces, practices, conventions, and taboos. That interaction is in part symbolic. Normative expectations or moral conventions, although potentially influenced by law, are not wholly creatures of the legal regime. Rather, behavioral conventions bear a more complex relationship to forces external to those conventions, such as legal restrictions or material incentives. Social expectation and "social meaning" are of critical importance to the maintenance of norms.[74] This observation is especially relevant to a decision to enact statutes like those in *Cahill*: if the government provides the funds to support people who happen to live together in certain arrangements, then the government can be seen as, in some respect, "subsidizing" those arrangements. That subsidy sends a message of acceptance, and can be taken as signaling that a way of life is in the public interest (or at least not against it). Since the government usually subsidizes what it supports and wishes to encourage, it is not surprising that benefits programs can be perceived as placing a stamp of approval on circumstances that trigger eligibility. This is especially so when eligibility is restrictive—as it is under AFDC—so that some types of families are actually *excluded* from a program.

The *Cahill* case illustrates another important respect in which considering a statute out of context can result in a distorted picture

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72. *See id.*

73. Carl Schneider has made a similar point with respect to some of the Court's family law and privacy cases, such as *Eisenstadt v. Baird*, 405 U.S. 438 (1972), and *Zablocki v. Redhail*, 434 U.S. 374 (1978). He faults the Court for "examining each statute in isolation, asking only how important its particular prohibition is and whether the statute effectuates that prohibition." Schneider, *supra* note 65, at 99. He suggests that the importance of a prohibition should be viewed as depending on "the larger socializing scheme," *id.*, which includes not just social practices and institutions, but also "the whole set of statutes." *Id.*; *see also* Carl E. Schneider, *The Channelling Function in Family Law*, 20 HOFSTRA L. REV. 495 (1992); Bruce C. Hafen, *The Constitutional Status of Marriage, Kinship, and Sexual Privacy—Balancing the Individual and Social Interests*, 81 MICH. L. REV. 463 (1983).

74. *See* Lawrence Lessig, *The Regulation of Social Meaning*, 62 U. CHI. L. REV. 943, 956 (1995); Cass R. Sunstein, *Social Norms and Social Roles*, 96 COLUM. L. REV. 903 (1996); *see also infra* Part II.A.2.

of its intent and effect. There, the Court not only ignored the issue of how the AFWP might work together with other laws and practices designed to buttress traditional family life, but it also failed to consider how the statute fit together with the federal AFDC program, which operated simultaneously and was thought by some to contribute to the breakdown of the two-parent family among the poor.

Even accepting that the purpose of the AFWP was to favor the traditional two-parent family, the statute setting up the program seems to draw some quite arbitrary and question-begging distinctions. For example, it excludes two-parent families consisting of remarried spouses and their children if the children are unavailable for adoption by the stepparent (presumably because the parent left behind will not relinquish parental rights), but includes similar families where the children are available to be adopted. A similar disparity exists for families consisting of a former single mother married to a man who is not the natural father of her illegitimate children. The children may or may not be available for adoption by her new husband.

The AFWP did not stand alone, however. The statute makes quite a bit more sense when considered as a supplement to AFDC—and one designed to neutralize some of the undesirable behavioral effects often attributed to the federal program. The key is that the AFWP dovetails almost precisely with AFDC: families eligible for AFWP include just those families excluded from AFDC, and vice versa (with one notable exception discussed below).

Although AFDC covers poor families with children and one parent "absent," it is available to some married and cohabiting couples. Intact stepparent families retain AFDC eligibility as long as the stepparent is not legally responsible for the children of the other parent. Likewise, after the demise of the "man in the house" rule,[75] a woman retains AFDC benefits if she is cohabiting with a man who is not the natural father of her children. AFDC is unavailable, however, if the stepparent of a legitimate or illegitimate child becomes a legally responsible parent by adopting his spouse's children. Likewise, if a cohabiting man marries his girlfriend and adopts her children, AFDC is unavailable. AFWP covers poor families that fit those disqualifying patterns, thus removing disincentives to adoption and/or marriage under those circumstances. Finally, AFDC is unavailable if two natural parents are present in the home, whether

75. *See* King v. Smith, 392 U.S. 309, 318-20 (1968) (holding that a state eligibility rule under the AFDC program that disqualified unmarried women who engaged in sexual cohabitation from receiving benefits—known as the "man in the house" rule—was invalid because cohabitation bears no relationship to the material needs of the household).

or not they are married. The AFWP offers a positive incentive for parents in such a circumstance to marry, since marriage will allow the family to receive state AFWP payments (which would be unavailable if they lived together without marrying).

Thus, if the Court in *Cahill* had surveyed the entire legal landscape, it would have realized that the New Jersey program was best regarded as a quite rational attempt to counteract some of the perverse incentives created by AFDC, rather than an effort to single out illegitimate children for unfavorable treatment. Indeed, it could be argued that the scheme aimed to improve the lot of children born out of wedlock by eliminating artificial disincentives—created by the design of AFDC—to the adoption and "legitimation" of children who had been wholly deprived of the support of one (natural) parent. Illegitimate children who were not adopted could still receive benefits under the federal program.[76]

In sum, the Court's illegitimacy jurisprudence in general—and its decision in *Cahill* in particular—are marked by a disregard of the legal and social setting in which the law operates. The cases contemplate a social world devoid of mediating structures, institutions, or conventions. Since there are no significant extralegal social forces at work, there need be no theory of how changes in the law might buttress or erode those forces. In this impoverished universe, the law can be expected to have a direct and unmediated effect on discrete individuals. The conduct the law seeks to regulate—such as out-of-wedlock childbearing—can be treated as a one-shot phenomenon, with antecedents and effects measured one child and one parent at a time.[77] This atomistic approach lends a distinct air of unreality to the Court's decisions, because out-of-wedlock childbearing is an area in which normative expectations can be expected to play an important role in shaping people's behavior.

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76. If the Court had looked even more closely, however, the statute might not have survived after all. Shortly after the enactment of the New Jersey program, a proposal was made for its repeal on the ground that its effect on marriage and family formation was exactly the opposite of what was desired. The AFWP did not replace the federal-state AFDC program, but it did replace the federal AFDC-U program, which provided cash benefits to two-parent families with an unemployed primary breadwinner. Because the benefits offered under the AFWP were significantly less generous than those available under AFDC to a family of comparable size, and also less generous than the benefits that previously had been available under the AFDC-U program, the New Jersey program actually increased the incentive for poor families in New Jersey to break up. *See Hearing on Assembly Bill No. 1201 Before the New Jersey Assembly Institutions and Welfare Comm.* 1-6 (1972) (copy on file with author).

77. In the illegitimacy cases, that framework is taken even to the point of implying that the justification for a particular child's sacrifice should be tested by its behavioral effect on *his* parent alone. *See, e.g.*, Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164 (1972) (stating that "penalizing the illegitimate child is an ineffectual—as well as unjust—way of deterring the parent").

2. The Disregard of Norms

Individuals act under others' influence, and they care what others think. More broadly, they are members of complex societies in which standards and expectations for conduct are an ineluctable feature of social and cultural life—a fact amply substantiated by sociologists, sociobiologists, and anthropologists studying a spectrum of cultures. This is not the place for a comprehensive exposition of the source and operation of moral and cultural norms—an issue that I and others have discussed elsewhere.[78] Suffice it to say that, traditionally and historically, sexuality, family relations, and marriage have been highly "normalized" areas of human existence in which moralism abounds, social expectations are often highly defined, conformity is expected, deviance is punished by social sanctions imposed by the group, and conformity is enforced through fear of rejection or loss of standing within the group.[79]

We have described how the Court's illegitimacy jurisprudence virtually ignores the dynamics of social norms that have evolved to regulate human sexuality. As a consequence, it is not surprising that the case discussions take little account of how individual behavior in the social setting is influenced by how others behave or by the incidence and prevalence of behavioral patterns. As we have seen, the Court asks whether the law makes sense based on how that law—and that law alone—will affect a single woman's decision-making process. This approach—which considers the effect of the law on one woman's decision and of one woman's decision on society—cannot help but influence the assessment of the magnitude of society's interest.

The problem with the Court's way of framing the inquiry is that the significance of an individual's conduct for society as a whole is

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78. *See* Amy L. Wax, *Against Nature—On Robert Wright's The Moral Animal*, 63 U. CHI. L. REV. 307 (1996) (book review). The legal academy has seen a recent flowering of interest in the nature of informal social norms and their role in shaping social expectations, behavior, and responses to legal change. *See, e.g.*, Lessig, *supra* note 74; Sunstein, *supra* note 74; *see also* Dan M. Kahan, *What Do Alternative Sanctions Mean?*, 63 U. CHI. L. REV. 591 (1996); Richard H. Pildes, *The Destruction of Social Capital Through Law*, 144 U. PA. L. REV. 2055 (1996). *See generally* Symposium, *Law, Economics, Norms*, 144 U. PA. L. REV. 1643 (1996). There has been relatively little attention paid in this literature to the role of norms that regulate marital and childbearing behavior or to the ways in which judges and policymakers should take cognizance of extralegal, collective forces in these areas. *Cf.* Wax, *supra*, at 341-54 (analyzing the interplay of welfare policy and law with norms that control reproductive behavior and family formation); *see also* Sunstein, *supra* note 74, at 953 n.188 (briefly noting "controversial . . . governmental efforts to stigmatize unwed parenthood").

79. *See* Wax, *supra* note 78, at 341-59.

not only a matter of the immediate consequences following from that act considered in isolation. There are two ways in which individual choices that are seemingly inconsequential or minimally "harmful" can have detrimental social effects that might warrant governmental action. First, society's ability to absorb the effects of a particular instance of behavior is often a function of its prevalence. Societies may barely feel the consequences of deviant conduct when the conduct is rare, but will experience severe strain as it becomes more common. A single drunk is of far less concern than a nation of drunks, and has far less impact on the social fabric.[80] A twenty-five percent illegitimacy rate has far more serious—and very different—consequences than a two percent rate.[81]

Second, the adverse consequences of behaviors can go beyond the burdens of simply dealing with a larger number of individual acts alone. Relatively small changes in patterns of conformity to normative expectations can have disproportionately large effects. The strength of a social convention is often not a simple linear function of the number of people adhering to it. Some norms are fragile because a small increase in nonconformity can lend accelerating momentum to the erosion of social practices.[82] One reason for this is that it is easier to assimilate people to a model of behavior when most people exemplify that behavior. As previously unacceptable behaviors become more common, policing the norms that hold those behaviors at bay becomes more costly to society as a whole. As nonconformists are counted in greater numbers among friends, relatives,

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80. As Sir Patrick Devlin observes in *The Enforcement of Morals*, conduct that can be harmless, or only minimally harmful, in isolation can have more serious effects when indulged in by a large number of people:

> You may argue that if a man's sins affect only himself it cannot be the concern of society. If he chooses to get drunk every night in the privacy of his own home, is any one except himself the worse for it? But suppose a quarter or a half of the population got drunk every night, what sort of society would it be? You cannot set a theoretical limit to the number of people who can get drunk before society is entitled to legislate against drunkenness.

SIR PATRICK DEVLIN, THE ENFORCEMENT OF MORALS 15 (1970). For additional discussion of social harms and the incidence of behaviors, see FRED R. BERGER, HAPPINESS, JUSTICE, AND FREEDOM: THE MORAL AND POLITICAL PHILOSOPHY OF JOHN STUART MILL 260-64 (1984); 1 JOEL FEINBERG, THE MORAL LIMITS OF THE CRIMINAL LAW: HARM TO OTHERS 193 (1984) (discussing "specific instances of generally harmful activities" as being "sometimes themselves quite harmless"); *see also id.* at 226 ("Some types of behavior are harmful if widely done, harmless if done by only a few.").

