Curbing its Enthusiasm: U.S. Federal Policy and the Unitary Family

by

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Introduction

The federal government’s “voice” on the subject of parenting has become both more audible and more influential over the past several decades. Not surprisingly, a great deal of federal involvement continues to be predicated upon a high level of federal welfare expenditures for single mothers and their children. These expenditures, presently denominated Temporary Assistance to Needy Families (TANF), have grown from approximately 780 million dollars in 1962 to nearly 13 billion dollars in 1996; from 1996 to 2009 the annual amount has held constant at about 20 billion dollars annually, although the American Recovery and Reinvestment Act of 2009 has injected an additional 5 billion dollars annually for several years thereafter. It should be noted that these figures do not include state welfare expenditures, nor do they include federal spending on a wide variety of means-tested programs such as food stamps, health care or housing. According to a report published by the National Fatherhood Initiative, a private organization seeking to increase the number of children growing up with involved

1 Associate Professor of Law, George Mason University School of Law (Virginia, USA). The author is grateful to Iva Futrell for her constant and expert assistance as research librarian, and to Sophie Coy and Ariel Baniowski for their research assistance. I would also like to thank Professors Scott Fitzgibbons, Lynn Wardle and Ursula Bassett for their convening the conference on the Jurisprudence of Parenting and the Influence of Culture, at which this paper was first presented. Thanks always to my husband for sharpening and expanding my thinking.


fathers,\(^4\) the federal government alone spends nearly one hundred billion dollars annually as a consequence of fathers’ absence from their children’s households.\(^5\)

Over the course of the last roughly 50 years, the federal government has begun to adopt positions and policies in response to other forces affecting parents and their children, in addition to the rise of single parenting. Various forces and developments have affected parenting in its essential aspects over the last several decades. By “essential aspects” I mean to include at the very least matters such as: whether or not to parent at all; the threshold conditions – e.g. age or economic – for entering into parenthood; the nature of the legal and personal bonds between persons who would become parents (e.g. marriage or some other relationship); the presence or absence of biological kinship between parents and the children they are rearing; and the roles and importance of both mothers and fathers. All of these aspects of parenting are in flux today. In law and in practice, there no longer seems to exist a more or less settled and overlapping consensus to affirm the “unitary family,” \(i.e\). the family composed of adults related to one another by marriage and related to each of their children by biological ties. Various forces and developments are at work. These include, for example, the appearance and widespread adoption of technology able to prevent conception with greater accuracy, increasingly sophisticated assisted reproductive technologies (ARTs), including those (“collaborative reproductive techniques”) involving the use of “donor” gametes and embryos; the legalization and frequent practice of abortion; reduced cultural hostility toward both abortion and nonmarital parenting; and the rise of same-sex marriage as a cultural and


legal force. Obviously, other broader forces have affected parenting – changing employment and educational and economic opportunities for women and for various other discrete groups in the nation, and a myriad of state family laws on divorce, custody and adoption, to name just a few. In this paper, however, I will focus on those subjects upon which the federal government (not states) makes decisions, and which on their face are meant to, or logically are very likely to directly affect parenting in its essential aspects. Thus I exclude consideration of state policies, and consideration of federal policies which may affect parenting, but much more remotely. Among topics in this latter category, for example, would be tax laws, as they very likely only indirectly affect essential parenting decisions. Also, it is notoriously difficult to draw a firm conclusion about the direction in which they might affect parenting decisions. I include in this paper, on the other hand, consideration of laws and policies about sex education, birth control, abortion, and assisted reproductive technologies, child support, as well as laws and policies about marriage insofar as these concern parenting, fatherhood policies, and laws and policies addressing same-sex partnerships in their association with parenting.

The importance of these changes notwithstanding, why has the federal government increased its involvement, and expenditures, around parenting? One obvious reason is the perceived need to increase expenditures in connection with child support, welfare, sex-education and birth control, in response to the needs of the increasing number of persons living outside unitary family structures. But why do various branches of the federal government speak about other parenting matters? Perhaps they are responding to the “deep” consequences of current alterations in the fundamental aspects of parenting? How one is parented affects profound aspects of the human development,
including emotional, cognitive, and sexual attributes. Some political leaders and interest
groups are looking everywhere, including to federal leadership, for responses to
perceived effects of changes in the fundamental aspects of parenting. Possibly the federal
government is also responding to the “wide” consequences of the proliferation of family
forms; whole communities and thereby the nation may be affected at the cultural and
economic levels. As to this second possibility, more and more observers are worrying
out loud about the appearance of large gaps between races, between new and old
immigrant groups, and between socioeconomic groups, in the matter of family and
practices.6

Before describing this paper’s plan for exploring federal parenting policy, several
preliminary observations are in order. First, not all federal laws and policies affecting
parenting explicitly so advertise or label themselves. They may proceed under banners
as diverse as healthcare, education or civil rights. Some policies are highly publicized
(“marriage and fatherhood initiatives”) while others are more or less hidden in the details
of legislation or regulations (e.g. the extent of Medicaid reimbursement for contraception
for poor women). Second, sometimes federal silence or inaction can be quite revealing
as well, especially respecting developments representing dramatic changes from the
past. Third, parenting policies come from the federal hand in stronger and weaker forms.

What is the overall thrust of federal parenting policy today? Casual consumers of
political speech about the family might have concluded through most of the 1990s and
into the first decade of the twentieth century, that the legislative and executive branches
of the U.S. government meant to strengthen the unitary family. This impression might be

6 See e.g. Kay S. Hymowitz, Marriage and Caste in America: Separate and Unequal Families in a Post-
Marital Age (2006).
gleaned from dramatic federal rhetoric about “teen pregnancy prevention,” and from the rhetoric accompanying passage of the 1996 “welfare reform” law, and its later reauthorization, about the importance of marriage and fatherhood. The truly attentive consumer of political rhetoric might even have heard a thing or two about the federal “Healthy Marriage Initiative.”

This paper will find, however, that it would be incorrect to conclude that the federal government’s policies, programs and rhetoric exhibit a robust preference for the unitary family. In the past few decades, in fact, while federal policy has remained firm in its preference for economically self-sufficient parenting, it has shifted noticeably toward the following combination of messages: a weak preference for parenting within marriage; a stronger preference for involved fathers; discounting or dismissal of the need for biological parent-child ties, and a very strong preference for individual adults’ choices about parenting (both about the form of their intimate association and whether or not there will be a biological relationships with the children they rear.)

