

## NORM CHANGE OR JUDICIAL DECREE? THE COURTS, THE PUBLIC, AND WELFARE REFORM

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The topic for this panel—the relationship between community values and judicial decision making—calls to mind Supreme Court cases on high-profile issues that have provoked strong criticism from the public. Decisions regarding church-state relations,<sup>1</sup> abortion,<sup>2</sup> free speech,<sup>3</sup> government regulation of property rights,<sup>4</sup> and affirmative action<sup>5</sup> are recent examples. This Essay addresses another example of tension between judicial decrees and popular attitudes. From the 1960s through the 1980s, key Supreme Court decisions addressing the administration of public welfare programs were at odds with the dominant values of much of the nation. For a number of reasons, that conflict has now largely been resolved. Therein lies a revealing story.

In 1996, after decades of experimental and pilot programs, Congress enacted a massive overhaul of the federal poverty-relief scheme. As part of a comprehensive welfare reform package sponsored by the Clinton Administration, the core federal cash-aid program, Aid for Families with Dependent Children (AFDC), was repealed and replaced with a work-based assistance program, Temporary Assistance for Needy Families

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1. *See, e.g.*, *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 5 (2004); *Zelman v. Simmons-Harris*, 536 U.S. 639, 644 (2002); *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 102 (2001).

2. *See, e.g.*, *Gonzales v. Carhart*, 127 S. Ct. 1610, 1639 (2007); *Stenberg v. Carhart*, 530 U.S. 914, 922 (2000); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 846 (1992); *Roe v. Wade*, 410 U.S. 113, 154 (1973).

3. *See, e.g.*, *Davis v. FEC*, 128 S. Ct. 2759, 2775 (2008); *Morse v. Frederick*, 127 S. Ct. 2618, 2622 (2007); *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 70 (2006).

4. *See, e.g.*, *Kelo v. City of New London*, 545 U.S. 469, 489–90 (2005).

5. *See, e.g.*, *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738, 2746 (2007); *Grutter v. Bollinger*, 539 U.S. 306, 343 (2003); *Gratz v. Bollinger*, 539 U.S. 244, 275 (2003).

(TANF).<sup>6</sup> These changes coincided with a significant decline in the role of the courts in shaping policy in the welfare area. Although the federal courts considered a range of important challenges to laws and regulations governing poverty relief and economic redistribution between the 1960s and the mid-1980s, they have been relatively uninvolved since that period and have not played a major role in sorting out issues arising from the welfare reform legislation. Moreover, despite widespread attention to growing economic and social inequality,<sup>7</sup> there is no evidence of a significant push to reenlist courts in efforts to address these problems. A visit to informational and advocacy websites on poverty issues bears out this abandonment of judicial avenues.<sup>8</sup> All told, there is little reason to believe that courts will significantly shape the law and policy of poor relief in the near future.

This picture represents a significant change. In the 1960s and 1970s, welfare-rights advocates were eager to use the courts to advance their agenda. Their main priorities at that time included establishing economic rights and invalidating restrictive conditions on entitlement to welfare benefits.<sup>9</sup> Poverty law courses began to appear in law school curricula around the country, and instructors became handmaidens of the activist welfare project.<sup>10</sup> The goal was to teach students how to litigate on behalf of the poor by arguing for expanded access to public assistance. On the theory that existing benefit conditions enshrined the race and class prejudices of a benighted majority, liberalizing

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6. The Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (1996) (codified as amended in scattered sections of 8 & 42 U.S.C.).

7. See, e.g., Michael Kazin & Julian E. Zelizer, *A New Social Contract*, WASH. POST, June 22, 2008, at B7; Alexander Stille, *Grounded by an Income Gap*, N.Y. TIMES, Dec. 15, 2001, at A17. See generally ARLOC SHERMAN & AVIVA ARON-DINE, CTR. ON BUDGET & POLICY PRIORITIES, NEW CBO DATA SHOW INCOME INEQUALITY CONTINUES TO WIDEN: AFTER-TAX-INCOME FOR TOP 1 PERCENT ROSE BY \$146,000 IN 2004 (2007), <http://www.cbpp.org/1-23-07inc.htm>; Amy L. Wax, *Engines of Inequality: Class, Race, and Family Structure*, 41 FAM. L.Q. 567, 588 (2007).

8. See, e.g., Public Agenda Issue Guide: Poverty and Welfare, <http://www.publicagenda.org/citizen/issueguides/poverty-and-welfare/sources-and-resources> (last visited Aug. 10, 2008).

9. See R. SHEP MELNICK, BETWEEN THE LINES: INTERPRETING WELFARE RIGHTS 83-84 (1994).

10. See Amy L. Wax, *Musical Chairs and Tall Buildings: Teaching Poverty Law in the 21st Century*, 34 FORDHAM URB. L.J. 1363, 1364 (2007).

poverty relief was regarded as an important rights-expanding project in keeping with a broader civil rights agenda.<sup>11</sup> As discussed more fully below, the results were decidedly mixed, with activists scoring some key victories while failing to achieve their broader goal of securely establishing positive economic rights.

Law students today are only dimly aware of the landmark decisions in the welfare area that received widespread attention at the time they were decided. Because issues surrounding public assistance do not currently preoccupy the courts, these earlier decisions are viewed as historical relics with little ongoing significance. That view is overly simplistic. Although the controversies surrounding the Supreme Court's welfare-rights decisions have largely abated, the trajectory of the courts' involvement in these issues sheds important light on the interplay between community norms and judicial decrees.