81. For a discussion of harms and illegitimacy, see *infra* Part III.A.

82. In his discussion of norm changes, Sunstein acknowledges the existence of these patterns. He labels the changing patterns of behavior that initiate modifications of norms "norm bandwagons" and the accelerating shifts in norms that can result from even minor behavioral changes "norm cascades." *See* Sunstein, *supra* note 74, at 909.

or business associates, conformists find it harder to disapprove of "deviance" and to act on the disapproval, further weakening sanctions for violations. The social stigma attached to previously unacceptable behaviors progressively abates, making it ever easier for individuals to defy expectations. Conduct once deemed socially deviant comes to be regarded as more normal and acceptable.[83] The erosion of norms thus accelerates, moving towards a kind of normative "tipping" point, which can radically alter social patterns over the long term.[84] The accelerating erosion of norms is a special danger in the areas of sexual and reproductive behavior, where conformity to moral conventions and expectations requires that people constrain strong natural impulses. As nonconforming conduct becomes more common, not only does society lose its capacity to absorb whatever adverse effects are generated by nonconformity, but its power to discourage and limit nonconformity also drains away.

Ignoring the ways in which relatively small changes in social patterns of conduct can subvert attitudes and expectations inevitably leads courts to discount the government's interest in preventing certain behaviors. It also makes it easier for the courts to ignore whatever concrete harms might flow from the conduct that is sought to be deterred, on the theory that the law will have, at most, a marginal effect on a few individuals—an effect that will easily be

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83. *See* Daniel Patrick Moynihan, *Defining Deviancy Down*, 62 AM. SCHOLAR 17 (Winter 1993). For an extended discussion of why people respond to social norms and how the maintenance of social norms is sensitive to the balance of conformity and deviance, see Wax, *supra* note 78.

84. Social scientists have observed that a number of social phenomena are marked by a nonlinear relationship between one or more factors that influence behavior and the behavior itself. The pattern produced by the nonlinear relationship is sometimes described as an "epidemic," because, in a medical epidemic, the pace at which a disease spreads accelerates as its incidence increases. Epidemic phenomena are often marked by a "tipping point" at which a small additional change in a causative factor can lead to a huge and catastrophic change in observed effects. The sociologist Thomas Schelling has argued that so-called "white flight," or the tendency of Whites to move out when minorities in a neighborhood reach a certain percentage of the population, is an example of the tipping phenomenon. *See, e.g.*, T.C. Schelling, *A Process of Residential Segregation: Neighborhood Tipping*, *in* RACIAL DISCRIMINATION IN ECONOMIC LIFE (A. Pascal ed., 1972); T.C. Schelling, *Dynamic Models of Segregation*, 1 J. MATHEMATICAL SOC. 143 (1971); *see also* Jonathan Crane, *The Epidemic Theory of Ghettos and Neighborhood Effects on Dropping Out and Teenage Childbearing*, 96 AM. J. SOC. 1226-59 (Mar. 1991) (describing nonlinear relationship between factors influencing social deviance in inner-city neighborhoods and the prevalence of those behaviors); David C. Rowe et al., *An "Epidemic" Model of Sexual Intercourse Prevalences for Black and White Adolescents*, 36 SOC. BIOLOGY 127-45 (Fall/Winter 1989) (suggesting that the practice of early intercourse among teenagers in a community or social group accelerates rapidly once the number of teens who are sexually active passes a threshold point); Malcolm Gladwell, *The Tipping Point*, NEW YORKER, June 3, 1996, at 36.

absorbed against the background of the dominant social order, and thus will barely be felt by the polity as a whole.

A more accurate understanding of how behavior is socially situated, and how normative and social expectations influence social choice, forces behavior to be seen in a new light. To acknowledge the existence and importance of social norms is to acknowledge that "moral climate" matters—the way one person behaves will influence what others do. The dynamic of social norms thus can greatly magnify the impact of seemingly unimportant instances of nonconforming behavior. Conduct that previously seemed "harmless" and "private" may come to be regarded with less equanimity as it is seen to propagate influence beyond its limited bounds. For example, not only might bearing a child out of wedlock visit harm upon that child and on others who must deal with that child as it grows up, but it might also make it more acceptable to engage in that behavior, which will in turn increase the chance that others will do so, and that others will be harmed.

B. *Law, Morality, and Illegitimacy—Or Should Judges Take Account of Norms?*

Why do courts so often ignore or downplay the existence of social and sexual norms? There are several possible reasons for judicial reluctance fully to acknowledge these forces. The first problem with social norms is their ambiguous status as ideas and entities. Exactly what is a social norm, how do we know it exists, and how do we assess its force or its vulnerability to influence? The problem comes down to empirical verification: norms are easy to talk about but hard to characterize and measure, presenting thorny problems of proof and causation. How does one reliably track the "erosion" of social norms or allocate blame (or credit) to one factor among many? The task is even more problematic when courts are faced with the prospect of "protecting" vague mediating entities and abstract social constructs at the cost of imposing serious disabilities on concrete, identifiable individuals. It is not surprising that courts prefer to take the safer course of sticking with ordinary principles of individual psychology or demanding real proof of actual shifts in behaviors.

"Norms-talk" is alarming for yet another reason: it threatens to validate more extensive state action—and more extensive intervention in people's lives—than could otherwise be justified by considering the effects of the conduct alone. By indirectly amplifying and multiplying the effects of individual conduct, social norms

painfully shrink the zone of "self-regarding" conduct.[85] Likewise, acknowledging the reality of social norms magnifies the ways in which a seemingly inconsequential loosening of legal rules can affect larger patterns of social behavior. It is not implausible to suggest that the desire to avoid the far-reaching implications of these understandings has had an often unacknowledged influence on jurisprudence in the highly moralized area of sexual conduct and has decisively shaped the discourse of judicial decision making in areas touching on sexual and reproductive choice.

Judicial reluctance to grapple with the reality and dynamics of social convention may also stem from the fear of being drawn into conceptually difficult questions regarding the proper relationship of law and morality. To be sure, the Supreme Court has never expressly rejected the legitimacy of "legislating morality," and has occasionally been willing to uphold laws enacted at least partly to vindicate the moral judgment of the majority.[86] But the "privacy" cases in general—and the illegitimacy cases in particular—leave the impression that judges have nevertheless been chary of legislative attempts to enshrine moral values or simple normative judgments in law without further consequentialist justifications. Put another way, many cases reveal a mistrust of what William Galston terms "intrinsic traditionalism"—the government's decision to legislate on the basis of moral judgment alone—and more comfort with what Galston terms "functional traditionalism"—which rests its case on the asserted links between adherence to moral principles and the promotion of concrete social goods (or the prevention of concrete harm).[87] All the better if the judicial assessment of benefit or harm is one that can be shared by people of widely differing beliefs and values. The quest for such common foundations has deep roots in the

85. For a further discussion of the remote consequences of ostensibly "self-regarding" behaviors in the broader context of the harm principle and the philosophy of John Stuart Mill, see *infra* note 89 and accompanying text.

86. *See, e.g.*, Barnes v. Glen Theatre, Inc., 501 U.S. 560 (1991) (holding that state law prohibiting total nudity in public places is not unconstitutional in that it furthers a substantial government interest in protecting social order and morality); Bowers v. Hardwick, 478 U.S. 186 (1986) (stating that the majority belief that sodomy is immoral is an adequate rationale for upholding a Georgia sodomy statute); Maher v. Roe, 432 U.S. 464 (1977) (stating that a state legislature can favor normal childbirth over abortion); *see also* King v. Smith, 392 U.S. 309, 320 (1967) (acknowledging a state's "general power to deal with conduct it regards as immoral, and with the problem of illegitimacy," but holding that the state is barred from discouraging out-of-wedlock childbearing by cutting off AFDC benefits).

87. *See* WILLIAM A. GALSTON, LIBERAL PURPOSES 280-81 (1991). The Supreme Court's recent decision in *Romer v. Evans*, 116 S. Ct. 1620 (1996), is in keeping with the courts' discomfort with "intrinsic traditionalism" in the form of laws based on moral judgments not grounded in readily identifiable "harm to others."

need to identify legitimate sources of legislative authority in our liberal democratic state.[88]

The distinction Galston draws traces its pedigree back to a "harm principle" articulated in the work of John Stuart Mill. In *On Liberty*, Mill explained that "[t]he only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others. . . . [H]is own good, either physical or moral, is not a sufficient warrant."[89] According to this principle, a state's goal in restricting personal liberty is "legitimate" only if directed at preventing harm to, or securing the well-being of, persons other than the person whose liberty is constrained. A complex debate has raged over what properly can be included in the category of "harm to others," and over the existence

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88. A number of commentators have noted that the trend toward "demoralization" and privatization of family law can be explained in part by an "increasingly pluralistic view of American society" and a growing hostility towards laws that smack of the forcible imposition of one group's moral code on others. *See* Schneider, *supra* note 14, at 1840 (The pluralistic view is "[o]ne explanation of the law's fondness for Mill. . . . Pluralism has strengthened the trend by inhibiting society's impulse to impose its moral principles on discrete groups within society and by nurturing a relativistic view of moral principles."); *see also* Singer, *supra* note 14 (documenting the tendency to discount moral justifications for constraining individual choice, preference, and desire, in laws concerning sexuality and marriage).

Defending this pluralistic view, one commentator has recently argued that legislation seeking to enshrine an unshared moral vision of proper conduct is an undemocratic, tyrannical form of "naked preference," and that imposition of the moral values of the majority on a minority through law is an illegitimate exercise of the power of the majority. Like an unadorned preference for one group of citizens over another, the author argues, a legislative preference for one set of moral principles cannot, without more, serve as a legitimate state purpose. *See* Steven G. Gey, *Is Moral Relativism a Constitutional Command?*, 70 IND. L.J. 331 (1995); *see also* Cass R. Sunstein, *Naked Preferences and the Constitution*, 84 COLUM. L. REV. 1689 (1984) (discussing policies reflecting otherwise unjustified preferences of the majority); *cf.* Gey, *supra*, at 343 (discussing Robert Bork's and others' advocacy of the position that majority rule can legitimately and freely be imposed "over every major aspect of social policy," including "the moral and aesthetic environment").

For a general discussion of the question whether advancing the majority's moral views constitutes a "legitimate state interest," see DEVLIN, *supra* note 80; RICHARD A. WASSERSTROM, MORALITY AND THE LAW (1971); Steve Sheppard, *The State Interest in the Good Citizen: Constitutional Balance Between the Citizen and the Perfectionist State*, 45 HASTINGS L.J. 969 (1994); Thomas Nagel, *Moral Conflict and Political Legitimacy*, 16 PHIL. & PUB. AFF. 215 (1987). Nagel draws "a distinction between two kinds of disagreement—one whose grounds make it all right for the majority to use political power in the service of their opinion, and another whose grounds are such that it would be wrong for the majority to do so." *Id.* at 231. He defends the position that governmental action in a liberal state should rest on "generally accessible" arguments and grounds, rather than on moral or religious conceptions shared only by a few. *Id.*; *cf.* KENT GREENAWALT, PRIVATE CONSCIENCES AND PUBLIC REASONS 72-84 (1994) (discussing Nagel's theory and questioning whether democratic states are limited to "accessible grounds" to justify actions).

