IT TAKES A FATHER? CONFORMING WITH TRADITIONAL FAMILY VALUES AS A CONDITION OF RECEIVING WELFARE: MORALS REFORM AND THE PRICE OF PRIVACY

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HYPOTHETICAL: A FAIRLY TYPICAL STORY NOT BASED ON ANYONE IN PARTICULAR

Heather is a twenty-one-year-old college student and the single mother of a seven-month-old baby. When Heather was a sophomore in college, she had a brief, sexual affair with Mike. When she discovered that Mike had a drinking problem and a history of violence against past girlfriends, Heather ended the relationship. By that time, however, she was already pregnant.

When Heather discovered she was pregnant, she went to her parents for advice. Neither she nor they believed abortion was a good choice, and Heather did not have the heart to give the baby up for adoption. Although her middle-class parents could not help her financially, they agreed to support her emotionally. Heather decided to keep the baby and raise it on her own.

When Heather told Mike she was pregnant, he shrugged and asked her how much money it would cost to get an abortion. When she told him she was going to keep the baby, he became angry and started screaming at her. Scared and bewildered, Heather left hurriedly. The next week, Heather tried to talk to Mike about the baby again. This time he threatened her, telling her if she had the baby, she would "live to regret it." Aware of

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This Comment is dedicated to my daughter, Reese Kiara Remington. I would like to thank Professors Mark R. Brown, Kristen D.A. Carpenter, and Ann M. Piccard for their contribution to the writing of this Comment. Thanks also go to Notes and Comments Editor Lindsey Smith, whose patience and perseverence has been invaluable. And, of course, I thank my parents, Tom Remington and Melinda Remington.

Mike's violent past, Heather moved, changed her telephone number, and transferred to the local community college.

With help from her parents, Heather managed to balance having a baby, going to school full-time, and working on campus thirty hours per week. She was very proud of the fact that she had not had to apply for public assistance. Her job ended with the school semester, however, and when summer came, Heather discovered that she could not find a job. By July, Heather had less than fifty dollars in her bank account and more than a month before school and her job started again. She had no choice but to apply for public assistance.

Today Heather arrives early at the local offices of the Department of Children and Families. Intimidated by the unfamiliar surroundings and loud, dirty environment, but determined not to starve, Heather waits in line to apply for cash assistance, Food Stamps, and Medicaid for herself and her baby. She fills out some forms and then is directed to sit and wait. Two hours later, she is called in to meet with a social worker. She will need more documentation about her financial status, the worker tells her, and will need to go to Child Support Enforcement to get another form signed. "But I don't get child support," explains Heather. "You have to go there to get your benefits," replies the worker without looking up.

Heather goes to the Child Support Enforcement office, which is located in the same building. She waits in line again, is directed to a chair where she waits some more, then gets to see another social worker. This social worker asks who the father of her baby is. Heather explains that he is not on the birth certificate and has never been involved in the baby's life. She attempts some light humor, "Believe me, if you knew the guy . . ."

"What is the father's name?" asks the worker again.

"I don't understand why you need to know," says Heather.

"I need to know so we can get a child support order on him; otherwise, you can't get your cash or Food Stamps."

Heather has to think fast. She needs money desperately. But she hasn't talked to Mike since the baby was born. She is afraid of what he might do. He might become angry and come after her or the baby, or he might try to take the baby away from her to get back at her.

"The thing is," she says, "I really don't want this guy in our lives." The social worker says nothing. "I just don't feel that it's in

my baby's best interest to have him involved. Plus, he doesn't even have a job. He's still in college."

"Has he ever abused you?" asks the worker.

"No, not really," answers Heather, thinking of his history and feeling grateful things never progressed to that point between them. She pushes the thought out of her mind and tries to think about all the food she will be able to buy when she gets her Food Stamps. The worker proceeds to ask her about her sexual partners, where she got pregnant, the names of the people she slept with in the months before and after she knew she was pregnant, and how she knows that Mike is the father of her baby. Heather answers all of the questions, her face red. She swears under oath that she has told the truth, then signs her name. The worker signs her paper, acknowledging her cooperation, and dismisses her.

When Heather gets out of the building, she bursts into tears. She knows that, by establishing the paternity of her baby, she has changed their lives forever, and she immediately regrets answering the social worker's questions.

I. INTRODUCTION

In 1996, fulfilling his campaign pledge to "end welfare as we know it,"[1] President William Jefferson Clinton signed into existence the Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA).[2] The PRWORA replaced the former federal system of welfare, Aid to Families with Dependent Children (AFDC), with Temporary Assistance for Needy Families (TANF).[3] As its title reflects, TANF is designed around the concept of temporary need, with emphasis on short time limits[4] for assistance and transitioning recipients into the work force.[5] Although the key word in the new welfare scheme is "temporary," women[6] who

1. Judith Havemann, *D.C.'s Welfare Waiver Draws Attack by Dole; Clinton Undercutting Promise, Opponent Says*, Wash. Post C5 (Aug. 23, 1996) (available in 1996 WL 10727659).

2. 42 U.S.C. §§ 601–619 (2000).

3. Julie A. Nice & Louise G. Trubek, *Cases and Materials on Poverty Law Theory and Practice* 94 (West 1997).

4. 42 U.S.C. § 608(a)(7) (2000). The maximum amount of time a recipient may receive assistance is five years. *Id*.

5. *Id*. § 607.

6. Men are not precluded from applying for and receiving TANF. *See id*. § 608(a)(1)

receive temporary assistance are subject to conditions that may require them to permanently alter their lives.[7] Women applying for temporary public assistance under the PRWORA must cooperate in establishing the paternity of their children or be denied relief.[8]

In this manner, the government is able to influence women to behave in a way it deems morally appropriate. Poor women applying for public assistance are in no position to bargain with the government. This creates a tremendous opportunity for the government to pressure indigent women into conforming with its prescribed ideals. Although the government could not directly mandate that single mothers marry,[9] by attaching conditions to a benefit without which poor women cannot live, the government can at least create legal ties — that neither the mother nor the putative father desires — between the putative father and the child.[10]

This Comment argues that the government has exceeded its power by conditioning the receipt of temporary assistance on a woman's sacrifice of her constitutionally protected right to privacy.[11] The United States Supreme Court has repeatedly affirmed the idea that individuals should be free to make personal decisions, especially regarding their family lives, without the government's unwarranted interference.[12] Individuals have a right to

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(prohibiting "assistance for families without a minor child"). However, this Comment focuses specifically on the cooperation requirement and its impact on women.

7. *Infra* nn. 222–226 and accompanying text.

8. *Infra* nn. 74–78 and accompanying text.

9. *See infra* nn. 95–115 and accompanying text (describing constitutionally protected privacy rights in the realm of the family).

10. *Infra* nn. 224–225 and accompanying text.

11. *Infra* pt. IV.

12. *Lehr v. Robertson*, 463 U.S. 248, 267 (1983) (refusing to allow a biological bond to create rights in a putative father who had never taken the opportunity to develop a relationship with his child); *Quilloin v. Walcott*, 434 U.S. 246, 256 (1978) (upholding the constitutionality of a state law that did not require a putative father's consent in an adoption proceeding); *Zablocki v. Redhail*, 434 U.S. 374, 377 (1978) (striking down a state law that would deny marriage to anyone who had not fulfilled child-support obligations); *Planned Parenthood of C. Mo. v. Danforth*, 428 U.S. 52, 71 (1976) (declaring unconstitutional a spousal-consent provision that would limit a woman's access to an abortion during the first trimester); *Eisenstadt v. Baird*, 405 U.S. 438, 454–455 (1971) (striking down on equal-protection grounds a law that limited contraception rights to married persons); *Loving v. Va.*, 388 U.S. 1, 12 (1967) (prohibiting a state ban on interracial marriages as a violation of equal protection and due process, and recognizing the freedom to marry as fundamental); *Skinner v. Okla.*, 316 U.S. 535 (1942) (prohibiting sterilization of persons convicted of "felonies of moral turpitude" and establishing a fundamental right to privacy in matters

marry,[13] to have a child,[14] and to prevent the birth of a child.[15] Beyond these privacy rights relating to marriage and procreation, the Court has attempted to define the boundaries of the family sphere.[16] In a series of cases denying absent biological fathers liberty interests in their biological children,[17] the Court has laid the jurisprudential foundation for a possible additional fundamental right — the right of an individual to determine her or his family composition.[18]

Although the government is not obligated to provide public assistance benefits to its indigent citizens,[19] the government does not have free license in attaching conditions to the receipt of that benefit.[20] The doctrine of unconstitutional conditions prohibits the government from abridging individuals' constitutional rights via a conditioned benefit, i.e., by attaching conditions to the receipt of a benefit, albeit one it is not required to provide, that would be otherwise unconstitutional.[21] Thus, although the government has no duty[22] to provide welfare to needy families, it may not, under the doctrine of unconstitutional conditions, make the receipt of welfare conditional upon an individual giving up her constitutional rights.[23]

By conditioning a single mother's receipt of welfare benefits on her cooperation in establishing her child's paternity, the United States Congress has violated the doctrine of unconstitu-

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relating to marriage and procreation).

13. *Zablocki*, 434 U.S. at 383; *Loving*, 388 U.S. at 12.

14. *Skinner*, 316 U.S. at 541.

15. *Planned Parenthood of C. Mo.*, 428 U.S. at 71; *Eisenstadt*, 405 U.S. at 454–455.

16. *See Michael H. v. Gerald D.*, 491 U.S. 110, 121–130 (1989) (rejecting the possibility that a putative father had a fundamental liberty interest in the offspring of his adulterous affair); *Lehr*, 463 U.S. at 263 (framing a putative father's biological connection to his offspring as an opportunity for greater involvement); *Quilloin*, 434 U.S. at 256 (upholding a state statute that would not require an absent father's consent in an adoption proceeding).

