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The Return of the Ring: Welfare Reform's Marriage Cure as the Revival of Post-Bellum Control

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In 1996, the United States Congress began its imposition of a marital solution to poverty when it enacted the Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA). Nearly ten years later, Congress has strengthened its commitment to marriage as a cure for welfare dependency with proposals such as the Personal Responsibility, Work, and Family Promotion Act of 2005. If passed, this bill would provide more than one billion dollars for pro-marriage programs and require each state to explain how its welfare program will encourage marriage for single mothers who receive public aid. With these proposals, Congress has continued to construct and treat poverty as a private rather than public problem. These programs, designed to move poor individuals into the husband-wife, normatively heterosexual dyad, are part of a long-term plan for privatizing economic responsibility for children in impoverished households.

This Article situates recent welfare debates concerning the Temporary Assistance to Needy Families (TANF) program, in particular those debates concerning the proposal of the "marriage cure," within a post-colonial context and examines, both historically and currently, how the law of marriage has been used in the United States as a tool for "civilizing" outsiders. Part I analyzes how marriage laws were used in the post-bellum period as a means of minimizing states' economic responsibility to provide for newly emancipated Blacks, especially former slave children. Part II scrutinizes the racialization of welfare recipients in the United States in recent history and dissects current and proposed TANF marriage-promotion provisions to compare today's use of marriage as a tool for domesticating welfare queens to the post-bellum reliance on marriage to "civilize" newly freed Blacks. Part III reveals the reasons that such a marriage cure for poverty is not only inadequate, but inherently inappropriate as a solution to the problems with the U.S. welfare system.

Finally, Part III concludes by exploring alternatives to the proposed marriage cure to poverty.

INTRODUCTION

Renita Pitts has been on and off welfare for much of her life.[1] After thirteen years of struggling with a crack addiction, Renita, a single black woman with five children and fourteen grandchildren, is a student in the African American Studies and Social Welfare departments at the University of California, Berkeley.[2]

Contrary to the stereotype of welfare mothers, Renita was married before—for more than twenty years—to the father of her children and the man who first brought cocaine into her home.[3] Like more than two-thirds of all welfare recipients in California, Renita was the victim of emotional and physical abuse by her partner.[4] It was Renita's husband who tried to keep her subordinated and locked in a life of poverty, eventually demanding that Renita either quit school or lose him.[5]

On December 22, 2004, Renita finalized her divorce from her husband, ending a relationship that she describes as "so abusive that if she stayed in it any longer, someone would have ended up dead."[6] Renita is an activist who works on issues concerning welfare mothers and serves as an intern at the Welfare Radio Collaborative Project.[7] When she graduates from the University of California, Berkeley, Renita will have a higher earning potential and thus greater opportunities to lift herself and her dependents out of poverty forever. Earning her college degree will, however, prove to be difficult for Renita, because as of June 30, 2005, she reached her lifetime limit on receiving public welfare assistance, and her benefits have been cut off. She is left with no public welfare support to aid her in completing her education and raising her children.[8] In other words, the welfare state has abandoned Renita at a time when she is closest to lifting herself and her family out of poverty permanently.

At this critical point in Renita's life, the remaining assistance available to her and women like her across the nation consists of programs that promote marriage to welfare mothers and teach them the benefits of

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1. Sarah Olson, *Marriage Promotion, Reproductive Injustice and the War Against Poor Women of Color*, DOLLARS AND SENSE (Jan./Feb. 2005), *at* http://www.dollarsandsense.org/archives/2005/0105olson.html.

2. *Id.*

3. *Id.*

4. *Id.*; Diana Spatz, *Bush Welfare Agenda—Married to a Myth*, CHRISTIAN SCI. MONITOR, Feb. 24, 2004, at 9 ("Rescarch shows that up to 83 percent of welfare mothers in my home state of California have experienced domestic violence."); Sara Steffens, *Marriage Initiative Vexes Abuse Activists*, CONTRA COSTA TIMES, Feb. 14, 2005, at A3 (asserting that 65% of a "random sample of CalWorks recipients in Kern and Stanislaus counties . . . reported experiencing some form of domestic abuse within three years of the study").

5. Olson, *supra* note 1.

6. *Id.* (internal quotations omitted).

7. Interview with Renita Pitts, "Women Coming Together" Conference at the University of Cincinnati College of Law (Feb. 26, 2005).

8. Telephone Interview with Renita Pitts (July 25, 2005).

marriage and strategies for marrying a man and sustaining a marriage. The U.S. Congress is currently considering legislation that will allot more than one billion dollars for the purpose of promoting marriage among low-income people in order to remove them from welfare rolls.[9] As this Article will demonstrate, the proposal is similar to post-bellum efforts to encourage Blacks to marry, and is congruent with the assumption that marriage will cure societal problems by "civilizing" poor women, especially women of color, who depend on public assistance.[10]

For women like Renita Pitts and Diana Spatz, the founder and Executive Director of Low-Income Families' Empowerment Through Education (LIFETIME), the notion that marrying a man will cure their poverty-induced problems is ironic, because, far from providing a cure for poverty, marriage to their abusive spouses actually initiated the downward spiral of poverty in their lives.[11] As Diana Spatz explained, "If I had waited for a man to marry me off welfare, not only would I still be a single mother, but my family would still be poor. My education, not marriage, got my family out of poverty."[12]

Still, policymakers continue to push for legislation that will promote a "marriage cure"[13] to welfare motherhood. The idea of a marital solution to welfare dependency is not new. In 1996, the U.S. Congress codified a "marriage cure" to poverty when it passed the Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA).[14] Mostly known for placing time limits on recipients' lifetime welfare eligibility,[15] PRWORA also permitted states to utilize federal and state Temporary Assistance to Needy Families (TANF) funds to promote marriage among welfare recipients.[16]

Following the lead of states like Oklahoma and West Virginia, which actually used their TANF funds to develop marriage promotion programs,[17]

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9. *See* Personal Responsibility, Work, and Family Promotion Act of 2005, H.R. 240, 109th Cong. (2005); PRIDE Act, S. 667, 109th Cong. (2005).

10. *See* Judith E. Koons, *Motherhood, Marriage, and Morality: The Pro-Marriage Moral Discourse of American Welfare Policy*, 19 WIS. WOMEN'S L.J. 1, 22 (2004) ("Into the twenty-first-century, marriage is being proposed as the ideal anti-poverty program.").

11. Spatz, *supra* note 4 ("Clearly, marriage is not a solution for mothers who face domestic violence, as I once did.").

12. *Id.*

13. Throughout this Article, I refer to the notion that marriage can remedy poverty as the "marriage cure" or "marital solution."

14. Pub. L. No. 104-193, 110 Stat. 2105 (codified as amended in scattered sections of 8 and 42 U.S.C.).

15. 42 U.S.C. § 608(a)(7)(A) (2000). The statute imposed a five-year limit on receipt of cash assistance. *See id.*

16. 42 U.S.C. § 601(a)(2) (stating that one of TANF's purposes is to "end the dependence of needy parents on government benefits by promoting job preparation, work, and marriage").

17. *See* Phoebe G. Silag, Note, *To Have, To Hold, To Receive Public Assistance: TANF Marriage-Promotion Policies*, 7 J. GENDER RACE & JUST. 413, 418-19 (2003) (describing pro-marriage programs in several states).

the Bush administration proposed its "Healthy Marriage Initiative" in 2002.[18] Soon thereafter, the marriage initiative was incorporated into a House Bill, H.R. 4, the Personal Responsibility, Work, and Family Promotion Act of 2003,[19] which would have reauthorized TANF for five years, provided $300 million annually for pro-marriage programs, and required each state to "include specific, numerical, and measurable performance objectives for encourag[ing] the formation and maintenance of healthy 2-parent married families and prevent[ing] and reduc[ing] the incidence of out-of-wedlock pregnancies."[20] Public interest groups, such as the National Organization for Women (NOW) and the Children's Defense Fund, opposed the bill, asserting that it failed to provide adequate access to education and job training and would inappropriately divert welfare funding from basic economic support for families, place victims of domestic violence at increased risk, and encourage women to depend on men to escape from poverty.[21] However, the bill still passed in the House of Representatives on February 13, 2003.[22] The highly similar Senate version of the bill, the Personal Responsibility and Individual Development for Everyone Act (PRIDE),[23] was tabled without vote in April 2004.[24]

The marriage initiative has not gone away, however. An essentially unchanged version of H.R. 4 was reintroduced in 2005 as H.R. 240, the Personal Responsibility, Work, and Family Promotion Act of 2005,[25] and

18. GEORGE W. BUSH, WHITE HOUSE, MARRIAGE PROTECTION WEEK, 2003: A PROCLAMATION (2003), http://www.whitehouse.gov/news/releases/2003/10/20031003-12.html.

19. Personal Responsibility, Work, and Family Promotion Act of 2003, H.R. 4, 108th Congress (2003).

20. *See id.* §§ 103, 112; Kate O'Beirne, *Altared States*, NAT'L REV., May 6, 2002, at 28 (noting that President Bush declared that "stable families should be the central goal of American welfare policy").

21. *See* Rebecca Winters, *A New Marriage Proposal*, TIME, Nov. 8, 2004, at 58; Cheryl Wetzstein, *Groups Wedded to Marriage Fund*, WASH. TIMES, Feb. 17, 2004, at A2 (describing NOW's reaction to the Bush administration's marriage initiative); Gary Andres, *Counterfeit Compassion*, NAT'L REV. ONLINE, June 4, 2004, http://www.nationalreview.com/comment/andres200406041006.asp (responding to criticisms of the marriage initiative by NOW and the Children's Defense Fund, among others).

22. *See* Bill Swindell, *Welfare Reauthorization Becomes Another Casualty in Congress' Partisan Crossfire*, CONG. Q. WKLY., Apr. 3, 2004, at 805.

23. *See* Personal Responsibility and Individual Development for Everyone (PRIDE) Act, H.R. 4 R.S., 108th Cong. (2003). PRIDE was reintroduced in the beginning of 2005 as PRIDE Act, S. 667, 109th Cong. (2005).

24. *See* Swindell, *supra* note 22, at 805 ("Republican leaders suspended debate on the reauthorization of the landmark 1996 welfare law (PL 104-193) on April 1. They did so after their motion to invoke cloture on the measure—which would have limited debate and blocked Democratic amendments on a series of workplace and labor issues—fell nine votes short of the 60 needed to proceed. The vote was 51-47.").

25. Personal Responsibility, Work, and Family Promotion Act of 2005, H.R. 240, 109th Cong. (2005).

Congress recently extended the 1996 PRWORA for the twelfth time.[26] The extension expires on March 31, 2006 and, in all likelihood, will continue to be extended until legislators are able to resolve the issues surrounding the new welfare bill.[27] Regardless of how or whether the initiative is ultimately enacted, given Congress's consistent use of measures that promote marriage, encouraging poor individuals to conform to the husband-wife dyad will surely remain a major component of welfare law as the federal government attempts to reduce dependence on public assistance. Indeed, many supporters of such marriage promotion programs view the lack of marriage as the root of numerous societal problems.[28] For example, Robert Rector, a senior research fellow at the Heritage Foundation, explicitly stated that the "collapse of marriage is the principal cause of child poverty and a host of other social ills."[29] Likewise, Dr. Wade Horn, Assistant Secretary of Health and Human Services for Children and Families, claimed, "[m]arriage matters to communities, because . . . when marriage starts to disappear in communities, we start to have higher rates of certain kinds of social difficulties."[30]

In response to the emphasis on this male-female, normatively heterosexual structure, many feminist scholars and activists have proposed a restructuring of marriage, if not a rejection of the institution, in favor of a "truly transformative model of family for all people."[31] For example, Professor Martha Fineman has called for an end to marriage as we know it, proposing that regulation of relationships and benefits should be focused on caretakers and their dependents, not on husbands and wives.[32] For many feminist activists and scholars, the current structure of marriage reinforces patriarchy by labeling families outside the husband-wife structure as deviant and unhealthy and by encouraging women to become dependent on men while neglecting inherently dependent relationships, such as those between parents and children.[33]

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26. TANF and Child Care Continuation Act of 2005, H.R. 4635, 109th Cong. (2005). This was the twelfth temporary extension since PRWORA lapsed in 2002. *See* Alex Wayne & Bill Swindell, *2005 Legislative Summary, Welfare Reauthorization*, CONG. Q. WKLY., Jan. 2, 2006, at 58.

27. *See id.*

28. *See* Patrick F. Fagan, *Restoring a Culture of Marriage: Good News for Policymakers from the Fragile Families Survey*, HERITAGE FOUND. BACKGROUNDER, June 13, 2002, at 1, *available at* http://www.heritage.org/Research/Family/BG1560.cfm.

29. Robert Rector, *Using Welfare Reform to Strengthen Marriage*, 4. AM. EXPERIMENT Q. 63, 63 (2001).

30. *Frontline* (PBS television broadcast July 12, 2002), transcript *available at* http://www.pbs.org/wgbh/pages/frontline/shows/marriage/interviews/horn.html.

31. Nancy D. Polikoff, *Why Lesbians and Gay Men Should Read Martha Fineman*, 8 AM. U. J. GENDER SOC. POL'Y & L. 167, 167 (2000).

32. *See* MARTHA ALBERTSON FINEMAN, THE NEUTERED MOTHER, THE SEXUAL FAMILY, AND OTHER TWENTIETH CENTURY TRAGEDIES 228-36 (1995).

33. *See, e.g.*, *id.* at 5-9.

Although many feminist scholars and activists have examined marriage and its role in maintaining the subordination of women both financially and reproductively,[34] fewer have analyzed the legal connection between marriage and welfare as a reversion to an earlier phase of colonialism in the United States.[35] Building on the work of Professors Dorothy Roberts, Katherine Franke, and Martha Fineman,[36] this Article situates the recent debates concerning the proposed "marriage cure" to poverty within a post-colonial context and examines how the law of marriage has been and is still being used in the United States as a tool for "civilizing" unruly outsiders, in particular Blacks.[37] Part I analyzes how marriage laws were used in the post-bellum period to privatize responsibility for individual economic stability within the families of newly-emancipated Blacks so that states' economic responsibility to provide for former slaves would be minimized. Part II scrutinizes the racialization of welfare recipients in the United States and dissects current and proposed TANF marriage promotion provisions to reveal how marriage is again being manipulated to domesticate "uncontrollable" welfare queens and to minimize the government's economic responsibility to provide for the modern descendents of "colonized" Blacks of the post-bellum period. Finally, Part III explores how "[e]vents that happened in the past, such as those in the period of colonial conquest and control, can provide insights into processes of domination and resistance in the present,"[38] critiquing the proposed marriage cure for poverty and using these insights to investigate alternatives to the marriage cure.

I

MARRIAGE AS COLONIZATION IN POST-BELLUM AMERICA

The vast majority of scholarship concerning colonization by the United States focuses on the colonization of Native Americans—also referred to as expansionism—and broadly discusses American colonialism as any "policy which attempted to obtain both formal political and economic control of a given area and which especially aimed to use this area as a

34. *See, e.g.*, Herma Hill Kay, *"Making Marriage and Divorce Safe for Women" Revisited*, 32 HOFSTRA L. REV. 71, 89-91 (2003) (asserting that the law of marriage "is at bottom a codification of a society's attitudes about women" and arguing that marriage should be restructured so that it may better accommodate equalitarian relationships).

35. *See, e.g.*, Laura F. Edwards, *"The Marriage Covenant Is at the Foundation of all Our Rights": The Politics of Slave Marriages in North Carolina after Emancipation*, 14 LAW & HIST. REV. 81, 91-107 (1996); Katherine M. Franke, *Taking Care*, 76 CHI.-KENT L. REV. 1541, 1549 (2001).

36. *See* FINEMAN, *supra* note 32, at 228-36; Franke, *supra* note 35, at 1549; Dorothy E. Roberts, *The Value of Black Mothers' Work*, 26 CONN. L. REV. 871, 874-75 (1994).

37. I capitalize the words "Black" and "White" when used as a noun to describe a racialized group.

38. Sally Engle Merry, *Law and Colonialism*, 25 LAW & SOC'Y REV. 889, 890 (1991).

source of direct economic benefits."[39] In recent history, scholars and activists have explored the civilizing mission of the United States as it relates to other racialized groups, including Blacks and Latino/as, with an expansive view of colonialism as an instrument through which white colonizers have used law to bring the colonized within an American national identity by subjecting them to oppressive state monitoring.[40] For example, Professors Katherine Franke and Laura Edwards have analyzed how governments utilized law to "civilize" newly freed Blacks as they transitioned from slavery to freedom.[41] The ultimate goal of these governmental efforts was not only to provide cheap labor for southern industries by creating a supply of convicts and child apprentices who could be forced to work with little or no pay, but also to force freed black people to comport with the heteronormative ideal of the nation's perceived national familial identity[42]—the self-sufficient American family with a working husband and a dependent wife and children[43]—and to therefore absolve the government of responsibility for financially supporting needy black women and children.[44]

One method for accomplishing the integration of former slaves into free society without burdening Whites with related economic costs was to insist that newly freed Blacks adopt and comply with the standard legal institution of marriage.[45] Prior to the issuance of the Emancipation Proclamation,[46] slaves had no ability to contract[47] and thus were not allowed to legally marry.[48] Instead, during the antebellum period, white

39. WALTER LAFEBER, THE NEW EMPIRE: AN INTERPRETATION OF AMERICAN EXPANSION, 1860-1898, at viii (1963).

40. *See, e.g.*, Julie Ewing, Book Note, *Public Vows: A History of Marriage and the Nation*, 4 J. L. & FAM. STUD. 199, 201 (2002) (asserting how "the national government attempted to reform . . . 'heathen' practices [of Native American tribes who did not follow the typical nuclear family structure] by encouraging or forcing [them] to adopt Christian monogamy").

41. *See* Edwards, *supra* note 35, at 91-107; Katherine M. Franke, Subjects of Freedom 3 (2003) (unpublished manuscript, on file with the author).