89. JOHN STUART MILL, ON LIBERTY 72 (1978).

and reach of the category of "self-regarding" conduct. Although some of Mill's critics have asserted that the fact that conduct is regarded by some as immoral can itself establish actionable social harm,[90] others have taken the position that the justification for state coercion must be cashed out in terms that go beyond a simple assertion of the "rightness" of society's moral judgment, since otherwise the justification simply threatens to swallow the rule.[91]

The Court's jurisprudence in the areas of reproduction, sexual privacy rights, and illegitimacy appears to have been influenced—if not actively informed—by some version of Mill's idea of the division between self-regarding and public conduct.[92] As noted, the Supreme Court has expressly stated on more than one occasion that moral judgments, without further consequentialist justification, can stand as a legitimate basis for legislative action.[93] There are some contexts, however, in which the Court betrays its uneasiness with this view. The discomfort sometimes takes the form of ignoring the fact of those judgments altogether.[94] At other times, it leads the Court to come up with a host of reasons why it cannot give effect to legislation that expresses society's collective moral stance.[95] But perhaps the most important way in which the Court betrays its implicit attraction to the Millian vision is by displaying a perverse blindness to

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90. *See* DEVLIN, *supra* note 80; JAMES STEPHENS, LIBERTY, EQUALITY, FRATERNITY (1873); *see also* FEINBERG, *supra* note 80, at 3-150 (discussing various versions of the position that societies have authority to guard against erosion of an integrated system of moral norms); BERGER, *supra* note 80, at 260-75 (discussing Devlin's conservative views).

91. *See, e.g.*, C.L. TEN, MILL ON LIBERTY 20-30 (1980).

92. *See* Jed Rubenfeld, *The Right to Privacy*, 102 HARV. L. REV. 737, 756 & n.108 (1989) ("American jurisprudence has had a long flirtation with [Mill's] simple but revolutionary idea. Several commentators have explicitly invoked the harm principle as the basis for a right to privacy.") (citations omitted). *But see* Tom Grey, *Eros, Civilization and the Burger Court*, 43 LAW & CONTEMP. PROBS. 83, 84, 88 (1980) (disagreeing with the academic consensus that *Griswold v. Connecticut*, 381 U.S. 479 (1965), "marked the first step in the constitutionalization of some contemporary version of John Stuart Mill's principle of liberty," and suggesting instead that the Court's privacy cases are motivated by "dedicat[ion] to the cause of social stability through the reinforcement of traditional institutions and have nothing to do with the sexual liberation of the individual"); *see also id.* at 87 (observing that "the [Supreme] Court has been of two minds in the areas of sex and the family—divided between the traditionalist viewpoint expressed in *Griswold* on the one hand, and a modern, rationalist, individualist outlook reflecting the perspective of J.S. Mill").

93. *See supra* note 86 and accompanying text.

94. *See, e.g.*, Schneider, *supra* note 14, at 1863-70 (noting the *Roe v. Wade* Court's failure to discuss the possibility that the Texas abortion statute at issue in that case expressed the state's specific moral opposition to the destruction of fetal life).

95. See *infra* Part II.C (discussing illegitimacy cases).

the quite detrimental consequences of certain "private" sexual behaviors.[96]

Of course, Mill's famous formulation—which bars government regulations for persons' "own good" but not for the good of society—depends on the existence of a significant category of "self-regarding" conduct that has no appreciable social consequences and that causes no significant harm to others. Although the concept of areas thought properly subject only to private preference has expanded,[97] the vision of persons in their splendid isolation can often be maintained only at the cost of doing violence to an accurate picture of social reality. Defenders of Mill are increasingly forced back on a qualified version of the harm principle (which Fred Berger has called the "strong liberal" position) that allows the government to act only on "*strong* evidence that engaging in the suspect behavior leads a *high* percentage of people to do *very* bad things" and when it is "extremely likely that government intervention can adequately deal with the . . . tide of abuse." As Berger observes, that position must leave society "inadequately equipped to protect itself from insidious harm that is the upshot of a chain of influences that begins with conduct that, viewed out of that context, appears to harm only the agent."[98]

The Court's attraction to the Millian paradigm is understandable. If the idea of a distinction between "private" behavior and behavior with which the public may rightly be concerned has, however indirectly, shaped judicial decision making, that is not because it is especially coherent or because it actually fits the facts, but because the alternative is frightening to the prospect of human freedom. The same set of concerns must also have a role in the courts' (admittedly erratic) reluctance to take moral judgments as conclusive of governmental authority on questions related to sexual privacy. As Lord Patrick Devlin has stated, any theory of harm, or of the relation of law to morals, must reckon with the strong conviction that a society cannot call itself free if it expects the individual to

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96. *Id.*

97. *See, e.g.*, Singer, *supra* note 14.

98. BERGER, *supra* note 80, at 264; *see also id.* at 260 ("The conservative foresees a *train* of events, perhaps a complex process, of which the (apparently) self-regarding acts are an early stage."). For other critiques of the "strong liberal's" narrow view of Mill's category of "self-regarding" conduct, see TEN, *supra* note 91, at 86 (noting that "[a] persistent criticism of Mill's liberty principle is its alleged failure to recognize that there are certain important social structures and institutions which a society is justified in protecting even at the cost of coercing individuals whose conduct threatens to undermine them"); Rubenfeld, *supra* note 92, at 756-57 (arguing that conduct can be considered "self-regarding" only by arbitrarily discounting certain forms of indirect, speculative, or emotional harm).

"surrender to the judgment of society the whole conduct of his life."[99] That surrender has already largely transpired in the sphere of economic rights. The courts long ago abandoned a commitment to economic self-determination as the bastion of freedom because they could no longer turn a blind eye to the baleful social effects of ostensibly "private" choices.[100] Sexual self-determination has not suffered the same fate yet, perhaps, in part, because it is seen as one of the last remaining redoubts of individual autonomy in the wake of the explosion of governmental regulation following the repudiation of *Lochner*.[101] That some aspects of sexual conduct and reproductive choice are, in important respects, "private," has hardened into a jurisprudential convention dissociated from any completely sound grounding in the harm principle. As I will argue below, any attempt to characterize the decision to bear a child out of wedlock as purely "private"—in the sense of "self-regarding"—stands in defiance of the evidence,[102] and thus must implicate a fundamentally arbitrary division. To maintain that division, it is necessary to resist the post-*Lochner* parallel: the recognition that private choices in the sphere of sexuality and reproduction—like those in business and commerce—can generate detrimental social "externalities." A more honest course is to assert that, when it comes to some areas of human life, harm to society's interests must be largely disregarded—that individuals must be free to engage in some forms of conduct completely free from state interference, regardless of effects.[103]

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99. DEVLIN, *supra* note 80, at 15.

100. *See, e.g.*, Richard A. Epstein, *The Harm Principle—And How It Grew*, 45 U. TORONTO L.J. 369 (1995) (arguing that an expansion in the types of harmful "externalities" that are viewed as resulting from various types of human activity has fueled the growth of the regulatory state). My contention (which Epstein does not contradict) is that the expansion has been selectively confined to commercial and economic activities. There has, if anything, been a contraction in the scope of what are considered, for purposes of legitimate public action, the cognizable externalities of sexual and reproductive choices.

101. Lochner v. New York, 198 U.S. 45 (1905) (holding that the due process clauses of the Fifth and Fourteenth Amendments protect liberty of contract and private property against unwarranted government interference); *see* Cass R. Sunstein, *Lochner's Legacy*, 87 COLUM. L. REV. 873 (1987); *cf.* Singer, *supra* note 14, at 1458-65 (describing how the notion of the family unit as the bastion of private power that serves as a counterweight to the state evolved into the recognition of the right of individuals to make decisions with respect to marriage and sexuality free from government interference, even where those decisions undermined the family).

102. See *infra* note 139 and accompanying text.

103. *See* Singer, *supra* note 14, at 1508-17.

C. *Law, Morality, and the Supreme Court's Illegitimacy Jurisprudence*

The foregoing discussion sheds new light on the Court's illegitimacy jurisprudence. In grappling with distinctions based on illegitimacy, the Court has operated in a constricted domain. Although it has never expressly denied that society has a valid interest in discouraging illegitimate births, the Court strives to sidestep the consequences of that interest. Although it acknowledges society's traditional condemnation "through the ages . . . of irresponsible liaisons beyond the bonds of marriage,"[104] it avoids confronting head-on the difficult issues raised by the existence of longstanding moral disapproval. The Court not only makes light of the purely moral grounds for the laws at issue, but also devotes virtually no attention to the more concrete or consequentialist grounds based on harm to others. Nor does it give any serious consideration to whether such concerns would amount to a "legitimate state interest" in discouraging out-of-wedlock births. Rather, the Court consistently concludes that no harm will be forthcoming from invalidating the rules at issue because they can be expected to have little impact on ordinary people. It thus avoids examining the effects of out-of-wedlock childbearing or considering whether liberty interests outweigh whatever harm is generated.

Instead, the Court declares the laws "irrational," "illogical," and "unjust."[105] In a number of cases, the measure at issue—whether a bar to recovery of workman's compensation,[106] or for wrongful death,[107] or of support from the natural father[108]—is deemed "irrational" based on the conclusion that it is an ineffective means of advancing whatever "legitimate" purpose the government might have. A measure of the Court's eagerness to avoid the hard questions is its acceptance, under the guise of a principle of constitutional law, of an essentially empirical proposition—that no person would ever be influenced by the presence of such laws in the desired direction. As already discussed, the Court's reasoning assumes that the influence must be direct, apparent, and immediate. It discounts or disregards the possibility of long-term trends mediated by a shift in

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104. Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164, 175 (1972), *quoted in* New Jersey Welfare Rights Org. v. Cahill, 411 U.S. 619, 620 (1973).

105. *See, e.g.*, *New Jersey Welfare Rights*, 411 U.S. at 620; Gomez v. Perez, 409 U.S. 535, 538 (1973); *Weber*, 406 U.S. at 175; Levy v. Louisiana, 391 U.S. 68, 72 (1968).

106. *See Weber*, 406 U.S. at 165.

107. *See* Glona v. American Guar. & Liab. Ins. Co., 391 U.S. 73, 73-74 (1968); *Levy*, 391 U.S. at 70.

108. *See Gomez*, 409 U.S. at 535.

the "moral climate." In this respect, the Court reveals its individualist bent most strongly—an outlook it shares with a robust version of Mill's harm principle, which focuses on the individual both as cause and effect of actionable consequences. On this view, the test of whether the state should be concerned with conduct is primarily whether an isolated individual's action or choice has any concrete and measurable effect on other persons.[109] Delayed or complex effects on the long-term vitality of institutions and norms are left out of the equation.

Of course, the Court has also stated—most prominently in the later illegitimacy cases—that it is "illogical and unjust" to "deny[] . . . an essential right to a child" or otherwise to penalize that child based on the choices and conduct of his parents.[110] It is unclear precisely what the Court means by "illogical." As already suggested,[111] this may be a variation on the theme that the differential treatment mandated by the statutory design "won't work." If the point is that the sanction (which falls on the individual child) does not run to the persons whose conduct generates the problem (his parents), the point is irrefutable but narrow. The problem is that this point of view discounts the collective, prospective, and cumulative effects of disadvantages running to illegitimate children as a whole. The parents of the particular child at issue might not be deterred by the prospect of the sanction being visited on their child—and, of course, they cannot be deterred retroactively once it is visited! But that does not mean that a sanction, in concert with other sanctions and signals, might not have some influence on persons within a community who are contemplating becoming parents in the future.