17. *Michael H.*, 491 U.S. at 121–130; *Lehr*, 463 U.S. at 263; *Quilloin*, 434 U.S. at 256.

18. *Infra* pt. III.

19. 42 U.S.C. § 601 (b).

20. *Infra* pt. IV.

21. Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 Harv. L. Rev. 1415, 1421–1422 (1989).

22. The presumption that the government has no duty to provide for its needy citizens is also debatable; some would argue that regardless of a statutory disclaimer, it has a moral imperative to do so. *See e.g.* Rev. Robert A. Sirico, *Subsidiary, Society, and Entitlements: Understanding and Application*, 11 N.D. J. L. Ethics & Pub. Poly. 549, 565 (1997) (explaining how the idea of welfare entitlement runs contrary to true notions of charity).

23. Sullivan, *supra* n. 21, at 1421–1422.

tional conditions. Convinced that marriage is the panacea for a troubled society,[24] Congress created the cooperation requirement as a way of channeling unmarried parents into a marriage-like relationship.[25] In an attempt to encourage "traditional family values" — by pressuring unmarried mothers into conformance with a heterosexual, patriarchal, cultural ideology — the government has invited unwilling and unwanted fathers to take a seat at the head of the family table.[26]

Part II will explore the history of welfare in this country, the resulting "need" for welfare reform, and how the cooperation requirement operates within the context of welfare reform.[27] Part III will provide a background of privacy-rights cases and attempt to isolate a core area of privacy rights in which an emerging right may be found, the right to determine family composition.[28] Part IV will advocate the recognition of the fundamental right to determine one's family composition as a viable privacy interest, worthy of protection in our changing society.[29] Part V will explain the doctrine of unconstitutional conditions and identify the inconsistencies the Court has perpetuated in addressing conditioned benefits.[30] It will provide one scholar's theory of the doctrine and apply this theory to some cases that have reached seemingly incompatible results to demonstrate that the theory is aptly suited for public-assistance cases.[31] Finally, it will discuss how the cooperation requirement, under the doctrine of unconstitutional conditions, impinges upon the right to determine family structure.[32] Part VI will assess the true goals of the PRWORA and the cooperation requirement and suggest alternative means of reaching those ends.[33]

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24. 42 U.S.C. § 601 note (containing the congressional finding that "[m]arriage is the foundation of a successful society").
25. *Id*.
26. *Id*.
27. *Infra* pt. II.
28. *Infra* pt. III.
29. *Infra* pt. IV.
30. *Infra* pt. V.
31. *Id*.
32. *Id*.
33. *Infra* pt. VI.

II. HISTORY OF WELFARE IN AMERICA: WHY THE NEED TO "END WELFARE AS WE KNOW IT"?[34]

President Clinton's signing of the PRWORA on August 22, 1996, received controversial treatment from Republicans and Democrats.[35] Although President Clinton promised in his 1992 election campaign to "end welfare as we know it,"[36] both parties accused him of signing the bill to win votes in the 1996 election.[37] Republicans were disgruntled at the timing of the signing — after twice vetoing proposed welfare-reform legislation, Clinton appeared to be taking credit for Republican-inspired policy just in time for the election[38] — while Democrats were stunned by his abandoning traditionally Democratic principles.[39] What arises as significant from the discourse is the universal acknowledgement that welfare reform was essential to a candidate's success. To understand how welfare reform became necessary as a political platform, one must explore the history of welfare in this country.[40]

Federally funded welfare began in the depression era as a cheaper alternative to sending children to orphanages: it was designed to provide mothers some income to raise their children at home.[41] Aid to Dependent Children (ADC)[42] received favorable support because the social atmosphere of that time considered a

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34. Part of President Clinton's 1992 presidential campaign included a promise to "end welfare as we know it." Havemann, *supra* n. 1.

35. *Id*.

36. *Id*.

37. *Id*.

38. *Id*. Senator Robert J. Dole, who was the Republican presidential nominee at the time, accused President Clinton of being motivated by "election year calculations." *Id*. Republicans were generally unconvinced of President Clinton's sincerity in enforcing welfare reform, especially in light of the availability of waivers for states reluctant to implement the reforms. *Id*.

39. *Id*.

40. As so aptly stated by one commentator, "Neither *Dred Scott* nor the PRWORA appeared suddenly on the scene; both reflected changing attitudes and positions that developed over decades." Willie Baptist & Mary Bricker-Jenkins, *A View from the Bottom: Poor People and Their Allies Respond to Welfare Reform*, 577 Annals Am. Acad. Pol. & Soc. Sci. 144, 147 (Sept. 2001).

41. Linda Gordon, *Who Deserves Help? Who Must Provide?* 577 Annals Am. Acad. Pol. & Soc. Sci. 12, 17 (Sept. 2001).

42. ADC later became Aid to Families with Dependent Children (AFDC). Joel Handler, *"Constructing the Political Spectacle": The Interpretation of Entitlements, Legalization, and Obligations in Social Welfare History*, in *Cases and Materials on Poverty Law Theory and Practice* 67, 79 (West 1997). PRWORA replaced AFDC with TANF. Nice & Trubek, *supra* n. 3, at 94.

woman's raising her children at home to be a natural activity, deserving of charity.[43] From its outset, however, the structure of the program invited criticism of its female recipients.[44] Although the program was federally funded, regulation was left to local governments.[45] Receipt of benefits required a woman to have a "suitable home," a provision that allowed patriarchal supervision of the single mother's home, along with its requisite imposition of morals.[46] For instance, a woman with "a man in the home" — a man other than her husband, that is — would be ineligible for ADC benefits.[47]

Not only did the stringent moral requirements invite scrutiny, but the meager living doled out to welfare mothers led women to supplement their income in other ways, leading to the notion that welfare mothers need to be closely monitored so they are not able to "cheat" the system.[48] Welfare has never been designed to get women out of poverty; indeed, a majority of states today do not provide enough income from cash, Food Stamps, and Medicaid combined, to allow families to reach seventy percent of the federal poverty level.[49] Tragically, a minimum-wage job[50] also

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43. Gordon, *supra* n. 41, at 17.

44. *Id*. at 21.

45. *Id*.

46. *Id*.

47. The Supreme Court invalidated this requirement in *King v. Smith*, 392 U.S. 309, 320–334 (1968). As a result of this decision, some states, including Louisiana, protested by cutting back on welfare benefits to mothers of illegitimate children. *See e.g. Lampton v. Bonin*, 299 F. Supp. 336, 337 (E.D. La., 1969) (upholding the State's reduction in ADC grants after case loads increased due to *King v. Smith*). These cutbacks were criticized as being racially motivated. *Id*. at 343. Although a discussion of the stigmatization of welfare based on race is beyond the scope of this Comment, it has received wide treatment. *E.g.* Tanya K. Hernandez, *Forging Our Identity: Transformative Resistance in the Areas of Work, Class, and the Law: An Exploration of the Efficacy of Class-Based Approaches to Racial Justice: The Cuban Context*, 33 U.C. Davis L. Rev. 1135 (2000).

48. Jonathan Zasloff, *Children, Families, and Bureaucrats: A Prehistory of Welfare Reform*, 14 J.L. & Politics 225, 260 (1998) (citing a 1994 CNN/USA poll that found that sixty-eight percent of Americans agreed that most people receiving welfare were abusing the system).

49. Nancy E. Dowd, *In Defense of Single Parent Families* 24 (N.Y.U. Press 1997).

50. The U.S. Department of Health and Human Services, which is responsible for implementing TANF, appears self-laudatory in pointing out that women leaving welfare make "significantly more" than minimum wage, at rates of $6.60 to $6.80 per hour. U.S. Dept. Health & Human Servs., Temporary Assistance for Needy Families Program, *Third Annual Report to Congress* 2 (Aug. 2000) [hereinafter *Report to Congress*]. What these statistics do not indicate is how many mouths are to be fed on that income and what the corresponding cost-of-living may be. For an account of a journalist's attempt to carve out a living by working in low-paying jobs, see Barbara Ehrenreich, *Nickel and Dimed* (Henry

fails to provide sufficiently for a family.[51] Yet women who tried — and continue to try — to maximize their incomes by working "under the table," accepting gifts or cash from boyfriends or their children's fathers, or misrepresenting the lack of the father's presence in the home, were criticized as freeloaders or liars.[52] To prevent welfare fraud, states devised methods for checking the validity of the recipients' needs, thus casting a shadow of suspicion on all recipients.[53]

Perhaps the greatest threat to the old welfare system was the growth in acceptance of the female-headed, single-parent family. As long as women were victims,[54] they deserved help, and welfare could properly be perceived as charity. As the number of never-married women on welfare continued to grow,[55] the public began to criticize a system of public assistance that it perceived encouraging dependency and discouraging marriage.[56] Welfare was seen as a demon that had created a society of poor, unmarried women raising illegitimate children with the help of taxpayers' money.[57] The debate between First Lady Hillary Rodham Clinton and Republican presidential nominee Senator Robert J. Dole over whether "it takes a village" or "it takes a family" (with the impli-

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Holt & Co. 2001).

51. Dowd, *supra* n. 49, at 24 (citing a Florida study that found that women leaving welfare earned only $157 more per year in 1994 than if they had stayed on welfare). Ironically, although the public perceives that the poor are working and still not making enough money, the public also perceives welfare as creating dependence by encouraging women to have more children. Pub. Agenda Online, *Poverty and Welfare, People's Chief Concerns* <http://www.publicagenda.org/issues/pcc.cfm?issue_type=welfare> (accessed Apr. 1, 2002).

52. Gordon, *supra* n. 41, at 21.

53. *Id*. at 16.

54. Until the 1960s, women who had children out-of-wedlock were seen as victims either of men, emotional disturbance, or the values inherent in their low social class. *Id*. at 19.