The courts' declining role in shaping the direction of social welfare law and policy is best understood as the culmination of a decades-long tug-of-war between community values—as expressed through legislative restrictions on poor relief programs—and the Supreme Court's vision of the proper ambit for those values in setting poor relief policies. The role of the courts has now abated because of two signal developments in the social and legal landscape. First, recent revisions in the basic New Deal scheme for federal poverty programs have largely corrected one source of popular discontent in the administration of welfare programs—the unfairness and perverse incentives flowing from the failure to require recipients to work. To the extent that these revisions have been challenged at all, the courts have largely upheld the imposition of strict work requirements. Second, sexual mores have shifted dramatically. They are now far more in sync with the decades-old (and originally unpopular) decisions invalidating benefits restrictions tied to unconventional sexual conduct and nontraditional families. Although the government has not given up on trying to support—and revive—the traditional nuclear family, it has largely abandoned the direct use of welfare law and policy to regulate, punish, or reward private reproductive behavior.

Recounting this story requires some historical background. The New Deal ushered in an important sea change in our coun-

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11. *See id.*

try's approach toward the poor. Until the 1930s, poverty relief was principally a local charge.<sup>12</sup> Modest antipoverty programs, such as aid for widowed mothers, were funded and administered largely at the state or municipal level.<sup>13</sup> As part of a comprehensive series of New Deal reforms that included both social insurance and direct subsidies, Congress established the Aid to Dependent Children Program, which eventually became Aid for Families with Dependent Children (AFDC). Congress designed the program, which the states administered, to support families with children left destitute by the death or abandonment of a parent (usually the father). The stated goal was to relieve mothers in those families of the need to work, thus leaving them free to care for their children.<sup>14</sup>

Although AFDC was initially a small and uncontroversial program, its popularity declined as the number of recipients grew and the beneficiary population changed. At first, recipients were mostly widows and divorcees.<sup>15</sup> After 1960, a burgeoning population of never-married single mothers and their out-of-wedlock children replaced those earlier recipients.<sup>16</sup> Although nonwhites rarely received benefits during the first decades of the program, the number of black single mothers on welfare expanded and became a significant part of the welfare population.<sup>17</sup> Community outreach programs spearheaded by welfare-rights advocates helped swell the rolls. These developments engendered concerns that AFDC encouraged dependency, undermined the traditional family, and fueled the growth of an

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12. For a discussion on the transition from state provision of welfare to federal provision, see Leo E. Strine, Jr., *Human Freedom and Two Friedmen: Musings on the Implications of Globalization for the Effective Regulation of Corporate Behaviour*, 58 U. TORONTO L.J. 241, 247–48 (2008).

13. See MELNICK, *supra* note 9, at 65; FRANCES FOX PIVEN & RICHARD A. CLOWARD, *REGULATING THE POOR: THE FUNCTIONS OF PUBLIC WELFARE* 46–48 (2d ed. 1993).

14. See JEFF GROGER & LYNN A. KAROLY, *WELFARE REFORM: EFFECTS OF A DECADE OF CHANGE* 10–11 (2005).

15. See Susan W. Blank & Barbara B. Blum, *A Brief History of Work Expectations for Welfare Mothers*, 7 *THE FUTURE OF CHILDREN* 28, 29–30 (1997); June Carbone, *Age Matters: Class, Family Formation, and Inequality*, 48 *SANTA CLARA L. REV.* 901, 936–37 (2008).

16. For a more statistically detailed discussion of this transition, see Carbone, *supra* note 15, at 936–37.

17. See, e.g., A. Mechele Dickerson, *Bankruptcy Reform: Does the End Justify the Means?*, 75 *AM. BANKR. L.J.* 243, 248 (2001).

urban, black, underclass culture.<sup>18</sup> Dissatisfaction with a growing, idle welfare population became a salient political issue, fueling the rise of the Republican Party in the 1970s and beyond.<sup>19</sup>

Throughout this period, the AFDC program was intermittently revised to introduce limited training and work requirements, but insufficient funding and the absence of political will prevented these innovations from being implemented effectively.<sup>20</sup> For most single mothers with children, especially in urban areas, welfare benefits were easily obtained and appeared to continue indefinitely. For more and more recipients, welfare did indeed become “a way of life.”<sup>21</sup>

The groundswell of popular concern grew slowly from the 1970s through the 1990s, finally culminating in decisive political action. The 1996 welfare reform legislation, TANF, introduced three key changes in the federal scheme of poverty relief. First, it significantly expanded states’ discretion in doling out benefits, allowing greater ambit for innovative programs, conditions, and restrictions. Second, it imposed substantial work requirements for adults—including single mothers—as a condition of receiving aid. Third, it established a strict five-year limit on benefits for most recipient families.<sup>22</sup>

What role have the courts played in these historical developments? Assessing the courts’ contribution to the current state of welfare law and policy requires some understanding of the core principles that govern the politics of poverty relief in this country. As Martin Gilens has documented, public opinion on the optimal design of public welfare programs has long em-

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18. See Theodore H. White, *Summing Up*, N.Y. TIMES, Apr. 25, 1982, § 6 (Magazine), at 32. For a recounting of early 1970s welfare reform efforts, see Robert B. Carleson, *Real welfare reform: More responsibility to the states*, WASH. TIMES, Apr. 18, 2005, at A19.