The Court ultimately falls back on the conclusion that these sanctions are "unjust." The argument is that it is fundamentally unfair—that is, contrary to some fundamental (and perhaps constitutional) principle of justice—to "visit the sins of the father upon the sons."[112] This suggests that setting up rules that disadvantage children born out of wedlock may be an impermissible way to try to reduce out-of-wedlock births because the disability is directed at persons who cannot respond to the incentives created. That unfairness would attach regardless of whether the technique of trying to influence the parents through the child actually worked.

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109. *See supra* note 80 and sources cited therein.

110. *See Gomez*, 409 U.S. at 538; *New Jersey Welfare Rights*, 411 U.S. at 620 (quoting *Weber*, 406 U.S. at 175); *see also* Plyler v. Doe, 457 U.S. 202, 220 (1982).

111. *See supra* notes 105-08 & 110 and accompanying text.

112. For an interesting discussion of the "sins of the fathers" concept in law, see Max Stier, Note, *Corruption of Blood and Equal Protection: Why the Sins of the Parents Should Not Matter*, 44 STAN. L. REV. 727 (1992).

I do not purport to offer a full analysis of the "injustice" rationale or of whether it can carry the full weight of the decisions in the illegitimacy cases.[113] Several observations are in order, however. Serious questions can be raised about the origin and vitality of this principle of "fairness," and about possible limits to its application. This principle makes a passing appearance as a constraint on legislative power in a number of contexts, but it bears a decision's full weight only in cases implicating the constitutional provision dealing with punishments for treason.[114] If taken seriously, the principle has far-reaching implications for the validity of a host of legislative measures that, although ostensibly directed at adults, have a substantial effect on children.[115] But if we accept that there are limitations on what the government can do to children directly to get at their parents' behavior, our intuition suggests that those limitations are strongest when the measures at issue are direct, punitive, and focused, rather than indirect, monetary, and mixed in effect. The statute at issue in *Cahill* arguably possesses the latter attributes, as its effects on illegitimate children are secondary to its effects on adult conduct and on the family unit as a whole. It is uncertain what force, if any, the "sins of the fathers" principle should have when evaluating programs structured along similar lines.

III. SHOULD THE GOVERNMENT "DEFUND" ILLEGITIMACY?

The Court's "fundamental rights" jurisprudence in the area of sexual privacy has been useful in dealing with the unsettling implications of taking the "harm" principle seriously. There is no

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113. The issue of the status of what I would term "transgenerational sanctions"—and their relation to the very idea of the family as a functioning unit—is a question beyond the scope of this article, but one which I hope to address at a later point. For a contrarian approach, see Daniel Lapin, *Ostracism and Disgrace in the Maintenance of a Precarious Social Order*, *in* THIS WILL HURT, THE RESTORATION OF VIRTUE & CIVIC ORDER 77, 84 (Digby Anderson ed., 1995) (defending the stigma that attaches to children born out of wedlock by observing that "[e]ven in an egalitarian society, we know that our positive achievements and our monetary success benefit our children. Why should we expect that our sins will not harm them?"). For a different view, see Sandra Guerra, *Family Values? The Family As an Innocent Victim of Civil Drug Asset Forfeiture*, 81 CORNELL L. REV. 343 (1996).

114. *See* Stier, *supra* note 112, at 732-33 (discussing the corruption of blood and bill of attainder provisions of the United States Constitution); *id.* at 733, 734, 741, 743 (documenting the invocation of the "sins of the fathers" principle in the Supreme Court's opinions in King v. Smith, 392 U.S. 309 (1967); Plyler v. Doe, 457 U.S. 202 (1982); Trimble v. Gordon, 430 U.S. 762 (1977); and Parham v. Hughes, 441 U.S. 347 (1979); and in the Fifth Circuit's decision in St. Ann v. Palisi, 495 F.2d 423 (5th Cir. 1974)).

115. *See* Stier, *supra* note 112, at 735 n.61, 752-53 (discussing the argument that the "sins of the fathers" principle "proves too much").

end to what can be justified if our aim is to forestall a host of perceived or potential harms by shoring up social norms in the area of reproductive choice. Coercion of the most blatant kind would be permitted. Yet, few would seriously question that there are some significant limits on the government's power to tell us when and whom to marry, or to penalize persons for bringing children into the world under less than optimal circumstances. The freedom from direct government interference with the choice to marry or bear children through outright proscription or direct penalty now receives protection as an essential component of "negative liberty." In such cases, the harm principle is either virtually ignored, or the potential harms to society from the conduct in question are implicitly deemed outweighed.[116]

Nevertheless, the courts are still unwilling to bar the government from all attempts to influence the incidence of potentially harmful conduct that might involve the exercise of "fundamental rights." The question of what kinds of incentives and disincentives the government can create through exercise of the spending power is properly part of the broader problem of unconstitutional conditions,[117] and this article does not purport to take on the vexed question of whether and when conditions on spending or subsidization can be acceptable where direct penalties with the same aims are not.[118] The problematic status of such conditions, however, frames our remaining analysis of welfare programs, like the one in *Cahill*, that attempt to shore up traditional family forms. Specifically, an awareness of the doctrinal difficulties might lead us to prefer programs that do not raise the specter of unconstitutional conditions. If we assume that our purpose is, at the least, to refrain from discouraging childbearing in two-parent families—and, at best, to encourage people to choose that setting for bearing children—then prudence alone prompts us to ask whether that purpose can be

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116. The Supreme Court's illegitimacy cases do not precisely fit the paradigm of a direct or criminal prohibition on "private" reproductive choice. Rather, they involve state laws that afford illegitimate children and their parents fewer common law rights than those enjoyed by legitimate children and their parents. Instead of viewing the cases as presenting possible violations of fundamental rights, the Court analyzes them under the equal protection guarantee. It is in this context that the Court downplays the potential harms offered up by the state to justify discriminatory treatment, and finds those harms variously insufficient to overcome other interests.

117. *See supra* note 17. The question of the limits of the government's freedom to act by indirection—by creating incentives and disincentives through the manipulation of government expenditures—is a central concern of the doctrine of unconstitutional conditions and the jurisprudence of government "subsidization." *See id.*; *see also* Maher v. Roe, 432 U.S. 464 (1977); Harris v. McRae, 448 U.S. 297 (1980).

118. *See supra* note 17 and accompanying text.

accomplished just as well with programs that do not "burden" marital or reproductive decision making in any objectionable way as with those that do. To that purpose, I discuss below the possibility of constructing so-called "neutral" options for cash benefit programs directed at the poor. I then compare such programs to proposals for direct subsidization of traditional families. Before proceeding to that analysis, however, it is necessary to examine more closely the question of the state's interest in seeing that its citizens make (or do not make) certain types of reproductive choices. It is to that issue I now turn.

A. *Is Out-of-Wedlock Childbearing "Harmful"?*

Even if we accept that harm to others justifies some kinds of state interference with conduct, we must still consider whether out-of-wedlock childbearing does harm. There is a growing body of social science evidence that indicates that being raised without two parents reduces a child's capacity to become an independent and contributing member of the community.[119] Children in single-parent families more often live in poverty than children born and/or raised in two-parent families.[120] But the claimed harms go beyond simple poverty: even controlling for socioeconomic status, there is at least some solid evidence that children of single parents do less well in school, complete fewer years of schooling, have lower earnings and higher rates of unemployment in adulthood, get in trouble with

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119. For the most comprehensive and recent summary of data on the fate of children in single-parent families, see Sara S. McLanahan, *The Consequences of Nonmarital Childbearing for Women, Children, and Society*, *in* U.S. DEP'T OF HEALTH AND HUMAN SERV., PUB. NO. 95-1257, REPORT TO CONGRESS ON OUT-OF-WEDLOCK CHILDBEARING 229-39 (1995). *See also* GALSTON, *supra* note 87, at 280-81; William A. Galston, *A Liberal-Democratic Case for the Two-Parent Family*, RESPONSIVE COMMUNITY, Winter 1990-91, at 14, 17 [hereinafter Galston, *Liberal-Democratic Case*]. A number of studies summarized in these sources report difficulties for children raised in single-parent families formed through extramarital birth as well as through divorce. Although this article focuses on extramarital childbearing, *see supra* note 9, a parallel analysis perhaps could be conducted for government efforts to discourage divorce.

120. *See* MARY NOEL GOUKE & ARLINE MCCLARTY ROLLINS, ONE PARENT CHILDREN, THE GROWING MINORITY: A RESEARCH GUIDE (1990); MARGARET B. HARGREAVES, LEARNING UNDER STRESS: CHILDREN OF SINGLE PARENTS AND THE SCHOOLS (1991); Linda McClain, *Irresponsible Reproduction*, 47 HASTINGS L.J. 339 (1996); Douglas J. Besharov et al., *A Portrait in Black and White: Out-of-Wedlock Births*, PUB. OPINION, May/June 1987, at 43, 44; IRWIN GARFINKEL & SARA MCLANAHAN, SINGLE MOTHERS AND THEIR CHILDREN: A NEW AMERICAN DILEMMA 11-15 (1986); SARA MCLANAHAN & GARY D. SANDEFUR, GROWING UP WITH A SINGLE PARENT: WHAT HURTS, WHAT HELPS (1994); *Home Sweet Home*, ECONOMIST, Sept. 9, 1995, at 25, 26-29 (discussing the relationship between fatherlessness and poverty); Eliza N. Carney, *Legitimate Questions*, 27 NAT'L L.J. 679, 681 (1995).

authority more often, have more emotional and health problems, and are more likely to become teenage or single parents themselves.[121] Moreover, growing up in a single-parent family significantly enhances the probability that a child (especially a male child) will engage in juvenile criminal activity.[122] Illegitimacy has also been identified as an independent risk factor for high rates of infant mortality.[123]

Thus, children growing up with one parent do less well than others. Moreover, they do less well in ways that have an impact on the rest of us. Juvenile crime, inadequate educational outcomes, teen pregnancy, and poor mental and physical health impose costs on persons other than the parents and children directly involved. Because reducing those costs is a matter of public concern, it follows that reducing the number of extramarital births is a legitimate goal of government. It would appear, then, that resolving the debate over whether the state is justified in taking at least some kinds of steps to promote and maintain the two-parent family norm is not just a matter of answering the hard question of whether and when the state may (or should) enforce majoritarian moral judgments. The issue is no longer one of so-called "intrinsic traditionalism."[124] Rather, the arguments are of the "functional traditionalist" school, which rests its case on the asserted links between concrete social harm and conduct that causes the harm, and not on the conduct's inconsistency with traditional moral precepts as such.

The application of the "harm" principle to out-of-wedlock childbearing is not entirely unproblematic, however. In addition to the unconstitutional conditions problem already noted, a second difficulty stems from a conceptual puzzle in the attribution of harm, which is known as the "nonidentity problem."[125] The "nonidentity"

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121. *See* McLanahan, *supra* note 119, at 229-39; *see also* Galston, *Liberal-Democratic Case*, *supra* note 119, at 17-19; *Home Sweet Home*, *supra* note 120, at 29; DAVID BLANKENHORN, FATHERLESS IN AMERICA 25-48 (1995); COUNCIL ON FAMILIES IN AMERICA, MARRIAGE IN AMERICA, A REPORT TO THE NATION 5-7 (1995) (summarizing studies).