55. Among households headed by a single mother, nearly one-half of never-married mothers received public assistance, compared with one-fifth of divorced women. 42 U.S.C. § 601 note (congressional findings).

56. Thomas L. Gais & Cathy M. Johnson, *The Implications of Welfare Reform for Children: Political and Structural Consequences of Welfare Reform for Children: Welfare Reform, Management Systems, and Their Implications for Children*, 60 Ohio St. L.J. 1327, 1331 (1999).

57. *Id*. Yet criticism of single parenting was not limited to poor mothers. The intense debate over family values and the television character Murphy Brown's decision to have a child outside of marriage reflect the public's general dissatisfaction with single parenting by choice. *See e.g.* E.J. Dionne, Jr., *Quayle v. Brown: Unplanned Furor Eclipses Message: Comment Has a Life of Its Own,* Wash. Post A23 (May 22, 1992) (available in 1992 WL 2186755) (discussing Vice President Dan Quayle's criticism of Hollywood's values specifically with respect to the television character Murphy Brown).

cation that a family includes a father and a mother) illustrated society's conflicting ideals and realities.[58]

The statistics spoke for themselves. Female-headed households made up forty-six percent of families with children living below the national poverty level, while only nine percent of married families lived in poverty.[59] In addition, the condition of being born out of wedlock led to tragic consequences: a greater likelihood of receiving public assistance; a higher risk of being born at a low birth weight; a greater likelihood of experiencing child abuse and neglect; a greater chance of having low verbal cognitive attainment, lower cognitive scores, and overall lower educational aspirations; and a reduction in the chance of a successful marriage as an adult.[60] Poverty and single parenthood were so interrelated statistically, it seemed clear that poverty was the evil — indeed, a crisis[61] — caused by being born to a single mother. Marriage was the solution.[62]

A. Promoting Responsibility and Marriage

The PRWORA emphasizes two ideologies, as both means to a successfully functioning society and an indicator that society is thus functioning: personal responsibility and marriage. Interestingly, despite the rhetoric of promoting marriage, the majority of the Act's provisions address instilling welfare recipients with a work ethic — the "personal responsibility"[63] emphasis. Some pro-

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58. Edward Walsh, *Democrats Stress Family Themes; First Lady Receives Thunderous Reception, Takes Jab at Dole Criticism,* Wash. Post A1 (Aug. 28, 1996) (available in 1996 WL 10728348).

59. 42 U.S.C. § 601 note (congressional findings).

60. *Id.*

61. Congress's findings conclude, "Therefore, in light of this demonstration of the crisis in our Nation, it is the sense of the Congress that prevention of out-of-wedlock pregnancy and reduction in out-of-wedlock birth are very important Government interests." *Id.*

62. *Id.*

63. Gais & Johnson, *supra* n. 56, at 1327. Gais and Johnson perceive three approaches to children's well-being that can be found in the Act: the family structure theory, promoting the best interests of children through marriage; the resource theory, promoting a benefit to children from increased income from parents' work; and the environment theory, promoting children's well-being through the psychological and sociological benefits of being part of a working family. *Id.* at 1329. They find that states have done little to promote the "family structure theory." *Id.* at 1330. Because this Comment addresses specifically the paternity establishment cooperation requirement of the Act, it focuses on what Gais and Johnson would call "the family structure theory."

visions, however, reveal the Act's alternative emphasis on promoting marriage,[64] including the cooperation requirement.[65]

Significantly, the first finding Congress made in the PRWORA is that "marriage is the foundation of a successful society."[66] Congress stated that the policy contained in the Act was intended to address the crisis of children being born out of wedlock, the flip side of children being born inside of marriage.[67] In other words, encouraging marriages would discourage out-of-wedlock births. The question is whether the crisis was the out-of-wedlock births, or the resultant poverty. Thus, it is difficult to discern whether PRWORA promotes marriage as a means or as an end.[68]

Although it may be argued that the cooperation requirement is intended to provide financial assistance to unmarried mothers and their children, this possibility is unlikely because women receiving assistance do not receive the benefit of child support payments received as a result of their cooperation.[69] The money instead goes to repay the states and the federal government, and so families do not enjoy an increase in resources in return for their cooperation, unless the amount of support exceeds the amount of the welfare benefit. The cooperation requirement seems to reflect the government's idea that all children are better off with a legally recognized father, regardless of the mother's wishes.[70]

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64. These provisions, not addressed in this Comment, include the proposed Child Exclusion provision, an optional provision for the states to adopt and which does not provide benefits to a child born out of wedlock to a mother already on TANF, and the provision that prohibits a mother under age eighteen from receiving TANF unless she and her child live with an individual over age eighteen. *Id*. at 1332.

65. Arguably, the cooperation requirement also encourages personal responsibility, in that it forces absent fathers — at least with the means to do so — to provide financial support for their offspring.

66. 42 U.S.C. § 601 note (congressional findings).

67. *Id*. § 601(a)(3).

68. This distinction will become relevant in the discussion of privacy rights, *infra*, pt. V, as attempts to yoke an unwilling father with an unwilling mother are likely an imposition on an emerging privacy right, the right to determine family composition. Though eradication of poverty is clearly a compelling governmental interest, other means that do not limit the exercise of individual liberties are available to promote this interest.

69. 42 U.S.C. § 657(a)(1).

70. The cooperation requirement does allow for a "good cause" exception to cooperation, if it is determined to be in the best interests of the child. 42 U.S.C. § 654(4)(A)(i)(IV). The good cause exception works better in theory than in practice, however, as documentation of prior domestic violence, not a well-founded fear of future violence, is required. Jacqueline M. Fontana, *Cooperation and Good Cause: Greater Sanctions and the Failure to Account for Domestic Violence*, 15 Wis. Women's L.J. 367, 383 (2000).

B. How the Cooperation Requirement Works

Although TANF funds are distributed to the states in the form of block grants, the states are required to participate in a child-support-collection structure to receive their grants.[71] In an effort to increase two-parent families, the PRWORA mandates state adoption of plans to encourage voluntary acknowledgment of paternity as well as to pursue nonvoluntary establishment of paternity for individuals not receiving TANF.[72] States get bonuses for establishing paternities,[73] so they have great incentive to encourage those not receiving public assistance to establish paternities. For those applying for public assistance, however, cooperation in paternity establishment is not optional.[74]

The states implement the cooperation requirement regulations.[75] In Florida, to show that she is cooperating in good faith, a woman must provide the identity or location of all men who could possibly be the father of her child.[76] If more than one possible father exists, and the mother does not disclose that fact, she may be deemed not to be cooperating in good faith.[77] Additionally, the mother must agree to consent to DNA tests,[78] to attend judicial hearings,[79] and to return to the State any additional support she receives from the father independent of a support decree.[80] The state agency determines whether she is indeed cooperating.[81] If a woman is determined not to have cooperated, she may be denied assistance or, if she already has been receiving assistance, have her assistance terminated.[82]

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71. *Kansas v. U.S.*, 24 F. Supp. 2d 1192, 1197 (D. Kan. 1998).
72. 42 U.S.C. § 666.
73. Tonya L. Brito, *The Welfarization of Family Law*, 48 Kan. L. Rev. 229, 258 (2000) (citing 42 U.S.C. § 652(g)(1) (1994)). Interestingly, the incentive payments reward states for establishing paternities for all children, regardless of welfare-dependency status, a practice that has caused states to include children beyond the welfare case-load in statistics. *Id*. This form of reporting may deceive the public into believing in the fiscal success of the cooperation requirement.
74. 42 U.S.C. § 608(a)(2).
75. *Id*.
76. Fla. Admin. Code Ann. r. 12E-1.008(2)(a) (2001).
77. *Id*. § (2)(a).
78. *Id*. § (2)(e).
79. *Id*. § (1)(b)(3).
80. *Id*. § (1)(b)(6).
81. *Id*. §§ (3)(a)–(b).
82. *Id.* § (3)(b).

Thus, for a maximum of five years' worth of public assistance, a woman must make a significant decision about her family structure[83] at a time in her life (facing impending poverty, starvation, homelessness) when she is least able to think objectively.

III. PRIVACY RIGHTS — IT'S A PERSONAL THING

People often speak of a right to privacy, not really certain what that means, but intuitively knowing that it must exist.[84] Other scholars considering the PRWORA's cooperation requirement have skirted privacy rights, suggesting that an issue might be involved, but not fully delineating how the cooperation requirement affects this right.[85] This Part will trace the history of privacy rights in the family context and will attempt to identify an emerging fundamental right in constitutional jurisprudence — the right of self-determination in structuring a family.

Under the Fourteenth Amendment protections of due process and equal protection, the "right to privacy" represents a right to participate in activities of a highly personal nature without governmental interference.[86] Specifically, the Supreme Court has recognized that the Bill of Rights' purpose to protect individual liberties requires allowing "the formation and preservation of certain kinds of highly personal relationships a substantial measure of sanctuary from unjustified interference by the State."[87] Moreover, it is the very nature of family relationships that distinguishes them from other human interactions: the "deep attachments and

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83. Although the mother's cooperation with the government does not automatically alter her family's composition, it does invite the putative father to have more of a presence in her life than he would have were it not for the cooperation requirement, and often for mixed motives, such as avoiding financial responsibility or to retaliate for being held responsible. *Infra* nn. 224–225 and accompanying text.

84. To many people, the definition of privacy rights is probably as elusive as that of obscenity — they just "know it when [they] see it." *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

85. Brito, *supra* n. 73, at 268 (discussing how the "punitive, privacy-invading measures" imbedded in the PRWORA deprive parents of "the right to make fundamental decisions affecting the best interests of their families"); Catherine Wemberly, Student Author, *Deadbeat Dads, Welfare Moms, and Uncle Sam: How the Child Support Recovery Act Punishes Single-Mother Families*, 53 Stan. L. Rev. 729, 755 (2000) (speaking of the "inarticulable privacy rights" of welfare mothers).