19. See E.J. DIONNE, JR., WHY AMERICANS HATE POLITICS 93–94 (1991).

20. See Joel F. Handler, *The Transformation of Aid to Families with Dependent Children: The Family Support Act in Historical Context*, 16 N.Y.U. REV. L. & SOC. CHANGE 457, 489–94 (1988).

21. For a well-known critique of welfare as “a way of life,” see Gov. William J. Clinton, *I Still Believe in a Place Called Hope*, Acceptance Speech at the Democratic National Convention (July 16, 1992), in L.A. TIMES, July 17, 1992, at 10.

22. See Amy L. Wax, *A Reciprocal Welfare Program*, 8 VA. J. SOC. POL’Y & L. 477, 487 (2001). Although TANF made cash relief harder to obtain, it left relatively untouched other aspects of the safety net for poor families. TANF benefits continued to be supplemented by a range of federal programs and transfers, including food stamps, housing subsidies, the Earned Income Tax Credit, and Medicaid.

braced the distinction between the deserving and undeserving poor.<sup>23</sup> These categories roughly track the so-called luck egalitarian divide between those who suffer deprivation through bad luck or forces outside their control and those whose poverty can be traced in large part to their own imprudent choices.<sup>24</sup> Although voters are generally skeptical of government-sponsored handouts, they are willing to help people down on their luck. That is, they support assisting people who are victims of misfortune, but are reluctant to bail out those perceived as behaving irresponsibly. In defining who is irresponsible and who is merely unlucky, voters have consistently embraced something of an ethos of conditional reciprocity for public welfare. They robustly endorse fundamental norms of self-reliance, and believe that able-bodied persons should strive to minimize their economic dependency.<sup>25</sup>

Historically, the distinction between bad luck and bad choices influenced transfer policies in two important ways. First, welfare rules were structured to take account of beneficiaries' behavior—including their sexual conduct—as it affected their economic need and dependency. At the time of AFDC's enactment, sexual relations out of wedlock were viewed with disapproval. The public was well aware that such relationships often produced children and mothers who were destined to become dependent on public assistance. Women who had sexual relations and gave birth to children outside of marriage, without the customary support of the male provider, were viewed as acting irresponsibly. Likewise, men's choices to engage in extramarital liaisons, while failing to marry or to provide support for resulting children, engendered public resentment. During the initial decades after AFDC's enactment, mothers were not expected to work, but men were expected to support their fami-

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23. See MARTIN GILENS, *WHY AMERICANS HATE WELFARE: RACE, MEDIA, AND THE POLITICS OF ANTIPOVERTY POLICY* 92–93 (1999).

24. See Amy L. Wax, *Something for Nothing: Liberal Justice and Welfare Work Requirements*, 52 EMORY L.J. 1, 20–29 (2003). For more on luck egalitarianism, see Daniel Markovits, *Luck Egalitarianism and Political Solidarity*, 9 THEORETICAL INQUIRIES L. 271 (2008).

25. For a defense of this view, see Amy L. Wax, *Social Welfare, Human Dignity, and the Puzzle of What We Owe Each Other*, 27 HARV. J.L. & PUB. POL'Y 121 (2003) [hereinafter Wax, *Social Welfare*], and Amy L. Wax, *The Political Psychology of Redistribution: Implications for Welfare Reform*, in WELFARE REFORM AND POLITICAL THEORY 200–22 (Lawrence M. Mead & Christopher Beem eds., 2005).

lies. This scheme gave rise to concern with men's idleness, failure to engage in gainful employment, and refusal to take on the breadwinner role. In more recent decades, as women entered the labor force in increasing numbers, these concerns were gradually extended to women as well.<sup>26</sup>

The voting majority's embrace of traditional norms of self-sufficiency, family obligation, sexual restraint, and responsible personal conduct contrasted sharply with the agenda of welfare-rights advocates in the 1960s and 1970s. That agenda received support from elements of elite opinion and from legal scholars concerned with poverty. Then, as today, welfare advocates were unrelentingly hostile to the deserving-undeserving distinction, with special animosity reserved for welfare restrictions based on individual sexual conduct and reproductive choices.<sup>27</sup> On this point, activists drew strength from liberal political theorists' contemporaneous attack on the very concept of desert.<sup>28</sup> On this view, individual conduct is not and should not be morally or legally relevant to the provision of public aid—or to desert more generally—at least in matters surrounding economic life.<sup>29</sup> But even if some people deserve their fate, the poor almost always do not. The poor are rarely undeserving, because they are trapped by social and economic conditions. Thus, the notion that society's disadvantaged could and should do more to support themselves is misguided and delusory.<sup>30</sup> As victims of a structurally unjust system, the poor should not be deprived of governmental aid by the imposition of stringent or conduct-

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26. See discussion *infra*.

27. See Jonathan L. Hafetz, "A Man's Home Is His Castle?": Reflections on the Home, the Family, and Privacy During the Late Nineteenth and Early Twentieth Centuries, 8 WM. & MARY J. WOMEN & L. 175, 221–24 (2002) (discussing the use of sexual norms to distinguish the "deserving" from the "undeserving"); Richard Hardack, *Bad Faith: Race, Religion and the Reformation of Welfare Law*, 4 CARDOZO PUB. L. POL'Y & ETHICS J. 539, 616 (2006) (arguing that "deserving poor," for purposes of AFDC, meant in practice "the sexually ascetic, monogamous, frugal, tidy, and white" (citation and internal quotation marks omitted)); see also Dorothy A. Brown, *Race and Class Matters in Tax Policy*, 107 COLUM. L. REV. 790, 810–16 (2007) (arguing that the deserving-undeserving distinction is race and class based).