122. *See, e.g.*, Natalie Angier, *Disputed Meeting to Ask if Crime Has Genetic Roots*, N.Y. TIMES, Sept. 19, 1995, at C1, C6 (reporting that the one factor that has been identified as highly correlated with criminal activity is the absence of a father in the home).

123. *See* Nicholas Eberstadt, *Why Babies Die in D.C.*, PUB. INTEREST, Mar. 1994 (reporting that high infant mortality is correlated with extramarital birth among Blacks in the District of Columbia regardless of educational and socioeconomic characteristics).

124. *See supra* note 87 and accompanying text.

125. *See* DEREK PARFIT, REASONS AND PERSONS 363 (1984) (discussing the "nonidentity problem"); *see also* JOEL FEINBERG, THE MORAL LIMITS OF THE CRIMINAL LAW: HARMLESS WRONGDOING 31, 325-28 (discussing the nonidentity problem)

problem has recently been described as posing the question of whether someone wrongs or "harms" a child "by bringing it into the world with some disability, handicap, or disadvantage when the disability could only have been prevented either by not reproducing at all or by having a different child."[126] As applied to out-of-wedlock birth, the nonidentity problem is only a problem if a particular child has no way to be born or raised free of the objectionable condition of his birth. If the only alternative to experiencing the harm of being born out of wedlock is for the mother to forgo childbearing or put it off, then the alternative for the child is not to be born at all. In such a case, preventing harm would mean preventing the birth of the child. But it is difficult to argue that a child's interests are protected by preventing its existence. Thus, even if being born out of wedlock is comparatively undesirable for the child (in that he would be better off being born to a married woman), the event cannot properly be regarded as harmful to the child. Indeed, it might be possible (although perhaps more strained) to argue that the *failure* of a child to be born because the mother is deterred from having a child outside of marriage introduces a new potential harm on the other side of the equation—a harm to the child who will never be brought into the world. This observation provides a potential counterweight to arguments that a high rate of out-of-wedlock childbearing produces harms against which the state could act.

A straightforward application of the classic version of the nonidentity problem to the social problem of out-of-wedlock childbearing is too simple. For one thing, the problem as classically stated presents too constrained a view of the possibilities contemplated by governmental efforts to discourage out-of-wedlock childbearing. The philosopher Derek Parfit's original statement of the nonidentity problem posed the example of a woman who becomes pregnant despite the knowledge that the life-saving medication she must take will cause her child to suffer a handicap. The background assumption is that the woman cannot live without the medication: thus, the *only* alternative to the birth of the handicapped child would be the child's nonexistence.

But the general run of out-of-wedlock childbearing does not present a parallel case because the counterfactual alternatives are not so precisely defined as in Parfit's hypothetical. It may well be that, as things stand today, the only realistic alternatives that many potential single mothers face to bearing a child outside of marriage are indeed forbearance or delay. But to rest with that observation is to

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[hereinafter FEINBERG, HARMLESS WRONGDOING]; FEINBERG, *supra* note 80, at 31, 103-04 (same).

126. Dan W. Brock, *Procreative Liberty*, 74 TEX. L. REV. 187, 202 (1995) (reviewing JOHN A. ROBERTSON, CHILDREN OF CHOICE (1994)).

consider the alternatives *ceteris paribus* in the narrowest sense, with other current social realities held constant. That way of thinking fails to take into account a collective alternative, or collective hypothetical counterfactual, to the world in which the pregnant single woman currently finds herself. As a general matter, the alternatives commonly available to pregnant single women in a particular society are a function of the availability and desirability of the option of marriage. The possibility of marriage, both before and after conception, as a means to "prevent" extramarital birth is in turn a complex function of other elements of social convention or moral climate, such as attitudes towards and prevalence of out-of-wedlock childbearing, the stigma or disabilities attached to single motherhood, the restrictiveness of the roles married women are expected to play, the comparative burdens customarily placed on them, the sexual availability of "companionable" females outside of marriage, the expectation that a man will marry a woman he impregnates, and the social consequences he elicits if he does not. It is at least plausible to believe that the availability of government cash grants to single mothers might influence—either quite immediately, or indirectly and over the long run—almost all of these factors. Thus, in considering the nonidentity problem, the woman's choice should not be considered apart from the circumstances in which it is made. And those circumstances cannot be considered apart from social policies that might influence them.

The most important reason that the nonidentity problem is of only limited interest is that the harm directly suffered by the illegitimate child is neither the exclusive, nor perhaps even the most important, form of socially cognizable harm that is perceived to result from extramarital childbearing. Although illegitimate children suffer deprivations, the consequences of creating a deprived class of children reach beyond the children themselves. Public order suffers, the public suffers collectively, and some members of the public suffer individually by being unlucky enough to encounter persons from the deprived class who are poorly equipped to fulfill their personal responsibilities, or worse. Of course, some extramarital childbearing could be considered "harmless" in producing children who become solid citizens. Thus, the children and citizens who suffer adverse effects from the social practice of out-of-wedlock childbearing cannot be identified ahead of time. (In the words of Jeremy Bentham, they are not "assignable individuals.")[127] The harm at issue takes the

127. *See* Gerald Postema, *Collective Evils, Harms, and the Law*, 97 ETHICS 414, 421 (1987).

form of a collective risk and, in that respect, is similar to other types of harms that are routinely the subject of legislative intervention.[128]

B. *Neutrality Towards Family Forms*

It is difficult to deny that the effects that are claimed to flow from the increase in out-of-wedlock childbearing provide at least some "rational basis" for governmental action. A fairly unproblematic reading of the harm principle alone gives the state a "legitimate interest" in reducing the risks posed by the growth in the number of extramarital births. Put another way, if two-parent families on average do a better job than single parents of raising functional, law-abiding citizens, and thereby impose fewer costs on society, then the government may legitimately promote the formation of two-parent families. One way to attempt to promote the formation of two parent families is to try to manipulate economic incentives for behavior through the design of cash benefit welfare programs. Which policy options are compatible with the goal of promoting the formation of two-parent families? Which policies work best? Among many possible options in the design of cash benefit programs, three will be discussed here: across-the-board income supports or guaranteed income (which will be termed "neutral intervention"); programs that refrain from providing cash grants or direct forms of financial assistance to anyone (neutral nonintervention); and programs that provide cash benefits only to some favored types of "conventional" families (*Cahill*-like programs, or selective subsidies).

There is considerable appeal to the seemingly "neutral" options presented above, because the government appears not to "take sides." In addition to the desirability of sidestepping the difficulties posed by the problem of unconstitutional conditions, there are political, pragmatic, and ideological reasons to prefer policies that appear to be evenhanded if those programs will in fact still have the effect of encouraging people to follow the government's preferences for family life. Are the options that fit that bill—blanket subsidies or no subsidies—equivalent in their effect on choice of family form? We put aside for now the theoretical question of whether "neutrality" of government action is even a coherent concept, which is addressed below.[129] We focus initially on the more pragmatic questions of the empirical relationship between welfare programs and social reality.

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128. *See* FEINBERG, *supra* note 80, at 191 (noting that in applying the harm principle, "[t]he important concept for the legislator . . . is neither magnitude of harm nor probability of harm alone, but rather, the compound of the two, which is called *risk*"); *see also* Postema, *supra* note 127, at 434-36.

129. *See infra* Part III.D.

An examination of that interplay reveals that seemingly "neutral" solutions can produce very different results.

I suggest that a proper analysis of the dynamics of social norms that surround illegitimacy leads to the conclusion that not all formally evenhanded welfare policies will end up being "neutral" in practice. Two of the options outlined above—giving no one money and giving everyone money—can be expected to have quite different effects on family formation. That result requires accepting a basic proposition: that significant aspects of behavior bearing on the success of child-rearing arrangements and the choice of family forms are governed by preexisting, extralegal conventions of social life, with which government policy interacts, but which governments do not originate and cannot always manipulate or control at will.

This point can be illustrated with an example. Consider Martha Fineman's proposal that the law revoke the privileged position of the patriarchal, heterosexual, two-parent family. She suggests that marriage be abolished as a legal institution and that the government withdraw from the business of enforcing spousal rights and responsibilities within the marital relationship.[130] Marriage would be replaced by the application of "the same rules that regulate other interactions in our society—specifically those of contract and property, as well as tort and criminal law."[131] Private arrangements would be supplemented by a purely functional approach to the collective financing of childcare: the government would subsidize caretakers and their dependents, regardless of biological or legal relationship.[132]

Fineman does not expressly put forward her proposal as a means of achieving greater governmental "neutrality" towards family forms. At least she does not state that as a principal goal, and her apparent sympathies with a "social constructivist" view of gender relations may well lead her to doubt the coherence of that project.[133] Nevertheless, her proposal does have some appeal to those who believe that the government should take an evenhanded approach—

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130. *See* MARTHA A. FINEMAN, THE NEUTERED MOTHER, THE SEXUAL FAMILY, AND OTHER TWENTIETH CENTURY TRAGEDIES 226-36 (1994).

131. *Id.* at 229.

132. Fineman's rather sketchy model raises a host of questions about, for example, the precise nature of the rights and responsibilities of natural parents and/or voluntary caretakers towards children in their care. Presumably, natural fathers would have no obligation towards their natural children unless they contracted, or acted, to incur those obligations. Nor would they have anything like parental rights in their children, unless voluntarily procured. Fineman says little about whether the same rules would apply to mothers, or how adults could bargain over access to, and obligations towards, children if no one had any preexisting claims on those children. These questions are beyond the scope of our concerns, however.

133. *See infra* notes 145-46 and accompanying text.

which could perhaps be conceptualized as one that leaves open all choices on an apparently impartial basis, while possibly "facilitating" some choices that might not previously have been made. That aspiration, however, potentially breaks down over the matter of subsidies. Because of the nature of reproductive norms, cash grants for all will not have the same effect as leaving this area entirely to "private forces."

This point depends on accepting that many "civilized" norms of sexual behavior are unstable and that the normative expectations that regulate conduct in the areas of sexuality, reproduction, and family life are especially fragile because they require individuals to keep at bay powerful natural impulses towards selfish or predatory behaviors.[134] Although the forces that create and maintain group norms for behavior are also powerful (and probably ultimately biologically based),[135] those norms are vulnerable to subversion by measures that undermine or destroy the social sanctions that customarily operate to suppress self-regarding strategies.

In many societies (including our own), the set of social sanctions that discourage out-of-wedlock childbearing has customarily included the difficulty of procuring adequate financial support for the mother-child unit. That support is ordinarily supplied by the father or by the extended kinship group. This form of "scarcity" is in part a product of simple economics (the inherent difficulties of one person caring for a child while making a living, or the limits on resources available for the child's support). But it has also been enforced by custom and deliberate choice—in the form of wage and employment discrimination against women and the reluctance of kin to extend support to mother-child units formed through extramarital birth. The mother-child unit's poor intrinsic economic prospects make it socially marginal, which may of have led societies deliberately to impose additional economic sanctions, further increasing its marginality.[136] The "natural" scarcity faced by each mother-child unit is thus reinforced by private action. The rationale behind that action ultimately has much to do with economics, since widespread out-of-wedlock childbearing confronts societies with thorny problems of production and distribution. Nevertheless, the customary sanctions imposed against single mothers are fueled by normative conventions that can exist independent of the financial

134. *See* Wax, *supra* note 78, at 337-51.