Part I of this paper will characterize the most significant elements of the current federal policy on parenting according to the preferences described immediately above. Part II will offer three broad critiques of these policies, on the grounds that they are not sufficiently attentive to emerging research, that they prioritize adult interests in an ideological fashion, and that they appear to be excessively driven by political winds. As a consequence, they fail to see the connection between good fathering and stable

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8 Congress reauthorized the Temporary Assistance to Needy Families Block Grant as part of the The Deficit Reduction Act of 2005, .
marriage, underestimate the importance of biological kinship to children, and fail to
acknowledge let alone respond to the dismal failure of federal policies for reducing
nonmarital births among the young and the poor.

Part I. Federal Parenting Policy

This section will characterize four federal stances on conditions or aspects of
good parenting, in three subsections. Within each, I will describe how a variety of
federal programs and policies work to promote the identified message, even if they do not
self-identify as “parenting” programs or policies. I will also characterize the federal
message as strong or weak.

A. Financial self-sufficiency is necessary for parenting. Discourage parenting in the
absence of financial self-sufficiency, ordinarily in circumstances involving some
combination of youth, poverty and lack of education. Insist on the assessment and
collection of child support from noncustodial parents.

This federal policy is very strong. It is manifested in the overlapping goals of federal
programs addressing teen pregnancy, including sex education and birth control programs,
programs providing birth control to the poor either free or at lowest low prices, and child
support laws. It is also implied by the absence of federal programs or policies directed to
persons who, while bearing children outside of the unitary family model, are more likely
to have achieved financial self-sufficiency. These include older but still unmarried
women and men, who account for 77%\textsuperscript{10} of the nonmarital births in the United States

\textsuperscript{10} Brady E. Hamilton, Joyce A Martin, & Stephanie J. Ventura, Births: Preliminary Data for 2007, 57
National Vital Statistics Reports, Mar. 18, 2009 (Centers for Disease Control and Prevention); see also
Stephanie J. Ventura, Changing Patterns of Nonmarital Childbearing in the United States, (US Dept. of
Health and Human Services, Centers for Disease Control and Prevention, National Center for Health
today; and single persons and couples contracting to conceive, via ARTs, children who will not be reared by both of their married, biological parents. In what follows, I will describe the leading federal programs and policies which, together, send the message to bear only those children you can provide for.

1. Teen Pregnancy Prevention Programs

Turning first to teen parenting, the federal government has placed an extremely high priority upon reducing this phenomenon, with an emphasis on the subtheme of avoiding poverty -- which is itself related to maintaining opportunities for further education and employment. The government has not emphasized to a similar degree the disadvantages to children born to relatively immature parents, or due to the absence of marriage, or due to the absence of a second parent of the opposite sex, in its messages or programs in this area.

A very recent Congressional Research Service report on “Teen Pregnancy Prevention,” 11 when describing the long-term consequences of teen childbearing, put the poverty correlation front and center:

[A]dolescent childbearing costs U.S. taxpayers about $9 billion per year: in child welfare benefits, $2.3 billion; in health care expenses, $1.9 billion; in spending on incarceration (for the sons of women who had children as adolescents), $2.1 billion; in lost tax revenue because of lower earnings for the mothers, fathers, and children (when they were adults) $6.3 billion; and in offsetting public assistance savings …, $3.6 billion. Research indicates that teens who give birth are less likely to complete high school and go on to college, thereby reducing their potential for economic self-sufficiency. The research also indicates that the children of teen parents are more likely …to repeat the cycle of teenage pregnancy and poverty.”

Congress has created a wide variety of federal programs to address teen pregnancy over the last 40 years. In 1970, it created the “National Family Planning Program,”

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known as Title X of the Public Health Service Act. This program serves both teenagers and others, and awards grants both to public and private entities to provide low income and uninsured men and women, birth control, infertility services, gynecological care, cancer and sexually transmitted infection (“STI”) screenings and “reproductive health counseling/education” and referrals. Likewise, both Title XIX of the Social Security Act (Medicaid) and Title XX of the Social Security Act provide federal funds to the states which may be used to support pregnancy prevention services among both adolescents and older patients. In fiscal year 2010, 317 million federal dollars were allocated for Title X family planning programs to 4500 U.S. clinics.

In 1981, Congress passed the Adolescent Family Life Act. Unlike the above described programs, this federal initiative – the smallest program directed to teen pregnancy – addresses the relationship between children’s well-being, and parenting by the very young woman. In fiscal year 2010 it received 16 million dollars in order to “promote the delay from sexual activity among adolescents and to provide comprehensive health care, education and social services to pregnant and parenting adolescents…in an effort to ameliorate the effects of too-early-childbearing for teen parents, their babies and their families. The AFL program also funds grants to support research on the causes and consequences of adolescent premarital sexual relations,

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12 Title X Family Planning program ["Population Research and Voluntary Family Planning Programs" (Public Law 91-572)]
16 Title XX of the Public Health Services Act, ______________.
adolescent pregnancy and parenting.” Among the “effects” often referenced are educational deficits, declines in the emotional and physical health of parents and children, and poverty.

Federally sponsored sex-education is another strategy to reduce teen pregnancy. In Fiscal Year 2010, the federal budget allocated 110 million dollars for “medically accurate and age appropriate” programs that are “proved through rigorous evaluation to be effective in reducing teenage pregnancy.” A new “Office of Adolescent Health” was created in the office of the Secretary of the Health and Human Services agency, in order to carry out such programs. An additional 4.5 million dollars was appropriated to carry out evaluations of approved programs. While a comprehensive review of the “evidence-based programs” identified by Health and Human Services is beyond the scope of this paper, in prior research I have characterized the most prominent ideas conveyed in the leading sex-education programs. These include generally: taking precautionary measures -- either abstinence or the use of birth control -- in order to avoid becoming pregnant; the good of preserving, and practical ways to preserve, opportunities for educational and other self-development, and economic self-sufficiency, by avoiding parenting;

Additional grants to states to prevent teen pregnancy were both authorized and funded by the health care reform law, the Patient Protections and Affordable Care Act ("PPACA"). These grants will allow states to operate the "Personal Responsibility Education Program" (PREP) a "comprehensive approach to teen pregnancy prevention" including information about both abstinence and contraception. Within this program, marriage is mentioned quite briefly, as one of many possible relationships a young person might experience, and not as an important context for rearing children. PREP also provides teens with information on "adult preparation" subjects including "healthy relationships, positive self-esteem and relationship dynamics, friendships, dating, romantic involvement, marriage, and family interactions," the development of healthy attitudes and values about adolescent growth and development, body image, racial and ethnic diversity," "financial literacy," "parent-child communication," "educational and career success," and "financial self-sufficiency." 