42. *See* Franke, Subjects of Freedom, *supra* note 41, at 8.

43. *See* Ewing, *supra* note 40, at 204 (describing monogamy as the "national standard for marriage" in the post-bellum period).

44. *See* Franke, Subjects of Freedom, *supra* note 41, at 3 (stating that marriage laws during the post-bellum period were strictly enforced as a means of controlling freed Blacks' "more base urges . . . [and] prepar[ing them] for the responsibilities of citizenship"); Franke, *Taking Care*, *supra* note 35, at 1549 ("[T]he state's recognition of the integrity of the African American family was motivated, in significant part, by a desire to privatize dependency.").

45. *See* Franke, Subjects of Freedom, *supra* note 41, at 8.

46. The Proclamation did not translate into true freedom for many slaves until long after the war's end when the federal government forced plantation owners to acknowledge the freedom of Blacks. *See* LEON F. LITWACK, BEEN IN THE STORM SO LONG: THE AFTERMATH OF SLAVERY 173, 181-83 (1979).

47. *See* Peggy Cooper Davis, *Neglected Stories and Progressive Constitutionalism*, 4 WIDENER L. SYMP. J. 101, 102 (1999) ("The slave was not a party to the social contract, but the subject, as well as the property, of one who was."); Jill Elaine Hasday, *Federalism and the Family Reconstructed*, 45 UCLA L. REV. 1297, 1329-30 n.119 (1998) (noting that "slaves had no legal ability to consent").

48. *See* NANCY F. COTT, PUBLIC VOWS: A HISTORY OF MARRIAGE AND THE NATION 11 (2000) (describing marriage as a contract with its terms set by common law); Edwards, *supra* note 35, at 89

slavemasters were deemed the head of each household and bore the financial responsibility of caring for each of their dependents, including their slaves.[49] Slave marriages were viewed as a threat to slave owners' power and control because, if recognized, such marriages would grant black men claims to black women and children as property based on the marital contract.[50] Additionally, plantation owners worried that slave husbands would become violent in defending their wives and children,[51] especially against those slave owners who sexually assaulted and abused slave women.[52]

Nevertheless, many slaves married by engaging in marriage rituals, such as jumping over broomsticks.[53] When slave owners stood to benefit from slave marriages because they made abandoning loved ones for escape to the North emotionally difficult, slaves' marriages were even recognized by their owners.[54] In those situations, however, slaveholders maintained

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(noting that slaves were legally prohibited from contracting and thus marrying); Ariela R. Dubler, Note, *Governing Through Contract: Common Law Marriage in the Nineteenth Century*, 107 YALE L.J. 1885, 1898 (1998) (same). Although not allowed to legally marry, slaves often performed their own wedding ceremonies. *See* Katherine M. Franke, *Women Imagining Justice*, 14 YALE J.L. & FEMINISM 307, 308 (2002) (describing how slaves enacted marriage rituals, such as jumping over broomstieks).

49. Mitchell F. Crusto, *Blackness as Property: Sex, Race, Status, and Wealth*, 1 STANFORD J. C.R.-C.L. L. 18 (forthcoming 2005) (unpublished manuscript, on file with author) ("[B]lacks were legally classified and treated as 'property' under their master's control."); Edwards, *supra* note 35, at 82 (examining conflicts surrounding marriage in North Carolina and noting that "[b]efore emancipation, white household heads assumed economic, legal, and moral responsibility for a range of dependents, who included African-American slaves as well as white women and children").

50. Cheryl I. Harris, *Finding Sojourner's Truth: Race, Gender, and the Institution of Property*, 18 CARDOZO L. REV. 309, 332 (1996).

51. Lea VanderVelde & Sandhya Subramanian, *Mrs. Dred Scott*, 106 YALE L.J. 1033, 1107-08 (1997).

52. RANDALL KENNEDY, INTERRACIAL INTIMACIES: SEX, MARRIAGE, IDENTITY, AND ADOPTION 42-46 (2003) (describing the sexual assault of black women by their slavemasters); ROBERT P. MCNAMARA, MARIA TEMPENIS, & BETH WALTON, CROSSING THE LINE: INTERRACIAL COUPLES IN THE SOUTH 24 (1999) (deseribing how black women were vulnerable to rape during the antebellum period); EUGENE D. GENOVESE, ROLL, JORDAN, ROLL: THE WORLD THE SLAVES MADE 415 (1976) (noting the way in which black women were raped and sexually assaulted during slavery); Crusto, *supra* note 49, at 33 (discussing how "enslaved blacks were expected to 'breed' enslaved children, adding to their master's wealth"); *see also* COTT, *supra* note 48, at 58-59 (describing the role that sexual violations against slave women played in the abolitionist movement and literature).

53. Franke, *Women Imagining Justice*, *supra* note 48, at 308; Adrien Katherine Wing, *Polygamy from Southern Africa to Black Britannia to Black America: Global Critical Race Feminism as Legal Reform for the Twenty-First Century*, 11 J. CONTEMP. LEGAL ISSUES 811, 857-58 (2001). One slave woman described her wedding as follows:

> We didn't have no preacher when we married. My Marster said, 'Now you and Lewis wants to marry and there ain't no objections so go on and jump over the broom stick together and you is married.' That was all there was to it. I lived on with my whites folks and he lived on with his and kept comin' to see me jest like he had done when was a courtin'.

DOROTHY STERLING, WE ARE YOUR SISTERS: BLACK WOMEN IN THE NINETEENTH CENTURY 35 (1984).

54. EDWARD P. JONES, THE KNOWN WORLD 102 (2003) ("[Henry, the black slavemaster,] realized, too, that what was happening [between two of his slaves, Celeste and Elias,] was better than chains. He had them together, bound one strong man to a woman with a twisted leg, and there was not a chain in sight."); Thomas E. Will, *Weddings on Contested Grounds: Slave Marriage in the Antebellum*

complete control over the marriages[55] and could and did end marriages and separate families by sale.[56] In fact, because slave families were so frequently ripped apart by the slave market, slave couples often recited vows such as "until death or *distance* do us part."[57]

With the emancipation of slaves and their release from slavemasters' households came the need to maintain power and control over Blacks such that they would not disrupt order in white civil society. By allowing and encouraging former slaves to marry, states maintained their power over the lives of freed people by requiring all married couples to register with the State and then forcefully prosecuting those Blacks who did not do so as a means of ensuring compliance with marriage laws.[58] Indeed, without any regard for the ways in which slavery and the slave market made it difficult for the husband-wife structure to remain intact in slave families,[59] newly freed Blacks and their families were punished for stepping out of this mold, even when the violations directly resulted from previous forced compliance with the slave system.[60] For example, because of the manner in which slavery often tore families apart, when a loved one who was sold or presumed dead returned, some newly freed Blacks found themselves with more than one spouse upon their emancipation.[61] These freed Blacks were prosecuted for bigamy in such situations, forcing them to comply with the free white

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South, 62 THE HISTORIAN 99 (1999) (describing how some slavemasters encouraged weddings as a means of ensuring loyalty and obedience while reinforcing their image as morally responsible people); VanderVelde & Subramanian, *supra* note 51, at 1108, 1115-16 (describing "Southern society's social purpose of cooptation where planters 'permitted' broom-jumping slave marriages as long as they were convenient to the master").

55. Ewing, *supra* note 40, at 201 ("The state would not protect a married slave's marital obligations, rather, the union was at the master's command.").

56. HERBERT G. GUTMAN, THE BLACK FAMILY IN SLAVERY AND FREEDOM 1750-1925, at 23 (1976); Hasday, *supra* note 47, at 1329-30 n.122 (reporting that in three southern states between 1864 and 1866 "slaveholders had terminated 32.4% of the 2,888 analyzed slave marriages" by the Freedmen's Bureau) (citing JOHN W. BLASSINGAME, THE SLAVE COMMUNITY: PLANTATION LIFE IN THE ANTEBELLUM SOUTH 175-77, 341, 361 tbl. 17 (2d ed. 1979)).

57. LITWACK, *supra* note 46, at 240; Franke, *Women Imagining Justice*, *supra* note 48, at 308. Marriage could, however, prove useful to an emancipated Black who wished to purchase the freedom of his spouse and/or children. In some instances, free Blacks were allowed to buy their family members in order to emancipate them. *See* Matthew Bennett, *Methods of Emancipation: Today's Children, Yesterday's Slaves*, 11 J. CONTEMP. LEGAL ISSUES 632, 635 (2000).

58. *See* Edwards, *supra* note 35, at 95 ("To keep freedpeople from threatening the civil society, they had to be brought into it. To be brought into it, they had to be married."); *see also* Franke, *Women Imagining Justice*, *supra* note 48, at 310 (arguing that the history of newly freed Blacks during the nincteenth century "teaches us that the granting or winning of rights cannot be the ultimate goal of any theory of justice because the conferral of rights merely inaugurates a new regulatory relationship with the State"). Indeed, records show that states enforced such authority aggressively. Along with the right to marry came a campaign of criminal enforcement of bigamy, adultery, and unlawful cohabitation laws. *Id.* at 309 (describing such records in North Carolina and Mississippi).

59. Richard H. Steckel, *Slave Marriage and the Family*, 5 J. FAM. HIST. 406, 407 (1980) (describing the insurmountable odds slave families faced).

60. Franke, *Women Imagining Justice*, *supra* note 48, at 309.

61. Dubler, *supra* note 48, at 1898.

model for normal familial relationships after decades during which Blacks had no choice but to develop alternative family and dependency structures.[62]

Despite the hardships brought by the newly gained right to marry at will, newly freed Blacks welcomed it[63] precisely because slave families had frequently been torn apart during slavery.[64] Additionally, newly emancipated Blacks wished to make their marriages right in the eyes of God and desired recognition of the validity of their marriages by the laws of free society, because they believed compliance with religious and legal requirements would prove their eligibility for the rights associated with citizenship and freedom.[65] Although Blacks were allowed to marry legally for the first time, this right was less part of recognizing Blacks as truly free citizens of the nation[66] than it was a means of regulating their behaviors because policymakers believed that they would drain states' economic resources without such regulation.[67] The prohibition against interracial marriages reveals this lack of true freedom through the right to marry.[68]

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62. *See* LITWACK, *supra* note 46, at 232-36; Dubler, *supra* note 48, at 1898.

63. *See* GUTMAN, *supra* note 56, at 415 (noting that of the slave marriages that likely took place in 1860 in seventeen North Carolina counties, at least 47% were registered in the spring and summer months of 1866); Edwards, *supra* note 35, at 85 (noting that "African-Americans saw marriage as an effective way to protect the institutional integrity of their families and buttress their claims to a range of public rights").

64. *See* LITWACK, *supra* note 46, at 246 (noting how "slavery had so often compromised" the black family by forced separation); Roberts, *supra* note 36, at 874 ("The forced separation of Black mothers from their children began during slavery, when Black family members faeed being auctioned off to different masters."); Paul Finkelman, *Thomas R.R. Cobb and the Law of Negro Slavery*, 5 ROGER WILLIAMS U. L. REV. 75, 106 (1999) (stating that at any moment, a slave marriage "could be destroyed by sale or the migration of the owner").

65. *See* PEGGY COOPER DAVIS, NEGLECTED STORIES: THE CONSTITUTION AND FAMILY VALUES 36 (1997) (quoting a chaplain of a Mississippi black regiment as stating the following about the legalization of forty-three black marriages: "I think I witness a very decided improvement in the social and domestic feelings of those married by the authority and protection of Law. It causes them to feel that they are beginning to be regarded and treated as human beings."); STERLING, *supra* note 53, at 318 (asserting that former slave couples legalized their marriages as a means of conforming to the rules of both free society and God).

66. *See* Dorothy E. Roberts, *Welfare and the Problem of Black Citizenship*, 105 YALE L.J. 1563, 1569-70 (1996) (reviewing LINDA GORDON, PITIED BUT NOT ENTITLED: SINGLE MOTHERS AND THE HISTORY OF WELFARE (1994)) (asserting that "[e]mancipation did not change the racial definition of citizenship" and that "[b]lacks' status now resembled that of colonial subjects rather than of independent and equal beings").

67. Katherine M. Franke, *Becoming a Citizen: Reconstruction Era Regulation of African American Marriages*, 11 YALE J.L. & HUMAN. 251, 302-03 (1999) (hereinafter *Becoming a Citizen*) (quoting the Freedmen's Bureau as proclaiming the following: "'The issue demanded immediate attention . . . so that freedpeople would not become a 'huge white elephant,' dependent upon the state or their former masters for support.'") (internal citation omitted).

68. The Supreme Court would not strike down anti-miscegenation statutes as unconstitutional until 1967, when it decided Loving v. Virginia, 388 U.S. 1 (1967). When the Supreme Court issued its opinion in *Loving*, sixteen states still had anti-miscegenation statutes on the books. Only eight states—Alaska, Connecticut, Hawaii, Minnesota, New Hampshire, New Jersey, Vermont, and Wisconsin—and

Powerful Whites permitted Blacks to marry only if the marriages did not disrupt social hierarchies; interracial marriage would challenge white supremacy by allowing Blacks and Whites to integrate in the most intimate of societal units, the family.[69]

Monoracial marriage was a key "civilizing" tool because, by establishing economic roles within black families, it shifted enormous financial responsibility from the government to individual, newly freed black men, who were charged with providing for their households' economic needs. When Blacks were finally freed, many former slaves, especially women and children, found themselves in the worst of conditions.[70] Henry Rowntree, a federal agency representative whose duties included dealing with the needs of indigent former slaves, described several freed women and children as follows:

> Five women all Mothers, and the residue of 29 children, all small and under 12 years of age. One of the Women had the small pox, her face a perfect mass of Scabs, her children were left uncared for except for what they incidentally [received]. Another woman was nursing a little boy about 7 whose earthly life was fast ebbing away, she could pay but little attention to the rest of her family. Another was scarcely able to crawl about. . . . They owned One Pan, and one Iron kettle amongst them, they had no tin cup, no crockery of any kind, no knives or forks, and certainly were the poorest off, of any I have met with being litterally [sic] and truthfully destitute in every sense of the word.[71]

In essence, the question looming over the heads of many white policymakers upon the emancipation of Blacks was exactly what to do with all these black women and children in need.[72]

Concerned that the inability of newly freed Blacks to support themselves would make large numbers of them become public charges, white policymakers and leaders stressed the notion that "[n]o really respectable

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one territory—Washington, D.C.—never enacted such statutes. *See* KENNEDY, *supra* note 52, at 219 n.*.

69. *See* RACHEL F. MORAN, INTERRACIAL INTIMACY: THE REGULATION OF RACE & ROMANCE 19 (2001) (asserting that interracial unions presented the following question: "If whites could share their emotional and economic fortunes with blacks, how could blacks be anything less than full persons?"); PAUL R. SPICKARD, MIXED BLOOD: INTERMARRIAGE AND ETHNIC IDENTITY IN TWENTIETH CENTURY AMERICA 244-45 (1989) (asserting that while Whites were firmly opposed to interracial sex, "[m]arriage, however, reflected an assumption that the two parties were social cquals [and] this the slave regime could not toleratc").

70. *See* Franke, *Taking Care*, *supra* note 35, at 1547 (describing the conditions of many freed Blacks as they fled from their owners to refugee camps monitored by northern troops).

71. *Id.* at 1547 (quoting Letter from Henry Rowntree to Contraband Relief Commission, Jefferson Davis Mansion (Apr. 13, 1864) (RG 105, Entry 2150, at 10-11, National Archives)).

72. *See id.* at 1547-48.

person wishes to be supported by others."[73] It was now time for former slaves, upon whose labor the economic foundation of the South had been built,[74] to support themselves. As one southern general stated to black soldiers, "You must now work. . . . You have families to support; your wives will need clothes. . . . Freedom confers new obligations."[75] Furthermore, as General Clinton B. Fisk, head of the Freedmen's Bureau in Tennessee, specifically declared to freed black men,

> Husbands must provide for their families. Your wives will not love you if you do not provide bread and clothes for them. They cannot be happy and greet you with a kiss, when you come home, if they are hungry, ragged, and cold. By industry and economy you can soon provide a real good home, and plenty of food and clothing for your family; and you should not rest until this is done.[76]

Marriage among newly freed Blacks was necessary to minimize states' economic responsibility for them, especially for black children born during slavery. Because of the inability of Blacks to marry during the antebellum period, the children of black slave couples were technically illegitimate and thus the government's responsibility.[77] To ensure that the government would not become economically responsible for illegitimate children born during slavery or for these children's mothers, legislators sought to ensure that the fate of such women and children would rest exclusively with freed black men, regardless of economic realities.[78] To do so, many southern states declared in their Black Codes[79] that former slaves

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73. *Id.* at 1548 (quoting Office of Assistant Commissioner, Bureau of Refugees, Freedmen and Abandoned Lands, Circular No. 4, Vicksburg, Miss. (July 29, 1865) (RG 826, Roll 28, frame 259, National Archives)); Edwards, *supra* note 35, at 93 (quoting a Confederate army officer as proclaiming to freedpeople: "'The loose ideas which have prevailed among you on this subject must cease. You will have to support and take care of your families'. . . . because it [is] no longer the duty of white masters to do so.").

74. *See* ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION 1863-1877, at 102-03 (1988) (hereinafter RECONSTRUCTION). One free black man noted the irony in the rhetoric regarding Blacks' need to support themselves, stating: "They say we will not work. He who makes that assertion asserts an untruth. We have been working all our lives, not only supporting ourselves, but we have supported our masters, many of them in idleness." *Id.* at 103.

75. GUTMAN, *supra* note 56, at 381 (quoting the southern general).

76. STERLING, *supra* note 53, at 319-20.

77. *See* Harris, *supra* note 50, at 332 ("Moreover, as Black children were the product of unions that were not legal marriages, they were legally fatherless.").

78. *See* Edwards, *supra* note 35, at 91-92.