86. John E. Nowak & Ronald D. Rotunda, *Constitutional Law* § 14.26, 852 (6th ed., West 2000).

87. *Roberts v. U.S. Jaycees*, 468 U.S. 609, 618 (1983).

commitments to the necessarily few other individuals" affords intimate family relationships greater constitutional protection.[88]

The right to privacy encompasses decisions relating to marriage, reproduction, contraception, and abortion.[89] *Skinner v. Oklahoma*,[90] a Supreme Court decision that struck down a law that would allow sterilization of individuals convicted of crimes "of moral turpitude," is said to have created the idea of a fundamental right to privacy.[91] Although the Court did not mention a "right to privacy," it recognized that "[m]arriage and procreation are fundamental to the very existence and survival of the race."[92] According to legal scholars, the significance of the *Skinner* decision is twofold: first, it recognized the existence of certain "fundamental rights" requiring judicial protection; second, it gave matters relating to marriage and procreation constitutional protection.[93] Establishing which activities relating to marriage and procreation deserve constitutional protection has been the task of the last half-century.[94]

A. Marriage: It's Fundamental

The right to marry is so fundamental that it cannot be abridged on the basis of race,[95] failure to provide child support,[96] or even status as a prison inmate.[97] *Loving v. Virginia* stands for the blanket proposition that the state cannot restrict the right of individuals to marry.[98] Significantly, *Loving* struck down a state

88. *Id*. at 619–620. It is important to note at the outset that the right to engage in private, consensual homosexual acts is not a constitutionally protected liberty. *Bowers v. Hardwick*, 478 U.S. 186 (1986). Thus, if one were inclined, one could differentiate between protected and nonprotected private acts on the basis of deviance from social norms. If deviance were the standard, the right to parent alone might still receive constitutional protection, because, although it has not traditionally been supported, it cannot in today's society be said to be a deviant behavior.

89. Nowak & Rotunda, *supra* n. 86, at § 14.27.

90. 316 U.S. 535 (1942).

91. Nowak & Rotunda, *supra* n. 86, at § 14.27, 853–854.

92. 316 U.S. at 541.

93. Nowak & Rotunda, *supra* n. 86, § 14.27, 853–854.

94. Richard F. Storrow, *The Policy of Family Privacy: Uncovering the Bias in Favor of Nuclear Families in American Constitutional Law and Policy Reform*, 66 Mo. L. Rev. 527, 528 (2001). Professor Storrow argues that the Supreme Court has limited its protection of the family to those individuals related by blood or marriage. *Id*. at 529.

95. *Loving*, 388 U.S. at 12.

96. *Zablocki*, 434 U.S. at 377.

97. *Turner v. Safley*, 482 U.S. 78, 78 (1987).

98. 388 U.S. at 12.

statute that criminalized interracial marriage on both equal protection and due process grounds.[99] Thus, *Loving* distinguished the fundamental right to marry as having its own constitutional protection, distinct from racial protections.

More significant to the development of the fundamental right to marry is *Zablocki v. Redhail*[100] because it reflects the tension between the constitutional recognition of marriage as a fundamental right and the competing state interest of ensuring that its children are cared for. At issue in *Zablocki* was the constitutionality of a Wisconsin statute limiting the rights of individuals to marry.[101] Noncustodial parents obligated to pay child support were required to provide proof of compliance with the support order before they were granted a marriage license.[102] The Court emphasized that, although its *Loving* decision[103] could have "rested solely on the ground that the statutes discriminated on the basis of race," it had established the fundamental right to marry.[104] As a result, the Court held that, because the Wisconsin statute interfered with the exercise of the fundamental right, a "critical examination" of Wisconsin's interests was required.[105] The Court acknowledged the "legitimate and substantial interests" of ensuring the welfare of children to whom support was owed, but held that the means for achieving that interest unnecessarily abridged the right to marry, and struck down the statute.[106] Thus, in balancing the importance of providing for out-of-custody children against the right of individuals to marry, even if those individuals are indigent child-support evaders, the fundamental right to marry trumps.

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99. *Id*.
100. 434 U.S. 374.
101. *Id*. at 375.
102. *Id*.
103. *Supra* nn. 98–99 and accompanying text.
104. *Zablocki*, 434 U.S. at 383 (citing *Loving*, 388 U.S. at 11–12).
105. *Id*. The Court seemed to apply a test somewhere in between strict and intermediate scrutiny, requiring a "sufficiently important state [interest] and . . . closely tailored [means]." *Id*. For a discussion of the unclear standard of review in fundamental-rights decisions, see Nowak & Rotunda, *supra* note 84, at § 14.28, 861.
106. 434 U.S. at 388.

B. Kids Are Optional

Along with the fundamental right to marry, individuals enjoy constitutional protection in matters relating to bearing children.[107] This includes the right to prevent childbirth through the use of contraception, whether single[108] or married,[109] or to obtain an abortion.[110] The right to have children is equally unrestricted, with no limits — other than biological — on who may bear children.[111] Obviously, it takes more than conception to create a family, and the Court has struggled with balancing its public-policy objectives of promoting and protecting the sanctity of marriage, on the one hand, and recognizing the boundaries of the family unit — which also merit constitutional protection — on the other.[112]

C. What Makes a Family?

A woman who has become pregnant has fairly wide latitude — provided she is not indigent[113] — in determining the make-up of her family. If she chooses an abortion, she is not required to obtain consent from the man who impregnated her.[114] If she is not married and continues with the pregnancy, the putative father who has not made any efforts to establish a relationship with the child will have no veto rights if another man chooses to adopt the child.[115] Further, if she is married and becomes pregnant by someone other than her husband, her husband may still be assumed to be the father of that child, with the interloper left without re-

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107. *Infra* nn. 108–115.

108. *Eisenstadt*, 405 U.S. 438.

109. *Griswold*, 381 U.S. 479.

110. *Roe v. Wade*, 410 U.S. 113 (1973). Absent a compelling interest, which might include protecting the health of the woman or a viable fetus, a state is limited in restricting a woman's access to an abortion. Nowak & Rotunda, *supra* n. 86, at § 14.29, 867.

111. *E.g. Skinner*, 316 U.S. 535 (invalidating a state statute that would allow sterilization of those convicted of crimes of moral turpitude); *but see* Nowak & Rotunda, *supra* n. 86, at § 14.27, 854 (noting that "the Supreme Court has not ruled that involuntary sterilization is *per se* unconstitutional" but nevertheless concluding that it is "doubtful" the Court would find any state interest sufficient "to impair this fundamental right").

112. *Infra* nn. 114–137 and accompanying text.

113. *See infra* n. 186. Under *Harris v. McRae*, 448 U.S. 297 (1980), her own indigence would be the only obstacle to her right to choose an abortion.

114. *Planned Parenthood of C. Mo.*, 428 U.S. at 69.

115. *Lehr,* 463 U.S. 248; *Quilloin*, 434 U.S. 246. Indeed, even if the father does not receive special notice before the adoption, he will not be deprived of due process. *Lehr*, 463 U.S. at 265.

dress.[116] While the Court has not explicitly said so, it seems to be grappling with the idea that family structure is not predetermined from sexual intercourse. Rather, family structure develops from an intimate relationship.

The Court acknowledged the importance of "[shouldering] significant responsibility with respect to the daily supervision, education, protection, or care of [a] child" in creating a biological father's legal rights to an illegitimate child in *Quilloin v. Walcott.*[117] The Court later confirmed in *Lehr v. Robertson* that the "mere existence of a biological link" between an absent father and child does not invoke the need for constitutional protection.[118] In both cases, the Court denied an absent father's claim that his constitutional rights were violated when he was denied veto power over the adoption of his illegitimate child.[119] Significantly, in both cases, the mother's current husband was adopting the child,[120] and in both cases, the biological father had not created any substantial relationship with the child.[121] Thus, with a ready-made family and an intact marriage weighing in on one side of the scales of justice, and a man who had provided little more than sperm on the other, it was easy for the Court to deny an absent father's liberty interest in his child.

The Court in *Lehr* framed the biological connection as an opportunity for the putative father to establish an intimate family connection.[122] Thus, a biological link plus valuable contributions to the child's upbringing would have afforded a putative father a liberty interest in his child.[123] The Court was emphatic that it was "not assessing the constitutional adequacy of [the State's] procedures for terminating a developed relationship."[124] Yet, the Court had the opportunity to grant a liberty interest in a relationship with a child to a putative father who had formed a substantial

116. *Michael H.*, 491 U.S. 110 (plurality).
117. 434 U.S. at 256.
118. 463 U.S. at 261.
119. *Quilloin*, 434 U.S. at 256; *Lehr*, 463 U.S. at 262.
120. *Quilloin*, 434 U.S. at 256; *Lehr*, 463 U.S. at 262.
121. *Quilloin*, 434 U.S. at 256; *Lehr*, 463 U.S. at 267.
122. 463 U.S. at 262.
123. *Id.*
124. *Id.*

relationship in the perplexing case of *Michael H. v. Gerald D.*,[125] and it refused to do so.