Six hundred and ten school-based or "school-linked" health clinics are also funded by the federal Maternal and Child Health Block Grant. These clinics provide "family planning" advice to adolescents. Among the "performance measures" required to be reported by grant recipients, are "the birth rate (per 1000) for teenagers age 15-17 years."

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25 Title V, Social Security Act, CITE. See also Carmen Solomon-Fears, Teenage Pregnancy Prevention: Statistics and Programs, Congressional Research Service, supra note __ at 15.
26 U.S. Dept. of Health and Human Services, Health Resources Administration, Maternal And Child Health Services, Title V Block Grant Program, Guidance and Forms for the Title V Application/ Annual
2. Speaking to the Poor: Medicaid and Beyond

The federal Medicaid program gives evidence of the high priority the federal government assigns to making contraceptives available to the poor in order to avoid parenting. While Medicaid is administered by the states, it is funded by both the federal and state governments to provide health services to low income persons. Federal Medicaid policies about contraceptive availability among the poor are extraordinarily pro-active. For example, states retain some discretion regarding whether or not they will provide some medical services within their Medicaid administration, but they have no discretion regarding contraception: they must provide it in order to participate in the program. Furthermore, contraception is the only service for which the federal government reimburses the states at the rate of 90%. A closer look at various state programs indicates that contraceptives are ultimately provided free to poor women in many cases by means of a further state subsidy.

One of the more visible congressional debates during deliberations over PPACA involved whether or not to require insurance companies to provide contraception as a mandatory “preventive service,” not only for poor women, but for all women, completely free of co-pays. Secretary Sebelius continues to study the possibility at the time of this writing.

3. Abortion

28 Cites. Wisconsin, etc.
29 Sharon Lerner, Yes, you will keep paying for birth control, Slate, Sept. 23, 2010, at http://www.doublex.com/blog/xxfactor/yes-you-will-keep-paying-birth-control
30 Ibid.
The argument regarding funding abortions in programs serving the poor rages annually in both houses of the U.S. Congress. Presently, under a provision usually called the Hyde Amendment (after its original sponsor), abortions may not be funded via monies appropriated by the annual Labor/Health and Human Services Appropriations Act, unless they are for reasons involving rape, incest, or a threat to the life of the mother. On the other hand, federal money authorized and appropriated by the new PPACA directly to Community Health Centers (CHCs), is not so limited. CHCs are federally supported health providers which are mandated to provide to the poor and underserved, among many other services, gynecologic and reproductive health care, which categories are generally interpreted by courts (cite) to include abortion. A recent article in the *New England Journal of Medicine* estimated that under PPACA, up to 40 million lower income Americans might turn to CHCs for their regular care. This raises the possibility that abortions might be performed on poor women for without limits, with a new pot of federal money. An attempt to enact a “permanent Hyde amendment” into federal law has just passed the U.S. House of Representatives at the time of this writing, but is not likely to pass in the Senate. It would limit federal funding for abortions for reasons other than rape, incest, and life of the mother, in PPACA and in all other relevant federal laws. Groups opposing a permanent Hyde amendment, including the current President, generally oppose bans on government funding not only in the name of

31 Labor/Health and Human Services Act FY 2011 ________.
32 42 U.S.C. §254b
34 No Taxpayer Funding for Abortion Act, H.R. 3 (2011).
women’s “privacy” rights, but also in the name of making abortion accessible to the poor.35

The judicial branch of the federal government has played a prominent role on the abortion issue in connection with its availability both to the young and to the poor. In Roe v. Wade, 36 in that part of its opinion just prior to announcing a constitutional right of privacy sufficient to encompass abortion, the Supreme Court expressed solicitude for women for whom a birth would portend a “distressful life and future,” and for women “unable to care for” a child. In a later opinion, Harris v. McRae, 37 however, the Court held that the right to abortion did not entail a right to federal funding for the procedure.

As for minors, the Supreme Court has limited states’ ability to require parental notice or consent before their minor daughters might obtain an abortion. Parental involvement laws are constitutionally mandated to include “bypass” provisions whereby minors may get permission from a judge to have an abortion following a judge’s determination that the abortion is in the minor’s best interests or that the minor is sufficiently mature to go forward without parental intervention.38


37 448 U.S. 297 (1980).
In short, federal policies on the provision of family planning, and on abortion, place a high priority upon promoting pregnancy- or sometimes birth- avoidance among the poorest women.

4. Child Support

Federal involvement in assuring the establishing and payment of child support obligations is perhaps the best known federal parenting policy. Among other laws on the subject, in the 1980s Congress mandated that states pass laws containing numerical support guidelines, with presumptive amounts.\(^{39}\) In 1992, Congress passed the Child Support Recovery Act,\(^{40}\) making it a federal crime to fail to pay child support to a child living in another state. In 1996, it passed the Personal Responsibility Work Opportunity Reconciliation Act (PRWORA),\(^{41}\) requiring states to adopt specific and onerous policies for establishing and enforcing child support awards, in exchange for the receipt of federal welfare dollars. The message sent by the degree of federal involvement in child support serves to affirm the messages of programs to help the young and the poor: avoid parenting, but if you do have children who will be born and rear outside the unitary family, you will be expected to support them privately to the maximum extent possible.