79. Determined to keep Blacks in their place, many southern states passed Black Codes, which placed extensive legal restrictions on newly freed Blacks. For example, the Codes prohibited Blacks from voting or holding office, serving on juries, and marrying Whites, among other things. PETER WALLENSTEIN, BLUE LAWS AND BLACK CODES: CONFLICTS, COURTS, AND CHANGE IN TWENTIETH-CENTURY VIRGINIA 4-5 (2004) (discussing such codes in the state of Virginia). They also outlined the rights of Blacks, such as the right to sue and be sued and the right to testify in cases involving other Blacks. *See generally* ERIC FONER, NOTHING BUT FREEDOM: EMANCIPATION AND ITS LEGACY 49 (1983) (hereinafter NOTHING BUT FREEDOM).

who lived together as couples during slavery were considered to be legally married from the beginning of their cohabitation.[80] For example, the Mississippi Black Code declared that "all freedmen, free negroes and mulattoes, who do now and have heretofore lived and cohabited together as husband and wife shall be taken and held in law as legally married, and the issue shall be taken and held as legitimate for all purposes."[81] If a former slave man and woman were deemed legally married while they were slaves, then their children were not illegitimate. Thus, rather than becoming liabilities of the state, these children became the responsibility of their now legally married parents, who were required by law to support them financially.[82]

The financial motives behind granting freed Blacks the right to marry were most apparent in the government's policies for newly freed men who were reunited with multiple spouses with multiple children. In these instances, government agents often selected one family for these men, basing their decisions on the number of dependents in each potential nuclear family unit. As one Freedmen's Bureau agent remarked about his own selection process, "Whenever a negro appears before me with two or three wives who have equal claim upon him . . . I marry him to the woman who has the greatest number of helpless children who otherwise would become a charge on the Bureau."[83] The government's motive of minimizing states' responsibility for freed slaves was also reflected in decisions to allow newly freed black women with children fathered by their former slavemaster to name a black man as the father in charge of supporting their children.[84]

In sum, the government used marriage to financially and socially domesticate newly freed Blacks to ensure that the white public faced minimal responsibility for former slaves' economic security.[85] Marriage was viewed

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80. LITWACK, *supra* note 46, at 241; Edwards, *supra* note 35, at 91; *see also* Franke, *Women Imagining Justice*, *supra* note 48, at 309 (noting that the retroactive legal recognition of enslaved people's marriages relieved them of the prohibitively expensive, five-dollar payment for a marriage license).

81. LAWS OF THE STATE OF MISSISSIPPI, PASSED AT A REGULAR SESSION OF THE MISSISSIPPI LEGISLATURE, HELD IN THE CITY OF JACKSON, OCTOBER, NOVEMBER, AND DECEMBER, 1865, at 82-93 (1866).

82. *E.g.*, Franke, *Becoming a Citizen*, *supra* note 67, at 303 (noting that "married African American men in South Carolina were forced by the state to support their families, and if they failed to do so, were subject to a judge forcibly binding them to work for renewable year terms—usually in the service of former slave owners").

83. LITWACK, *supra* note 46, at 242; GUTMAN, *supra* note 56, at 420.

84. *See* LITWACK, *supra* note 46, at 233-34.

85. *See* Franke, *Women Imagining Justice*, *supra* note 48, at 309-10. Interestingly, in cases where the "husband" of a newly freed woman was killed during the Civil War, the widow and her children were allowed to receive a pension for the soldier without proof of marriage if they submitted proof that they "'had habitually recognizcd each other as man and wife, and lived together as such.'" Franke, *Becoming a Citizen*, *supra* note 67, at 268 (citing Act of June 8, 1866, ch. 106, § 14, 14 Stat. 56 (1866)).

as a vehicle through which the government could promote industriousness among Blacks, gradually eliminating Blacks' dependence on any form of public assistance. As one northern correspondent wrote, "Marital relations are invaluable as a means of promoting industry. Morality encourages industry and prosperity. Immorality in the sexual relations produces idleness, intemperance, and apathy."[86] In essence, enforcing marriage laws privatized the dependency of newly freed Blacks.[87] Marriage allowed states to deflect their responsibility for supporting newly-emancipated Blacks to impoverished black men, who were forced to assume the financial caretaking role of their former slave owners in their private homes even though they had no resources or access to political and economic power.

By forcing newly freed black families to fit within the economic structure of the husband-wife dyad—with males as the primary breadwinners for their wives and children[88]—white policymakers gave freed black men the financial burdens traditionally held by heads of white slaveowning households, and thus eliminated public responsibility for newly freed black women and children.[89] In the end, marriage for Blacks signified domestic obligations with very few corresponding social and political rights and no acknowledgment by the government of how treatment of Blacks and black families during slavery made it difficult for newly freed Blacks to model their households in this manner.[90]

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86. LITWACK, *supra* note 46, at 241.

87. Franke, *Women Imagining Justice*, *supra* note 48, at 309-10; Franke, *Taking Care*, *supra* note 35, at 1549.

88. *See generally* Margaret F. Brinig & June Carbone, *The Reliance Interest in Marriage and Divorce*, 62 TULANE L. REV. 855, 870-72 (1988).

89. *See* Edwards, *supra* note 35, at 84 ("Freed from their dependent position as slaves, African-American men could, theoretically, take on the role of household head with all its private and public privileges."); Franke, *Taking Care*, *supra* note 35, at 1549 (describing the "move to shore up the black family" was intended to "insulate the public from responsibility for black poverty").

90. *See* Edwards, *supra* note 35, at 85 (asserting that "[c]onservative white lawmakers saw marriage as a way to consolidate state power over freed-people and compel them to fulfill domestic obligations"). *But see* GUTMAN, *supra* note 56, at 3-44 (describing how many slave families involved long marriages and double-headed households). For example, although black men were deemed the heads of their households, they had few such corresponding rights to their own children and could not protect their children from apprenticeship laws, which often bound black children to labor for white men without their parents' consent. FONER, RECONSTRUCTION, *supra* note 74, at 201 (noting that "the most bitter complaints [from Blacks] centered on apprenticeship laws, which seized upon the consequences of slavery—the separation of families and the freedmen's poverty—as an excuse for providing planters with the unpaid labor of black minors" and "allowed judges to bind to white employers black orphans and those whose parents were deemed unable to support them"); FONER, NOTHING BUT FREEDOM, *supra* note 79, at 50 (same). As one scholar noted, marriage did nothing more than obligate black men "to support their dependents when it was inconvenient and unprofitable for white planters to do so." Edwards, *supra* note 35, at 98; *see also* Franke, *Taking Care*, *supra* note 35, at 1550-51 (describing disputes that often arose as a result of black children being stripped from their families, many times without notice, for apprenticeships). To white lawmakers, marriage meant the possible prevention of an overwhelming number of freedpeople who could become public charges. *See* Edwards, *supra* note 35, at 94 ("Indigent women and children became wards of the state in the absence of marriage, but they became the legal responsibility of individual household heads in its presence.").

Indeed, the control exerted by states over families of newly freed Blacks was so powerful that even the "colonized" defended the civilizing tool of marriage.[91] For example, a number of freed Blacks, many of whom desperately wanted to obtain the rights and freedoms of Whites, facilitated enforcement of marriage laws, and in a sense contributed to their own subjugation by revealing to authorities the identities of other newly freed Blacks who violated societal marital norms by having more than one partner.[92] Likewise, many black newspapers and preachers during this period encouraged newly freed Blacks to marry as a means of demonstrating to Whites that Blacks truly deserved their freedom.[93] For example, one black preacher proclaimed to his congregation:

> Look at de white folks. D'ye eber see a *white* man want to marry a woman when he had a lawful wife a libing? Neber! I neber heared ob sech a thing in all my life. A white man is 'structed; he knows dat's agin de law and de gospil.[94]

The desire to prove themselves worthy of membership in society as truly free citizens by conforming to white marriage laws and customs had both negative and positive effects on the black community. On one hand, promoting marriage within the black community strengthened and solidified black families by stabilizing black households, especially those that had been torn apart during slavery.[95] On the other hand, as historian Eric Foner has explained, "it [also] strengthened patriarchy within the black family and institutionalized the notion that men and women should inhabit separate spheres."[96] For example, some black male church and political leaders emphasized to black women their duty to subordinate themselves to their husbands and to create a comfortable space at home for their men.[97] Others denounced the resistance by some black women, who—unlike most white women—had to work outside the home to support their families,[98] to laws

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Marriage was also used as a tool for eontrolling what Whites believed was the sexual immorality of Blacks. Franke, *Becoming a Citizen*, *supra* note 67, at 280 ("The prevailing belief that marriage civilized and controlled the brutish nature of all people encouraged the use of formal matrimony as a remedy for the widespread immorality and promiscuity that whites believed to prevail among blacks.") (quoting MICHAEL GROSSBERG, GOVERNING THE HEARTH: LAW AND THE FAMILY IN NINETEENTH-CENTURY AMERICA 133 (1985)).

91. *See* Franke, *Becoming a Citizen*, *supra* note 67, at 281-92.

92. *See id.*

93. *Id.* at 290-92; *see also* LITWACK, *supra* note 46, at 244 (describing Blacks' eagerness "to assume the 'graces of civilized life'").

94. LITWACK, *supra* note 46, at 243-44.

95. *See* FONER, RECONSTRUCTION, *supra* note 74, at 84-85.

96. *Id.* at 87.

97. *See id.* (quoting Thomas Bayne as stating, "It is a woman's right to raise and bear children, and to train them for their future duties in life"); LITWACK, *supra* note 46, at 245 (quoting a contemporary observer who noted "the frequency with which blaek leaders urged black men to 'get the women in to their proper place'").

98. LITWACK, *supra* note 46, at 246 (noting that few black women "had the means to become 'ladies' of leisure").

requiring their husbands to sign labor contracts for them and receive payment for their work.[99] Such views were supported by authoritative government entities, which had designated newly freed black husbands as the heads of their households, thus endorsing the view that black men should play the role of primary provider and black women the role of dependent homemaker.[100] Remarkably, though perhaps not surprisingly given the pervasive influence of states' marriage regimes on newly freed Blacks, it seems that even the "colonized" themselves implemented the tool of marriage to "civilize" each other, not only by turning each other in but also by actively encouraging all Blacks to abide by white society's standards for appropriate roles of husbands and wives.

II
THE MODERN "MARRIAGE CURE" FOR POVERTY

As noted in Part I, post-bellum policymakers readily concluded that marriage would prevent slaves from being "undomesticated" and economically dependent on the government.[101] In the same way that marriage was used during the post-bellum period to "civilize" and control newly freed Blacks, it is often proposed today as a solution to the welfare crisis—specifically, the public problem of poor households headed by single mothers who are consistently blamed for widespread social problems such as drug use, illiteracy, and crime.[102] Although race is rarely ever explicitly mentioned in debates on welfare reform, its influence on people's perceptions of the welfare system is overpowering.[103] For much of the public, discussions of welfare reform invoke the image of a single black or Latina woman with several children,[104] and proposed solutions to social problems

99. FONER, RECONSTRUCTION, *supra* note 74, at 88.

100. *See* FONER, RECONSTRUCTION, *supra* note 74, at 85-88.

101. *See* Edwards, *supra* note 35, at 93 ("If marriage would not completely resolve these problems, it [was certainly a] way to contain them.").

102. *See generally* Parvin R. Huda, *Singled Out: A Critique of the Representation of Single Motherhood in Welfare Discourse*, 7 WM. & MARY J. WOMEN & L. 341, 349 (2001) ("If single motherhood in both white and black communities has been lamented as the cause for poverty, marriage historically has been proclaimed the cure."); Susan L. Thomas, *Race, Gender, and Welfare Reform: The Antinatalist Response*, 28 J. BLACK STUDS. 419, 419-20 (1998) (describing how the children of unmarried women are portrayed as troubled by their and their mothers' very status); Linda C. McClain, *"Irresponsible" Reproduction*, 47 HASTINGS L.J. 339, 355-56 (1996) (noting that many scholars, such as Charles Murray, assume that "marriage is the best anti-poverty program").

103. *E.g.*, Lisa A. Crooms, *Don't Believe the Hype: Black Women, Patriarchy, and the New Welfarism*, 38 How. L.J. 611, 613 (1995) ("Although the rhetoric is facially neutral, the conduct it seeks to modify is associated with poor black women in impoverished, ghetto communities.").

104. *See, e.g.*, FINEMAN, *supra* note 32, at 107 ("[I]n the public's mind, and despite overwhelming evidence to the contrary, the face of poverty has increasingly become that of a single mother, particularly the African-American single mother."); Kevin R. Johnson, *Public Benefits and Immigration: The Intersection of Immigration Status, Ethncity, Gender, and Class*, 42 UCLA L. REV. 1509, 1542-44 (1995) (asserting that there is an assumption that many welfare recipients are Mexican immigrant mothers); Roberts, *supra* note 36, at 873 ("When welfare reformers devise remedies for

share a common underlying message—that laws must be adopted to "civilize" these welfare mothers with uncontrollably large families.[105]

This Part analyzes the ways in which PRWORA and H.R. 240, which includes the Bush marriage initiative, like marriage laws during the post-bellum period, blindly promote marriage as a means of eliminating state financial responsibility for poor women and children—in particular black welfare mothers and their children—and of controlling problems such as drugs and crime that policymakers assume are caused by poor, single black mothers.

Part II.A demonstrates how discussions of the welfare system and welfare reform have been racialized, and how this has spawned public resistance to providing welfare assistance due to pervasive racism in the United States. Racist assumptions have turned public opinion and policy against providing the American poor with welfare benefits as the image of its primary beneficiaries changed from deserving, chaste white widows to lazy, never-married black baby-makers.[106] As welfare recipients became racialized as black, standard rhetoric changed to implicitly blame unwed welfare mothers for the impoverished conditions in which they and their families live and, consequently, for societal problems that often stem from poverty.[107] Indeed, Charles Murray, author and Bradley Fellow at the American Enterprise Institute, once declared, "[I]llegitimacy is the single most important social problem of our time—more important than crime, drugs, poverty, illiteracy, welfare, or homelessness, *because it drives everything else.*"[108] In essence, as Part II.A will show, the darker the welfare mother becomes, the more proponents of welfare reform argue that welfare mothers are poor as a result of their own moral failures,

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maternal irresponsibility, they have Black single mothers in mind."); Thomas, *supra* note 102, at 429-30 (stating that the use of racial code words and stereotypes invokes an image of welfare recipients as promiscuous black women).

105. *See* Koons, *supra* note 10, at 24 ("From the perspective of the right wing, poverty is created by individual moral failure. Forcing women back into the marital fold is advanced as the means to end the economic misery of low-income women and to reestablish the social order."); Roberts, *supra* note 36, at 873 ("The image of the lazy Black welfare queen who breeds children to fatten her allowance shapes public attitudes about welfare policy."). Historically, law has played an important role in establishing colonial control over oppressed peoples. *See* Merry, *supra* note 38, at 890-91 ("Colonial governments often promulgated regulations concerning land and labor, regulations that frequently extended to specifying conditions of marriage and divorce and patterns of dancing, drinking, and entertainment. . . . The role law played in the colonizing process is an instance of its capacity to reshape culture and consciousness.").

106. *See* Lisa A. Crooms, *The Mythical, Magical "Underclass": Constructing Poverty in Race and Gender, Making the Public Private and the Private Public*, 5 J. GENDER RACE & JUST. 87, 89-90 (2001) (arguing that "the underclass" is raced as black).

107. *See* FINEMAN, *supra* note 32, at 106 ("One characteristic typical of a group of welfare recipients—being unmarried—has been identified and charcterized by a wide variety of commentators as constituting the cause as well as the effects of poverty.").

108. *Id.* at 114 (quoting Charles Murray, *The Coming White Underclass*, WALL STREET J., Sept. 29, 1993, at A14) (emphasis added).

specifically their failure to attach themselves to the fathers of their children through marriage, and thus do not deserve public aid.

Part II.B examines the marriage promotion provisions of PRWORA and H.R. 240 within a post-bellum context, and shows that a primary goal of such provisions is to rein in "uncivilized" black welfare mothers and correct the broad range of problems that policymakers argue spring from their deviant choice to remain single and place an unwarranted economic and social strain on the general public.[109] In other words, the proposed solution for the welfare crisis, or rather for welfare mothers' dependency on the government, has increasingly become the private remedy of marriage, which reformers insist is needed to help contain the burdens that stem from the deviant behavior of single black mothers; this argument is strikingly similar to post-bellum policymakers' misguided argument that marriage was the key to instilling industriousness among former slaves.[110]

A. The Rise of the Black Welfare Queen

1. The Racialization of the Welfare System

Public benefits for needy women with children began in the 1920s with programs such as the Mothers' Pensions and Widows' Pensions Programs.[111] Under these programs, the government provided monetary aid only to women and children in "worthy" or "suitable" homes[112] which, for many years, primarily belonged to white women—white widows in particular.[113] Indeed, these programs' pension recipients were 96% white and only 3% black.[114]

In 1935, President Franklin Delano Roosevelt laid the groundwork for the modern welfare state when he signed the Social Security Act.[115] One small part of this large public assistance structure was Aid to Dependent

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109. *See* Robert E. Rector & Melissa G. Pardue, *Understanding the President's Healthy Marriage Initiative*, HERITAGE FOUNDATION BACKGROUNDER, Mar. 26, 2004, at 1, *available at* http://www.heritage.org/Research/Family/bg1741.cfm ("The erosion of marriage throughout the last four decades . . . lies at the heart of many of the social problems with which government currently grapples.").

110. *See supra* notes 86-87 and accompanying text.

111. *See* DOROTHY C. MILLER, WOMEN AND SOCIAL WELFARE: A FEMINIST ANALYSIS 30-35 (1990); Tonya Brito, *From Madonna To Proletariat: Constructing A New Ideology Of Motherhood In Welfare Discourse*, 44 VILL. L. REV. 415, 417-18 (1999). By 1934, every state but South Carolina and Georgia had a mothers' pension program. STEVEN M. TELES, WHOSE WELFARE? AFDC AND ELITE POLITICS 26 (1996).