In a plurality opinion, the Court considered whether a state's statute granting a presumption of legitimacy, rebuttable only by the husband and wife, to a child born to a married couple, violated a putative father's procedural- and substantive-due-process rights.[126] In denying the putative father's substantive rights, the Court rejected the notion of the putative father's interest as "so rooted in the traditions and conscience of our people as to be ranked as fundamental."[127] The plurality opinion emphasized the need for judicial restraint in creating fundamental rights, admonishing that the purpose of the Due Process Clause is "to prevent future generations from lightly casting aside important traditional values — not to enable this Court to invent new ones."[128] Because of the common law's traditional "aversion to declaring children illegitimate"[129] and "interest in promoting the 'peace and tranquility of States and families,'" an interest that would be nullified by allowing suits by putative fathers,[130] the Court denied the liberty interests of a putative father asserting a right against an established family unit.[131]

The dissent criticized the plurality's method of analyzing Due Process Clause issues.[132] Justice William J. Brennan, Jr. marveled that, "[W]hen and if the Court awakes to reality, it will find a world very different from the one it expects."[133] The dissent chided the plurality's unwillingness to expand beyond traditionally protected rights in considering whether a putative father has a liberty interest in his child, but ultimately declared the hesitancy to expand liberty interests simply unnecessary.[134] Instead of asking

125. 491 U.S. 110 (plurality).
126. *Id*. at 116.
127. *Id*. at 122 (quoting *Snyder v. Mass.*, 291 U.S. 97, 105 (1934)).
128. *Id*. at 122 n. 2.
129. *Id*. at 125.
130. *Id.* (internal citations omitted).
131. *Id*. at 130.
132. *Id*. at 136 (Brennan, J., dissenting). Significantly, only one other Justice would have approached the Due Process analysis as Justice Antonin Scalia did. *Id*. This suggests that not all Justices are as myopic in their consideration of "new" fundamental rights, i.e., they might account for the changing needs of society in determining what rights *have become* so fundamental they need protection.
133. *Id*. at 157.
134. *Id*.

whether the specific relationship in question had been given constitutional protection, the dissent would ask whether the relationship was "sufficiently substantial" to be a protected liberty interest under *prior* cases.[135] The dissent read the jurisprudential foundation laid by such cases as *Lehr* and *Quilloin* as giving a liberty right to a putative father who had established a substantial relationship with his child.[136] Because the relationship in the case at hand fell within that category, the dissent concluded it was a constitutionally protected one.[137]

IV. THE RIGHT TO DETERMINE FAMILY COMPOSITION — ARE WE THERE YET?

A. Making the Argument for the Right to Determine One's Own Family Composition

The fundamental difference in the way the conservative and liberal Justices frame the bestowing of fundamental rights — either as a formalization of rights that historically have warranted protection,[138] or as an acknowledgment of the emerging needs of a "facilitative, pluralistic" society[139] — is becoming increasingly significant in our changing world. As family structures change to embrace a multitude of family values,[140] individual liberties could be seriously compromised if the Court continues to

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135. *Id*. at 142.

136. *Id*.

137. *Id*.

138. According to the dissent, this view of fundamental rights turns the Constitution into a "stagnant, archaic, hidebound document steeped in the prejudices and superstitions of a time long past." *Id*. at 141.

139. *Id*.

140. This Comment presupposes that all families have a value system, regardless of whether the value system is one that is contained (or restrained) in the concept of "traditional family values" (whatever that means). Cynthia Heimel, feminist pop culture commentarian and humorist, opines:

> We've all had miserable and strange childhoods, which is why we all seem to share the same neuroses. One of these neuroses is denial. In an effort to avoid our actual lives, we spent our formative years watching television. Those rosy memories we all share are actually memories from our favorite TV shows: We've confused our own childhoods with episodes of "Ozzie and Harriet," "Father Knows Best," and "The Brady Bunch."

Cynthia Heimel, *Get Your Tongue out of My Mouth, I'm Kissing You Goodbye* 42 (Ballantine 1993).

limit fundamental rights to those that existed at English common law.[141]

This Comment does not advocate the recognition of a radical new right. If anything, it advocates only that those who are in the position to make decisions regarding their family's composition be allowed to use their best judgment,[142] combined with their intimate knowledge of the facts and circumstances, in the same way that those who are not subject to the government's moralizing are allowed to make decisions.[143]

When a man and a woman have sexual intercourse outside of marriage and the woman becomes pregnant, the man can no more compel the woman to have an abortion than she can compel him to marry her (or he could compel her). Nor can the man veto the woman's choice to have an abortion.[144] If the woman decides, against the man's wishes, to continue with the pregnancy, she may choose to pursue making the man the child's legal father,[145] or she may decide that it is in the best interests of her child and herself that she not invite him into the family sphere. Of course, her decision would not prevent the father from pursuing paternity establishment on his own behalf.[146] Thus, an abolishment of the cooperation requirement would not act as a barrier to father's rights, as the same means to establishing paternity would be

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141. What rights in fifteenth century England would have protected surrogate mothers who wanted to keep their babies, or transgendered people wanting custody rights to their children from a ten-year marriage, or grandparents who wanted visitation rights to their grandchildren? Yet, each of these situations involves biological ties and substantial relationships, and is therefore, arguably, subject to protection.

142. After all, common law has long recognized that parents act in the best interests of their children, and only threats of abuse and neglect warrant the state's interference in the family. *E.g. Parham v. J.R.*, 442 U.S. 584, 602 (1978).

143. This right, if recognized, would not be limited to only female-headed households. This Comment also advocates for the right of unmarried fathers to not be involved, when he and the mother have made a voluntary decision that the family should be structured as such. Thus, the biological father also determines his own family composition — that of a single-unit family. The right also would protect gay and lesbian parents who wish to adopt, participate in a co-parenting venture, or undergo artificial insemination treatments.

144. *Planned Parenthood of C. Mo.*, 428 U.S. at 69.

145. The PRWORA provides for an office of Child Support Enforcement, which allows women who do not receive welfare to use the services to establish paternity. Brito, *supra* n. 73, at 258 (citing 42 U.S.C. § 652(g)(1)).

146. The argument that unmarried fathers' equal protection rights are violated is countered by the fact that the conscientious father still has access to the courts and to the Putative Child Registry. Lynn Marie Kohm, *Marriage and the Intact Family: The Significance of* Michael H. v. Gerald D., 22 Whittier L. Rev. 327, 364 (2000) (citing 42 U.S.C. § 666(a)(5)(L), which provides for Putative Father Registries).

available to those who voluntarily sought it. The difference is, removing the cooperation requirement would eliminate the invitation to absent fathers to intrude on the already-intact family established by the mother.

Women have legitimate reasons for not attempting to establish paternity.[147] For one, common sense dictates that a father with a reliable source of income would be attractive to a mother so destitute she needs public assistance and so, if the mother does not pursue this source of support, she must have determined it is not available, or that the costs outweigh the benefits.[148] Alternatively, the father already may provide cash or other support on a sporadic or informal basis, and the mother may have decided that pursuing a formal support order would impede this voluntary support.[149] Thus, a woman choosing not to pursue a child support determination on her own behalf very likely has already determined that the father will not be able to provide additional financial support for her family.[150]

If the biological father has no interest in the child,[151] and the mother has made a decision to allow his lack of involvement, then the government should not interfere with this private family decision.

That said, it is unclear whether the Court is lagging behind society[152] in recognizing the right to determine family composition as a fundamental right, or whether the Court had laid the foundation for the recognition of such a right before *Michael H*. Further, *Michael H.* has perplexing consequences for the existence of

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147. Brito, *supra* n. 73, at 265.

148. *Id*.

149. *Id*.

150. Columnist Cynthia Tucker attributes the declining marriage rates to changing gender roles, arguing that because women have had increased career opportunities while men have had "marginal jobs paying minimum wage," making them more likely to turn to crime and drugs and less likely to pay support, women have refused to marry such men, who would only "drag his family down." Cynthia Tucker, *Welfare Reform Proposal: Poor Men Less Eligible for Marriage*, Atlanta J. Const. 10E (Mar. 3, 2002).

151. This situation cuts against any argument about "the best interests of the child," because it is never in the child's best interest to be forced into a relationship with a father who has never wanted him.

152. Then again, it is even less clear whether society is lagging behind itself. Despite our high divorce rate and the overwhelming number of families with two parents working outside of the home, over half of us purport to condone "traditional family values." Public Agenda Online, *Family*, *People's Chief Concerns* <http://www.publicagenda.org/issues/pcc.cfm?issue_type=welfare> (accessed April 1, 2002).

this right: while appearing to advance support of "traditional" family values, the decision has the paradoxical effect of elucidating the significance of the mother's role in determining her family's composition.

B. Before and after *Michael H.*

Before *Michael H.*, the Supreme Court had recognized a right, inhered in a mother of an illegitimate child, to determine the composition of her family when the biological father had not established a relationship with his offspring.[153] Although the Court has never specifically articulated the fundamental right to determine one's own family structure, the privacy-rights decisions relating to family can be read to provide for this right, or to provide a jurisprudential foundation supporting the emergence of the right.[154]

Justice Antonin Scalia's opinion in *Michael H.* demonstrated that the Court was unwilling to consider making up any newfangled fundamental rights, particularly rights that are at odds with the traditional heterosexual, married, two-parent family.[155] However, this pronouncement was not fatal to the right to determine one's family structure. As Justice Brennan's dissent made equally clear, only one other Justice agreed with Justice Scalia's construction of the bestowal of fundamental rights.[156] Furthermore, the jurisprudential framework already existed to support the recognition of this emerging right.[157] Thus, although *Michael H.* was a boon for heterosexual family valuists, it did little to diminish a potentially viable fundamental right.

On the other hand, *Michael H.* has the paradoxical effect of empowering women in their familial formations even more, because it emphasizes yet again that biological connections are not all that significant when the father is not married to the mother

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153. *See supra* nn. 117–124 and accompanying text (discussing the *Lehr* and *Quilloin* decisions).

154. *See supra* nn. 84–137 (discussing the ever-evolving privacy-rights protections created by the Court).

155. *See supra* nn. 127–128 and accompanying text (describing the plurality's framing of fundamental-rights bestowing in *Michael H.*).

156. *Michael H.*, 491 U.S. at 136 (Brennan, J., dissenting).

157. *See supra* nn. 117–123 and accompanying text (describing the development of privacy rights and indicating that fathers who voluntarily remove themselves from the family hold no rights in regard to that family's composition).