5. Absence of Federal Opinion on Childbearing Outside the Unitary Family by Presumably Self-Sufficient Persons

Several federal choices indicate that the federal government does not object to older (than adolescents) single women (or men) parenting alone, presumably because they are able to support themselves and any children. First, federal programs do not direct

pregnancy prevention messages to women who are past their teenage years or not among the poor. While several of the federal programs mentioned in section I.A.1 supra do provide free or more easily available contraception to women in their 20s and beyond, these programs do not proactively seek the attention and compliance of older, economically self-sufficient single women in the same way they seek these from teenagers and the poor. For a brief time between about 2007 and 2008, the Department of Health and Human Services targeted abstinence messages to single women of all economic strata, based upon their high nonmarital birth rates. The effort was greeted with derision by the leadership of the National Campaign to Prevent Teen Pregnancy, and groups advocating sexual freedom for adults on the grounds that it was doomed to failure, or that matters concerning adults sex-lives were a matter of privacy, or that birth control was the better message and solution.42 Today, women past their teenage years still account for the largest percentage of nonmarital births by quite a margin (77% to 23%), but this federal initiative no longer exists.43.

Another indication of the federal laissez-faire attitude toward older (than adolescents’) women’s nonmarital births can be found in the way the White House Council on Women and Girls treated the data about nonmarital births in its March 2011 report on the situation of women in America, entitled Women in America, Indicators of

43 Brady E. Hamilton, Joyce A Martin, & Stephanie J. Ventura, Births: Preliminary Data for 2007, 57 National Vital Statistics Reports, Mar. 18, 2009 (Centers for Disease Control and Prevention); see also Stephanie J. Ventura, Changing Patterns of Nonmarital Childbearing in the United States, (US Dept. of Health and Human Services, Centers for Disease Control and Prevention, National Center for Health Statistics), NCHS Data Brief, No. 18, May 2009, 2, 6.
When speaking in the language of women’s “well-being and progress,” the report referred to college attendance and completion, percentage of advanced degrees, numbers of women in the work force, and women’s earnings as a share of family income. Under the heading of continuing “problems” for women one could find wage and income equity, poverty, unique health challenges, and intimate partner violence. When it came to the report’s assertions, however, that “[f]ewer women are married,” or “single mother households are more common than single-father” households, or that there are “reshaped patterns in marriage and divorce,” the report says only that these phenomenon “affect women and men differently.” The normative language about “progress or problems” was absent, in other words, and only descriptive language appeared.

5. ARTs – Those Who Can Afford a Baby

The federal government’s nearly complete absence from the arena of ARTs regulation is also telling. Older and wealthier Americans tend to make use of these services. It might also be presumed that clients of fertility clinics have thoughtfully prepared to become parents, although this is not always the case. At the same time, the practice of ARTs has affected essential parenting matters such as the family structure into which children are brought, and the presence or absence of biological relationships between children and the parent(s) who rear them.

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Especially during the 1980s, but even continuing to today, the ART industry has generated controversies of the kind that usually attract lawmakers. Despite this, the federal government has demurred. On the one hand, this is very likely because many of these controversies are more susceptible to state rather than federal regulation. They concern, e.g. parentage determinations or health care practices. On the other hand, there is no doubt that if the federal government wished to insert itself into the equation, it might have done so by means of one or more of the “tools” it used to affect child support and parenting by the poor and the young: interstate commerce, broadly sweeping health care policies, and federal grants to states with mandatory quid pro quos. Consequently, today, federal laws in this area are limited to assuring that clinics advertise their success rates in a standardized form which avoids deception.46 A Congressional promise to propose a model program for the inspection and certification of facilities handling embryos was never realized.47 Even the judiciary has demurred respecting lawmaking on ARTs, refusing to grant certiorari on the Seventh Circuit case Lifchez v. Hartigan,48 on the question of the constitutionality of a state law potentially impeding access to in vitro fertilization.

In sum, this subsection I.A. indicates that the federal government has proactively sought to discourage childbearing among those not likely to sustain families which are economically self–sufficient. These family units are unlikely to take the form of the unitary family. At the same time, the federal government has declined to interfere with those older and likely more well-off men and women who choose to form families lacking marriage and/or biological kinship.

46 See the Fertility Clinic Success Rate and Certification Act, 42 U.S.C. §263a-1 (2002)
B. Encourage involved fathering, but not necessarily in the context of marriage, and encourage stable marriages too.

It is helpful to treat the second and third federal policies together because they appear together, with more or less emphasis upon each, in federal laws. In some sense, both of these policies – encouraging active fathering and encouraging marriage -- are an extension of the federal concern that parents take care of their own children financially; involved fathers and marriage both predict for improved familial financial circumstances. Yet both policies also hold the potential for sending other messages about parenting, e.g. that children benefit when their fathers are involved in their lives, and when their parents are married.

Federal marriage promotion efforts originated during the Clinton Administration in 1996 when Congress passed PRWORA. Prominent among PRWORA’s legislative findings were the statements: “Marriage is the foundation of a successful society.” and “Marriage is an essential institution of a successful society which promotes the interests of children.” 49

Marriage efforts later received significant federal money when President Bush created the National Healthy Marriage Initiative in 2001, devoting 90 million dollars at that time to marriage-promotion via the Department of Health and Human Services. 50 In 2002, federal funding totaling 59 million dollars was allocated to the Administration for Children and Families within HHS for “healthy marriage demonstration products” in pursuit of the marriage goals of PRWORA. 51 In 2005, under the Deficit Reduction Act, Congress legislatively initiated a “Healthy Marriage and Responsible Fatherhood

49 Sec. 1 of Pub. L. 104-103 (the Personal Responsibility and Work Opportunity Reconciliation Act).
50 CITE
51 CITE, See Pushed to the Altar, supra note _ at 32.
Program” in which 150 million dollars per year for 5 years would be allocated to strengthening marriage and fatherhood. This program was intended to assist all Americans, not just those with low income, though it promised special foci upon groups particularly hard hit by declines in marriage, including the poor and minority communities.52 Marriage itself, and its relationship to good parenting, were its driving ideas. According to HHS, the goals of the Healthy Marriage program included: “increas[ing] the percentage of children who are raised by parents in a healthy marriage, and “increas[ing] the percentage of married couples who are in a healthy marriage.” It also aimed to help couples contemplating marriage, and to support marriage preparation awareness among youth and the public generally, as well as to support relevant research, and to help avoid domestic violence.53 The HHS office administering the marriage initiative openly advocated on its website that children “who grow up in healthy married, two-parent families do better on a host of outcomes than those who do not,” and that marriage is associated with “more wealth” “better physical health of children,” and reduced domestic violence.54 Of its total annual funds, 100 million dollars per year was allocated for programs addressing healthy marriages directly, and the remaining 50 million upon responsible fatherhood grants. The former might include, inter alia, public advertising campaigns on value of marriage, high school marriage education classes, premarital education and marriage skills training, divorce reduction activities, and marriage mentoring.55 The latter – responsible fatherhood grants – were available for

52 CITE
activities promoting “counseling, mentoring, marriage education, relationships skills, parenting, and activities to foster economic stability.”