135. *See id.*

136. In the words of Charles Murray, "Throughout human history, a single woman with a small child has not been a viable economic unit. Not being a viable economic unit, neither have the single woman and child been a legitimate social unit." Murray, *supra* note 7.

exigencies of a particular situation and that have force over and above the immediate constraints of "natural" scarcity. The sum total of the resulting economic hardship brings social norms to bear as a constraint on behavior.

It is to be expected, then, that the government's decision to supply financial support to *all* families will have a subversive effect on the traditional two-parent family precisely because it will throw the principal alternative—single-parent families—an "artificial" financial lifeline that would not ordinarily be available. Two-parent families will also receive cash benefits, but that subsidy will have a smaller effect on people's "baseline" choices because traditional families are in general more economically self-sufficient. Thus, subsidizing traditional families will less often have the effect of removing an extralegal obstacle to choosing that way of life. On this analysis, across-the-board guaranteed income supports are likely to tip the balance towards single-parent families by removing an important barrier to forming them. Put another way, the two-parent family model is more vulnerable to subversion through universal subsidization than the one-parent family. That observation applies equally to Martha Fineman's hypothetical world, in which some people will choose to live together in a state of "virtual" marriage, and others in single-parent units. The balance between the two groups will inevitably be affected by the availability of income supports for all.

The soundness of this conclusion has been borne out by studies of negative income tax, guaranteed income, and income maintenance pilot programs conducted during the 1970s. These proposals were thought to be superior to AFDC on the strength of their very "neutrality": they do not overtly favor single-parent families over two-parent and working families, as they provide subsidies regardless of marital status or the number of adults in the household. The programs are still thought to have that virtue.[137] In study after study, however, the guaranteed benefits appeared to have a negative impact on family stability, significantly increasing the divorce and separation rate and lowering the marriage rate.[138]

In sum, an understanding of the dynamics of social norms suggests that the ideal of government "neutrality" towards family lifestyle and reproductive choice cannot be achieved through one

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137. *See, e.g.*, Michael Kinsley, *The Ultimate Block Grant*, NEW YORKER, May 29, 1995, at 37 (defending the guaranteed income as a "libertarian" solution to the problem of poverty).

138. *See* MARTIN ANDERSON, WELFARE 149 (1978) (surveying data on family breakups from guaranteed income and income maintenance experiments nationwide); *see also* JENCKS, *supra* note 4, at 133-36; Moffitt, *supra* note 67, at 209-29.

strategy of so-called neutral intervention—that is, supplying cash grants to all. Handing out money all around is formalistically evenhanded, but when considered against the baseline of preexisting social and economic forces, such indiscriminate largesse creates a set of incentives that is quite uneven and far from neutral. This observation suggests that a similar but opposite point can fairly be made about a strategy of "neutral nonintervention"—that is, abolishing cash benefits entirely. Such a strategy involves wholesale state inaction, and therefore raises no doctrinal problems (such as unconstitutional conditions) and requires no doctrinal justification (such as the identification of a legitimate state interest). But there is an important sense in which the decision not to act, although formalistically neutral, is no more evenhanded in its potential impact than the decision to establish a program of universal entitlements. Because social and economic realities make it difficult for the mother-child unit to achieve self-sufficiency, nonintervention would appear to preserve a powerful incentive to refrain from childbearing outside marriage. That incentive is not initially of the government's making, but the decision to leave it undisturbed is very much the government's choice.

The point of the foregoing passage is that the goals of enhancing, or at the very least preserving, whatever forces lead women to bear children within marriage through the creation of seemingly "neutral" cash benefit programs—i.e., those that do not appear to favor some families over others—will prove elusive so long as the program operates against the preexisting background of social custom and economic reality. The goals are only consistent with the government staying its hand entirely or adopting a program of what I term "selective subsidies"—providing cash benefits only to some or all two-parent families. We have already argued that selective subsidies can be justified on the basis of the "harm" principle. In deciding whether such a policy should actually be implemented, however, there are a number of important issues that should be addressed. The pertinent questions, some of which will be taken up in the remainder of this paper, include: whether selective subsidization as a strategy for dealing with the harm resulting from out-of-wedlock childbearing is justified on the balance of costs and benefits; whether alternative strategies (such as countering the ill effects of extramarital childbearing) would be preferable and work better; and finally (and perhaps most importantly) whether the incentives created by selective income supports can be expected to have the intended effects of reducing the incidence of out-of-wedlock childbearing in practice.

C. *Costs and Benefits*

The case so far considered for minimizing the incidence of out-of-wedlock childbearing takes the ill effects of the practice as ineluctable: it looks at the reality of the lives of children in single-parent families and the consequences for the rest of us, but does not ask whether the reality could be transformed and the harm eliminated through an entirely different series of policy choices.

In questioning whether the government may, or should, act on public concerns about the rise of single-parent families and out-of-wedlock childbearing, some feminist scholars[139] have abandoned exclusive reliance on the view that the decision to bear a child out of wedlock falls on the "self-regarding" side of Mill's line—the line that separates actions that do not have the kind of adverse impact on others that make them a legitimate concern of government from those that do. In an effort to deal with the argument from social harm, these scholars have taken a number of tacks. The first is to argue, in effect, that the government should not single out and act upon the harms from out-of-wedlock childbearing without considering both the benefits of that phenomenon and the detrimental consequences of combating the effects. On this view, government should not attempt to influence choices in the areas of reproduction and family forms on the basis of the identification of *some* harm, but only on a recognition of *net* harm—that is, after weighing up total costs as well as benefits. The suggestion seems to carry with it an implicit requirement that the government achieve a high degree of certainty regarding the balance of costs and benefits before it can act to influence conduct in this sensitive area—a kind of special rule of prudence that excepts programs designed to deal with the problem

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139. *See, e.g.*, Susan B. Apel, *Communitarianism and Feminism: The Case Against the Preference for the Two-Parent Family*, 10 WIS. WOMEN'S L.J. 1, 12-16 (1995) (arguing that conventional marriage should not be sanctioned or encouraged by the state because marriage is harmful to women overall and may cause net harm to children, whose fate is tied so closely to that of women); Pepper Schwartz, *Gender and the Liberal Family*, RESPONSIVE COMMUNITY, Spring 1991, at 86, 86-89 (arguing that a "newly enforced" two-parent family ideal will lead to increased unhappiness and decreased well-being for women, which will hurt their children in the long run). *See generally* Frances E. Olsen, *The Myth of State Intervention in the Family*, 18 U. MICH. J.L. REFORM 835, 835 (1985) [hereinafter Olsen, *The Myth of State Intervention*]; Frances E. Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 HARV. L. REV. 1497 (1983) [hereinafter Olsen, *The Family and the Market*]; Nancy E. Dowd, *Stigmatizing Single Parents*, 18 HARV. WOMEN'S L.J. 19 (1995); FINEMAN, *supra* note 130; Wallach & Tenoso, *supra* note 65; Larry Catá Backer, *Welfare Reform at the Limit: The Futility of "Ending Welfare as We Know It,"* 30 HARV. C.R.-C.L. L. REV. 339 (1995); McClain, *supra* note 120; Dorothy E. Roberts, *The Only Good Poor Woman: Unconstitutional Conditions and Welfare*, 72 DENV. U. L. REV. 931 (1995); Iris Young, *Making Single Motherhood Normal*, DISSENT, Winter 1994, at 88, 91-92.

of illegitimacy and single-parent poverty from the ordinary rule of legislative speculation.[140]

It is unclear whether the suggestion for a more complete calculus is merely intended as a policy recommendation or is meant to function as a doctrine of limitation on legitimate government action. If put to work imposing real limits on lawmaking, these insights would in effect force a modification of the notion of what constitutes a "rational basis" for legislative action. To be sure, one could argue that a rationality analysis that looks only at one side of the equation is overly "atomistic"[141] in failing to take account of the comprehensive social setting of legislation and its effects. This critique functions very differently, however, when it is brought to bear to urge *upholding* a legislative judgment that would otherwise be questioned (as in the illegitimacy cases),[142] than when it is to be applied, as here, in an attempt to delegitimate legislative judgments about how best to deal with a social problem. In the former case, it is the legislature that has taken into account a comprehensive set of factors, which the courts proceed to ignore. In the latter, it is the legislature that is claimed to have failed to measure, assign, and assess the costs and benefits, so the courts must now do so. Yet that is a job to which the courts are notoriously unsuited, and one that is ripe for manipulation depending on the particular theory of social causation adopted.[143]

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140. *See supra* note 139. A more popular expression of the "net benefit" view can be found in a recent editorial in the *Economist*:

> Simply, it is too soon to say of society at large that the rise in divorce and the increase in single parent households . . . has gone so far that the loss outweighs the gain. Without compelling evidence that the net harm is great, and perhaps not even then, governments have no business imposing their moral choices on citizens. This remains true even if it is mainly adults who benefit from more divorce and mainly children who lose . . . .

The Disappearing Family, ECONOMIST, Sept. 9, 1995, at 19.

141. *See supra* Part II.A.1.

142. *See id.*

143. The second problem with formulating a "special" or heightened rational basis rule is that it is unclear when it should apply. Why is the cost/benefit calculus not required to validate every piece of legislation? One possibility is that the heightened standard comes into play where fundamental values and judgments are at issue and where there is significant disagreement on conceptions of the "good life." As Thomas Nagel explains, however, there is disagreement and a "pluralism" of views on many questions of public policy that do not implicate fundamental issues of sexual morality and family life, but the majority is still allowed to impose its will on the minority as a matter of course. *See* Nagel, *supra* note 88, at 231-32. *See generally* authorities cited in *supra* note 88. Thus, the fault line cannot be that the majority is trampling the interests of the minority. We are left with the question of why we should impose a more stringent "harm" test in some morally charged areas but not in other areas that do not directly implicate moral concerns, but in which disagreements are intransigent or deeply felt.

D. *Harm As Socially Constructed: The Possibility of Compensation*

Yet another tack against the functional traditionalists' argument for confining poor support to conventional two-parent families rests on an assumption about the source of the supposed harms inflicted on children and society by children being raised by one parent. The assumption is that whatever harms are generated are not "intrinsic" to the single-parent family as such—that is, they do not "naturally" or inevitably flow from the fact of out-of-wedlock birth or the absence of the father. Rather, these effects are the product, more narrowly, of enshrining distinctions based on circumstance of birth directly into law[144] or, more broadly, of a web of adverse social and economic conditions that are ultimately the product of political choices.

The notion that the unfortunate lot of illegitimate children is ultimately the product of governmental action (or inaction) is one species of the view that social reality—encompassing everything from economics and family life to preferences and attitudes—is "socially constructed."[145] The harms that flow from certain social

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144. *See* authorities cited in *supra* note 139; *see also* Wallach & Tenoso, *supra* note 65, at 60, 61-63 (suggesting that eliminating all legal classifications based on circumstance of birth would in large part negate the "stigma" and the attendant social disadvantages that attach to illegitimate birth, and recommending that "the institution of illegitimacy should be abolished" through adoption of a "Proposed Uniform Legitimacy Act" that grants illegitimate children "equality of legal status"). It is difficult to maintain that merely changing the law to eliminate any legal recognition of distinctions based on illegitimate birth would equalize the status and circumstances of children in single-parent and two-parent families. Indeed, even Wallach and Tenoso acknowledge that some legal rights will inevitably turn on proof of the biological parent-child relationship. *See id.* at 64. Even if in-wedlock children were not entitled to the customary presumption of paternity, they would still, as a group, find it much easier than out-of-wedlock children to prove the identity of their natural fathers.