28. But see Charles A. Reich, *Individual Rights and Social Welfare: The Emerging Legal Issues*, 74 YALE L.J. 1245, 1255 (1965) (arguing that the concept of desert entitles the poor to public assistance).

29. See Samuel Scheffler, *Justice and Desert in Liberal Theory*, 88 CAL. L. REV. 965, 985–86 (2000).

30. See Amy L. Wax, *The failure of welfare reform*, L.A. TIMES, Oct. 22, 2006, at M3 [hereinafter Wax, *The failure of welfare reform*]. See generally Wax, *supra* note 24.

related conditions. To the extent that popular attitudes reject this view, they are unsophisticated at best and bigoted at worst.

What role did the courts play in mediating between these contrasting views of the proper scope of public largesse? In the 1960s and 1970s, during the heyday of the welfare-rights movement, the courts regularly ruled on challenges to official attempts to shape benefit eligibility requirements to respect traditional mores of sexual and financial responsibility. Although the Supreme Court was largely sympathetic to these challenges, the landscape is somewhat mixed. In rejecting some conditional benefits restrictions, the Supreme Court issued a few key opinions that placed it distinctly at odds with dominant notions of deservingness. In other cases, however, it upheld restrictions consonant with popular views.

The most controversial cases concerned restrictions placed on eligibility for AFDC benefits. Under the terms of the federal statute governing these benefits, states were to make cash aid available to families with an "absent parent," with no express exclusion for single, unmarried mothers. But the dominant norms of the time made many states reluctant to pay benefits to unmarried mothers cohabiting with men who took no responsibility for them or their children. Not only were the women (and men) involved in such relationships considered undeserving, but eligibility for single mothers under these circumstances was viewed as unfair and corrosive of public morals.<sup>31</sup> Such benefits undermined marriage by "subsidizing" illicit relationships and flouting accepted conventions of family self-sufficiency. Concern was also directed at the potential horizontal inequity between welfare beneficiaries and conventional families, who were ineligible for benefits under the terms of the program. Aid programs without conduct restrictions were seen as putting poor married couples at a disadvantage compared to single mothers.

A number of states responded to these concerns by developing rules designed to deny benefits to cohabiting single mothers. A 1968 case, *King v. Smith*,<sup>32</sup> challenged Alabama's use of

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31. See Jill Duerr Berrick, *From Mother's Duty to Personal Responsibility: The Evolution of AFDC*, 7 HASTINGS WOMEN'S L.J. 257, 260-61 (1996); Amy Mulzer, *The Doorkeeper and the Grand Inquisitor: The Central Role of Verification Procedures in Means-Tested Welfare Programs*, 36 COLUM. HUM. RTS. L. REV. 663, 667-69 (2005).

32. 392 U.S. 309 (1968).

its administrative discretion under the AFDC program to exclude families consisting of unmarried mothers who were living with or maintaining sexual relationships with men. Under the Alabama rule, any man engaged in a relationship with an eligible mother was deemed a “substitute father” under the statute, thus defeating the statutory requirement of an “absent parent.”<sup>33</sup> Alabama maintained that the “substitute father” interpretation was necessary to discourage illicit relationships and illegitimate births and to put couples involved in informal sexual relationships on a par with married couple families.<sup>34</sup>

Likewise, in *Lewis v. Martin*,<sup>35</sup> California sought to exclude unmarried cohabiting women from the AFDC program by deeming available, for purposes of calculating benefits eligibility, the earnings of any unrelated adult male present in a single mother’s home. This regulation, which designated the single woman’s male partner a “man assuming the role of a spouse” or “MARS” under the pertinent regulations, effectively assigned him financial responsibility for the woman’s family unit for purposes of welfare entitlement.<sup>36</sup> Again, this regulation was intended to discourage illicit conduct and out-of-wedlock births and to establish horizontal equity with poor married couple families who were ineligible to receive benefits under AFDC.

In both cases, the restrictions imposed by the states meant that some children of cohabiting or sexually active single mothers were deprived of benefits regardless of whether the mothers’ male partners were actually their fathers, actually contributed to their support, or were legally required to do so. In both cases, the Supreme Court struck down the state regulations. In *King v. Smith*, the Court ruled that the Alabama substitute-father rule was inconsistent with the federal statute creating the AFDC program.<sup>37</sup> Relying on what it identified as the core purpose of the AFDC statute—to support needy children—the Court noted that the mothers’ sexual conduct had no bearing on the existence of the children’s need.<sup>38</sup> Therefore, conditioning bene-

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33. For a discussion on “substitute parent” state laws, see WINIFRED BELL, AID TO DEPENDENT CHILDREN 76–92 (1965).

34. See *King*, 392 U.S. at 318.

35. 397 U.S. 552 (1970).

36. See *id.* at 554.

37. *King*, 392 U.S. at 326–27.