In the most recent federal budget, this program and its accompanying funding were allowed to lapse. The last federal dollars granted under this program were spent as of September 2010 to carry programs to September 2011. In his 2011 budget President Obama proposed, and Congress voted, CHECK to zero out the Healthy Marriage and Responsible Fatherhood program, and replace it with the “Fatherhood, Marriage and Families Innovation Fund,” to receive a one-time 500 million dollar grant. This program, now in place, offers competitive grants to states to conduct and rigorously evaluate comprehensive responsible fatherhood programs, “including those with a marriage component,” as well as demonstrations geared towards improving outcomes for custodial parents with serious barriers to self-sufficiency as a mechanism for improving outcomes for children in these families. Overall, the shift is notable for its somewhat reduced focus upon marriage and parenting within marriage, for its heightened attention to poverty reduction among men and families, and for its goal of connecting fathers with their children, whether inside or outside of marriage to those children’s mothers. Groups like the Alternatives to Marriage project greeted the shift as great good news, claiming: “This amounts to a permanent 25% reduction in marriage promotion and 33% increase in

56 Id. at ___.
fatherhood funding. At the same time, they acknowledged – as “less good news” -- that fatherhood and marriage promotion could also work hand in hand in some of the programs funded under the new initiative. This is certainly true on the face of the law.

HHS’ Questions and Answer document about the new initiative indicates that the program’s “key goal” is to “develop more comprehensive approaches that may include assisting parents with employment, child support payment, housing stability, and parenting and relationship skills.” HHS continued by explaining that the reason for “address[ing]fatherhood and marriage in combination” is to “increase the likelihood that children will receive financial and emotional support from both parents as a crucial part” of promoting their well being. Sometimes, without referring specifically to marriage, it uses the language of “two parents” in a “healthy low-conflict relationship, who are “committed to and respectful of each other” “supportive of their children” and not engaging in abuse. It further states that even children raised by single parents do better if they have the benefit of two parents’ financial support, involvement, positive communication and cooperative efforts. According to an HHS press release about “Protect[ing]the Health and Safety of America’s Families,” the new program will be evaluated according to its ability to achieve better economic outcomes for parents and children. Marriage per se is not a part of the evaluation. The same press release mentions

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60 Alternatives to Marriage Project, Good news on federal policy for families in poverty, at http://unmarried.org/blog/category/marriage-promotion/.
61 Ibid.
that 2.5 billion additional federal dollars are set aside to “strengthen[] States’ efforts to enhance employment related assistance to low-income families.”

A further HHS communiqué on the initiative emphasizes the importance of parents’ providing financial and “emotional support” for their children. It mentions marriage as one possible way to “ensure that children receive the financial and emotional support they need and deserve from both their parents,” and hopes this goal might be reached with partnerships between “States and community-based organizations, and between fatherhood initiatives, marriage initiatives, efforts to improve parenting, and efforts to help parents succeed in the labor force.”

The federal Office of Child Support Enforcement has also weighed in on the new initiative, concluding that the “key goal of the Fund,” in addition to getting existing fatherhood and marriage programs to work together, is to “coordinate these with efforts to assist parents with employment, child support payment, and parenting and relationship skills.” A White House Press Release about the President’s “Fathering Initiative,” spoke about “mentoring” and “personal responsibility” but did not mention marriage. It stated that the President “recognize[s]” that “the best leg up for any family is a good job.”

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67 CITE WHITE HOUSE PRESS RELEASE
The tone and substance of the new initiative largely accords with the consistent rhetoric of President Obama on the subject of fatherhood – emphasizing the importance of preparing men to be fathers and insisting upon their involvement, but not connecting fatherhood with marriage. It is appropriate to consider this rhetoric alongside laws and agency programs, given its potential impact on Americans. Furthermore, there is no doubt that the President hopes that his rhetoric and his life will influence behavior.68 Experienced political observers agree: “The president and the first lady have a unique opportunity to be role models.”69

At a 2010 Father’s Day event – his longest discourse on fatherhood – President Obama never links marriage with the strengthening of fatherhood.70 Likewise in a June 2009 speech, “kick[ing] off a national conversation on fatherhood and personal responsibility,” he never spoke about fatherhood and marriage together, but rather about education, employment, job training, parenting skills training, striking the right work-family balance, avoiding domestic violence, and the stresses on military families and fathers in prison. The President sounded the same themes in a series of June 2011 events to encourage fatherhood. Kicking off a year of “Strong Fathers, Strong Families” on Father’s Day 2011, he invited groups in civil society to provide opportunities for fathers and their children to do things together.72 He also penned an essay for the popular People magazine73 gave television interviews, issued a presidential proclamation, and devoted

68 See M.J. Lee, Obama opens up on fatherhood, Politico, June 22, 2011 at ___________.
69 See M.J. Lee, Obama opens up on fatherhood, Politico, June 22, 2011 at ___________, quoting Sally McDonough, press secretary to Laura Bush.
70 CITE
71 Obama Father’s Day 2009 ___________.
72 Katelyn Sebochik, Happy Father’s Day! The White House Blog, 7:43am, at http://www.whitehouse.gov/blog/2011/06/19/happy-father-s-day
his weekly address to the subject of fatherhood. Everywhere, he spoke about fatherhood without mentioning any relationship to marriage. He also downplayed the importance of biological kinship. In his proclamation he states that a father figure “may be a biological father, or a surrogate father who raises, mentors, or cares for another's child.” “Every family is different,” he wrote, but “what matters is the unconditional support, guidance, and love fathers and mentors give us throughout life.”

This presidentially-initiated conversation will continue, at least in part, via a new program emerging from the White House’s Office of Faith-Based and Community Partnerships.” It is a program planning a series of community forums on fatherhood and personal responsibility around the country. While the effort has no dedicated funding, it will also sponsor E-newsletters on tips from experts, and support and publicity for community trainings.