— even when the father has been involved with raising the child.[158] In this way, the opinion illustrates that, to a child born out of wedlock, mothers are really the only automatically recognized parent.[159]

V. THE DOCTRINE OF UNCONSTITUTIONAL CONDITIONS

Some might argue that because a woman approaches the state seeking assistance, and the state is under no mandate to provide this much-needed assistance,[160] the state may grant the assistance conditioned on the woman's conforming to behavior the state deems in the public's best interest. However, the doctrine of unconstitutional conditions prevents the state from doing just this, in that it prohibits the government from "doing indirectly what it could not do directly."[161] A typical unconstitutional conditions problem arises when the government, in conferring a benefit on an individual, attaches a condition to the receipt of that benefit that burdens the exercise of a constitutionally protected right of the individual.[162] In this manner, the government makes an offer, and the offer can be accepted only by the individual's relinquishing a right.[163] The individual is free to refuse the offer, of course, and so the doctrine of unconstitutional conditions asks the question, Under what circumstances is an offer so compelling that the government should not be able to attach conditions to it?[164] As one commentator asks, "[I]s the carrot mightier than the stick?"[165]

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158. *See supra* nn. 129–131 and accompanying text (discussing the effects of the *Michael H.* decision on an adulterous interloper's claim to parentage).

159. This reading comports with natural-law concepts, which would recognize a parent–child relationship between father and child only if the child was born from a marriage. William Joseph Wagner, *The Contractual Reallocation of Procreative Resources and Parental Rights: The Natural Endowment Critique*, 41 Case W. Res. 1, 86 (1990). Of course, mothers need not be married to be legally recognized as mothers.

160. *Supra* n. 22 and accompanying text.

161. Gary Feinerman, Student Author, *Unconstitutional Conditions: The Crossroads of Substantive Rights and Equal Protection*, 43 Stan. L. Rev. 1369, 935, 1369 (1991).

162. Sullivan, *supra* n. 21, at 1421–1422.

163. *Id.*

164. *Id.*

165. Jonathan Romberg, *Is There a Doctrine in the House? Welfare Reform and the Unconstitutional Conditions Doctrine*, 22 Fordham Urb. L.J. 1051, 1061–1062 (1995).

A. The Source of the Doctrine's Confusion

Unfortunately, the answer to when the doctrine of unconstitutional conditions applies has not been settled. The Supreme Court does not always apply the doctrine of unconstitutional conditions,[166] and when it has, it has not clearly articulated the basis for its application.[167] Commentators have attempted to schematize the Court's decisions using different theories to determine when the Court will uphold a conditioned benefit.[168] The most basic explanation is the distinction between when the government penalizes the exercise of a right and when it merely fails to subsidize the right.[169] However, the penalty–nonsubsidy distinction serves little use in predicting the outcomes of cases: often, the difference between a penalty and a nonsubsidy is only semantic[170] and requires vast judicial speculation.

The ineffectiveness of trying to fit cases into the penalty–nonsubsidy schema is most clearly demonstrated by the differing results in three different cases, each involving public-assistance benefits, the receipt of which implicated the possible nonexercise of certain constitutionally protected rights. In *Maher v. Roe*,[171]

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166. Lynn A. Baker, *The Prices of Rights: Toward a Positive Theory of Unconstitutional Conditions*, 75 Cornell L. Rev. 1185, 1190–1191 (1990). At times the Court has used the "greater includes the lesser doctrine," meaning that the government's greater power to deny a benefit includes the lesser power to attach conditions to it. *Id*. at 1190 n. 12.

167. Romberg, *supra* n. 165, at 1052–1053.

168. Baker, *supra* n. 166, at 1187 n. 6 (indexing theories of unconstitutional conditions and identifying the seminal works on unconstitutional conditions). These seminal works include Richard A. Epstein, *The Supreme Court, 1987 Term — Foreword: Unconstitutional Conditions, State Power, and the Limits of Consent*, 102 Harv. L. Rev. 4 (1998), Seth F. Kreimer, *Allocational Sanctions: The Problem of Negative Rights in a Positive State*, 132 U. Pa. L. Rev. 1293 (1984), and Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 Harv. L. Rev. 1413 (1989). *Id*. These theories attempt to delineate the doctrine of unconstitutional conditions in all of its contexts, an attempt that is well beyond the scope of this Comment. Professor Baker suggests that the doctrine may not actually be a consistent theory, and may have different applications depending on the type of benefit offered. *Id*. at 1196–1197. She offers a convincing theory of the doctrine of unconstitutional conditions used by the Supreme Court in decisions involving public assistance. *See infra* nn. 220–229 and accompanying text (summarizing Professor Baker's theory and applying it to the PRWORA).

169. Dorothy E. Roberts, *In the Context of Welfare and Reproductive Rights: The Only Good Poor Woman: Unconstitutional Conditions and Welfare*, 72 Denv. U. L. Rev. 931, 936 (1995).

170. *Infra* nn. 195–202 and accompanying text. Roberts refers to this distinction as a "doctrinal sleight of hand." Roberts, *supra* n. 169, at 936.

171. 432 U.S. 464 (1977).

Shapiro v. Thompson,[172] and *Wyman v. James*,[173] the plaintiffs argued that individual rights protected by the Constitution were infringed when the government conditioned the receipt of public assistance on the nonexercise of a constitutional right.[174] Thus, the problem presented in each case was a classic unconstitutional-conditions scenario. However, the outcomes and reasoning were different in each case.[175]

1. Of Penalties and Nonsubsidies

Since *Maher v. Roe*, the Court has consistently held that, although a woman has a right to have an abortion without direct governmental interference, the government is under no obligation to subsidize that right.[176] In *Maher v. Roe*,[177] the Court addressed a Connecticut statute that limited payment of Medicaid benefits to "medically necessary" first-trimester abortions.[178] The Court rejected the argument that states may not advocate a certain policy preference by funding medical expenses related to childbirth while denying medical expenses relating to abortion.[179] In considering its past abortion-rights decisions, the Court emphasized that it had not made the "right to an abortion" a fundamental right in *Roe v. Wade*[180] and its progeny, but rather had recognized "a constitutionally protected interest 'in making certain kinds of important decisions'" without governmental interference.[181] The Court distinguished between placing an obstacle in the woman's path to choose abortion, which would be unconstitutional under *Roe v. Wade*,[182] and making childbirth a more attractive option

172. 394 U.S. 618 (1969).
173. 400 U.S. 309 (1971).
174. *Infra* nn. 176–199.
175. *Id*.
176. *Webster v. Reproductive Health Services*, 492 U.S. 490, 507–513 (1989) (upholding a state law prohibiting public funds and facilities for abortion services); *Harris v. McRae*, 448 U.S. 297, 316–317 (1980) (holding that when an indigent woman's only obstacle to an abortion was her own indigence, no constitutional rights were violated); *Maher v. Roe*, 432 U.S. 464, 479–480 (1977) (validating the constitutionality of a state statute that prohibited public funding of abortions).
177. 432 U.S. 464 (1977).
178. *Id*. at 466.
179. *Id*. at 470.
180. 410 U.S. 113 (1973).
181. *Maher*, 432 U.S. at 473 (citing *Whalen v. Roe*, 429 U.S. 489, 599–600 (1977)).
182. 410 U.S. 113 (1973).

than abortion.[183] Nothing in the Constitution prohibits the states from making value judgments and then supporting those judgments through public funds.[184] Emphasizing that the Connecticut statute put an indigent woman at no disadvantage,[185] because she was still free to seek private funding of an abortion, the Court upheld the statute.[186]

Thus, the Court has distinguished the mere nonsubsidy of a right from a direct obstacle in the path of the exercise of that right. The Court has also considered government actions that serve to deter an individual from exercising a right, whether empirically or theoretically.[187] In *Shapiro v. Thompson*,[188] the Court considered whether states' restrictions on AFDC funds to those individuals who had been state residents for more than a year were unconstitutional.[189] The Court immediately dismissed the argument that AFDC benefits, as a privilege rather than a right, allowed unconstitutional conditioning.[190] Designating the right to travel as "fundamental,"[191] the Court noted that a durational residency requirement would have a chilling effect on the right to travel.[192] Because the requirements penalized the exercise of a

183. *Maher*, 432 U.S. at 474.

184. *Id*.

185. *Id*. The court distinguished *Shapiro v. Thompson*, *infra* n. 188, as a case that placed a penalty on proscribed conduct. *Id*. at n. 8.

186. *Maher*, 432 U.S. at 474. In *Harris v. McRae*, 448 U.S. 297 (1980), the Court extended the rights of governments to not subsidize abortions when it held that states were not obligated to provide Medicaid funds to women wanting abortions when federal monies were not available because of the Hyde Amendment to the Medicaid Act. *Id*. at 300–301. The Court held that the Hyde Amendment's effect of encouraging "alternative activity deemed in the public interest," in other words, choosing to give birth, presented no obstacle in the path of a woman choosing an abortion. *Id*. at 315. If the government had chosen to punish a woman for exercising her freedom to have an abortion, such as by withholding all Medicaid benefits, that would be an example of a clear penalty that unduly interfered with a constitutional right, the Court explained. *Id*. at 317 n. 19. This is consistent with Professor Baker's theory, *infra* pt. V(B) that the unconstitutional conditions doctrine asks whether the challenged condition requires a person unable to earn a subsistence income pays a "higher price" for exercising a constitutional right than a similarly situated person not able to earn a subsistence income. Baker, *supra* n. 166, at 1217.

187. Baker, *supra* n. 166, at 1206.

188. 394 U.S. 618 (1969). The Supreme Court recently applied the *Shapiro* reasoning in striking down a California state law limiting state newcomers access to TANF benefits. *Saenz v. Roe*, 526 U.S. 489 (1999).