112. TELES, *supra* note 111, at 30-31; MILLER, *supra* note 111, at 31; Brito, *supra* note 111, at 420.

113. Brito, *supra* note 111, at 421; Roberts, *supra* note 66, at 1569-70.

114. Naomi Cahn, *Representing Race Outside Of Explicitly Racialized Contexts*, 95 MICH. L. REV. 965, 971-72 (1997); Roberts, *supra* note 66, at 1570.

115. Brito, *supra* note 111, at 421; *see also* Gwendolyn Mink, *Welfare Reform in Historical Perspective*, 26 CONN. L. REV. 879, 879-80 (1994) (describing the inception of the Aid to Dependent Children program).

Children (ADC), which later became Aid to Families with Dependent Children (AFDC) and is known today as Temporary Assistance for Needy Families (TANF).[116] Progressive groups had lobbied for the adoption of ADC to relieve mothers from working outside the home so that they could properly supervise and raise their children.[117] Much like the state pension programs, the American public accepted this early program as a necessary component of its campaign against poverty largely because of the "deservingness" of its primary beneficiaries—again, pitiable white widows who needed help to properly perform their motherly duties.[118]

Two major changes over the next few years triggered the slow erosion of public approval of what became AFDC.[119] The first was the creation of Survivor's Insurance (or Old Age Insurance) in 1939, which caused a decrease in the number of white widows supported by AFDC funds.[120] The second was the increase in the number of black women who received benefits from AFDC.[121]

In 1939, Congress created the Survivor's Insurance Program to provide benefits to the wives and children of deceased and retired workers who qualified for retirement benefits.[122] Almost immediately upon implementation of the Program, 43% of the 254,000 AFDC families were

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116. *See* Risa E. Kaufman, Note, *The Cultural Meaning of the "Welfare Queen": Using State Constitutions to Challenge Child Exclusion Provisions*, 23 N.Y.U. REV. L. & SOC. CHANGE 301, 305 (1997); *see also* TELES, *supra* note 111, at 31 (describing the foundation of ADC). Unlike AFDC, which was means-tested, Social Security benefits are based on past earnings and are provided as a pension to retired workers. Although work-based when created, Social Security was structured such that it would exclude most black workers. "To accommodate Southern politicians' desire to hold on to the low-wage, black labor force in the South, Social Security excluded agricultural laborers and domestic servants." Brito, *supra* note 111, at 422.

117. *See* Roberts, *supra* note 66, at 1567; Burns v. Alcala, 420 U.S. 575, 582 (1975) (citing President Roosevelt's message to Congress recommending the legislation, H.R. Doc No. 81, 74th Cong., 1st Sess. 29-30 (1935)) ("The AFDC program was originally conceived to substitute for the practice of removing needy children from their homes and placing them in institutions, and to free widowed and divorced mothers from the necessity of working, so that they could remain home to supervise their children.").

118. *See* Linda Gordon, *Who Deserves Help? Who Must Provide?*, *in* LOST GROUND: WELFARE REFORM, POVERTY, AND BEYOND 9, 16 (Randy Albeda et al. eds., 2002); Thomas, *supra* note 102, at 422. At the Conference on the Care of Dependent Children in 1909, President Theodore Roosevelt proclaimed:

> We then meet the case—one of the most distressing of cases—where the father has died, where the breadwinner has gone, where the mother would like to keep the child, but simply lacks the earning capacity. Surely in such a case the goal toward which we should strive is to help that mother, so that she can keep her own home and keep the child in it; that is the best thing possible to be done for that child.

TELES, *supra* note 111, at 27.

119. To avoid confusion, I refer to the pre-1996 TANF program as AFDC throughout the remainder of the section, even at times when the program was called ADC.

120. Kaufman, *supra* note 116, at 306-07.

121. Brito, *supra* note 111, at 422-24

122. TELES, *supra* note 111, at 35.

transferred to Survivor's Insurance.[123] Such transfers dramatically reduced the percentage of widows in the welfare program from 43% in 1937 to 7.7% in 1961.[124] By 1971, only 4.3% of AFDC recipients were widows.[125] Thus, while the transfers were intended to provide AFDC recipients with more assistance from the federal government, they ultimately harmed the remaining recipients: without the public image of the impoverished and needy white widow, AFDC began to lose public sympathy and popular support.[126] As one scholar explained, "With 'the best' single mothers tracked separately into the social security system, ADC became a program for the widows of uninsured men and for morally suspect mothers who were single because they were divorced or never married."[127]

In addition to the creation of Survivor's Insurance, an increase in the number of black women AFDC recipients also changed public attitudes towards the program. At the inception of AFDC, people viewed the white, chaste widow, whose husband had been a hard-working member of society, as the primary beneficiary of the program.[128] They believed that that these women's children needed their mothers at home in order to raise them to become law-abiding citizens who contribute to society.[129] Black women,

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123. MILLER, *supra* note 111, at 32.

124. Mink, *supra* note 115, at 880.

125. Lucy A. Williams, *The Ideology of Division: Behavior Modification Welfare Reform Proposals*, 102 YALE L.J. 719, 725 (1992).

126. TELES, *supra* note 111, at 35-36; *see also* STUART M. BUTLER & ANNA KONDRATAS, OUT OF THE POVERTY TRAP: A CONSERVATIVE STRATEGY FOR WELFARE REFORM 138-39 (1987). Butler and Kondratas' rhetoric demonstrates this shift in support:

> The typical AFDC parent today is not the 'worthy widow' envisaged in the original legislation but a divorced, deserted, or never-married woman. Regardless of extenuating circumstances behind any particular out-of-wedlock birth or the justification for any particular divorce, the fact remains that illegitimacy and divorce have an element of personal choice and responsibility that widowhood does not. . . . Regardless of how difficult it is for individuals to pay for making irresponsible or unfortunate choices, that does not absolve those individuals of dealing with the consequences as best they can, before society is asked to step in to support them and their children. . . . Social assistance has always been based on social norms and expectations. One of the assumptions underlying AFDC was the idea that a mother has an important role to play in the upbringing and socialization of her children. It was the humane intention of the program in 1935 to enable a mother to take care of her children—in other words, to encourage what was left of a family to stay together. It was, in today's parlance, a 'pro-family' measure. But now the program finances a subculture whose citizens argue . . . that they want children but not marriage, because 'you don't want the commitments' and 'male figures are not substantially important in the family.'

127. Mink, *supra* note 115, at 880.

128. Lucy A. Williams, *Race, Rat Bites and Unfit Others: How Media Discourse Informs Welfare Legislation Debate*, 22 FORDHAM URB. L.J. 1159, 1175-76 (1995); Thomas, *supra* note 102, at 422.

129. Williams, *supra* note 128, at 1175-76; *see also* THEDA SKOCPOL, PROTECTING SOLDIERS AND MOTHERS: THE POLITICAL ORIGINS OF SOCIAL POLICY IN THE UNITED STATES 424-79 (1992) (describing how women's organizations were able to attain mothers' pensions on the ground that widowed mothers needed such benefits to continue their caretaking roles without joining the workforce).

however, benefited from no such assumptions.[130] Instead, black mothers were often viewed as "inherently unfit and their children as inherently useless."[131] In AFDC's early days, state and local administrators frequently prevented black women from receiving deserved benefits by abusing their discretionary authority to determine the "deservingness" of potential recipients.[132] Unlike white women, black women were usually considered to be of undeserving character.[133] Indeed, in 1937, white women accounted for 85% of the AFDC rolls while black women, many more of whom were poor, accounted for a mere 13%.[134] Even black women deemed morally fit to receive AFDC benefits often received smaller cash benefits than their white counterparts because of the "belief . . . that 'blacks needed less to live on than whites.'"[135]

With time, more black women gained access to welfare.[136] By 1961, the number of black children on welfare had increased dramatically due to a number of reasons; primary among these reasons was black migration to the North, where welfare was less likely to be distributed in a discriminatory fashion.[137] In fact, black women grew from 31% to 48% of the welfare caseload between 1950 and 1961.[138] By 1967, the number of black and white children on AFDC rolls was nearly the same,[139] and the number of

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130. *See* Adrien Katherine Wing & Laura Weselmann, *Transcending Traditional Notions of Mothering: The Need for Critical Race Feminist Praxis*, 3 J. GENDER RACE & JUST. 257, 274 (1999) ("The law's preference for stay-at-home mothers never applied to Black mothers.").

131. Roberts, *supra* note 36, at 873; *see also* Kaufman, *supra* note 116, at 312-13 (analyzing child exclusion laws and how they stigmatize what is "pereeived to be a largely black population of welfare mothers").

132. *See* Roberts, *supra* note 66, at 1570-71. Minority women were excluded for a variety of reasons, one of them being southern states' discretion to deny ADC. *See* Catherine R. Albiston & Laura Beth Nielsen, *Welfare Queens and Other Fairy Tales: Welfare Reform and Unconstitutional Reproductive Controls*, 38 How. L.J. 473, 479 (1995).

133. Williams, *supra* note 128, at 1176 n.87 ("States were given wide discretion to determine who was able to work outside the home, and was therefore ineligible for AFDC. States also exercised their given diseretion to exclude children living in 'unsuitable homes,' i.e., those in whieh the mother was deemed 'immoral.'").

134. TELES, *supra* note 111, at 24; Martin Gilens, *How the Poor Became Black: The Racialization of American Poverty in the Mass Media*, *in* RACE AND THE POLITICS OF WELFARE REFORM 101, 104 (Schram et al. eds., 2003).

135. Brito, *supra* note 111, at 423 (quoting LINDA GORDON, PITIED BUT NOT ENTITLED: SINGLE MOTHERS AND THE HISTORY OF WELFARE 276 (1994)).

136. *See* Roberts, *supra* note 66, at 1571-72 (describing the work of NOW in helping to increase access to welfare benefits).

137. TELES, *supra* note 111, at 24-26. As Teles detailed,

> [b]etween 1940 and 1960, the black population of the South increased from 9.9 million to 11.3 million, while the black population in the Northeast went from 1.1 million to 3 million, in the North Central from 1.4 million to 3.4 million, and in the West from 171,000 to slightly over a million."

Id.

138. Thomas, *supra* note 102, at 423 (citing MIMI ABRAMOVITZ, REGULATING THE LIVES OF WOMEN: SOCIAL WELFARE POLICY FROM COLONIAL TIMES TO THE PRESENT 321 (1988)).

139. *See* Brito, *supra* note 111, at 424 (stating that by 1967 the welfare population was 46% non-white).

Latinas receiving AFDC had also increased dramatically.[140] By the late 1960s, a string of cases had made welfare a statutory right in the United States, which enabled the number of black women on welfare rolls to continue to increase.[141] Furthermore, the rolls themselves began to grow, expanding from 3.5 million in 1961 to 11 million in 1971.[142]

As the AFDC program grew in size and began to include an increasing proportion of black women, public attitudes regarding dependent welfare mothers began to change for the worse. As the welfare recipient became racialized in people's minds as black, welfare was more frequently pointed to as the source of emerging societal problems, such as crime and illiteracy.[143]

Portrayals of the welfare mother depicted her as poor because of an unwillingness to work—an image partially fed by the stereotype that Blacks are generally lazy.[144] Moreover, the stereotype of the black matriarch played into notions that the independence of black women denied them "the status of legitimate womanhood" and caused their poverty.[145] In other words, policymakers blamed the deviance of poor black women who failed to marry for their unenviable situation. Unlike the initial recipients of women's pensions programs—white widows who needed to be saved by public benevolence—black welfare mothers were endangering the integrity of the system, and the public needed to be rescued from their greediness. According to critics, black welfare mothers were poor not solely because of their laziness, but because of their failure to establish links with husbands who could support them and their children.[146] Thus,

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140. *See* Berta Esperanza Hernández-Truyol, *Las Olvidadas—Gendered in Justice/Gendered Injustice: Latinas, Fronteras and the Law*, 1 J. GENDER RACE & JUST. 353, 359 n.22 (1998) (citing NATIONAL COUNCIL OF LA RAZA, UNTAPPED POTENTIAL: A LOOK AT HISPANIC WOMEN IN THE U.S. 31 (1996)) (noting "that 12.3% of all Latinas/os receive AFDC [and] that 17.4% of all AFDC recipients are Latina/o").

141. *See* King v. Smith, 392 U.S. 309, 328-34 (1968); Goldberg v. Kelley, 397 U.S. 254, 262 (1970); Shapiro v. Thompson, 394 U.S. 618, 627 n.6 (1969); *see also* Brito, *supra* note 111, at 424. There are a number of reasons that can explain why such a dramatic change was able to occur. First, differential changes in poverty and illegitimacy rates played a part in this shift. *See* TELES, *supra* note 111, at 25-26. Second, the increasing number of white women entering the work market may have contributed to the shift. As white women entered the working market, they gradually changed the perceived image of women as caretakers to career women. Additionally, "[t]hroughout the late 1960s to 1970s, black women made a series of demands on the state for easier eligibility for AFDC." TERESA L. AMOTT, *Black Women and AFDC: Making Entitlement Out of Necessity*, *in* WOMEN, THE STATE, AND WELFARE 288 (Linda Gordon ed., 1990); *see also* TELES, *supra* note 111, at 25-26.

142. Brito, *supra* note 111, at 424

143. *See, e.g.*, Thomas, *supra* note 102, at 423-24 (discussing the problem of welfare dependency as the driving force behind increased forced sterilization proposals in the state legislature).

144. *See* Mink, *supra* note 115, at 882 (noting widespread resentment of what is perceived as black "female loaferism"); Angela Harris, *Foreword: The Unbearable Lightness of Identity*, 2 AFR.-AM. L. & POL'Y. REP. 207, 213 (1995).

145. Albiston & Nielsen, *supra* note 132, at 485-86.

146. *See* Holloway Sparks, *Queens, Teens, and Model Mothers: Race, Gender, and the Discourse of Welfare Reform*, *in* RACE AND THE POLITICS OF WELFARE REFORM, *supra* note 134, at 171, 179

black welfare mothers had brought their condition upon themselves and were undeserving of public aid.[147]

2. *The Racial Politics of Black Motherhood and Welfare*

Politicians reiterated and reinforced race-based stereotypes of black women, which played a critical role in shaping negative public perceptions of welfare mothers generally, who were perceived to be predominantly black.[148] Mississippi State Representative David Glass, who proposed a bill in 1958 that would have mandated sterilization for unwed mothers, helped to perpetuate images of immoral, unmarried black women who were having multiple illegitimate babies who would become burdens on the state.[149] Representative Glass made his intentions with respect to black women clear, stating, "The Negro woman, . . . because of child welfare assistance, [is] making it a business, in some cases of giving birth to illegitimate children. . . . The purpose of my bill was to try and stop, or slow down, such traffic at its source."[150] Specifically, Glass's proposed bill would have given chancery courts the authority to institute proceedings to achieve temporary or permanent sterilization of any unmarried female who gave birth to a subsequent illegitimate child.[151] Under this scheme, unmarried mothers would have had only two means of avoiding sterilization, one of which was to prove that she was married and living with her husband.[152]

Similarly, Senator Daniel Patrick Moynihan's 1965 governmental report reinforced race-based stereotypes in its examination of the negative influence of illegitimacy and the lack of marriage on the black family.[153] The report linked poverty in the black community to the absence of fathers

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("Commentators criticized not only the number of children welfare recipients (supposedly) had, but the fact that they had children by multiple men and were rarely married to them. Poor unmarried mothers were also censured for the fact that children who grew up in households without fathers seemed more likely to be suspended from school, have emotional problems, and display antisocial behavior").

147. *Id.* at 178-80 (describing how black women were seapegoated in welfare debates); Roberts, *supra* note 36, at 873 ("Part of the reason that maternalist rhetoric can no longer justify public financial support is that the public views this support as benefiting primarily Black mothers. Society particularly devalues Black mothers' work in the home because it sees these mothers as inherently unfit. . . ."); Williams, *supra* note 128, at 1163-71 (noting how welfare mothers are portrayed as black, unproductive, and lacking in mainstream American values).

148. *See* Thomas, *supra* note 102, at 424 (discussing state legislative proposals of forced sterilization as an effort to reduce the welfare rolls).

149. *See id.* at 424-25.

150. *Id.*

151. *See* Julius Paul, *The Return of Punitive Sterilization Proposals: Current Attacks on Illegitimacy and the AFDC Program*, 3 L. & SOC. REV. 77, 88 (1968).

152. *Id.* The other means was to pay a $3,000 bond, with the condition that she would "cease and desist from such immorality and [would] amply support and maintain any illegitimate heretofore born to her and give them the benefit of a common school education." *Id.*

153. *See* JILL QUADAGNO, THE COLOR OF WELFARE: HOW RACISM UNDERMINED THE WAR ON POVERTY 124 (1994) (citing DANIEL PATRICK MOYNIHAN, U.S. DEP'T OF LABOR: OFFICE OF PLANNING AND RESEARCH, THE NEGRO FAMILY: THE CASE FOR NATIONAL ACTION 12-13 (1965)).

from families, as well as the dominance of the black matriarch.[154] Moynihan argued that the black family was deteriorating because of the absence of black fathers, whose inability to financially support their families allegedly caused them to abandon their families altogether.[155] Moynihan contended that because black men could not support their families, black matriarchs controlled and supported families economically, undermining the role of men in black households and causing the breakdown of the black family.[156] According to Moynihan, it was "the breakdown of the Negro family [that] led to a startling increase in welfare dependency."[157]

By the 1990s, the image of the welfare queen had fully developed, and visual images in the media routinely displayed her as a black woman.[158] Thus, although originally designed as a program for chaste white widows,[159] AFDC eventually beeame associated with black women and their families.[160] Opponents of public support for those women and families demonized poor single mothers for their poverty and the burdens they were viewed as placing on society.[161] In 1995, public figure Senator Kay Bailey Hutchinson described the U.S. welfare system as "a

154. *See id.* Afterwards, several scholars worked to disprove Moynihan's report. As some scholars found, contrary to Moynihan's report, the absence of black men was not responsible for the destruction of black families, which for a large number of black families had remained stable even in the face of slavery. GUTMAN, *supra* note 56, at 461-69.