The “take-away” message from the current combination of legislative and executive policies, programs and discourse about fatherhood and marriage is decidedly more about building up fatherhood than it is about marriage. There is also a stronger emphasis on the relationship between economic (and educational) factors and the exercise of sound, stable fathering, than in prior programs. Messages regarding marriage and marital parenting are not completely absent in the current executive and legislative initiatives. They are simply not front and center.

C. A Biological Connection Between Parent and Child is Not Essential

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One of the elements of the “unitary family” model is the biological relationship between parents and the children they are rearing. A child’s opportunity to be reared by his or her biological parents may be affected or attenuated as a result of many different laws, including, speaking broadly, laws concerning fornication, cohabitation, divorce, remarriage and assisted reproductive technologies. Most of these laws are the province of the states, such as the law of divorce and remarriage, and nearly any law one might imagine regarding cohabitation or fornication. It is therefore no surprise that the federal government has not spoken to these matters. It is slightly more surprising, on the other hand, that the federal government has not entered into the arena concerning assisted reproductive technologies (ARTs). “Collaborative reproduction,” or the creating of children with donor eggs, semen, or embryos, who will be reared by one or more parents without a biological relation to the child, is increasingly common in the United States. Tens of thousands of such children are created annually. Recent reports indicate that between 30 and 60 thousand children are born each year in the United States via sperm donation, via egg donation and another via embryo adoption. As described in Part I.A.5 supra, no branch of the federal government has not addressed ARTs in any significant way.

The executive branch of federal government has further indicated its disinterest in or dismissal of the importance of biological kinship in parenting, by its support for a new form of publicly recognized union in which any children reared would necessarily be genetically unrelated to one or both of their parents. By this of course, I am referring to same-sex marriage. President Obama has been extending protection to same sex

\[\text{77 CITE}\]
partnerships in an incremental fashion over the course of his term. He has declared his support for civil unions which include all the rights and obligations of marriage, offered federal benefits to the partners of federal workers, repealed the military’s “don’t ask, don’t tell” policy, and most significantly, refused to defend in court the law (the Defense of Marriage Act (DOMA)) barring federal recognition of same-sex marriages. On the matter of DOMA the President, via his Department of Justice, has signaled that he does not believe that the state could rationally assert that there is any important relationship between children’s well-being and their growing up in the context of their biological parents’ marriage. He did this first via the Department of Justice’s refusing to argue in both the lawsuits challenging the DOMA (Pedersen v. OPM and Windsor v. United States) that the government has any significant interest, in protecting marriage for the sake of protecting children’s link with their biological parents. The administration conceded it had no such interest in both cases. The President then did it more definitively by abandoning the defense of DOMA altogether. Attorney General Eric Holder’s statement on this matter said:

[T]he President has concluded that…classifications based on sexual orientation should be subject to a more heightened standard of scrutiny. … Section 3 of DOMA, as applied to legally married same-sex couples, fails to meet that standard and is therefore unconstitutional.

80 See Kirk Semple, U.S. Drops Deportation Proceedings Against Immigrant in Same-Sex Marriage, the New York Times, June 30, 2011, at _________________ (“immigration officials put into effect new, more flexible guidelines governing the deferral and cancellation of deportation…. Immigration lawyers and gay rights advocates said the decision represented a significant shift in policy and could open the door to the cancellation of deportations for other immigrants in same-sex marriages.”)
81 CITE____
83 Reply Brief of the United States, pp. 6-7.
In other words, the public’s interests in ensuring that children are born and reared in families which include their biological parents is not sufficient in the President’s view, to warrant a law granting unique status of marriage to opposite-sex couples. This view was also signaled in the President’s Father’s Day proclamation, when he opined that “what matters,” with respect to fathering, “is the unconditional support, guidance, and love fathers and mentors give us throughout life,” and not biological kinship. 85

President Clinton and the Congress who passed DOMA, and the current Congress -- which has picked up the defense of DOMA abandoned by the President 86 -- conveyed the contrary message: that the common good requires allowing states to distinguish between intimate adult relationships having the potential for procreation (and consequent biological family connections) and those which do not.

Supporters of same-sex marriage intend their pursuit of marriage to pave the way for parenting by same-sex couples via both adoption and ARTs. Already, there are myriad ART clinics which advertise their services to the gay and lesbian community. 87 The extension of marital status to same-sex unions is stirring greater interest in same-sex parenting, 88 and no doubt, legally speaking, same-sex couples’ arguments to be allowed

87 See e.g. Brette McWhorter Sember, The Infertility Answerbook, Chapter __, Gay and Lesbian Assisted Reproduction (2005), p. 31 (citing websites listing gay and lesbian friendly clinics, e.g. gayfamilyoptions.com; gayspermbank.com; queerparents.org). See also “Gay and Lesbian Access to ART” http://www.utexas.edu/law/faculty/jrobertson/robertson.DARBY.pdf
to parent jointly will strengthen when they attain marriage rights. Thus there is a high probability that the move toward state recognized same-sex unions will not only increase the practice of collaborative reproduction, but also adoption. Regarding adoption, states adopting marriage or civil-union definitions which include same-sex couples have already made it clear that adoption agencies are thereafter forbidden from discriminating against couples of the same sex. Religious adoption agencies have been forced to close as a consequence.

In sum, support for granting marital status to same-sex unions, and the disavowing of any significant state interest in linking marriage with procreation and childrearing, are by themselves clear assertions to the effect that biological parenting – and by extension, parenting within marriage – are of little importance.

**Part II. Missed Connections and Ideology**

*Prima facie,* it is clear that while some federal policies on parenting are logical and potentially effective, others are misdirected or even contradictory. The executive and legislative campaign to promote fatherhood, for example, could surely be ranked among the most promising policies. It is fathers who are largely absent from single-parent homes, and research demonstrates that men with superior economic and educational capital are more likely to get married and remain married. Furthermore, President Obama is personally extremely well-suited to the task of encouraging men to assume

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91. See, e.g Paula England & Kathryn Edin, Unmarried Couples with Children, 96-97 (2007); ____.
their fathering responsibilities. His fatherless upbringing, and his dedication to being the kind of father he never had, combined with his record of personal accomplishment, is a convincing and integrated message.