38. See *id.* at 320.

fits on the mothers' behavior was inconsistent with the statute's objective. Enforcing public morality or satisfying the state's sense of fairness to intact families and married fathers could not be allowed to interfere with this goal.<sup>39</sup> In the same vein, the Court in *Lewis v. Martin* ruled that California was not allowed to assume that a man's income was available to support a mother and her children unless state law obligated that man to provide support.<sup>40</sup> In California, a male who was neither married to a woman nor the legally established father of her children had no such obligation. Therefore, the income of a man who did not meet these conditions could not be assumed available under the federal statute for purposes of determining eligibility for aid.<sup>41</sup>

In a similar case decided shortly after, *United States Department of Agriculture v. Moreno*,<sup>42</sup> the Supreme Court considered a challenge to Congress's decision to amend federal law to disqualify households consisting of unrelated individuals from eligibility for food stamps. Although the legislative record suggested that this provision was motivated by Congress's disapproval of and reluctance to subsidize "hippie communes," the government did not rely on this rationale in defending the provision at issue.<sup>43</sup> Rather, the government argued that the measure was necessary to minimize fraudulent claims for food stamps.<sup>44</sup> Striking down the amendment as constitutionally impermissible, the Court in *Moreno* characterized the restriction on household composition as irrational and arbitrary in light of the core purpose of the food stamp program, which was to ensure an adequate supply of food for individuals unable to afford proper nutrition.<sup>45</sup> Disregarding Congress's stated concern

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39. See *id.* at 325 ("In sum, Congress has determined that immorality and illegitimacy should be dealt with through rehabilitative measures rather than measures that punish dependent children, and that protection of such children is the paramount goal of AFDC.").

40. See *Lewis*, 397 U.S. at 556–57 ("[T]he regulations explicitly negate the idea that in determining a child's needs, a stepfather . . . or a[n] [adult male person assuming the role of spouse to the mother although not legally married to her] may be presumed to be providing support.").

41. See *id.* at 559–60.

42. 413 U.S. 528 (1973).

43. See *id.* at 537–38.

44. See *id.* at 535.

45. See *id.* at 538.

with the unconventional sexual arrangements in some households, the Court characterized Congress's goal of excluding hippie communes as motivated by pure animus or the bare desire to harm an unpopular group.<sup>46</sup> The Court ruled that this desire did not advance a valid public purpose, especially in light of the food stamp program's avowed aim of feeding the hungry.<sup>47</sup>

These three cases stand in contrast to others, decided within the same period, in which the Supreme Court upheld conditions on benefits designed to reinforce—or at least to avoid undermining—widely held expectations of self-sufficiency and sexual conduct. In *Dandridge v. Williams*,<sup>48</sup> for example, welfare recipients challenged Maryland's decision not to pay higher AFDC benefits to families with more than a designated number of children. The State sought to justify the benefits ceiling as a means to maximize the number of families supported with limited resources. The State also pointed to the goals of fairness to non-beneficiary working families, who did not automatically get a raise upon the birth of each child. It also sought to encourage employment by ensuring that single-mother families on welfare did not possess more resources than low-income working families. The Supreme Court upheld the Maryland benefits schedule, accepting the State's justifications for the cap as consistent with the objectives of the AFDC program and grounded in the realities of family life.<sup>49</sup>

Similarly, the Supreme Court in *Califano v. Boles*,<sup>50</sup> upheld a regulation under the Social Security program that distinguished between married and unmarried mothers of insured wage earners' children. Under the terms of the Social Security Act, dependent relatives of deceased qualifying wage earners

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46. *See id.* at 534.

47. *See id.* at 535–36.

48. 397 U.S. 471 (1970).

49. The Court acknowledged Maryland's "legitimate interest in encouraging employment and in avoiding discrimination between welfare families and the families of the working poor." It further explained that "[b]y combining a limit on the recipient's grant with permission to retain money earned, without reduction in the amount of the grant, Maryland provides an incentive to seek gainful employment. And by keying the maximum family AFDC grants to the minimum wage a steadily employed head of a household receives, the State maintains some semblance of an equitable balance between families on welfare and those supported by an employed breadwinner." *Id.* at 486.

50. 443 U.S. 282 (1979).

are entitled to survivors' benefits, including a special allotment for the widowed mothers of workers' minor children. In *Boles*, the Court considered the claim that restricting these so-called "mothers' insurance benefits" to widows and divorced wives, while denying payments to unmarried mothers of the wage earner's biological children, was an unconstitutional violation of the equal protection component of the Fifth Amendment.<sup>51</sup> In rejecting that claim, the Court reasoned that the statutory distinction was based on the reasonable general assumption that a wage earner's widow or former wife was more likely than an unmarried consort to have been dependent on the wage earner during his lifetime and to suffer economic dislocation upon his death.<sup>52</sup> The Court also denied that the rule unlawfully discriminated against children born out of wedlock, noting that those children were entitled to separate benefits under specified conditions.<sup>53</sup> Although relying principally on the validity of legislative generalizations about the economic significance of marriage, the Court's decision in *Boles* had the effect of reinforcing conventional expectations and norms regarding sexual behavior and family. By preserving the priority of marriage over extramarital liaisons through ensuring more favorable treatment to a wage earner's lawfully wedded wife (and her children) than to his girlfriend (and her children), the provision rewarded and encouraged marital relationships.

The rules and restrictions at issue in these cases reflect traditional notions regarding sexuality, family relations, and economic obligation. In each case, public officials responsible for creating and administering public welfare programs were loathe to offer financial support—which could be viewed as a form of public subsidy—for behavior that ran afoul of customary expectations. The rules were also designed to achieve fairness toward those who, to paraphrase President Clinton's more recent formulation, "work hard and play by the rules."<sup>54</sup> On this view, programs to help the poor must be structured to ensure that welfare recipients are no better off than other low-income persons who manage, by virtue of their own effort and restraint, to avoid depend-

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51. *See id.* at 295–96.

52. *See id.* at 289.

53. *See id.* at 294–95.