189. *Shapiro*, 394 U.S. at 621–622.

190. *Id*. at 627 n. 6. (citing *Sherbert v. Verner*, 374 U.S. 398, 404 (1963), an unconstitutional-conditions case dealing with First Amendment rights and unemployment benefits).

191. *Id*. at 630 (quoting *U.S. v. Guest*, 383 U.S. 745, 757–758 (1966)).

192. *Id*. at 631. Indeed, a law that has "no other purpose . . . than to chill the assertion

constitutional right, a compelling state interest would be required to justify the penalty.[193] None of the reasons for the residency requirements were held to justify an infringement on the right to travel, because the residency requirements were not narrowly tailored to meet the state's interests.[194]

In both the fundamental-right-to-travel cases and the abortion-funding cases, the government was clearly trying to encourage the nonexercise of behavior that was constitutionally protected: in the abortion funding cases, the government was trying to prevent access to abortions, and in the right-to-travel cases, the government was trying to keep needy individuals from moving into the state. Thus, although the government's action was suspect, in that its intent was to interfere with a constitutional right, it was held to be unconstitutional only when it was held to have presented an actual obstacle, or to have penalized certain behavior, and not when it was held to have merely refused to subsidize the proscribed behavior. However, this theory of the doctrine of unconstitutional conditions cannot be reconciled with the Court's decision in the troublesome case of *Wyman v. James*,[195] a case that addressed the rights of welfare recipients to be free from unwarranted searches of their homes.

2. When a Nonsubsidy Looks Like a Penalty

In *Wyman*, the Court considered whether a home visit required for receipt of AFDC benefits abridged the plaintiff's Fourth Amendment rights.[196] In upholding the constitutionality of the

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of constitutional rights by penalizing those who choose to exercise them . . . [is] patently unconstitutional." *Id.* (quoting *U.S. v. Jackson*, 390 U.S. 570, 581 (1968)).

193. *Id.* at 634. Significantly, the Court did not determine that the sole purpose of the residency requirements was to deny the right to travel; instead, it considered the valid interests invoked — but because strict scrutiny was required, ultimately, the residency requirements were not narrowly tailored to meet any of the objectives. *Id.* at 634–638.

194. *Id.* The states argued that the waiting period served to deter fraud, but the Court rejected that argument on the grounds that other means were available, such as sending a letter or placing a telephone call to the public assistance office of the former state. *Id.* at 637. Similarly, proponents of the cooperation requirement of the PRWORA may argue that it prevents mothers from enjoying the benefits of the State while still receiving nonordered support from her child's father. Because other measures already in place — such as family composition statements and income verification — are less intrusive, the cooperation requirement is not narrowly tailored, even assuming the government has a compelling interest.

195. 400 U.S. 309 (1971).

196. *Id.* at 310.

visitation requirement, the Court emphasized that the visitation was not "forced or compelled" and that the plaintiff was free to refuse a visitation and, as a result, not receive financial assistance.[197] Because there was no forced entry of the home, the Court concluded, the home visit did not amount to a search.[198] The Court then assumed, *arguendo*, that the home visit did fall under the umbrella of a Fourth Amendment search, and applied the standard of unreasonableness to determine that the home visit was not unreasonable, focusing on the public's interest in assuring the needs of the dependent child were met and that charitable funds were being spent properly.[199]

In his dissent, Justice William O. Douglas distilled the case to a pivotal issue: "[W]hether the government by force of its largesse has the power to 'buy up' rights guaranteed by the Constitution."[200] Justice Douglas criticized the majority's reliance on the plaintiff's welfare dependence as justification for access to her home, citing other governmental welfare programs, such as aid to farmers, that did not allow intrusive monitoring programs.[201] Justice Douglas reminded the Court of the doctrine of unconstitutional conditions, emphasizing that, "[b]ut for the assertion of her constitutional right," the plaintiff would have been entitled to welfare benefits.[202]

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197. *Id*. at 317–318. Interestingly, the Court compared the government's home visit to a "routine civil audit of a taxpayer's income tax return" by the IRS; like a taxpayer refusing to produce proof of a claimed deduction, the plaintiff could simply refuse the home visit. *Id*. at 324. A taxpayer would not get the benefit of the deduction, and the AFDC recipient would not get the benefit of welfare assistance. The problem with this analogy is that it does not take into account the initial point of reference. For instance, with taxation, it is more easily said that being taxed is the norm, and tax relief is a benefit, than that not being taxed is the norm and not getting a deduction is a burden. In contrast, to a woman who is already receiving public assistance, the continuance of this subsistence is her baseline and the reduction in benefits is a burden. For a further discussion of the problem of using normative values to determine whether a government's action is coercive, see Sullivan, *supra* n. 21, at 1446–1454.

198. *Wyman*, 400 U.S. at 317–318.

199. *Id*. at 318. In a paternalistic tone, the Court justified home visits on the grounds that the state welfare agency was acting in the capacity of a "public trust," with a "paramount interest and concern in seeing and assuring that the intended and proper objects of that tax-produced assistance are the ones who benefit from the aid it dispenses." *Id*. at 318–319. It did not explain why home visits were necessary to achieving that end; the plaintiff had volunteered to provide any necessary information about her home life, so long as an intrusion into the home was not required. *Id*. at 313.

200. *Id*. at 328. (Douglas, J., dissenting).

201. *Id*. at 332.

202. *Id*. at 328.

The *Wyman* case represents the difficulty with the doctrine of unconstitutional conditions — even though the plaintiff's assertion of her constitutional rights[203] resulted in a penalty, the diminution of the welfare assistance she needed to survive and raise a family, the Court likened the situation to a nonsubsidy, a benefit merely passed up by the exercise of free choice.[204]

B. An Answer to the Confusion

Professor Lynn Baker's theory of the doctrine of unconstitutional conditions best explains the disconnect between the *Wyman* outcome and the penalty–nonsubsidy distinction.[205] Professor Baker's theory is that the Court applies a two-prong test in public-assistance cases.[206] First, the Court asks whether the condition attached to the benefit "involves" an activity protected by the Constitution.[207] If it does, the Court considers whether the condition causes an individual who relies on public assistance for subsistence to pay a "higher price" to engage in that activity than a person, similarly situated, who does not rely on public assistance for subsistence.[208] Thus, under Professor Baker's theory, individuals are not compared solely on the basis of the exercise of a right, but rather are compared with others who are able to afford the exercise of the right.[209] Professor Baker's theory gets at the heart of the unconstitutional-conditions doctrine, for it articulates the core of Justice Douglas' dissent: the need to prevent the government from "buy[ing] up" individual liberties.[210] The theory recognizes that individuals relying on public assistance do not operate as individuals in a free market: facing desperation, poor people will trade in their rights for a chance to survive.

Professor Baker's theory also serves to reconcile the differing outcomes — not aptly explained by the penalty–nonsubsidy dis-

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203. Note, however, that Professor Baker's theory reconciles this problem by focusing on the Court's refusal to deem the home visit a search within the meaning of the Fourth Amendment. Baker, *supra* n. 166, at 1224–1225.

204. *Wyman*, 400 U.S. at 317–318.

205. Baker, *supra* n. 166, at 1217.

206. *Id*.

207. *Id*. Interestingly, Professor Baker's theory does not ask whether the right is "violated" or "burdened" or "penalized." The theory makes it possible to reach the same result, however, without coming to that conclusion.

208. *Id*.

209. *Id*.

210. *Wyman*, 400 U.S. at 328 (Douglas, J., dissenting)

tinction — in the *Maher*, *Shapiro*, and *Wyman* cases. Because the first prong of the theory asks whether participation in a constitutionally-protected activity is involved, any condition not implicating a constitutionally protected activity will immediately be sustained. Thus, because the condition implicated the fundamental right to travel in *Shapiro*, and the right to choose a first-trimester abortion in *Maher*, these two cases passed the first part of the test. In *Wyman*, however, because the Court found that the search involved did not fall within the Fourth Amendment meaning of that term, the conditioned benefit was sustained.[211] This provides a more plausible explanation of the result in *Wyman* than any attempt to differentiate between penalties and nonsubsidies could provide.

The second prong of Professor Baker's theory asks whether the price of the exercise of the constitutionally protected right is greater to those dependent on public assistance than to those who do not depend on public assistance for subsistence.[212] Thus, in *Shapiro*, the question is whether indigents who exercised their right to travel paid a higher price to do so than those similarly situated but not dependent on welfare.[213] Professor Baker concludes that the indigents in *Shapiro* did pay a higher price for exercising their freedom, in that they were denied subsistence benefits, whereas others similarly situated (those who moved to the state but were not dependent on welfare) were not denied a subsistence income.[214]

Applying the second prong of the test to *Maher* explains why a condition that effectively limited poor women's access to abortions was upheld as a mere nonsubsidy and not deemed an unconstitutional penalty on the exercise of a right. Rather than comparing individuals receiving publicly funded health insurance who exercise their right with those who do not exercise their right — which would show a clear penalty to those who exercised their right to an abortion, in the form of the loss of health insurance — Professor Baker's model compares those unable to earn subsis-

211. Baker, *supra* n. 166, at 1224.
212. *Id*. at 1217.
213. *Id*. at 1242.
214. *Id*. This explanation does seem a bit contrived, particularly because it imagines that a nonindigent could be statutorily restricted from earning an income. *Id*.

tence income with those earning a subsistence income.[215] Thus, because the indigent women were required to pay the same amount to exercise their right to abortion as nonindigent women exercising the same right, the condition did not present an unconstitutional barrier to abortion.[216]

Professor Baker's theory of the doctrine of unconstitutional conditions provides a tool for understanding the Court's rhetoric in previous cases involving conditioned public assistance benefits and also provides a framework for accessing future problems that might invoke the doctrine. Whereas other attempts to understand the Court's rationale have focused on individuals who exercise a right as compared with those who do not,[217] Professor Baker's model considers the comparative price paid by an individual who relies on public assistance against an individual who is able to provide her own income.[218] However, before reaching that question, Professor Baker's theory first asks whether a constitutionally protected activity is involved.[219] Thus, to determine whether, under the doctrine of unconstitutional conditions, the PRWORA's cooperation requirement is unconstitutional, we must first ask whether the condition implicates a constitutionally protected activity.