Federal support for healthy marriages is also encouraging. The decline of marriage is a national phenomenon: the poor, the less educated and lesser employed are suffering the most; and racial and ethnic gaps are becoming alarming, while marriage remains one of the surest predictors of stable, financially adequate, and overall beneficial parenting.

Initial reviews of federally funded marriage and relationship education programs found them “effective in improving relationship quality,” and “somewhat more effective at improving overall communication skills.” A 2011 evaluation of programs directed specifically to low-income, unwed parents found disappointing results associated with all but one program. Yet it also provided clues as to some means for boosting results in the future.

Programs assisting adolescents and the poor to wait until they are financially and developmentally ready to have a child also makes sense, as do those delivering information and skills for succeeding in education, employment, and family life. Some would prefer that private groups and institutions – families and churches for example -- transmit these lessons. And no doubt there are advantages associated with having trusted figures deliver help which is more precisely tailored to a recipient’s individual’s need. But for various reasons – intergenerational poverty and father-absence, declining church attendance, and ignorance and confusion about the facts concerning the conditions for

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sound parenting, to name just a few – a large swath of Americans are not getting this kind of private assistance, and the state is understandably stepping in as a service to the common good.

At the same time, however, some federal parenting policies are simplistic, or even fly in the face of the relevant research about the essential attributes of good parenting, or the effective means of promoting it. This is not to say that genuine concern for children is not apparent in many of the federal efforts discussed infra in Part I, but rather that some efforts are tainted or even driven by politics and ideology triumph, rather than the results of relevant research and experience. In this section, I will treat the major shortcomings of extant federal parenting policies in three points. The Conclusion will offer several additional observations about possible future efforts.

A. Federal policy unduly discounts or even dismisses the possible importance of the role of biological connection in parenting.

As described in I.C. above, current federal approaches to fathering, to same-sex unions, and to collaborative reproduction via ARTs do not appear to value the preservation of biological kinship as a part of the parenting enterprise. Neither does federal silence regarding single parenting by women over 19. Yet, while scientists from many disciplines continue to study the correlates and effects of the absence of the organic biological link between parents and children, there is already sufficient data to indicate that, on average, advantages inure to children who are reared by their own biological
parents in an intact marriage. At the very least, it is quite premature to discount, let alone dismiss the importance of kinship.

Recently, in response to changes in family structures and interest group claims about the effects of such changes, researchers are studying the effects on children of the absence of a biological parent(s). They are also attempting to discern the nature of the contributions parents of either sex make to child outcomes, in particular whether such contributions are unique to one sex, overlapping with the other sex, or complementary or reinforcing between the sexes. Public appeals and Internet searches for parents by children conceived via ARTs using gamete donors, are spurring some of this research. An emotional editorial in the New York Times on the most recent Father’s Day, entitled “A Father’s Day Plea to Sperm Donors,” concluded “I am sometimes overwhelmed by the infinite possibilities by the reality that my father could be anywhere in the neighboring lane of traffic on a Friday during rush hour, behind me in line at the bank or the pharmacy, or even changing the oil in my car…. I am sometimes at such a petrifying loss for words or emotions that make sense that I can only feel astonished by the fact that he could be anyone.”

In Canada, a reporter conceived via sperm donation brought a lawsuit challenging anonymous donation in British Columbia. The highest court there held in May 2011 that children conceived with donor sperm are a “vulnerable group,” whose well-being is “too important to leave unregulated.” Relying, inter alia, upon a report entitled My

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96 Pratten v. British Columbia, 2011 BCSC 656
Daddy’s Name is DONOR, issued in 2010 by the Institute for American Values, the court concluded, similarly to the report, that “donor offspring feel a very deep, painful and personal loss.” It banned donor anonymity for both egg and sperm donation in its jurisdiction in the future. The Washington State legislature in the U.S. has just passed a law requiring fertility clinics there to preserve certain identifying information about donors, to be revealed upon application by their offspring when they reach majority age, albeit it provides for a donor veto on releasing information to their offspring.

Another analysis of the research regarding the well-being of children conceived via sperm donation, a meta-analysis of prior studies, found that the children appear to be psychosocially sound up to ages 8-10, but that matters are “unknown” after that time. It recommended “larger and longer studies.”

Another aspect of the biological-kinship aspect of parenting concerns the nature of the contributions that parents of different sexes may make to their children. The absence from a child’s life of a parent of one or another sex might occur as a result of ARTs, nonmarital parenting, divorce (likely to a lesser extent), or to a same-sex couples use of ARTs or adoption. In response to these situations, researchers are asking: are parents’ contributions unique, overlapping or even complementary/interacting?

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97 Elizabeth Marquardt and ____, (Commission on Parenthood’s Future, 2010).
101 Ibid. WSJ
A review of this research is beyond the scope of this paper. I have addressed the subject at length in a separate paper. Summarizing matters very briefly, it appears that there is evidence of all three types of parental contributions. Regarding fathers, and again speaking generally, the evidence appears to show that their active presence has “long term benefits [for children]…independent of those linked to good mothering.” The source(s) of their differing contributions is not yet certain. Some have suggested that this might be due to neurological differences in brain wiring. Cornell University research psychologist Peggy Drexler’s *Our Fathers Ourselves*, also reports on the possibility that father absence can have inhibiting effects on the brain development of children, based upon studies of types of animals whose fathers typically help the mothers to rear their offspring. Single parenting, involving by far the largest number of children reared without the regular presence of fathers in their lives, is associated with diminished emotional and academic outcomes for children as compared with those achieved within an intact marriage. (These studies control for potentially confounding factors, such as poverty.) A very recent federal study also concluded that children living with their married parents also have the best chance of avoiding family violence. These children suffer relatively low rates of maltreatment (6.8 per 1000) and abuse (2.9 of 1000),

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103 Peggy Drexler, Our Fathers, Ourselves (2011); Sue Shellenbarger, The Secret of Dads’ Success, the Wall Street Journal, June 14, 2011.
104 Peggy Drexler, Our Fathers, Ourselves, 2011
especially as compared to children living with one parent and an unrelated partner (respectively 57.2 per 1000 and 33.6 per 1000).106