54. The President's Radio Address, 31 WEEKLY COMP. PRES. DOC. 31, 32 (Jan. 7, 1995).

age, by virtue of their own effort and restraint, to avoid dependency. Individuals who are working, getting married, and paying taxes to support others deserve more favorable treatment than those on the public dole.<sup>55</sup>

Thus, what seemed to incense the architects of the “substitute father” and “man in the house” rules at issue in cases like *King v. Smith* and *Lewis v. Martin* was the prospect of single mothers on welfare enjoying no-strings-attached sexual relationships with men who bore no responsibility for the women’s children and were heedless of the fate of any children they might conceive. Meanwhile, living right next door were hard-working married couples with no greater advantages or skills who, nonetheless, were not receiving aid. The decision of those neighbors to marry, and the steps the men in those families took to support their wives and children, rendered most of these families ineligible for welfare benefits under the terms of AFDC, which was designed primarily to assist children with “absent parents.” In formulating the restrictions at issue, the states were clearly acknowledging the deserving neighbors of welfare recipients and seeking to mute or eliminate the perversity of denying aid to traditional families while supplying cash to people who disregarded conventional moral expectations and strictures. Not only were such efforts viewed as serving principles of fairness, but they were also seen as reducing the temptation to fall into dependency.

In turning back the effort to minimize the perversity of AFDC, the Court’s primary motive seems to have been avoiding harm to poor dependent children; that is, it tried to refrain from visiting the sins of the parents upon the sons. The Supreme Court had relied on this principle in a series of contemporaneous decisions repudiating longstanding state rules that put illegitimate children at a disadvantage relative to children born in wedlock.<sup>56</sup> Applying this principle in the Court’s decisions on welfare, however, produced perverse results. By enshrining

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55. The principle that best captures this idea is that of avoiding perversity in the design of public welfare programs. See ALBERT O. HIRSCHMAN, *THE RHETORIC OF REACTION: PERVERSITY, FUTILITY, JEOPARDY* 27–42 (1991) (suggesting that conservative opposition to welfare programs is often grounded in a concern with such programs’ perverse effects, including creating undesirable incentives and rewarding antisocial behavior).

56. See, e.g., *Levy v. Louisiana*, 391 U.S. 68, 70–72 (1968). In the welfare context, see *N.J. Welfare Rights Org. v. Cahill*, 411 U.S. 619, 621 (1973).

duct, the rulings undermined states' efforts to preserve equity in the treatment of welfare recipients and working families.

In the wake of these decisions, Congress and the States got the message: Heavy-handed attempts to use conditions on public benefits to enforce dominant norms surrounding family life, sexuality, and economic dependency were off-limits. The States were now constrained in their attempts to incorporate conduct-based rules reflecting popular conceptions of deserving and undeserving behavior. After *King v. Smith*, *Lewis v. Martin*, and *United States Department of Agriculture v. Moreno*, political actors at the state and federal level were forced to back away from official efforts to "legislate morality" through conditions on public welfare.<sup>57</sup>

The fallout from the Court's decisions, however, was not lost on the voters. The abandonment of the twin goals of non-perversity, which were to preserve the favored position for those who respected conventional mores and to eliminate incentives for bad behavior, was politically ill-timed. Taxpayers resented the liberalization of welfare disbursements, and their ire was fueled by simultaneous explosions in crime, welfare dependency, and extramarital childbearing.<sup>58</sup> These developments had important political consequences. The growing unpopularity of the AFDC program worked to the advantage of the Republican Party and contributed to the success of Republican Presidential candidates Richard Nixon and Ronald Reagan, who made taming the excesses of the welfare system a priority.<sup>59</sup> The backlash was heard in Bill Clinton's promise to "end welfare as we know it," which helped get him elected and produced the significant reforms enacted during his Administration.<sup>60</sup>

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57. But see J.L. Mashaw, *Welfare Reform and Local Administration of Aid to Families with Dependent Children in Virginia*, 57 VA. L. REV. 818 (1971) (documenting continued informal efforts to distinguish between deserving and undeserving recipients of AFDC, and to maintain equity between working and welfare families, by administrators of welfare programs in various counties in Virginia).

58. See Susan Chira, *War Over Role of American Fathers*, N.Y. TIMES, June 19, 1994, at A22; Steven A. Holmes, *Out-of-Wedlock Births Up Since '83, Report Indicates*, N.Y. TIMES, July 20, 1994, at A1.

59. See ALONZO L. HAMBY, LIBERALISM AND ITS CHALLENGERS: FROM F.D.R. TO BUSH 319-29, 359 (2d ed. 1992).

60. See Francis X. Clines, *Clinton Signs Bill Cutting Welfare; States in New Role*, N.Y. TIMES, Aug. 23, 1996, at A1.

Nonetheless, the Court's influence on the trajectory of welfare law and policy and on the politics surrounding welfare reform should not be overstated. The pro-welfare decisions detailed above, although receiving widespread attention and undeniably shaping the course of poor relief, are only part of the story. Other developments, both in the courts and in society as a whole, have influenced the evolution of government benefits programs and attitudes towards the disadvantaged more generally. First, as already discussed, the Supreme Court's antipathy towards state-initiated measures designed to temper the perverse incentives and morally unconventional features of welfare programs began to ease. The Court in *Dandridge v. Williams* allowed the state to cap benefits in deference to conventional concerns about the unfairness of escalated payments to welfare recipients that were unavailable to working families. Similarly, the Court in *Califano v. Boles* refused to require the Social Security program to put a man's mistress on a par with his wife. By effectively deferring to prevailing norms, these outcomes helped temper political discontent.