155. DANIEL PATRICK MOYNIHAN, U.S. DEP'T OF LABOR: OFFICE OF PLANNING AND RESEARCH, THE NEGRO FAMILY: THE CASE FOR NATIONAL ACTION, at 15-25, 29-45 (1965), *reprinted in* LEE RAINWATER & WILLIAM L. YANCEY, THE MOYNIHAN REPORT AND THE POLITICS OF CONTROVERSY 61-91 (1967).

156. *Id.*

157. *Id.* at 12-13, *reprinted in* RAINWATER & YANCEY, *supra* note 155, at 58-59.

158. Roberts, *supra* note 36, at 873 ("When welfare reformers devise remedies for maternal irresponsibility, they have Black single mothers in mind."). Media images of welfare mothers were primarily black during the 1980s and 1990s. During that time, the majority of welfare recipients were white, although Blacks constituted a disproportionately high percentage of welfare mothers. *See* Cahn, *supra* note 114, at 970 (1997). Recently, however, black welfare recipients have come to outnumber white welfare recipients. *Whites Are Now Leaving the Welfare Rolls Faster Than Blacks*, 21 J. BLACK HIGHER EDUC. 70, 70 (1998).

159. Restrictive requirements for AFDC ensured that most AFDC benefits initially remained in the hands of chaste white widows. *See* Miller, *supra* note 111, at 32-34.

160. *See* Lisa A. Crooms, *Stepping Into the Projects: Lawmaking, Storytelling, and Practicing the Politics of Identification*, 1 MICH. J. RACE & L. 1, 20-23 (1996) (noting that the welfare debate's prototype is "constructed as a single Black mother"); *see also* Roberts, *supra* note 66, at 1576 (noting how the rhetoric that propelled early welfare programs such as Mothers' Pensions lost their force as more black women received welfare).

161. *See* Mink, *supra* note 115, at 881 (asserting that "[s]o long as welfare recipients were morally supervised and culturally regulated; . . . so long as they were white—[they] were not stigmatized as recipients"); *see generally* Floyd W. Hayes, III, *Governmental Retreat and Politics of African-American Self-Reliant Development: Public Discourse and Social Policy*, 22 J. BLACK STUDS. 331, 332 (1992) (noting that the urban underclass, which is disproportionately black and Latino, has "been characterized as experiencing chronic and increasing rates of unemployment, teenage pregnancies, out-of-wedlock births, female-headed households, welfare dependency, and serious crime").

self-perpetuating monster that sustains the most distressing ills of our society—illegitimacy, the disintegration of the family, weakening of the work ethic, and crippling dependency."[162] "Indirectly," she said, "it feeds ever-rising levels of functional illiteracy, violence, and juvenile crime."[163]

As the image of the welfare mother shifted from that of a deserving white widow to a black single mother, the assumption that only a bad single mother would want to stay at home with her children, rather than work outside the home, became entrenched.[164] More importantly, the belief that only a bad mother would not marry or remain married to a man—an assumption that is based on yet another assumption, that plenty of potential husbands for welfare mothers not only exist but also have the means to support these women and their children financially[165]—grew stronger.[166] The images of black welfare mothers in the media combined with widespread assumptions about Blacks resulted in the perception that unlike good white mothers, black welfare mothers were burdens to society, taking the public's money and giving nothing back.[167] In sum, the public increasingly grew to view the welfare system in racial terms, and began to place the blame for a culture of welfare dependency on black welfare

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162. *See* Sparks, *supra* note 146, at 182.

163. *Id.*

164. *See* Crooms, *supra* note 160, at 21-23.

165. *See infra* Part III.A.

166. *See id.* at 20 ("[The black single mother prototype's] sexual irresponsibility enabled her to drop out of school and to join the AFDC rolls. Rather than marry the child's father and make the best of the situation, she chose to remain single, to collect AFDC, and to have many more children by many different fathers."); *cf.* 113 Cong. Rec. 26782 (daily ed. Sept. 26, 1967). Senator Javits remarked,

> In its effect, it becomes a punitive and coercive approach which seems founded upon the belief that welfare recipients are universally shiftless and satisfied with being dependent upon a dole. It proceeds from the assumption that the recipient's status is self-imposed and that it is up to the Government to condition its assistance in such a way as to transform the attitudes and motivations of welfare recipients into something comparable with those of middle-class America.

Roberts, *supra* note 36, at 873 ("As unpaid caregivers with no connection to a male breadwinner, single mothers are considered undeserving clients of the welfare system.")

167. *See* Wing & Weselmann, *supra* note 130, at 270 (stating that "many view the single mother on welfare . . . as embodying the wrongs of society" and "that poor mothers and mothers of color are most often portrayed as bad mothers"). As the stereotype would have her, the quintessential welfare queen was a black, unmarried teenage mother who was lazy and unwilling to work, lacking morals, defrauding the system, living a luxurious life off of the hard-earned money of taxpayers, having more children to receive more welfare money, and teaching her children to become dependent on welfare. *See* Brito, *supra* note 111, at 426 ("Some perceive welfare as encouraging low-income individuals to have children they cannot afford out-of-wedlock. Many even claim that welfare encourages young women to have unwanted children simply to increase their welfare benefits."). However, supporters of comprehensive welfare programs have repeatedly asserted that statistics clearly show that welfare recipients are generally ready and willing to work. *See* JOEL F. HANDLER, THE POVERTY OF WELFARE REFORM (1995) 85 ("The evidence over time is both consistent and persuasive that the vast majority of welfare recipients do not lack a work ethic. Empirical work demonstrates . . . that, against considerable odds, the majority of welfare recipients work while they are on welfare, trying over and over to find and keep jobs, and that, in fact, the majority do leave welfare through work").

recipients' allegedly inherent flaws, and to therefore see supporting poor families as a private rather than public problem.[168]

B. *Encouraging Marriage as Welfare Reform*

1. *The Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA)*

In 1996, pressure from a Republican Congress and a public incensed by the perceived lack of self-sufficiency of black "welfare queens" motivated former Democratic President Bill Clinton to attempt to follow through on his campaign promise to "end welfare as we know it" by signing the Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA) into law.[169] PRWORA reinforced the stereotype of the lazy black welfare queen through its work requirements and the time limits it placed on eligibility for receipt of welfare benefits.[170] Specifically, PRWORA implemented a new system of benefits through TANF, which provided block grants to states to assist mothers in need, required welfare mothers to enter into work programs, and limited the receipt of benefits to only five years for an entire lifetime.[171]

In addition to PRWORA, many states implemented policies that further bolstered the image of the welfare queen by implicitly acknowledging the assumption that welfare mothers have children in order to increase their eligibility for welfare funds. Several states instituted Family Caps programs, which eliminated the benefits increases that welfare mothers received upon the birth of another child.[172] Welfare reformers believed that

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168. *See* Rickie Solinger, *Race and "Value": Black and White Illegitimate Babies, in the U.S., 1945-1965*, *in* UNEQUAL SISTERS: A MULTICULTURAL READER IN U.S. WOMEN'S HISTORY 463, 471 (Vicki Ruiz & Ellen Carol Dubois eds., 1994) ("Once the public came to believe that Black illegitimacy was not an innocuous social fact but carried a direct and heavy cost to white taxpayers, many whites sanctioned their political representatives to target Black unwed mothers and their babies for attack.").

169. Pub. L. No. 104-193, 110 Stat. 2105 (codified as amended in scattered sections of 8 and 42 U.S.C.); *see also* Sheryll D. Cashin, *Drifting Apart: How Race and Wealth Segregation Are Reshaping the American Dream*, 47 Vill. L. REV. 595, 603-03 (2002) (asserting that former President Clinton pushed for welfare reform as a means of ensuring the votes of suburbanites); Sheryll D. Cashin, *Civil Rights in the New Decade: The Geography of Opportunity*, 31 CUMB. L. REV. 467, 474 (2000-2001) (same); Crooms, *supra* note 106, at 93 (asserting that the basis for the PRWORA relied on "racially differentiated expectations about women and waged work" and noting that "[h]aving recast poverty as a matter of the personal irresponsibility of a black and gender-dysfunctional 'underclass,' the PRWORA makes controlling their behavior a matter of public policy"); Nancy A. Wright, *Welfare Reform Under the Personal Responsibility Act: Ending Welfare as We Know It or Governmental Child Abuse?*, 25 HASTINGS CONST. L.Q. 357, 358-59 (1998) (noting that PRWORA was passed in response to a public outcry for welfare reform).

170. *See* Crooms, *supra* note 103, at 611-13.

171. *See* 42 U.S.C. §§ 607, 608(a)(7) (2000).

172. *See, e.g.*, N.J. Stat. Ann. § 44:10:3.5 (1995) (repealed 1997) (eliminating incremental benefits for the birth of additional children and providing for deductions from the amount of financial assistance eligible for federal reimbursement for the birth of an additional child to a recipient family); *see also* Thomas, *supra* note 102, at 431-32 (noting that lawmakers in Arizona, Arkansas, California, Delaware,

these changes would not only discourage welfare mothers from having additional babies but, more importantly, encourage them to marry the fathers of their children to displace the burden of supporting their children from the government to individual men.[173] Reformers maintained that their changes to the welfare state would put an end to what they viewed as the pathological behavior of mothers who passed down dependency on public resources to their children.[174] Indeed, as many proponents of the reformed welfare system argued, public benefits themselves had destroyed families, leading to a vicious cycle of dependency.[175] Reformers argued that "higher welfare payments marginalized the role of the father and made him more dispensable,"[176] thus creating a culture in which marriage itself was perceived as economically disadvantageous and therefore deviant, and in which the stigma of living on welfare and without a man disappeared. According to welfare reform proponents like Charles Murray, if women knew that they would receive no assistance if they became pregnant outside of marriage, then they would stop having babies who become burdens on states as a result of not having fathers in the home to support them.[177] And, the logic continues, if welfare benefits were unavailable to single

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Georgia, Indiana, Kansas, Maryland, Massachusetts, Mississippi, Nebraska, New Jersey, and Virginia had passed "child disincentive legislation capping welfare benefits for children born to mothers already enrolled in public assistance programs"); Brito, *supra* 111, at 430 ("The rationale underlying Family Caps programs is straightforward and rather simplistic. . . . The expectation is that welfare mothers are dissuaded from having more children while on welfare because of the unavailability of an increase in public assistance upon the birth of an additional child.").

173. A. Mechele Dickerson, *America's Uneasy Relationship with the Working Poor*, 51 HASTINGS L.J. 17, 31 (1999) (detailing claims by critics that welfare reform was needed to prevent welfare mothers from having children outside of marriage and to encourage welfare mothers and their partners to marry); Mink, *supra* note 115, at 881 (stating that, in addition to revealing negative racial stereotypes, public disapproval of welfare dependency reveals "discomfort with the idea that women can choose not to depend on men, whether through work, divorce, or unmarried motherhood"); *see also* Martha L. Fineman, *Images of Mothers in Poverty Discourse*, 1991 DUKE L.J. 274, 274 (1991) (challenging arguments that suggest that the goal of any poverty program centers around "appropriate coupling of the single mother with the child's father—who would thereby assume his 'rightful' place in the family and fulfill his financial obligations").

174. *See* Roberts, *supra* note 36, at 874 (noting how "contemporary poverty rhetoric blames Black single mothers for perpetuating poverty by transmitting a deviant lifestyle to their children"); *see also* Crooms, *supra* note 103, at 612 (arguing that "the new welfarism claims [that] . . . public assistance . . . rewards poor women for remaining both unmarried and promiscuous").

175. *See* Charles Murray, *Welfare and the Family: The U.S. Experience*, 11 J. LABOR ECON. 224, 225 (1993); *see also* Dickerson, *supra* note 173, at 28-31 (noting claims by critics that welfare created a permanent underclass and helped to destroy the traditional family).

176. Murray, *supra* note 175, at 233.

177. *Cf.* Murray, *supra* note 175, at 234-59 (exploring the relationship of illegitimacy to welfare); *see also* Thomas, *supra* note 102, at 420 (asserting that recent welfare reforms are based on the notion that "[t]he solution to poverty rests on curbing the fertility of poor women, which will prevent the births of more (unwanted) babies").

mothers, the number of divorces would drop and divorced mothers would remarry more frequently.[178]

State and federal politicians have readily adopted many scholars' "culture of poverty"[179] arguments, which favor welfare reforms that encourage women to marry and rely on men for financial stability. Citing the collapse of marriage as the primary cause of child poverty, intergenerational poverty, and emotional and behavioral problems among poor children,[180] politicians pushed for and passed welfare legislation designed to strengthen marriage[181]—as if it were obvious that marriage would cure these societal ills.[182] For instance, some states instituted "Bridefare" programs, which give monetary rewards to welfare mothers who marry.[183] Additionally, PRWORA explicitly listed "the formation and maintenance of two-parent families" as one of its primary goals, which Congress assumed would remedy women and children's dependence on public benefits.[184] Congress made a number of findings in PRWORA regarding the importance of marriage and the problems stemming from the perceived societal rejection of marriage.[185] For instance, the congressional findings for the PRWORA note that "[m]arriage is an essential institution of a

178. *See* Murray, *supra* note 175, at 233 (citing Income Maintenance Experiments that were conducted in several cities in the United States in the early 1970s).

179. Jody Raphael, *Domestic Violence and Welfare Receipt: Toward a New Feminist Theory of Welfare Dependency*, 19 HARV. WOMEN'S L.J. 201 (1996) (describing the development of Oscar Lewis's "culture of poverty" concept, which contends that attitudes developed in children as a result of alienation and isolation caused by poverty work to perpetuate poverty from generation to generation).

180. *See generally* 42 U.S.C. § 601 (listing congressional findings on the importance of marriage in society).

181. *E.g.*, PRWORA, Pub. L. No. 104-193, 110 Stat. 2105, §§ 101, 401, 403(a)(2) (codified as amended in scattered sections of 8 and 42 U.S.C.) (listing as one of the four purposes of the PROWRA the goal of ending the "dependence of needy parents on government benefits by promoting . . . marriage"); Helen M. Alvare, *Saying "Yes" Before "I Do": Premarital Sex and Cohabitation as a Piece of the Divorce Puzzle*, 18 NOTRE DAME J. L. ETHICS & PUB. POL'Y 7, 14-15 (2004) (acknowledging that part of the intent of the PROWRA was to encourage marriage); *see also* Silag, supra note 17, at 418-19 (noting the Oklahoma legislature's grant of $10 million in 2000 for relationship programs, marriage counseling, a marriage mentor program, and a marriage resource center and the Michigan legislature's requirement for unmarried mothers to attend classes that include "marriage exploration"); Anita Bernstein, *For and Against Marriage: A Revision*, 102 MICH L. REV. 129, 157 (2003) (describing programs in Florida and Minnesota that reduce marriage registration fees for couples who can demonstrate the completion of a marriage promotion course); Koons, *supra* note 10, at 11 (describing a bonus in West Virginia that is given to TANF recipients who are married).

182. *See* Martha Fineman, *Progress and Progression in Family Law*, 2004 U. CHI. LEGAL F. 1, 3-4 ("From poverty to school attendance, from crime to teenage pregnancy, the culprit is assumed to be the 'crisis' in the family.")

183. *See* Susan Frelich Appelton, *Standards for Constitutional Review of Privacy-Invading Welfare Reforms: Distinguishing the Abortion-Funding Cases and Redeeming the Undue-Burden Test*, 49 VAND. L. REV. 1, 6-7 (1996) (discussing the bridefare program in Wisconsin and how it focused on identifying the fathers for children born out of wedlock); Brito, *supra* note 111, at 428-29 (generally discussing Bridefare programs).

184. 42 U.S.C. § 601(a)(4).

185. *See generally* PRWORA, Pub. L. No. 104-193, 110 Stat. 2105, § 101 (codified as amended in scattered sections of 8 and 42 U.S.C.) (detailing the congressional findings).

successful society which promotes the interests of children."[186] Congress also declared that "[t]he increase in the number of children receiving public assistance [was] closely related to the increase in births to unmarried women."[187] Indeed, congressional findings hinted that marriage might cure a number of problems, including low birth weights, low verbal cognitive attainment, child abuse and neglect, low educational aspirations, poor student performance, and the rising numbers of convicts in the juvenile justice system.[188] In fact, according to these findings, marriage would even reduce the incidence of divorce and out-of-wedlock births among members of future generations, as simply "[be]ing born out-of wedlock significantly reduces the chances of the child growing up to have an intact marriage."[189]

Moreover, much like in the post-bellum period, when former slaves were encouraged to marry and government agents selected families for former slave men according to the number of dependents in each potential family, the reasons behind the marriage promoting goals of PRWORA were primarily economic.[190] In the same way that post-bellum state governments used marriage as a vehicle for minimizing the dependency of newly-emancipated Blacks—especially black children—on the government by passing responsibility for former slaves' economic welfare after decades of brutal slavery to individual black men,[191] Congress intended PRWORA, at least in part, to "end the dependence of needy parents on government benefits by promoting . . . marriage."[192] In fact, Congress pointed to low marriage rates as a central cause of poverty, noting that while "[o]nly 9 percent of married-couple families with children under 18 years of age have income below the national poverty level[,] . . . . 46 percent of female-headed households with children under 18 years of age are below the

186. *Id.* at § 101(1).

187. *Id.* at § 101(5)(C). Under current TANF provisions, states are awarded bonuses for demonstrating large reductions in illegitimate births. 42 U.S.C. § 603(a)(2).

188. *See* PRWORA, Pub. L. No. 104-193, 110 Stat. 2105, § 101(8)-(9) (codified as amended in scattered sections of 8 and 42 U.S.C.) (listing congressional findings on the importance of marriage in society).

189. *Id.* at § 101(8)(E).