145. On social constructivism generally, see Daniel Farber & Suzanna Sherry, *Is the Radical Critique of Merit Anti-Semitic*, 83 CAL. L. REV. 853, 855-57 (1995); Wax, *supra* note 78. "Social constructivism" refers to the view that social conditions are the product of behaviors and environmental influences that can be manipulated by political means. It follows that any undesirable social condition can be quite dramatically altered or corrected through government intervention. The notion that the conditions that constrain human existence are socially constructed is often contrasted with the view that "natural," pre-social forces—such as biological predispositions—place limits on the possible forms of social life. *See, e.g.*, Janet E. Halley, *Sexual Orientation and the Politics of Biology: A Critique of the Argument from Immutability*, 46 STAN. L. REV. 503, 550-53 (1994) (discussing various "constructivist" theses in the context of homosexuality); Daniel R. Ortiz, *Creating Controversy: Essentialism and Constructivism and the Politics of Gay Identity*, 79 VA. L. REV. 1833, 1843-48 (1993) (same); Deborah L. Rhode, *The "No-Problem" Problem: Feminist Challenges and Cultural Change*, 100 YALE L.J. 1731, 1784-90 (1991) (downplaying the role of biological differences between the sexes); Nancy Levit, *Feminism for Men: Legal Ideology and*

conditions are wholly dependent on the "rules of the game"—the policies and laws that a society chooses to adopt. Although law may appear to have nothing to do with the existence of certain social and economic conditions—which rather seem to be the product of individual choices and behaviors—that appearance is illusory. For one thing, behaviors and choices are decisively influenced by social conditions that are subject to manipulation. Even if individual behavior is not entirely manipulable, however, the consequences attached to individual choices and behaviors are wholly the creation of politics and law and can be altered at will by governmental action.

These insights inevitably influence any conception of what the law can (and should) do. For one, the law can always be other than it is. It follows that social and economic conditions can be other than they are and that the way to change them is by changing the law. All social conditions are up for grabs, and the law's potential to correct social ills is limited only by political will. Moreover, on this view, there is no "baseline" set of conditions that is beyond the law's reach. There is no such thing as a "pre-legal" distribution of wealth, property, entitlement, social influence, or authority, and no preexisting justification for adopting any one set of legal rules to govern the distribution of wealth or power.[146] This understanding goes along with the view that the law cannot avoid taking sides in ideological battles and power struggles. The very possibility of the neutrality of law is incoherent, because there is no independent social reality against which to be neutral.

A variation on this theme—and a strong undercurrent in feminist scholarship on family law and welfare policy—is the assertion that existing familial arrangements are at bottom all creatures of the

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the Construction of Maleness, 43 UCLA L. REV. 1037 (1996) (same); Richard A. Epstein, *The Authoritarian Impulse in Sex Discrimination Law: A Reply to Professors Abrams and Strauss*, 41 DEPAUL L. REV. 1041, 1047 (1992) (defining the theory of "social construction" as positing that behaviors are "not seriously constrained by biological elements").

There is a strain of constructivist thought that appears not to rest on a commitment to the view that human behavior is unconstrained by a preexisting or biological "nature." That school emphasizes the malleability not of human nature but of the social significance or consequences attached to biologically-influenced human choices, and the error in seeing those consequences as "natural." Cass Sunstein seems to take this approach. *See infra* note 146 and accompanying text.

146. These ideas find expression in Cass Sunstein's work on the jurisprudence of the New Deal. According to Sunstein, the courts' growing acceptance of legislative intervention in the free market—in the form of the regulation of business and direct redistribution—coincided with an understanding of laissez-faire rules of exchange as "state-created, hardly neutral, and without prepolitical status." Sunstein, *supra* note 101, at 882.

state.[147] A corollary of this view of family life is that the relative disadvantages suffered by those who make unconventional choices must be laid at the feet of rules that "privilege" some family forms over others. Since the rules can be other than they are, it follows that the disadvantages can readily be reversed or corrected by altering government policy through law. Just as it is possible to change the law to deprive two-parent families of dominant or privileged status, so the law also can be modified to insure that one-parent families are not bad for children. Because the harms to children and society from having only one parent are "socially constructed," it is within the government's power to equalize the lot of children across all family situations. The principal challenge is to hit on the correct policy formula for accomplishing this goal.

From this set of assumptions, it can be argued that the first line of approach to the social fallout from illegitimacy should be to change the social and economic conditions that give rise to the harms, rather than to try to deter the behaviors that produce them. In other words, we should treat the symptoms rather than attempt to reduce the incidence of the disease.

There are two main justifications for this priority, or hierarchy, of harm-reducing strategies. The first relies on the observation that, although single-parent families are costly to society, some individuals benefit from them. Single parenthood is a preferable option for women seeking to escape oppressive or dangerous relationships or to avoid the perceived exploitation inherent in some marital arrangements. Second, *Cahill*-like strategies have some element of "coercion," in that they bring pressure to bear on women to exercise their reproductive autonomy in approved ways. A preference for the least drastic means of reducing social harm dictates that the government should avoid making "autonomy reducing"[148] offers in

147. This view holds that the patriarchal, two-parent family system has no life of its own. The family is not an autonomous institution that functions according to internal, extralegal logic, roles, dynamic, or rules; it is not an institution that the government can elect to tolerate, discourage, or encourage, but for which the government does not provide the original foundation. Rather, it is the product of social and political choices implemented by a complex legal regime. *See, e.g.*, Olsen, *The Myth of State Intervention*, *supra* note 139, at 835 ("A useful comparison can be drawn between arguments against a policy of nonintervention in the private family and arguments against a policy of nonintervention in the free market."); Olsen, *The Family and the Market*, *supra* note 139.

148. The problem of unconstitutional conditions is so difficult in part because there is little consensus over whether offers to forgo rights at a price are "coercive"—that is, whether they are "autonomy-reducing"—or whether they should be viewed as "autonomy-expanding" invitations to engage in efficient voluntary exchange. *See, e.g.*, Kreimer, *supra* note 17, at 1352-59 (discussing "offers" and "threats"); Sullivan, *supra* note 17, at 1446-50 (discussing the concept of "coercion"); *see also* Baker, *supra* note 17, at 1191-93 (discussing the "frequently invoked justification for absolute ju-

favor of less "coercive" alternatives. Finally, it is asserted that extramarital childbearing will always be with us, despite the government's best efforts. Therefore, the government's resources are best directed at reducing the deprivations suffered by the innocent children who will inevitably be born without two parents. For all these reasons, efforts to abrogate the harm of out-of-wedlock childbearing are to be preferred to attempts to induce people to avoid producing the harm.[149]

This argument is ultimately unconvincing. Even if we assume the premise—that the harms of extramarital birth are compensable—the redistributive and regulatory measures that the government would have to undertake to "equalize" the lot of children in single-parent and two-parent families would in themselves be quite coercive and disruptive and would entail considerable downside costs in resistance and loss of efficiency.[150] There is quite a good possibility, however, that the premise is false. The argument assumes that the advantages that attach to one type of family structure can ultimately be traced back to the legal rules that maintain that structure. If that assumption is wrong—if extralegal norms and the patterns they support have vitality apart from the structures mandated by law—then perhaps that is because the institutions those norms support have an intrinsic functional superiority that is independent of their legally privileged status.

Can political choices compensate for the harms that are claimed to flow from the rising incidence of single-parent families, or is there some irreducible consequence that is beyond manipulation by the state? Put another way, is the two-parent family "naturally" more conducive to social stability or better suited than the single-parent family to the raising of children? Is the superiority of one type of family configuration a product of social injustice, or is it something

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dicial deference" towards the imposition of conditions on the exercise of rights: that the acceptance of conditions when offered is a Pareto-superior result); Epstein, *supra* note 17, at 7-11 (discussing the Pareto model of conditional benefits).

149. These are policy arguments, rather than points made in a doctrinal debate concerning standards for "rational" or nonarbitrary government action. The points potentially bear on whether *Cahill*-like attempts to discourage out-of-wedlock childbearing are "rational" if the measure of rationality is expanded to include choosing the strategy to eliminate the most harm at the lowest cost. *See supra* Part III.C.

150. Any attempt to provide children with even partial compensation for the disadvantages of being born out of wedlock would require a massive and intrusive redistribution of resources. In addition, government programs designed to compensate children for the disadvantages of being raised by a single parent would work at cross-purposes with attempts to reduce the incidence of extramarital births by undermining an important deterrent to out-of-wedlock childbearing, which is the fear that one's children will suffer disadvantage and deprivation if born out of wedlock. Equalization would also generate resentment from parents in traditional families who believe that it is just for children to retain some of the comparative advantage they enjoy from their parents' socially responsible behavior.

for which, by the very order of things, the government can never wholly compensate?[151]

The government can redistribute income, equalize educational resources and opportunity at an institutional level, and provide other tangible benefits to children and families. What it cannot do is provide a father. Even if the father is identified, and forced to take some financial responsibility, the state cannot—short of virtual imprisonment—insure the father's physical presence.[152] For that reason, the "natural" advantages that flow from the presence of a living, breathing father in the home are not those the state can readily supply. Even harder for a state to mimic is a father who is not merely grudgingly present, but who is also willing and involved. The state cannot generate and redistribute love, care, devotion, interest, encouragement, emotional support, advocacy, personal attention and assistance, example, fidelity, and discipline. It can attempt, perhaps, to engage professional or hired surrogates to supply these good things in select cases. Any effort effectively to substitute for "the real thing" on a large scale is almost certainly doomed to failure.[153]

In sum, the state cannot replace the father. The real-world consequences of that inability, of course, turn on an assessment of what actual—as opposed to ideal—fathers are worth. How often are two heads better than one? If most fathers offer little more than a paycheck, then it is tempting to answer "not often," as the government is

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151. This query assumes a claim of average superiority, which is not inconsistent with the possibility that some single-parent families do a better job than some two-parent families.

152. This statement begs the question of why a state cannot use its coercive power to control the father's legal relationship with the mother of his children and to insure the father's presence in the home. For instance, the government could require a man to marry the mother of his children or to establish the home of the wife and children as his residence. Even aside from the constitutional difficulties of such restrictions under current law, the limitations inherent in such measures are obvious. A man can only marry one woman, so the marriage requirement would not supply a father to children fathered on more than one woman. Moreover, marriage and the requirement of co-residence would not in themselves guarantee a father's physical presence; that would have to be enforced by draconian interventions such as physical monitoring or house arrest. Even if such measures were feasible, the need for them would probably destroy any benefits they are designed to confer, since the salutary effects correlated with a father in the home are likely to depend on the man's choosing, however grudgingly, to be there. It is almost certainly not the father's presence as such, but his *voluntary* presence that counts.

153. By "father" I mean principally a biological father. That is not to suggest that adoptive fatherhood cannot be as successful and effective as biological fatherhood. I would submit, however, that adoptive fatherhood works well only against the background of biological fatherhood as the dominant mode. It is the biological tie that provides the foundation for the exemplary patterns of fidelity and vigilant care associated with good fatherhood. Without this model to set the standard for emulation, adoptive fatherhood would likely be a less successful institution.

perfectly capable of providing money. Although it is difficult to know how the quality of fathering varies, social science research suggests that the statistical presence of the father in the home is, on average, worth a lot. The sustained attention of a devoted and conscientious father may well be worth even more, and the children of such fathers form a kind of "natural aristocracy" even within the group of those growing up in intact families, enjoying enormous intangible advantages that compound the material advantages already enjoyed by children raised by two parents.[154] More to the point, the absence of a conscientious father creates a "naturally" disadvantaged class of children, doubly deprived both of material support and of personal attention.