C. Applying Professor Baker's Theory to the PRWORA

Recall that Professor Baker's theory of the doctrine of unconstitutional conditions first asks whether a conditioned benefit involves the exercise of a constitutional right.[220] Thus, we must ask whether the cooperation requirement of the PRWORA involves a constitutional right. If the right to determine one's family composition is an emerging fundamental right, yet to be named by the

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215. *Id*. at 1231.

216. *Id*. As Professor Baker points out, this result comports with the hypothetical raised by the Court in *Maher*, in which a woman having an abortion would be required to give up additional benefits. Because this would require her to pay a higher price for choosing her abortion than a similarly situated income-earning woman, the hypothetical situation would be unconstitutional. *Id*. at 1231–1232.

217. *E.g*. Roberts, *supra* n. 169. Roberts compares women choosing to exercise their reproductive rights at the loss of welfare benefits with women who forego this choice and retain the benefits. *Id*. at 936–937.

218. Baker, *supra* n. 166, at 1217.

219. *Id*.

220. *Id*.

Court,[221] how does the cooperation requirement implicate that right?

One main purpose of the PRWORA is to encourage marriage.[222] Obviously, any purpose to promote marriage between two adults who have chosen not to marry juts against the right to determine one's own family composition. Furthermore, it is important to note that, although some parents may be glad to establish the paternity of their children, for many others the choice has been carefully weighed and executed not to involve the fathers. In many cases, the mother will have done an economic cost–benefit analysis, much in the same way the government will do, to determine that the father does not have sufficient resources to justify risking her family's integrity.[223] Creating a legal tie between putative father and child invites greater ties — the desire for visitation,[224] possible retaliation for being fingered as a deadbeat dad,[225] demands to be involved in parenting decisions — but probably will not lead to the hoped-for marriage. Thus, the cooperation requirement clearly involves — indeed, burdens — the right, if it exists, to determine family composition.

The second part of Professor Baker's theory asks whether the cost to engage in a constitutionally protected activity is greater to the individual dependent on welfare for subsistence than is the cost to an individual capable of earning a subsistence income.[226] Thus, in the context of the cooperation requirement, the theory would ask whether a poor woman receiving TANF pays more to exercise her right to determine her family composition (by refus-

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221. *Supra* pt. III.

222. 42 U.S.C. § 601 n. (congressional findings).

223. *Supra* nn. 147–150 and accompanying text.

224. It is not unconceivable that some fathers, once named, would seek to establish custody rights purely as a retaliatory measure or to mitigate child support obligations.

225. In Pennsylvania, for instance, a mother had a child by a man whom she had never married. The father never paid any child support or had contact with his child since she was two years old. The mother wanted to terminate the absent father's paternity rights, alleging the father was involved in illegal drug activities and she feared he would kidnap her child. However, because she was not married (to a man who would adopt the child), the court would not terminate the absent father's rights. Donna Schratz, *Mom Can't Terminate Birth Father's Parental Rights without Adoptive Dad: C.P. Judge Says Adoption Act Precludes Involuntary Termination of Parental Rights*, 25 Penn. L. Wkly. 8, 5 (Feb. 25, 2002) (citing *In re Adoption of T.N.D.*, PICS Case No. 02-0166 (C.P. Lawrence Jan. 22, 2002).

226. Baker, *supra* n. 166, at 1217.

ing to cooperate) than a woman earning her income on the free market would pay to exercise the same right.

The analysis is the same as that in *Shapiro*,[227] in that the comparison must be between those barred from access to an income through exercise of a right and those not barred. A woman who is not welfare dependent pays no price — other than the voluntary relinquishment of child support[228] — for her decision not to establish paternity of her children. She is free to determine her family structure and still has access to earned income. In contrast, a welfare-dependent woman who chooses to exercise the right to determine her family's composition pays a great price to do so: she now has no access to income, in that the barriers to income that existed before her decision to not cooperate still exist, and she is prohibited from receiving public-assistance benefits. Both women have exercised a fundamental right; however, only one has a resultant deprivation of subsistence income.

The cooperation requirement therefore fails the doctrine of unconstitutional conditions under Professor Baker's theory. Because it involves an activity that is constitutionally protected,[229] and because a woman dependent on welfare pays a higher price to engage in the constitutionally protected activity than a woman who does not need welfare to survive, the cooperation requirement becomes an unjustifiable condition on the receipt of a benefit.

VI. HOW TO ACCOMPLISH THE GOALS ATTEMPTED BY THE COOPERATION REQUIREMENT WITHOUT VIOLATING INDIVIDUAL RIGHTS

As discussed above,[230] it is unclear whether Congress intended to influence women's decisional rights to marry as a means or an end in enacting the PRWORA. Although the rhetoric of the findings focuses on the decline of two-parent families and the desire to promote heterosexual two-parent families,[231] the bulk

227. *Supra* nn. 213–214 and accompanying text.

228. Note that the voluntary relinquishment of child support is no greater price to the nonindigent woman than to the indigent woman, because both women are foregoing this income to which they would otherwise be entitled.

229. Obviously, this assumes that the right to determine family composition is a fundamental right.

230. *Supra* nn. 63–70 and accompanying text.

231. 42 U.S.C. § 601 n. (congressional findings).

of the provisions in the Act speak to creating resources[232] and work opportunities for women, not foisting marriages upon them.[233] Indeed, Congress seems to have simply decided that, because poverty and single-parent families were so statistically related, single parenting was causing poverty. Eliminating single parenting, according to Congress, would cure the poverty crisis.

Eradicating poverty is clearly an important governmental interest. However, other ways to achieve this end exist without any imposition on privacy rights.[234] Moreover, many such programs already exist within the PRWORA and have been implemented successfully by many of the states.[235] However, if Congress truly wants to end welfare dependence, it must get out of the mindset that poor families are entitled to just enough to get by. If a working woman making minimum wage makes only a few hundred dollars more per year than she would receive from public assistance,[236] at a risk of losing important benefits, including health insurance and child care, what incentive does she have to leave the safety of the system?[237] Additionally, what makes Congress think that she will not recycle back into the system if, in all likelihood, she loses her job after a few months? To be successful, programs targeted at ending poverty in America must aggressively strive to create true financial independence for women, rather than attempt to yoke them with men whose prospects are less than attractive.

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232. Gais & Johnson, *supra* n. 56, at 1333.

233. *Supra* nn. 6–10 and accompanying text.

234. Additionally, even though ensuring that children are economically cared for is a compelling interest, it would not justify burdening a privacy right. *Zablocki*, 434 U.S. at 388.

235. In Florida, these programs include childcare benefits for women engaged in work or vocational training, benefits for women choosing higher education to maximize their future earning potential, diversion programs, and job-readiness training. Fla. Dept. of Children & Families, *Temporary Assistance for Needy Families State Plan* 21, 32, 44–45 (Oct. 1, 2000) (available in PDF format at <http://www5.myflorida.com/cf_web/myflorida2/healthhuman/ess/TANF-Plan.pdf.> (accessed Apr. 20, 2002)).

236. Dowd, *supra* n. 49, at 24.

237. The average national TANF grant is $357.27 per month. *Report to Congress*, *supra* n. 50, at 130. Further, those who both work and receive TANF earn $598 per month from working. *Id*. at 65. Thus, a person who leaves the welfare rolls to make $6.80 per hour, *id*. at 2, at forty hours per week, will make only $223.99 per month more from working full-time, at the expense of more time away from her family and more worries about adequate child care, effectively running a household, job security, health insurance, and transportation.

If the cooperation requirement exists as a means for the federal government and the states to recoup their dollars, then an overhaul of the welfare system would be more appropriate. For instance, providing women with short-term loans at low interest rates would more effectively advance the government's interest in repayment than the cooperation requirement does. Additionally, providing loans to women in need would not threaten the privacy rights of these women.

On the other hand, if promoting marriage truly is a major goal of the PRWORA — a proposition that is problematic given the discussion of privacy rights above[238] — then the only marriages that could legitimately be encouraged are the ones already in existence. This is because the individuals consenting to the marriage have already determined their family structure. Thus, programs designed to nurture the continuation of already-existing marriages — including paying for counseling for married couples, as recently proposed by President George W. Bush[239] — do not present a constitutional problem, in that they do not implicate a constitutional right.

VII. CONCLUSION

The right to privacy protects individuals from unwarranted governmental intrusions into decisions affecting their very personal family lives. An argument can be made for the existence — or even emerging existence, soon to be acknowledged — of a fundamental privacy right, the right to determine one's own family composition. If this fundamental right can be agreed to exist, then the cooperation requirement under the PRWORA places a limit on the exercise of this right, because it creates legal entanglements between individuals who have no desire to be placed in a family together.

Under the doctrine of unconstitutional conditions, the government may not attach to the receipt of a benefit a condition that causes an indigent person to pay a greater price for the exercise of a constitutional right than a nonindigent would pay for the exer-

238. *Supra* pt. II.

239. Paul Leavitt et al., *Campaign-Finance Bill Will Pass This Year, Daschle Vows*, USA Today 7A (Feb. 27, 2002).

cise of that same right.[240] Therefore, because an indigent woman exercising her right to determine her family composition pays a higher price to exercise that right — in the absolute loss of her income — than a nonindigent woman pays to exercise the same right, the cooperation requirement does not withstand analysis under the doctrine of unconstitutional conditions.

240. *Supra* nn. 208–219 and accompanying text.