190. *See* Mink, *supra* note 115, at 882 (asserting that PRWORA sought to privatize solutions to poverty by giving "incentives to poor mothers to seek economic security through men and marriage").

191. *See supra* Part I; *see also* FINEMAN, *supra* note 32, at 106 ("By [appropriate coupling of the single mother with the child's father,] the paramount welfare reform objective—letting the state off the economic hook—will have been achieved.").

192. 42 U.S.C. § 601(a)(2); *see also* Rector, *supra* note 29, at 63 (arguing that more welfare funds must be allocated to strengthening marriage in order to alleviate child poverty more effectively). A few states have taken advantage of the federal resources available for expanding the "marriage cure." For example, Michigan and Utah offer classes and videos on marriage and parenting skills. West Virginia pays married welfare couples in the state a monthly bonus of $100. Oklahoma sponsors a broad marriage promotion program that involves churches, social service agencies, and businesses. *See* O'Beirne, *supra* note 20, at 29.

national poverty level."[193] Additionally, Congress explicitly foeused on plaeing economic responsibility with men in its attempt to create a remedy for poverty in female-headed households,[194] citing a need for responsible fatherhood along with its finding that "only 54 percent of single-parent families with children had a child support order established."[195] In fact, under PRWORA, a woman can have her public benefits for her children withdrawn if she is perceived as failing to cooperate in identifying the father of her children.[196] The thrust of PRWORA and related state legislation is to alleviate governmental responsibility where it can be privatized through the family. Where that has failed, the thrust has been to eliminate state financial obligations by preventing certain families from growing through measures such as family size caps.[197] Indeed, in the same vein as post-bellum Black Code declarations that made slave marriages valid and the children of legally married black couples their own responsibility, PRWORA specifically provides economic bonuses for states that successfully relieve themselves of burdens from illegitimate children by implementing measures that decrease the numbers of out-of-wedlock births.[198]

2. *The Bush Marriage Initiative and H.R. 240*

The most recent proposals for welfare reform mirror and work to fortify Congress' codification of the purported "marriage cure" to poverty in 1996. Indeed, both President Bush and Congress have made proposals to bolster state efforts to encourage marriage among welfare recipients and reduce the number of out-of-wedlock births.[199] In 2002, the Bush administration announced its plan to set aside nearly $300 million per year to promote healthy marriages and reduce out-of-wedlock births that are likely to result in poverty-stricken families.[200] Standing before a backdrop that read, "*Working toward independence*," the President delivered a speech

193. PRWORA, Pub. L. No. 104-193, 110 Stat. 2105, § 101(9)(A) (codified as amended in scattered sections of 8 and 42 U.S.C.) (detailing congressional findings on the importance of marriage in society); *see also* FINEMAN, *supra* note 32, at 106 ("One characteristic typical of a group of welfare recipients—being unmarried—has been identified and characterized by a wide variety of commentators as constituting the cause as well as the effects of poverty.").

194. *See* FINEMAN, *supra* note 32, at 106; Crooms, *supra* note 106, at 95 ("PRWORA uses paternity and child support enforcement to encourage men to initiate changes in the 'underclass" family structure and marital status.").

195. PRWORA, Pub. L. No. 104-193, 110 Stat. 2105, § 101(4) (codified as amended in scattered sections of 8 and 42 U.S.C.).

196. 42 U.S.C. § 608(a)(2).

197. *See* Albiston & Nielsen, *supra* note 132, at 495-97 (analyzing how Family Caps are used to control the "reproductive capacity of poor women of color"); Melynda G. Broomfield, Note, *Controlling the Reproductive Rights of Impoverished Women: Is This the Way to "Reform" Welfare?*, 16 B.C. THIRD WORLD L.J. 217, 227-29 (1996) (same).

198. 42 U.S.C. § 603(a)(2).

199. *See* Fagan, *supra* note 28, at 1; *see generally* Personal Responsibility, Work, and Family Promotion Act of 2005, H.R. 240, 109th Cong. (2005).

200. Fagan, *supra* note 28, at 1.

about his plan to make welfare families self-sufficient.[201] Much like public figures who pressed former slaves to marry during the post-bellum period by emphasizing that "[n]o really respectable person wishes to be supported by others,"[202] President Bush has urged that marriage and other welfare reforms are a means of "return[ing] [welfare recipients and their families] to lives of self-reliance and dignity."[203] Nearly 150 years after the U.S. government shirked its responsibility to assist former slaves in transitioning into free society, the government continues to assume that encouraging Blacks to marry and black women to depend on men as economic caretakers is the appropriate method for making poor Blacks become economically self-sufficient.

Pursuant to President Bush's wishes, the House of Representatives incorporated this misguided assumption into its version of the marriage cure in H.R. 4,[204] which the House passed but the Senate tabled in 2003, and which was then reintroduced in 2005 as H.R. 240. In this bill, legislators directly associated out-of-wedlock births with an "increased likelihood of welfare dependency."[205] The drafters of the bill also highlighted the significance of the slight increase in "nonmarital childbearing" since 1996,[206] even in the face of their cites to the many "successes" of welfare reform, such as the placement of welfare mothers in jobs and the alleged decrease in the percentage of children living in poverty.[207] According to H.R. 240, the fact that the child poverty rate is only 8.6% in married-couple families but 41.7% in households headed by single mothers mandates a renewed commitment to marriage.[208] Despite claims by the bill's supporters that poverty has decreased among children since 1996[209]—claims that opponents of H.R. 240 dispute[210]—the House strengthened its commitment to

201. *Bush Welfare Plan Promotes Marriage, Work*, CNN.com, Feb. 27, 2002, http://archives.cnn.com/2002/ALLPOLITICS/02/26/welfare.reform.

202. Franke, *Taking Care*, *supra* note 35, at 1548 (quoting Office of Assistant Commissioner, Bureau of Refugees, Freedmen and Abandoned Lands, Circular No. 4, Vicksburg, Miss. (July 29, 1865), RG 826, Roll 28, frame 259, National Archives).

203. THE WHITE HOUSE, WORKING TOWARD INDEPENDENCE: ACHIEVEMENTS OF THE WELFARE REFORM LAW OF 1996 (2002), http://www.whitehouse.gov/news/releases/2002/02/print/welfare-book-02.html.

204. Personal Responsibility, Work, and Family Promotion Act of 2003, H.R. 4, 108th Cong. (2003).

205. Personal Responsibility, Work, and Family Promotion Act of 2005, H.R. 240, 109th Cong. § 4(4)(B) (2005).

206. *Id.* § 4(2).

207. *Id.* § 4(1)(A)-(D) (noting that the percentage of working welfare recipients reached an all-time high and that "[t]he child poverty rate continued to decline between 1996 and 2003").

208. *Id.* § 4(4)(D).

209. *Id.* § 4(1)(D).

210. *See, e.g.*, *Welfare Reform Reauthorization Proposals: Hearing Before the Subcomm. on Human Resources of the House Comm. on Ways and Means*, 109th Cong. (2005) [hereinafter *Welfare Reform Reauthorization Proposals*] (statement of Lisalyn Jacobs, Vice President for Government Relations, Legal Momentum), http://waysandmeans.house.gov/hearings.asp?formmode=detail&

the marriage cure through various programs for marriage promotion in H.R. 240.

Notably, H.R. 240 replaces PRWORA's stated purpose of encouraging the formation and maintenance of two-parent families with the twin goals of not only encouraging "healthy, 2-parent *married* families" but also "responsible fatherhood."[211] As support for its revisions of existing law, the House bill includes findings about how children who live apart from their fathers are more likely to be poor, engage in criminal behavior and be incarcerated, and otherwise become social and financial burdens on the public.[212] The proposed bill also requires states to conduct a family self-sufficiency plan for each work-eligible individual.[213] Harkening back to the post-bellum period during which former slave parents had to prove their ability to support their children in order to avoid having them stripped from their household to serve as apprentices to white landholders,[214] H.R. 240 requires states to develop a self-sufficiency plan for welfare recipients that requires them to participate in certain approved "direct work" activities, monitors the recipients' participation in these programs, and regularly reviews their progress toward self-sufficiency.[215]

In essence, just as in the post-bellum period when marriage was hailed as the moral means for overcoming "idleness, intemperance, and apathy"[216] and for ensuring "industry and prosperity,"[217] today marriage is being touted as a potential catch-all solution to the complex problem of poverty and as the proper method for supporting children in need. Specifically, Congress encourages the use of the marriage cure in H.R. 240 by proposing a variety of programs, including public advertising campaigns on the value

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hearing=373. The number of people on welfare rolls has dropped since 1996. *See, e.g.*, Personal Responsibility, Work, and Family Promotion Act of 2005, H.R. 240, 109th Cong. § 4(1)(D) (2005) (noting that child poverty dropped between 1996 and 2003); MOLLY DAHL, CONGRESSIONAL BUDGET OFFICE, ECONOMIC AND BUDGET ISSUE BRIEF: CHANGES IN PARTICIPATION IN MEANS-TESTED PROGRAMS (2005) (noting that the number of TANF "recipients has dropped by more than 60 percent—from about 13 million to 5 million" since 1996), http://www.cbo.gov/showdoc.cfm?index=6302&sequence=0. As some have claimed, however, the fact the welfare rolls has dropped does not necessarily mean that these former welfare recipients have moved out of poverty. *Welfare Reform Reauthorization Proposals*, *supra* (statement of Hon. Lynn C. Woolsey) ("Too often, when I hear people brag about welfare reform, the statistic they cite is the number of people who have been dropped from the rolls. But that shouldn't be the measure of success. What we should be talking about is the number of people who have been able to move out of poverty."); *see also* Jarrett Murphy, *Where the Welfare Queens Went*, VILLAGE VOICE, Apr. 25, 2005, *available at* http:www.villagevoice.com/blogs/powerplays/archives/000863.php (reporting that while TANF rolls dropped, participation in other federal programs, such as Food Stamps and Supplemental Security Income, swelled).

211. Personal Responsibility, Work, and Family Promotion Act of 2005 § 101(4) (emphasis added).

212. *Id.* § 4(4)(D).

213. *Id.* § 109.

214. *See supra* note 90 and accompanying text.

215. *Id.* § 109(b)(1).

216. LITWACK, *supra* note 46, at 241.

217. *Id.*

of marriage, marriage education in high schools, marriage education programs and mentoring programs for unmarried pregnant women and expectant fathers, pre-marital education programs for individuals interested in marriage, and divorce reduction programs that teach relationship skills.[218] One prominent theory behind these proposals is that people would marry and stay married if they only knew about the benefits of marriage.

Even more important to President Bush's plan and to H.R. 240, however, is the underlying theory that marriage will domesticate unruly welfare recipients to the point that the government will no longer be responsible for supporting people who currently depend on public benefits.[219] President Bush's proposals indicate that he and his supporters would agree with post-bellum policymakers that marriage is the most effective way to make poor families financially independent.[220] Just as agents of the Freedmen's Bureau encouraged newly-emancipated black men to focus on providing for their wives and children, supporters of H.R. 240 expect the bill's marriage-promoting programs to compel fathers of children of welfare mothers to marry and support these mothers and children instead of forcing the government to do so. As Dr. Wade Horn explained, the idea behind marriage promotion is that "[m]arriage [will] provide greater family stability and [that] men tend to earn more money once they become married because they focus on their family's needs."[221]

A significant segment of the black community has actually embraced the widespread campaign for the marriage cure. Much like their post-bellum counterparts who rushed to marry to prove their eligibility for rights given to free white citizens and attempted to enforce traditional gender roles by turning in Blacks who failed to abide by marital norms and laws and like post-bellum black religious figures who stressed the importance of marriage,[222] a number of Blacks today, especially religious leaders, vigorously defend marriage as one means of saving black communities and

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218. Personal Responsibility, Work, and Family Promotion Act of 2005 § 103(2)(B).

219. *See* Fagan, *supra* note 28, at 3 (asserting that policymakers clearly have reason to examine the causes of the breakdown of the typical American family because it "impose[s] such heavy costs on children and society").

220. *See* THE WHITE HOUSE, WORKING TOWARD INDEPENDENCE: PROMOTE CHILD WELL-BEING AND HEALTHY MARRIAGES (2002), http://www.whitehouse.gov/news/releases/2002/02/print/welfare-book-05.html; Wade Horn, *Take a Vow to Promote Benefits of Marriage*, WASH. TIMES, Nov. 2, 1999, at E2 ("Marriage is good for children, it is good for adults, and it is good for communities. . . . [M]arriage, on average, is still the most stable and healthy environment within which to bear and raise children.").

221. Anne Farris, *Opponents and Advocates of Marriage Promotion Plan Decide Not to Forever Hold Their Peace*, THE ROUNDTABLE ON RELIGION & SOCIAL WELFARE POLICY, Jul. 22, 2003, http://www.religionandsocialpolicy.org/news/article_print.cfm?id=789 (quoting Dr. Wade Horn, Assistant Secretary for Children and Families of the U.S. Department of Health and Human Services, and noting that in spite of his statements like this one, Dr. Horn claims that marriage promotion is not intended to be an anti-poverty measure).

222. *See supra* note 91-100 and accompanying text.

society as a whole.[223] For example, during the 2004 presidential campaign, black religious leaders across the nation joined President Bush and his supporters in taking an aggressive stand to insulate marriage against gays and lesbians,[224] whom H.R. 240 excludes from its proposed marriage programs.[225] Reverend Walter E. Faunroy, a minister at New Bethel Baptist Church in northwest Washington, D.C., described part of the reason for his opposition to same-sex marriage by proclaiming, "As an African American whose people have not yet recovered from a form of slavery that was based on the destruction of the family, I believe we do not need any more confusion about what a marriage is and what a family is."[226] Similar to black newspapers that pushed for marriage among former slaves as a means of proving their worthiness as free members of society,[227] and to black church leaders who told newly freed black women that it was essential to fulfill their roles as dutiful wives,[228] today's black church leaders have been at the forefront of sponsoring marriage promotion programs and conferences since President Bush announced his "Healthy Marriage Initiative" in 2002.[229]

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223. *See* Kelly Brewington, *Black Churches Ponder Direction as Come Ally with GOP Debate*, Balt. Sun, Mar. 29, 2005, at 1A (describing how Republicans have gained the acceptance of some black churches with their focus on faith and traditional American values and quoting one minister as asserting that Blacks are "losing [their] strength" with "[b]abies . . . being born to single mothers, black babies . . . being aborted"); Robert M. Franklin, *Can the Church Save African American Families?*, *available at* http://www.law.emory.edu/cisr/pressreleases/Editorialfranklin.htm (stressing the importance of "the internal conversation that African Americans should be having about the future of black families" and the significant role that black churches should play in "saving the African Ameriean family"). Part of this promotion of marriage with the black community has included, for some pastors and ministers, taking a strong stance against same-sex marriage, which is at times perceived as a threat to the sanctity of marriage. *See* Carlyle Murphy & Hamil R. Harris, *Thousands Rally on the Mall to Protest Same-Sex Marriage*, WASH. POST, Oct. 16, 2004, at B1 (describing how a growing number of Blacks are altering their political allegiances because of the issue of same-sex marriage); *see also* Adrien Katherine Wing, *Derrick Bell: Tolling in Protest*, 12 HARV. BLACKLETTER L.J. 161, 172 (1995) (noting that "[s]pirit injury due to racism can be so profound that some victims may embrace the values of the oppressor").

224. Lawrence Aaron, *Black Clergy Speak Out Against Gay Marriage*, N.J. MEDIA GROUP, Oct. 6, 2004, at L11 (asserting that Reverend Jeff Beacham was one of a coalition of black religious leaders to oppose same-sex marriage and quoting Reverend Beacham as stating, "We don't want them passing any laws that contribute to the degradation of marriage."); Robert King, *Denominations United Against Gay Marriage*, IND. STAR, Sept. 8, 2004, at B1 (noting that "there is no great debate within the predominantly black National Missionary Baptist Convention of America over the issue of gay marriage" and that the Convention takes a strong stance against same-sex marriage).

225. Robert Pear & David D. Kirkpatrick, *Bush Plans $1.5 Billion Drive for Promotion of Marriage*, N.Y. TIMES, Jan. 14, 2004, at A1 (reporting that Dr. Wade Horn, Assistant Secretary for Children and Families of the U.S. Department of Health and Human Services, said that federal money for marriage promotion would be available only to heterosexual couples).

226. Darryl Fears, *Gay Blacks Feeling Strained Church Ties*, WASH. POST, Nov. 2, 2004, at A3.

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

228. *See supra* notes 94, 97 and accompanying text.

229. *See* Chip Johnson, *Flash Point for Black Churches; Gay Marriage Issue May Benefit GOP*, S.F. CHRON., Sept. 27, 2004, at B1.

Of course, this is not to say that marriage should not be encouraged, welfare should not be reformed, or the most recent welfare proposals are entirely improper. Certainly, marriage will pull some welfare recipients above the poverty line, and it is undeniable that two incomes in a family are often better than one.[230] Furthermore, there is little doubt that children who grow up in homes with only one caretaker are significantly more likely to encounter substantial obstacles in their lives, including life without a high school diploma.[231] Having more than one caretaker increases the chances that a child will receive more attention and decreases the amount of work and stress involved in raising children by allowing caretakers to divide the burdens of earning money and rearing children.[232] However, focusing on promoting a heteronormative model of marriage for all individuals ignores the many other factors that shape people's economic condition and affect poor families' ability to climb out of poverty. The assumption that marriage is the solution to poverty for most needy people neglects to recognize that many families with two incomes still live in poverty,[233] and that a traditional marriage arrangement is wholly inappropriate for many individuals. These and other limits to marriage as a cure-all for dependency on welfare are discussed in Part III.

III

THE LIMITS OF AND ALTERNATIVES TO THE MARRIAGE CURE

Much like marriage could not resolve the dire economic situation of newly emancipated Blacks during the post-bellum period, it will not cure the dependency of the women and children who find themselves on welfare today. Without focusing attention on the true underlying problems of poverty in the United States, in particular the way in which heterosexism, sexism, racism, and classism work to both feminize and racialize poverty, marriage or any other solutions proposed to address poverty cannot effectively work to remedy the problem.