The state cannot supply a father. Nor can it replace him. But one way to equalize the lot of children may be to deprive them *all* of fathers. As noted, Martha Fineman proposes that marriage and fatherhood be abolished as legal categories, to be replaced by a purely functional role of state-supported caretaker.[155] If fathers no longer have any legally enforceable rights or responsibilities with respect to their natural children or their children's mother, then the basic preconditions for the existence of a privileged class of children would seem to disappear. Every child would be on a par with respect to fathers because no child would have preexisting claims against any man, nor any man responsibility for a child.

Even in such a brave new world, however, there would still emerge a "natural aristocracy" of children whose fathers were willing to behave like "real" fathers, entering into voluntary private arrangements reflecting that choice. The point does not depend on the legal status of marriage, or even on the existence of enforceable contracts. Regardless of legal formality, there would still be a "natural" disparity in the life-course and well-being of children who are born into virtual families (those voluntarily conforming to the two-parent model of faithful, physically present, caring parents, despite the absence of legal recognition or protection) and those who are not. Of course, families living on the traditional model—whether perfected by formal contract or not—might be less common than they are today because whatever incentives are created by the legal privileges currently attached to marriage would be gone. That would not change the fact that virtual marriage offers benefits for children—benefits that are, in an important sense, beyond the reach of the state. It follows that many of the detriments of the alternative—the single-parent caretaker—are also beyond the state's reach.

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154. *See supra* Part III.A.

155. *See* FINEMAN, *supra* note 130; *see also supra* notes 130-32 and accompanying text.

These are facts of social life—and, perhaps, of human nature—that stand apart from the government's well-intentioned intervention.

If this vision is correct, what does that say of the argument that the government should first eliminate the harms of single parenthood before seeking to discourage single parenthood through "autonomy-reducing" measures? It suggests that the strategy won't work—those harms cannot be entirely, or even perhaps largely, eliminated. Although some of the disadvantages of single parenthood (for example, relative lack of material resources) are at least theoretically amenable to full correction by the state, a reduction in the incidence of single parenthood is still the only way fully to eliminate the social fallout of this pattern. On this view, attempting to discourage out-of-wedlock births through *Cahill*-like statutes is a wholly "rational" strategy, in that the alternatives can never effectively deal with the problem.

Of course, some will continue to resist these conclusions. The alternative of compensating for disadvantage directly does not impose the countervailing costs of governmental attempts to influence personal decisions on reproduction and family formation, or of pressuring women into "patriarchal" marriages as the price for having children, or of forcing children to suffer because they are born to women who, for whatever reason, are unresponsive to the government's attempts to change their behavior. For some, the alternative of compensating for harm—rather than attacking it at its source—will always be more attractive because the tradeoffs are too hard to bear, even for a potentially more complete solution.

E. *Will It Work?*

One remaining question in the calculus has to do with efficacy. Can *Cahill*-like statutes be expected to achieve the objective of actually reducing the incidence of single-parent family formation? The question is potentially relevant to doctrine because the Supreme Court in the illegitimacy cases declared the state statutes at issue "irrational" based in part on its "finding" that there was no realistic expectation that they would work.[156] And effectiveness is always of

156. Although I have criticized this aspect of the Court's decisions, I do not purport to offer a comprehensive theory of how the element of efficacy should figure in rationality analysis or how courts should assess whether a statute will tend to accomplish its stated purpose. The relationship between evidence of efficacy and whether the purpose of legislation is "rational" is a complex issue not addressed here. *See, e.g.*, Scott Bice, *Rationality Analysis in Constitutional Law*, 65 MINN. L. REV. 1, 33-37 (1980) (discussing the role of empirical data in the judgment of legislative rationality).

paramount importance in deciding whether to adopt a measure as a matter of policy. In considering whether *Cahill*-like statutes would work, we should strive to avoid the errors made by the Supreme Court in its analysis and attempt to take a more comprehensive view of the legal and social setting in which the question must be answered.

Anne Alstott points out that, in evaluating the potential effects of social policies, "[i]t is essential to distinguish disincentives from the *effects* of disincentives on behavior."[157] It is dangerous to conclude that economic disincentives will always induce a change in personal conduct, and such conclusions are especially problematic when it comes to sexual and reproductive behavior. Indeed, a realistic understanding of the dynamics of social norms in the highly moralized sphere of reproduction would seem to cast a shadow over claims that the sudden adoption of programs that selectively confer benefits on favored family forms will significantly alter current social patterns. The fact that illegitimacy rates have increased much more rapidly among the poor than among the non-poor over the past fifty years[158] provides the best evidence that the federal government's decision to provide cash benefits only to single-parent families through AFDC may have contributed significantly to an increase in extramarital births. It does not follow, however, that cutting off those benefits will be nearly as effective in reversing the trend. The "one-way ratchet" effect of legal change on social norms comes into play here: laws do sometimes help reinforce traditional social patterns, and a change in the law that radically alters preexisting incentives for behavior can cause traditional patterns to unravel. But the law is more effective in eroding certain types of norms than in creating them or restoring them once they have lost their hold. I have elsewhere described the one-way ratchet effect of legal change on social practice.[159] Once norms have eroded, the damage cannot

157. Anne L. Alstott, *The EITC and the Limitations of Tax-Based Welfare Reform*, 108 HARV. L. REV. 533, 545 (1995).

158. *See* SALUTER, *supra* note 6. Educated, affluent women still almost always marry before bearing children, despite the fact that they are financially better able to support children on their own than women with less income. Consequently, single parenthood among middle- and upper-class women is almost entirely a product of divorce. There could be a number of reasons for this dearth in extramarital births in the upper socioeconomic classes: despite professions of tolerance, conventional notions of personal responsibility may continue in force among that group; middle- and upper-middle-class men may be better socialized to fatherhood and economically more valuable as husbands, thus countering any financial advantages of "going it alone"; or women with independent earning power may feel that single motherhood is incompatible with the maintenance of their socioeconomic status or with the demands of their careers.

necessarily be undone by restoring the legal status quo. More comprehensive and extensive social change may well be required.

There is reason to fear that the government's power to subvert the traditional two-parent family through the design of social programs will prove greater than its power to return the family to its former popularity. In the case of single parenthood, the social disapprobation that formerly attached to single parenthood has diminished significantly. The recent weakening of legal rules that once discouraged irresponsible avoidance of, or exit from, marriage almost certainly hastened that change.[160] Programs subsidizing single-parent families, and the virtual elimination of legal discrimination against illegitimate children, no doubt have also played some role. The deterioration of the family might have been largely avoided if none of these legal measures had been adopted—and if the New Deal had set up a *Cahill*-like welfare program instead of AFDC. It is quite a different matter to think that the trend can be reversed by making those changes now. Thus, selective government subsidies or economic favoritism, although not entirely without force, may be less effective in restoring previous patterns of family living than the same measures would have been in preserving those patterns in the first place.

Charles Murray tries to take on this argument by suggesting that, although cutting off government largesse may not have a direct and immediate effect on behavior, it will eventually contribute to shifts in mediating normative expectations and attitudes, which are ultimately the most powerful and enduring determinants of patterns of sexuality and childbearing. He speculates that the absence of government income supports for new single-parent families will force friends and family repeatedly to bear the cost of the "folly of their children," which "will make an illegitimate birth the socially horrific act it used to be."[161]

Whatever the validity of this prediction, one must recognize that it is just that: an empirical prediction, open to testing and proof over time. The question is one for social scientists, not judges, to assess. Because the Constitution appears to adopt no particular theory

159. Once norms erode or cultural life becomes demoralized, "renormalization" may be very difficult to achieve. Complex systems of social control—most notably those that tightly channel male and female sexuality in socially constructive ways—are particularly vulnerable to subversion by factors, such as economic incentives or weakened legal sanctions, that lower the cost of flouting social taboos. But once cultural and moral expectations have eroded, they cannot easily be resurrected by legal sanctions or reverse economic incentives. This suggests that the efficacy of social policy interventions may be asymmetrical: they are more effective in loosening traditional behavioral restrictions than in promoting social patterns that depend on personal discipline and restraint. *See* Wax, *supra* note 78, at 340-41.

160. *See, e.g.*, Singer, *supra* note 14; Glendon, *supra* note 14.

161. Murray, *supra* note 7, at A14; *see also* Murray, *supra* note 8, at 26.

of sociology or psychology, the courts' attempt to embrace one school of thought on these questions must make for weak and unstable doctrine—or decisions with unintended and unanticipated consequences. If a statute cutting off benefits to single-parent families were to pass today, there would be no basis for considering it "irrational" based on what we know, although experience may yet teach us that it fails miserably to accomplish its ultimate purpose.

Finally, we must recognize that it is possible to ask too much from the decision to cut off income supports for nonmarital families. Perhaps, contra Charles Murray, a withdrawal of benefits will not in itself set in motion the changes and adjustments that will ultimately restore old patterns of conduct. The forces that are strong enough to trigger the necessary sequence of behavioral reforms will have to be of another order, proceeding from very different sources. It may still be the case, however, that providing benefits to single mothers is a critical obstacle to any widespread change in behavior among the populations most vulnerable to the detrimental effects of their own conduct. In other words, a change in the patterns of government "subsidization" is an absolutely necessary—although very far from sufficient—precondition for any significant lowering of the out-of-wedlock birth rate. Without "desubsidization," we might as well give up on turning these statistics around and accept that the problem will continue to grow despite every other governmental initiative and effort.

CONCLUSION—A NEW CIVIL RIGHTS VISION?

This paper was presented at a conference on the future of civil rights. The problem of single-parent families is a civil rights problem. Most particularly, it is a problem for the Black community because single-parent families are far more common among Blacks and most Black children are brought up by only one parent.[162] The problem is not just absolute, but comparative. Sixty-eight percent of all Black children are born out of wedlock, and the rate of out-of-wedlock births is three times higher among Blacks than Whites.[163] The disparity in living arrangements is pronounced even among the well-educated, which means that the advantages enjoyed by children from White, affluent, well-educated families are compounded by disproportionate membership in the class of children living with

162. *See* SALUTER, *supra* note 6, at 44, 52 (reporting that more than 80% of White children under 18 live with two parents, whereas only 38% of Black children do).

163. *See supra* note 6.

both parents.[164] An important part of the future of civil rights, I submit, is the future of Black children's well-being and their degree of preparedness for full and constructive citizenship. Those prospects depend in no small part on Black children's joining the ranks of those fortunate enough to grow up in the care of two parents.

164. Fewer than 8% of White children of parents with a graduate degree live with only one parent, whereas the parallel figure for Blacks is 28%. Among families earning over $50,000 annually, the percentage of Black children living with one parent is three times greater than the percentage of White children. *See* SALUTER, *supra* note 6, at 44-52; *see also* Charles Murray, *The Partial Restoration of Traditional Society*, PUB. INTEREST, Fall 1995, 122, 125 (noting the overwhelming adherence to the two-parent family model of child rearing among White, well-educated professionals); *id.* at 125 n.3 (reporting statistics compiled in the National Longitudinal Study of Youth showing that 41% of children born to Black women with a college degree were born out of wedlock, compared to fewer than 2% of White children, and commenting that "[t]his state of affairs in well-educated Black families presumably will have reverberating effects on many economic and social outcomes in the next generation").