Second, even during the heyday of welfare rights, the courts did not go nearly as far as they could have. Nor did they embrace the core agenda of welfare activists. Judges consistently refused to recognize a fundamental right to economic support and repeatedly asserted that the legislative decision to grant government largesse is a discretionary one.<sup>61</sup> In *San Antonio Independent School District v. Rodriguez*,<sup>62</sup> for example, the Supreme Court decisively turned back an attempt to declare the poor a constitutionally suspect class, which would have triggered strict scrutiny for legislative distinctions based on economic status.<sup>63</sup> The Court's refusal to recognize positive rights to economic support, or to view the poor as a special protected class, preserved some degree of leeway for Congress and the States to structure benefits to achieve desirable social goals.

In the wake of these rulings, the lower courts have selectively permitted attempts to tailor aid programs to create work incen-

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61. For a discussion and historical overview, see CASS R. SUNSTEIN, *THE SECOND BILL OF RIGHTS: FDR'S UNFINISHED REVOLUTION AND WHY WE NEED IT MORE THAN EVER* 149–71 (2004).

62. 411 U.S. 1, 6 (1973).

63. *See id.* (reversing a lower court's ruling that the Texas school finance system was unconstitutional).

tives, preserve fiscal integrity, shore up intact families, encourage law-abiding behavior, and serve other popular goals. Under TANF, for example, the courts have recently upheld restrictions on benefits based on past conduct, criminality, and immigration status. These restrictions include provisions barring persons convicted of certain drug-related felonies from receiving aid under the federal food stamp or TANF programs.<sup>64</sup> Courts have also allowed states to cap the amount of welfare payments to single mothers who continue to bear children out of wedlock.<sup>65</sup> Finally, judges have given Congress, the States, and welfare agencies broad leeway to structure programs to advance the core goal of encouraging work. Few legal challenges to work requirements under TANF have been undertaken, and none of importance has succeeded.<sup>66</sup>

There is no question that the Supreme Court's refusal to allow states and administrators to "legislate morality" seriously restricted the political options for dealing with what was perceived in some quarters as the socially destructive excesses of poverty relief programs. Nonetheless, this account of the relationship between the courts and the community on matters related to public welfare is seriously incomplete. This is because the morality that voters—and their representatives—are interested in legislating has evolved radically over time. When the most important welfare cases were decided, most people embraced fairly conservative values on sexuality, family structure, and dependency. When poverty relief and social insurance programs were forged in mid-century, most mothers were not in the workforce.<sup>67</sup> Women were, however, expected to control their sexuality in ways that would minimize their own and

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64. See 21 U.S.C. § 862(a), (d); *Turner v. Glickman*, 207 F.3d 419 (7th Cir. 2000) (finding Section 862(a) to be "rationally related to legitimate government interests in deterring drug use and reducing welfare fraud").

65. See, e.g., *C.K. v. Shalala*, 883 F. Supp. 991, 997 (D.N.J. 1995), *aff'd sub nom.*, *C.K. v. N.J. Dep't of Health & Human Servs.*, 92 F.3d 171, 195 (3d Cir. 1996).

66. For a review of some of the issues involved in work requirements imposed on recipients of benefits under TANF, see Matthew Diller, *Working Without a Job: The Social Messages of the New Workfare*, 9 STAN. L. & POL'Y REV. 19, 23–25 (1998), reprinted in FEMINIST LEGAL THEORY: AN ANTI-ESSENTIALIST READER 151, 152–54 (Nancy E. Dowd & Michelle S. Jacobs eds., 2003).

67. See Martin H. Malin, *Unemployment Compensation in a Time of Increasing Work-Family Conflicts*, 29 U. MICH. J.L. REFORM 131, 133 (1995–96).

their children's dependency.<sup>68</sup> Specifically, they were expected to avoid conduct that posed the risk of their becoming economically dependent single mothers. Although male sexuality was not so rigidly regulated, men's behavior was also subject to strict social norms. Fathering children out of wedlock, or abandoning mothers and children, elicited extreme disapproval.

The 1960s sexual revolution and the rise of feminism fueled a softening in these attitudes and a shift in expectations regarding work, sexuality, and family structure. These norm changes have decisively influenced public views on welfare and have shaped the course of welfare reform. The critical development relevant to this Essay is that the liberationist values of the 1960s took hold in the mainstream. In the decades since the 1960s, unconventional families—including single-parent families—have become more prevalent and socially acceptable, and extramarital sexual activity is now commonplace.<sup>69</sup> Persons deviating from conventional norms are no longer uniformly viewed as undeserving of public assistance. In addition, a central tenet of the sexual revolution has been a reluctance to judge others' choices in areas related to sexuality and family structure. This shift in mainstream morality has undermined the public's willingness to use law and policy to hold people to traditional standards of sexual conduct.

In sum, the past forty years have witnessed a pronounced sea change in the expectations for personal behaviors that bear on dependency. These developments, however, have not caused the public to abandon the distinction between the deserving and undeserving poor. Rather, they have resulted in a reassessment of who falls within those categories. To be sure, there remains uncertainty and ambivalence on issues of sexual conduct relevant to public aid programs. Is having a child out of wedlock a choice for which mothers (and fathers) should be held responsible, or is it something that women do not really control? Is a woman's decision to marry or have a child one on which the government should have no opinion and take no position, or should the government be able to take those decisions into account, especially when spending taxpayers' money? There is

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68. For a discussion of early efforts to prevent recipients from becoming economically dependent on AFDC, see Berrick, *supra* note 31, at 260–62.