If federal and state governments truly want to assist poor women and children on welfare, then they will not only increase aid to fund educational, training, and childcare programs that will enable poor women and children to move off the welfare rolls permanently, but will also enact

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230. *See* Katherine Boo, *The Marriage Cure*, THE NEW YORKER, Aug. 18, 2003, at 109 ("Two parents means two paychecks.").

231. Julia M. Fisher, Book Review, *Marriage Promotion Policies and the Working Poor: A Match Made in Heaven?*, 25 B.C. THIRD WORLD L.J. 475, 481-84 (2005) (detailing the risks that children face when growing up with only one parent); Jason DeParle, *Raising Kevion*, N.Y. TIMES, Aug. 22, 2004, at 27 (same).

232. *See* Fisher, *supra* note 232, at 480-84 (describing the way in which sharing both the financial and rearing obligations of parenthood may benefit children).

233. *See* MILLER, *supra* note 111, at 43 (noting especially that "[c]oncentration on marriage and male wage earners often ignores the evidence that for Black families poverty status doesn't change with the transition to or from marriage").

legislation to encompass and support a broad range of family forms that can give the poor agency in determining how to structure private support to help in escaping from poverty. This Part details and explains the limitations of the marriage cure as a means of reducing poverty and improving the lives of poor families.

Part III.A critiques the marriage cure to poverty, analyzing the many ways in which PRWORA, H.R. 240, and other marriage promotion laws fail to address the real reasons people are unable to permanently escape poverty. Part III.B details practical alternatives to the marriage cure that will allow poor individuals to join together in a variety of cooperative relationships in order to successfully provide for themselves and their children and gradually become self-sufficient.

A. The Limits of the Marriage Cure

The limits of the marriage cure cannot be overstated. The proposed marital solution fails not only poor women and children but also poor men. To begin, it falls short of providing any remedy that will lift welfare mothers and their children out of poverty forever by diverting resources that could be spent on education and training—factors which have proven to assist people in escaping poverty[234]—to programs on marriage education and counseling. Second, it not only disregards the role that previous welfare legislation played in destroying and tearing apart families due to regulations such as "man-in-the-house" rules, but also neglects the fact that one-half of the two-parent solution—poor men, in particular poor black men—often find themselves in equally disadvantaged economic positions as their counterparts, with alarming unemployment and incarceration rates. Finally, it fails the entire family by limiting poor people, especially poor black and Latino families, to one model of the American family that does not incorporate the generational links, strengths, and practices, such as othermothering,[235] that are often utilized within black and Latino communities. At a basic level, the marriage cure to welfare fails because it ignores many significant realities that any comprehensive remedy for poverty must address.

As opponents of H.R. 240 have argued, current proposed welfare reforms do not provide adequate money or time for welfare mothers to permanently escape from poverty through education and training that will allow them to hold more than low-wage, no-benefit jobs, nor do they provide enough funding to support mothers who need good child care to

234. *Welfare Reform Reauthorization Proposals*, *supra* note 210 (statement of Lisalyn Jacobs, Vice President for Government Relations, Legal Momentum) (highlighting the fact that in 2000 "only 1.2% of single mothers with a college degree who worked full-time lived in poverty").

235. *See infra* notes 273-76 and accompanying text.

successfully work outside the home.[236] As Representative Jim McDermott stated during his testimony on H.R. 240 before the House Committee on Ways and Means, "[r]ather than empowering welfare recipients to climb out of poverty, Republicans restrict access to education and training. And, incredibly, Republicans propose only 10% of the urgent need for [] child-care, so that working mothers can work without fearing for the safety of their children."[237] Moreover, the proposed reforms to welfare fail to account for the gender- and race-based inequities that have placed many welfare mothers in the dire situations in which they find themselves. For example, the marriage cure does not adequately address the ways in which many women welfare recipients are driven into poverty and the safety net of the welfare system—often by domestic violence or desertion by the fathers of their children.[238] As Representative Lynn Woolsey of California explained about the indispensability of welfare to her successful struggle to support her family after her husband left her with no support for their three young children, "I wouldn't be here today if it weren't for a generous, compassionate welfare system. . . . At its best, welfare is a lifeline, not a *lifestyle*[,] . . . an emergency support that helps people until they can put their lives together and stand on their own two feet."[239] Rather than fortifying the safety net that welfare represents for many struggling families, the proposed reforms in H.R. 240 divert funds that could be used to strengthen funding for education, child care, and domestic-violence counseling promoting marriage.[240] The marriage cure to poverty fails to satisfactorily address the public problem of poverty by placing excessive emphasis on the private, incomplete remedy of two-parent, heteronormative marriage.

Even if one accepts the proposal to remedy poverty with the promotion of marriage, the proposals in H.R. 240 disregard numerous factors that make a marital solution to poverty inadequate. First, they neglect the history of welfare in the United States, specifically that restrictions placed on

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236. *See Welfare Reform: Reauthorization of Work and Child Care: Hearings Before the Subcomm. on 21st Century Competitiveness of the House Comm. on Education and the Workforce*, 109th Cong. (2005) (statement of Mark Greenberg, Director of Policy for the Center for Law and Social Policy), http://edworkforce.house.gov/hearings/109th/21st/welfare031505/greenberg.htm; *see also Welfare Reform Reauthorization Proposals*, *supra* note 210 (statement of Lisalyn Jacobs, Vice President for Government Relations, Legal Momentum) (urging Congress to invest in education, training, and childcare that will allow poor women to achieve true economic security).

237. *Welfare Reform Reauthorization Proposals*, *supra* note 210 (statement of Hon. Jim McDermott); *see also id.* (statement of Hon. Lynn C. Woolsey) ("We need to give people the chance to receive an education and to learn the skills that will allow them to earn a living that supports a family.").

238. *Welfare Reform Peauthorization Proposals*, *supra* note 210 (statement of Lisalyn Jacobs, Vice President for Government Relations, Legal Momentum); *see also* Spatz, *supra* note 4.

239. *Welfare Reform Reauthorization Proposals*, *supra* note 210 (statement of Hon. Lynn C. Woolsey).

240. *See id.* (statement of Lisalyn Jacobs, Vice President for Government Relations, Legal Momentum).

welfare eligibility once necessitated the break-up of families rather than their preservation. For many years, the law prohibited both men and married couples from receiving welfare benefits;[241] such man-in-the-house eligibility rules subjected women welfare recipients to suspension of their benefits if they had a male partner in the home.[242] The welfare system did not value unemployed fathers' non-monetary contributions to their families, often compelling fathers who could not economically provide for their families to abandon them. The law disregarded any notion of men as nurturers, assigning men the exclusive task of financial caretaking and cementing the notion that only economic fatherhood is valuable in our culture.[243] These man-in-the house eligibility rules were not struck down until 1968.[244] Even after these rules were eliminated, by 1987 only twenty-six states and the District of Columbia allowed two-parent families to receive welfare funds.[245] In a sense, the marriage provisions in TANF and the similar proposals in H.R. 240 are responses—albeit imperfect ones—to past failures of the welfare system, even as they fail to address the forces that keep many welfare mothers in poverty.

Second, the proposed marriage cure fails to account for the desperate economic condition of the men who are critical to its success.[246] The pool of available and marriageable men for black women—especially black welfare mothers—has been severely diminished by the mass incarceration of black men.[247] Nearly half of all male prison inmates are black men,[248]

241. *See* Murray, *supra* note 175, at 230.

242. *See id.*; *see also* TELES, *supra* note 111, at 101 (describing how "morals tests" imposed by welfare departments result in the exclusion of women who were living with men out of wedlock from AFDC programs).

243. *See* Brito, *supra* note 111, at 431 (asserting the clear message of welfare reform is "that children need financial support from their parents, rather than from the state, and that financial support trumps the parental nurturing role"); Nancy E. Dowd, *From Genes, Marriage and Money to Nurture: Redefining Fatherhood*, 10 CARDOZO WOMEN'S L.J. 132, 140-41 (2003) (arguing that "we must implement policies that support children while also bearing in mind that children's core needs are not purely economic"); *see also* FINEMAN, *supra* note 32, at 204 ("The focus is on the male, the father who must be economically and socially empowered to assume his traditional responsibilities."); Solangel Maldonado, *Deadbeat or Deadbroke: Redefining Child Support*, 38 U.C. DAVIS L. REV. (forthcoming 2005) (manuscript at 11-17) (critiquing the limited definition of child support as solely financial).

244. King v. Smith, 392 U.S. 309, 328-34 (1968). Federal law allowed the provision of welfare payments to families with an unemployed father in 1961, but not all states followed the federal government's lead. *See* Murray, *supra* note 175, at 230.

245. *See* Murray, *supra* note 175, at 232.

246. *See* Crooms, *supra* note 106, at 94 ("For many, their desire to do manhood correctly is frustrated by the laek of available jobs not only for which they are qualified, but also that pay enough to support familial dependents."); *see also* Boo, *supra* note 230, at 111, 117-18 (describing the obstacles that two women attending marriage promotion programs in Oklahoma faced in finding marriage partners when half of Oklahoma's black men were not in the labor force, including one woman's incarcerated partner).

247. *See* Dorothy E. Roberts, *The Social and Moral Cost of Mass Incarceration in African American Communities*, 56 STAN. L. REV. 1271, 1272-74 (2004). Although black women may marry across racial lines, the focus is on the availability of marriageable black men because most Blacks

even though Blacks constitute less than fifteen percent of the overall population.[249] As Professor Dorothy Roberts recently stated, "On any given day, nearly one-third of black men in their twenties are under the supervision of the criminal justice system—either behind bars, on probation, or on parole."[250] Moreover, as Professor William Julius Wilson's book, *When Work Disappears*, makes clear, it is unreasonable to think that placing economic responsibility for poor women and children on men will cure poverty given current realities; black men face substantial barriers to finding jobs because of the loss of jobs in poor inner city neighborhoods due to technological changes and the disappearance of many urban manufacturing jobs.[251] For example, Professor Wilson's study of inner-city job availability in fifteen black communities in Chicago found that "only 37 percent of all the adults were gainfully employed in a typical week in 1990."[252] The marriage cure largely ignores important obstacles to the economic success of the husband-wife dyad, such as the devastating effects of the disappearance of well-paying industrial jobs once held by men of color—especially black men—in the inner city.[253]

Thus, at a most basic level, if Congress wants to institute a marriage cure to poverty, it must support such efforts by creating jobs for the potential future spouses of women welfare recipients. The problem with the marriage cure is not that welfare mothers never wish to marry—many do, but as one Florida state senator said, "If you're going to solve the problem of poverty, you've got to do what you can to make these guys marriage material."[254] Bills like H.R. 240 should include elaborate employment

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marry intraracially. *See* MORAN, *supra* note 69, at 6, 103 (asserting that more than 93% of Blacks marry intraracially).

248. Jody David Armour, *Bring the Noise*, 40 B.C. L. REV. 733, 734 (1999).

249. JESSE MCKINNON, UNITED STATES CENSUS BUREAU, THE BLACK POPULATION IN THE UNITED STATES: MARCH 2002 1-2 (2003), http://www.census.gov/prod/2003pubs/p20-541.pdf (stating that Blacks represent 13% of the noninstitutionalized civilian population in the United States).

250. Roberts, *supra* note 247, at 1272; Paul Butler, *(Color) Blind Faith: The Tragedy of Race, Crime, and the Law*, 111 HARV. L. REV. 1270, 1270-71 (1998) (reviewing RANDALL KENNEDY, RACE, CRIME, AND THE LAW (1998)); Harry J. Holzer, Paul Offner & Elaine Sorensen, Declining Employment among Young Black Less-Educated Men: The Role of Incarceration and Child Support 7 (May 2004) http://www.irp.wisc.edu/publications/dps/pdfs/dp128104.pdf (unpublished manuscript, on file with author) (stating that "5 percent of all black men were incarcerated as of 2002, versus just 2 percent of Hispanic men and under 1 percent for all white men").

251. *See* WILLIAM JULIUS WILSON, WHEN WORK DISAPPEARS: THE WORLD OF THE NEW URBAN POOR 3-24 (1996). *But see* Holzer, Offner & Sorenson, *supra* note 250, at 6 (arguing that the decline in manufacturing jobs "account[s] for relatively little of the declining employment of young black men").

252. WILSON, *supra* note 251, at 19.

253. *See id.* at 28-30 (describing the damaging effects of manufacturing losses in cities such as Philadelphia, Chicago, Detroit, and New York).

254. DeParle, *supra* note 231, at 31, 48 (quoting Representative E. Clay Shaw Jr., a Florida Republican). A significant pool of black men are "unavailable" for marriage, at least in any way that could work to remedy poverty, because of incarceration, unemployment, lack of education, and poverty. *See* Holzer, Offner & Sorenson, *supra* note 250, at 7-9, 17-18 (detailing how mass incarceration affects the employment rates of young black men); Courtney Jarchow, NATIONAL

agendas for unemployed fathers that provide "apprenticeship and mentoring programs, wage subsidies, community-service jobs, training programs and case management for excons."[255] For a marriage cure to work, its provisions must provide resources and assistance for both struggling fathers and mothers, so that the couple is able to earn enough money to support the family and either care for their children themselves or pay for childcare. The fact remains that many two-parent families live in poverty.[256] As one scholar estimates based on the incomes of low-income men, "low-income women would need to have roughly 2.3 husbands apiece in order to lift them out of poverty."[257]

On at least one level, H.R. 240 recognizes this problem with its proposed expansion of a responsible fatherhood program[258] that recognizes a father's "lack of job skills" is often a significant factor in the poverty of a family.[259] In fact, as part of its plan, H.R. 240 seeks to enhance "the abilities and commitment of unemployed or low-income fathers to provide material support for their families and to avoid or leave welfare programs by assisting them to take full advantage of education, job training, and job

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CONFERENCE OF STATE LEGISLATURES, *Strengthening Marriage and Two-Parent Families*, Feb. 2003, at 6 (noting that "[s]tudies have found that 38 percent of unmarried fathers had been incarcerated, 34 percent have less education than a high school diploma, up to 25 percent of noncustodial fathers live in poverty and 20 percent earn less than $6,000 annually"), *available at* http://www.ncsl.org/statefed/welfare/marriage.pdf.

255. Jason DeParle, *Raising Kevion*, N.Y. TIMES MAG., Aug. 22, 2004, at 28, *available at* http://www.jasondeparle.com/Materials/Raising%20Kevion.pdf; Holzer, Offner, & Sorenson, *supra* note 250, at 24-26 (suggesting programmatic and policy efforts that may have a positive impact on the employment rate of black men).

256. *Welfare Reform Reauthorization Proposals*, *supra* note 210 (statement of Lisalyn Jacobs, Vice President for Government Relations, Legal Momentum) (noting that "[f]orty percent of all families living in poverty are two-parent families").

257. Olson, *supra* note 1 (citing author Barbara Ehrenreich's work); *see also* Vivian Hamilton, *Mistaking Marriage for Social Policy*, 11 VA. J. SOC. POL'Y & L. 307, 367 (2004) ("Studies have shown, however, that even if [low-income mothers] were to marry and work in the marketplace, most poor women would remain poor or near-poor. In fact, marriage can actually reduce the well-being of low-income mothers if a potential spouse cannot contribute to the economic viability of the household"). Even when married, Blacks are less likely than Whites to receive the full benefits of marriage. As Professor Dorothy Brown has explained, because of the way tax laws operate, black married couples, in which both the husband and wife are more likely to be equal wage earners, are more susceptible to the marriage penalty in the earned income tax credit. In short, households where husbands and wives contribute roughly equal amounts pay the highest marriage penalty, and households where husbands contribute all wage income and wives work at home receive a marriage bonus in the form of reduced tax liability as a result of getting married, resulting in a system that has rewarded Whites for marrying while punishing Blacks for the same decision. Dorothy A. Brown, *The Tax Treatment of Children: Separate But Unequal*, 54 EMORY L. J. 757, 826-33 (2005); Dorothy A. Brown, *Race, Class, and Gender Essentialism in Tax Literature: The Joint Return*, 54 WASH. & LEE L. REV. 1469, 1501-04 (1997) (same).

258. Personal Responsibility, Work, and Family Promotion Act of 2005 §§ 119, 441.

259. *Id.* § 441(a)(3) ("Where families (whether intact or with a parent absent) are living in poverty, a significant factor is the father's lack of job skills."); Holzer, Offner, & Sorenson, *supra* note 250, at 2; DeParle, *supra* note 231, at 28.

search programs."[260] The proposal does not detail any methods for accomplishing these goals, however, unlike similar proposals for welfare mothers; it consists of only a few paragraphs in one subsection of the bill and includes no well-defined work programs. In sum, although the most recent welfare proposals from Congress—unlike the marriage laws during the post-bellum period—pay lip service to the harsh economic realities facing poor men, particularly men of color,[261] their efforts are not only too minute, but too vague to be practically effective.

Despite Congress's greater, if inadequate, effort to include men's joblessness in the welfare problem equation, reform proposals such as H.R. 240 are fundamentally flawed because they require a narrow, patriarchal definition of family as the basis for the solution to poverty. As Professor Kaaryn Gustafson has explained, "the gist is that if there isn't a man in the house there isn't a family."[262] This limited definition diminishes the likelihood that welfare reform will move significant numbers of recipients out of poverty, because reform proposals fail to look past the husband-wife dyad to explore other family formations that are more viable for many people. The marriage cure wrongfully emphasizes the assumed dependency of women on men at the expense of a more logical, non-gendered focus on the dependence of those who need care, such as children, on caretakers.[263] In so doing, some family promotion programs further entrench notions of female dependency with programs focused solely on training and employing men. For example, in Pennsylvania, the "publicly funded" Family Formation and Development Project offers a marriage education course for low-income, married couples that provides employment services only to fathers, not mothers.[264] Likewise, the Texas Fragile Families Initiative emphasizes helping fathers find employment and improving their economic well-being.[265] On the whole, these marriage promotion programs assume that children may be properly raised in only one family form; underlying this assumption is the view that a home run by an independent woman (or women) is an inappropriate place to raise children.

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260. Personal Responsibility, Work, and Family Promotion Act of 2005 § 441(b)(1)(B).

261. *See* Wing & Weselmann, *supra* note 130, at 259 ("The Black community is facing a crisis where over one million Black men are currently in prison, homicide remains the leading cause of death among Black men, undereducation reigns, and unemployment and poverty run rampant.").

262. Olson, *supra* note 1.

263. *See* FINEMAN, *supra* note 32, at 6-9, 230-33; *see also* Roberts, *supra* note 36, at 871-72 (discussing how workfare proposals reflect an underappreciation for the contribution of mothers, in particular black mothers, as caretakers).

264. *See* Olson, *supra* note 1. NOW Legal Defense and Education Fund filed a class complaint of sex discrimination on behalf of the women participating in the program. *See* NOW Legal Defense and Education Fund, Class Complaint of Sex Discrimination in Violation of Title IX, *available at* http://www.legalmomentum.org/issues/wel/allentowncomplaint.pdf.

265. *See* Jarchow, *supra* note 254 (describing the Texas Fragile Families Initiative, which places its emphasis on fathers).

The husband-wife dyad should not be the only household structure that states encourage and support in the effort to assist poor families with children to escape poverty.[266] A child does not need exactly one mother and one father to raise him or her. If it is true that two parents are better equipped than one, then one must accept the probability that three are better than two. There is no principled reason why the law should require the foundation of family where the care of children is concerned to be an intimate relationship involving two people of the opposite sex.[267] States should expand the definition of family to support people with children who have independently agreed to live in the same household and support each other financially and emotionally, regardless of whether they are heterosexually intimate.

More imaginative and culturally-inclusive legislation and policymaking are clearly called for in this area. The marriage cure is tinged with racism, in spite of the fact that no marriage promotion legislation ever explicitly mentions race. The racism underlying these laws is only evident when one realizes that welfare reform, including the encouragement of welfare recipients to marry and therefore privatize their economic hardships, was virtually unheard of before government assistance for needy families became associated with the black welfare queen.[268] Regardless of the roots of the marriage cure, one must ultimately consider whether or not it will work, and no evidence has been presented to show that it will. Considering the marriage cure's many shortcomings that are described in this Part, it is likely to fail miserably. Instead of colonizing Blacks from the outside—a tradition since the post-bellum period—legislators should learn from, not aim to erase, cultural differences between the many diverse groups in the United States. Recognizing alternative familial arrangements as valid would enable policymakers to finally implement family promotion programs that encourage people to maintain a variety of relationships depending on their individual situations, all of which would encourage building healthy dependencies where they are truly needed. The ability to form parenting partnerships is necessary for the survival and success of persons whose life circumstances do not allow them to fit within traditional models of marriage and family or who, for whatever reasons, reject the institution of marriage in their lives.

266. *See* FINEMAN, *supra* note 32, at 232 ("Family and welfare law [sh]ould be reconceived so as to support caretaking as the family intimacy norm.").

267. *See* Wing & Weselmann, *supra* note 130, at 267 (asserting that "[c]ourts refuse to acknowledge the possibility of more than one mother per child").

268. *See supra* Part II.A.

B. *Realistic Family-Based Cures for Welfare Dependency*

The marriage cure considers any family structure outside of the husband-wife model to be deviant and dangerous[269] and punishes such families accordingly.[270] Such a limited conception of proper familial relationships fails to acknowledge expanding definitions of healthy families.[271] Strict limits on acceptable notions of family have a particularly devastating effect on black and Latino communities for a variety of reasons. Besides the fact that incarceration and pervasive joblessness have narrowed the pool of marriageable black and Latino men,[272] for many Blacks and Latinos "family" extends beyond the traditional nuclear-family model of mother, father, and children.[273] Indeed, it is estimated that over 15% of black children have been informally adopted by relatives in their extended families[274]—by people who are "othermothers." As Professor Patricia Hill Collins explained in *Black Feminist Thought*, "[O]thermothers—women who assist bloodmothers by sharing mothering responsibilities—traditionally have been central to the institution of Black motherhood."[275] Collins explaincd that relationships between women in the black community who divide caretaking responsibilities among extended family members and even entire neighborhoods are essential to ensuring that black children receive proper care.[276]

Professors Margaret Brinig and Steven Nock confirmed the highly positive effects of kinship care[277] or othermothering in the black community in a comparative study of children in foster homes, kinship care arrangements, and transracially adoptive homes.[278] Professors Brinig and Nock measured and compared depression, morbidity, alcohol and

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269. *See* Wing & Weselmann, *supra* note 130, at 270.

270. *See* FINEMAN, *supra* note 32, at 101-25.

271. Indeed, less than 25% of households in the United States in 2001 eonsisted of married couples with children. Eric Schmitt, *For First Time, Nuclear Families Drop Below 25% of Households*, N.Y. TIMES, May 15, 2001, at A2.

272. *See supra* text accompanying notes 248-259.

273. *See* Wing & Weselmann, *supra* note 130, at 262 (acknowledging that "persons other than biological mothers can mother"); Dorothy E. Roberts, *The Genetic Tie*, 62 U. CHI. L. REV. 209, 269 (1995) (noting that "[b]lood ties have not held the preeminent position in Black families that they have held in white families").

274. Roberts, *supra* note 273, at 270 (citing a study by sociologist Robert Hill).

275. PATRICIA HILL COLLINS, BLACK FEMINIST THOUGHT: KNOWLEDGE, CONSCIOUSNESS, AND THE POLITICS OF EMPOWERMENT 178 (2d ed. 2000).

276. *Id.* at 178-79; *see also* Solangel Maldonado, *When Father (or Mother) Doesn't Know Best: Quasi-Parents and Parental Deference After* Troxel v. Granville, 88 IOWA L. REV. 865, 901-10 (2003) (explaining the importance of multi-generational households in childrearing in black and Latino communities).

277. Margaret Brinig and Steven L. Nock define kinship care as "living with relatives in a situation ranging from completely informal sharing of care to permanent and somewhat supervised arrangements." Margaret Brinig & Steven L. Nock, *How Much Does Legal Status Matter?: Adoptions by Kin Caregivers*, 36 FAM. L.Q. 449, 459-60 (2002).

278. *Id.* at 461-63.

substance abuse, and juvenile dependency in their adopted subjects, and discovered that unlike white children, for whom adoption was far superior to kinship care, kinship placements for black children functioned as well as parental homes.[279]

Importantly, the Supreme Court has recognized the dangers inherent in governmental support of exclusively narrow definitions of family. In *Moore v. City of East Cleveland*,[280] Inez Moore was convicted in Ohio state court for violating an East Cleveland ordinance that limited occupancy of a dwelling unit to members of a single family, which the ordinance defined as consisting of only a few limited, related individuals.[281] Ms. Moore lived with her son and two grandsons, who were first cousins, in a unit zoned for multi-family occupancy.[282] Under the local ordinance, Ms. Moore was permitted to live only with her son and his children, and committed a criminal offense by also living with the children of another of her own children.[283] In holding that the ordinance violated homeowners' right to due process under the Fourteenth Amendment, the Court noted the benefits of partnerships among kin in achieving their family responsibilities.[284] The Court explained, "Out of choice, necessity, or a sense of family responsibility, it has been common for close relatives to draw together and participate in the duties and the satisfactions of a common home."[285] It held that "the Constitution prevents East Cleveland from standardizing its children—and its adults—by forcing all to live in certain narrowly defined family patterns."[286] Justice Brennan's concurrence, in which Justice Marshall joined, even recognized the prevalent use of kinship care in poor black families, noting that a pooling of resources is "a means of survival . . . for large numbers of the poor."[287]

In fact, in *United States Department of Agriculture v. Moreno*,[288] the Supreme Court even recognized the necessity of assisting nontraditionally structured families so poor "that they cannot even afford to alter their living arrangements so as to retain their eligibility" for food stamps.[289] In that case, the Court evaluated a challenge by a group of individuals who were not all related to each other by blood or marriage to regulations for food

279. *Id.* at 463-64, 467. Indeed, the scholars found that kinship caregivers were better off not adopting black children because they were significantly aided by subsidies they received that were similar to those received by foster parents—more proof that states should support other types of families different from the traditional nuclear family. *See id.* at 467.

280. 431 U.S. 494 (1977).

281. *Id.* at 494, 496.

282. *Id.* at 494.

283. *Id.* at 496 n.1.

284. *Id.* at 504-06.

285. *Id.* at 505.

286. *Id.* at 506.

287. *Id.* at 508-09 (Brennan, J., concurring).

288. 413 U.S. 528 (1973).

289. *Id.* at 538.

stamp eligibility that made any household whose members were not "all related to each other" ineligible for participation in the program.[290] Noting that the "federal food stamp program was established in 1964 in an effort to alleviate hunger and malnutrition among the more needy segments of our society,"[291] the Court held that the "unrelated person" provision of the regulations was an irrational classification in violation of the equal protection component of the Fifth Amendment Due Process Clause.[292] In so doing, the Court again referenced the ways in which pooling resources may enable poor individuals to come together and successfully support each other as a family.[293] Specifically, the Court explained that the classification would only harm "AFDC mothers who try to raise their standard of living by sharing housing" and who cannot "utilize the altered living patterns in order to continue to be eligible without giving up their advantage of shared housing costs."[294]

Given the documented benefits of family formations outside of the husband-wife dyad—particularly within the black and Latino community—one wonders why policymakers are singularly focused on encouraging traditional marriage as the primary solution for women struggling to raise their children. Why offer marriage classes when individual women could often more readily improve their economic situations by creating parenting partnerships with each other? In the same way that a father's presence may allow a biological mother to stay home while the father works outside the home, parenting partnerships or othermothering arrangements could accomplish the same poverty-alleviating division of tasks. As Professor Collins has previously explained, the most common occupation for enslaved older women during slavery "was caring for the children of parents who worked."[295] Slaves' reliance on older women to care for children is one example of how black families have developed a tradition of sharing childrearing responsibilities and work outside of the home among multiple family and community members. Such partnerships may improve the quality of childrearing, especially in poor families, by creating an arrangement where two or more persons ean divide the labor and costs of raising children while holding jobs and therefore sharing job benefits, such as health insurance, with each other and their dependent children.

If, as congressional findings suggest, the development of emotionally and physically healthy children is an important goal of current welfare

290. *Id.* at 530.
291. *Id.* at 529.
292. *See id.* at 535-38.
293. *Id.* at 537-38.
294. *Id.* (quoting the California Director of Social Welfare).
295. COLLINS, *supra* note 275, at 181.

reforms,[296] then the government should broaden its conception of "normal" families to include all groups of people who have agreed to raise children jointly.[297] The law of marriage is already contractual in nature: men and women formally and informally agree with one another about the terms of their relationships, including fidelity, spousal support, and supporting their children during marriage, and states provide financial, legal, and social support to such couples. Why not allow people with children to create a household and enter into a separate legal agreement—reserving marriage for intimate couples who wish to solemnize their relationship—that will obligate them to support each other and each other's children by pooling resources, both financial and non-financial? In sum, why not permit individuals to pool their resources and become custodial cohorts or form parenting partnerships that are not centered around sexual intimacy?

Indeed, the notion of parenting partnerships is not radical. The groundwork for such parenting partnerships has been laid by events such as the creation of civil unions for gay and lesbian couples in Vermont.[298] Although civil unions are not the perfect legal foundation on which to develop parenting partnerships, because they were designed specifically for gays and lesbians, whom many believe should be granted the right to marry,[299] civil unions demonstrate states' ability to broaden eligibility for important benefits and protections to include families that fall outside of the traditional white nuclear family structure. Congress has declared that one of the primary purposes of a family-based cure to poverty is to ensure the well-being of children in poor families;[300] to achieve this goal, the government must support all parenting arrangements that will aid in the healthy upbringing of children.[301]

Like the use of marriage during the post-slavery period of colonial control, the proposed marriage cure in H.R. 240 is amiss. Neither post-bellum marriage promotion efforts nor H.R. 240 acknowledge or address the real problems underlying poverty and inequality.[302] Rather, they deal with these issues superficially by promoting traditional husband-wife marriages. Moreover, both approaches to privatizing poverty are based on

296. Personal Responsibility, Work, and Family Promotion Act of 2005 §§ 4(5), 101(1).

297. *See* Wing, *supra* note 53, at 860 ("[C]ouldn't there exist a common law polygamous marriage, where the parties agree to be married, cohabit either all together or in some relatively equal fashion, and tell the world they are spouses?").

298. *See* Vermont v. Baker, 744 A.2d 864 (Vt. 1999).

299. *See* Tobias Barrington Wolff, *Rights for Gay and Lesbian Couples*, FINDLAW'S WRIT, Dec. 6, 2001, http://writ.news.findlaw.com/commentary/20011206_wolff.html.

300. Personal Responsibility, Work, and Family Promotion Act of 2005 §§ 4(5), 101(1).

301. *Cf.* Brinig & Nock, *supra* note 277, at 471-72 (encouraging legislators to consider kinship care, at least as it regards black children, as a viable alternative to adoption).

302. *See* Hamilton, *supra* note 257, at 360 ("Much of the link between single parenting and negative child outcomes can thus be attributed to low income, less-stable adult presence, and residential mobility after divorce.").

racist motivations, which blame victims of poverty for their situation as soon as those victims are perceived as being primarily people of color. Similar to post-bellum marriage laws that were tailored to control Blacks and privatize their slavery-induced poverty, the marriage cure to welfare dependency gradually developed as the image of welfare recipients evolved from white widows to single black mothers, and policymakers therefore determined that this group's struggle was their own.

Today's marriage cure to poverty in the United States is nearly identical in form to the post-bellum efforts to marry off disadvantaged black women with children, although proposals like H.R. 240 are targeted at modern outsiders instead of former slaves. Both "cures" to poverty suggest that all societal problems would be resolved if unruly outsiders would simply behave in a civilized manner—in other words, if they would conform to traditional white American culture by getting married and accepting their proper roles as breadwinning husbands and economically dependent wives. If one of the primary purposes in effectuating a cure to poverty is to ensure that children in poor families are cared for and educated—both primary purposes of PRWORA and H.R. 240[303]—then the government should support and protect alternative parenting partnership agreements that have been proven to aid in the upbringing of healthy children.[304]

CONCLUSION

As I have demonstrated in this Article, Congress's proposed "return of the ring"—its revival of the encouragement of marriage as a cure for the social ills that are assumed to be the fault of racial minorities, specifically of Blacks—is ineffective to address the systemic forces that keep disadvantaged families of colonized racial groups in poverty. Indeed, the marriage cure proposal is nothing more than an extension of American colonialism that labels families that do not fit the traditional white family model as deviant and attempts to make all people into self-sufficient citizens who do not disturb the hierarchical race-based organization of American society.[305]

In the end, the promotion of marriage for the poor, specifically for poor Blacks, has never been about helping Blacks to permanently avoid the cycle of poverty. Rather, it is a result of decades of blaming outsiders of white American culture for their own poverty, which actually results from

303. Personal Responsibility, Work, and Family Promotion Act of 2005 §§ 4(5), 101(1); 42 U.S.C. § 601(a)(1).

304. *Cf.* Brinig & Nock, *supra* note 277, at 471-72.

305. *See* Olson, *supra* note 1 (quoting one advocate for welfare mothers as stating the following about the marriage cure: "We are talking about putting $1.5 billion into telling women to find their knight in shining armor and then everything will be okay.").

pervasive racism, nationalism, and classism.[306] Marriage promotion is therefore a method for deflecting governmental responsibility for providing help to the colonized poor. During the post-bellum period, the government, including the Freedmen's Bureau, knew that the public possessed some duty to assist Blacks in transitioning from slavery to freedom through economic assistance and public aid. Yet, in order to appease Whites, especially former slaveowners, policymakers manipulated former slaves' desire to prove their worthiness as free members of socicty and enjoy the benefits of the marital contract by promoting marriage in a way that minimized public financial responsibility for newly freed Blacks. In sum, the new right to marry was not granted to promote inclusion, but rather to shift the financial responsibility for poor former slave women and children from the state and former slaveowners to black male workers.

Today, similar motivations drive the marriage promotion proposals in H.R. 240. Instead of devoting resources to effective tools for combating poverty, such as college education and high-level vocational training, the government chooses to divert these resources to encouraging marriage. Poor black women who fail to marry or remain married are considered deviant and criticized for failing to conform to the conservative white family model, and marriage is emphatically heraldcd as a cure for society's problems. As the supporters of the marriage cure imply, the answer to poverty is not found in education, training, and counseling, but in "normal" marriages. Plain and simple, welfare mothers, who are racialized as black, must simply get married so that their inherent dependency may be privatized. It is a return to the ring—the wedding ring—that will civilize them and stop the growing number of problems that stem from their deviance.

As this Article indicates, however, such colonizing behavior is damaging for everyone involved—the colonizers and the colonized. For this reason, governments should recognize the unique needs of different groups and encourage remedies for poverty that formally incorporate other forms of parenting in statutes to provide financial and social support to all families. As feminist scholar bell hooks asserted, "[Othermothering] is revolutionary in this society because it takes place in opposition to the idea that parents, especially mothers, should be the only childrearers. . . . It cannot happen . . . if parents regard children as their 'property,' their 'possession.'"[307] To expand state recognition to include parenting partnerships other than the husband-wife dyad would dcbunk the notion that mothers and children are men's property. Such broadened recognition

306. *See* Charlotte Rutherford, *Reproductive Freedoms and African American Women*, 4 YALE J.L. & FEMINISM 255, 262 (1992) (noting that the root causes of poverty are racism, sexism, and classism).

307. bell hooks, FEMINIST THEORY: FROM MARGIN TO CENTER 144 (1984).

would also attack poverty, as well as racism, sexism, and heterosexism at their core.