69. See Malin, *supra* note 67, at 133 (“The percentage of families headed by single parents more than doubled from 1970, reaching twenty-seven percent in 1993.”).

now less unanimity on these questions, with views running the gamut. Nonetheless, the number of people taking a hard line is unquestionably in decline. The upshot is that public opinion is now more closely in sync with the reasoning and outcomes of cases like *King v. Smith*, *Lewis v. Martin*, and *United States Department of Agriculture v. Moreno*.

Attitudes have also decisively changed on the question of work, with the voting public less tolerant of single mothers' economic dependency and more willing than in past decades to hold poor women responsible for their own support. Although some still embrace men's traditional duties to marry and provide for their children, there is less consensus on this point, with the result that much of the burden of supporting extramarital children has effectively been transferred to the mothers themselves.<sup>70</sup> One key impetus for this change is that a growing number of women have joined the workforce.<sup>71</sup> Proponents of work requirements point out that mothers across the board now work. They ask why poor women should be different. Even if many are unable to achieve complete economic independence, they can at least contribute reasonable efforts toward their own support.<sup>72</sup> What Noah Zatz has termed the "class parity" argument—the position that mothers on welfare, like other women in the post-feminist world, should no longer automatically expect to stay home and be supported by others—has gained a decisive influence in the welfare policy world.<sup>73</sup>

The dramatic social developments just discussed prompt a question: If the Supreme Court had never decided cases like *King*, *Lewis*, and *Moreno*, would public assistance programs have taken a different turn? Were these judicial decisions instrumental in shaping the course of public welfare? Alternatively, did they affect the behavioral choices of welfare recipients? Although it is impossible to give a definitive answer, the situation suggests that these decisions were a modest influence.

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70. For a discussion of the increased emphasis on personal responsibility, see Berrick, *supra* note 31, at 272–74.

71. See Malin, *supra* note 67, at 133 (women in the work force increased by 200% between 1950 and 1990).

72. For a more detailed discussion of the issue of self-sufficiency, see Amy L. Wax, *A Reciprocal Welfare Program*, 8 VA. J. SOC. POL'Y & L. 477 (2001); Wax, *Social Welfare*, *supra* note 25; see also Noah Zatz, *Revisiting the Class Parity Analysis of Welfare Work Requirements* (unpublished manuscript, on file with Author).

73. See Zatz, *supra* note 72.

The post-60s juggernaut was rolling, the family was weakening, and the expectation of economic independence for women was growing stronger. The courts did not foment these trends, and they probably could not have stopped them. On this view, the key welfare decisions were probably of minor importance. They were an anticipation of things to come and, at most, hastened the arrival of new social patterns. Broader cultural trends were at least as significant as the decisions themselves.

Indeed, recent changes in sexuality and family structure have been so powerful that efforts to slow or reverse these trends have proven unsuccessful. It has now been twelve years since the enactment of the TANF program. Although the key elements of TANF are stringent work requirements and time limits for receiving cash benefits, the preamble to the welfare reform statute reveals that the drafters were more concerned with the disintegration of the family than with economic dependency.<sup>74</sup> Proponents of reform thought that work requirements, by making welfare less attractive, would create strong incentives for women to marry.<sup>75</sup> The hope was that a surge in marriage among poor women would generate a revival of the traditional family. This hope was never realized. Although reform has been successful in promoting employment among poor single mothers, it has not achieved the stated goal of reversing the decades-long decline in the nuclear family for this group.<sup>76</sup> For the least skilled and educated segment of the population, the family continues to deteriorate apace. Extramarital childbearing is ever more common and marriage increasingly rare, with single-parent families now the norm for low-income women.<sup>77</sup> The failure of welfare reform to slow these trends reveals that family structure changes have now taken on a life of their own. These developments have thus far resisted manipulation through legal or policy instruments.

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74. See Wax, *The failure of welfare reform*, *supra* note 30.

75. See Wax, *supra* note 7, at 588 (explaining that these hopes were unrealized because work support programs continued effectively to subsidize all types of families).

76. See Philip K. Robins, *Economic and Social Security and Substandard Working Conditions: The New World of Welfare*, 56 *INDUS. & LAB. REL. REV.* 735, 735 (2003) (reviewing *THE NEW WORLD OF WELFARE* (Rebecca Blank & Ron Haskins, eds. 2001)).

77. For a more extensive discussion of this issue, see Wax, *supra* note 7, at 574–

75. See also Amy L. Wax, *Too Few Good Men*, 134 *POL'Y REV.* 69 (2006).

The question of whether AFDC accelerated the decades-long disintegration of the family is highly controversial.<sup>78</sup> We will never really know whether judicially imposed leniency, as mandated in cases like *King v. Smith* and *Lewis v. Martin*, contributed significantly to the nuclear family's decline, or whether poor families would be more cohesive today if those cases had come out differently. But whether or not the courts had much to do with weakening families in recent decades, the evidence suggests that government programs and policies cannot do much to strengthen them.<sup>79</sup> The deterioration of the family continues apace among the less advantaged members of our society. Most likely, nothing short of a cultural revolution—akin to the one this country experienced in the 1960s—will reverse this trend.

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78. See CHARLES MURRAY, *LOSING GROUND: AMERICAN SOCIAL POLICY, 1950–1980*, at 124–34 (1984).

79. For a more extensive discussion of this issue, see Wax, *supra* note 7, at 587–88.