Research demonstrating the detrimental effects of mother-absence is somewhat older.107 Today, some suggest that mother-absence has not only psychological, but also neuropsychological aspects, involving brain development.108 According to the National Institute of Child Health and Human Development, maternal sensitivity and bonding is the most consistent predictor of a child’s cognitive, social and emotional development.109 Furthermore, it appears that a father’s care for a mother strengthens her maternal sensitivity and reduces her maternal stress, enabling her to nurture more.110

There is emerging, and contested, evidence about the effects on children of being reared by two parents of the same sex. There is a dearth of research concerning male-couples, and heated controversy about the quality of studies about female-couples. Studies suffer from various problems including, to name just a few, short-term time-frames, self-selection by couples into the studies, prior ideological and personal commitments by the researchers, and the fact that the children studied have often been reared for some part of their lives in opposite-sex households.111 Data regarding same-

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108 A.N. Schore, Affect regulation and the origin of the self: The neurobiology of emotional development (1994) at. 355
sex couple stability – stability being an important correlate of child welfare – is hard to find given the short time frame in the United States during which same-sex unions have enjoyed state support. Recent European studies looking back over nearly two-decades of same-sex unions, on the other hand, indicate that these may be notably less stable than opposite-sex unions in the countries studied.

Certainly, further research is very much needed in all of these areas. It is inherently difficult to determine whether particular child outcomes are related to a father’s, or a mother’s, or their joint behavior. At the same time, it is possible to find respected child-welfare organizations concluding that children are most likely to thrive in marriages wherein parents are rearing their own biologically related children. Evidence is emerging too, about the absence of intergenerational contributions (e.g., by grandparents) into households lacking both marriage and biological connections. CITE

Perhaps the best one can conclude without much controversy at this point in time, is that it is far too soon to decide that biological parenting is irrelevant to children’s flourishing.

Why then, is federal policy – particularly the current Executive opinion that the federal government cannot muster an argument in favor of preserving biological parenting – so far removed from this conclusion? The evidence points to politics, ideology, and possibly even the influence of the ART industry or the politics of abortion.

Parent Adoption by Same-Sex Parents 109 Pediatrics 341, 343 (2002) (“The small and nonrepresentative samples studied, and the relatively young age of most of the children suggest some reserve.”).

112 Mary Parke, “Are Married Parents Really Better for Children?” Center for Law and Social Policy Policy Brief, May 2003, p. 1, 6; Kristin Anderson Moore, et al., “Marriage From a Child’s Perspective: How Does Family Structure Affect Children, and What Can We Do about It?” Child Trends Research Brief, June 2002, p. 1-2 (“Thus, it is not simply the presence of two parents, as some have assumed, but the presence of two biological parents that seem to support child development.” (emphasis in the original)).
Politically speaking, it is no secret that President Obama, and Democrats (who presently constitute a majority of the U.S. Senate) derive considerable support from groups supporting same-sex marriage. A recent headline in *Politico* blared “Gay donors fuel Obama’s 2012 campaign.” The authors explain that the Obama administration is “banking on gay donors to make up the cash it’s losing from other groups of wealthy supporters who have been alienated and disappointed by elements of Obama’s first term.” In fact, the leading homosexual rights interest group, the Human Rights Campaign, has already endorsed Obama in his 2012 presidential run.

President Obama and other Democrats also receive donations from the leading supporters of abortion (in particular Planned Parenthood and the National Abortion Rights Action League) and from feminist groups more likely to support a vision of freedom that is more distrustful of marriage and more supportive of individual sexual expression – both of which positions incline toward family structures lacking marriage and/or biological kinship. (Over the course of his career, according to Open Secrets, Barack Obama has received nearly seven million dollars in campaign contributions from the “women’s issue” industry.) This vision is too large to address fully here; I have previously written at some length about the anthropology of this strand of feminism.

Among the most famous among groups supporting abortion as well as the valorization of individual sexual expression, is the Planned Parenthood Federation of

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113 Ben Smith & Maggie Haberman, Gay donors fuel Obama’s 2010 campaign” May 9, 2011, at _____.
114 Julie Mason & Glenn Thrush, Obama’s gay marriage tendencied, Politico, June 23, 2011.
116 Obama has received $6,904,864 from the "Women's Issue" industry over his career. See http://www.opensecrets.org/industries/recips.php?Ind=Q08&cycle=2008&recipdetail=S&Mem=Y&sortorder=
America. Senate Majority Leader Harry Reid replied “hell no” when asked if he would allow Planned Parenthood to be defunded as the Republicans’ *quid pro quo* for avoiding a federal government shutdown in early 2011. President Obama also strenuously defended Planned Parenthood’s continuing receipt of federal dollars in early 2011, and later that year threatened the state of Indiana in federal court for its decision to deny state Medicaid funding to Planned Parenthood, despite the Indiana Governor’s assurances that an audit of the state’s medical providers ensured women continuing access to reproductive and other health care. Planned Parenthood contributed more than $148,000 to federal candidates -- almost all Democrats -- during the 2010 election cycle; its PAC spent over $443,000, and it reported $905,796 in “independent expenditures” almost exclusively for Democrats – *i.e.* money spent to support or oppose federal candidates, mostly through advertisements.

While a failure to regulate ARTS in favor of biological kinship might stem from federal reticence to enter various state lawmaking preserves, it should also be mentioned that other reasons might help explain federal inaction, including the profitability of the fertility industry. Harvard Business School Professor Debora Spar’s *The Baby Business: How Money, Science and Politics Drive the Commerce of Conceptions,* 122

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120 Ken Kusner, Ind. Appeals Freeing of Planned Parenthood Funds, Associated Press, June 28, 2011, at http://www.google.com/hostednews/ap/article/ALeqM5iMWPxdit72sUHPltSfxhVE5DfEZg?docId=6ede5109ad97464d9d5b21ddf45fcb96
describes the multi-billion dollar business that U.S. ARTs have become. This nearly unregulated industry is the destination of choice for citizens of many foreign countries with more restrictive laws regulate everything from donor anonymity to permitted payments. It is also conceivable (as I have suggested in a prior article)\(^{123}\) that abortion politics underlies the absence of legislation which would reign in the ART industry; the question of the value of embryonic human life is involved in both arenas. Finally, there is the simple possibility that the government has decided to defer to adult wishes regarding childbearing, wishes regarding parenting not infrequently expressed in dramatic and emotional terms by single persons and infertile couples.

In conclusion, there is insufficient reasoning or scientific backing for the federal government’s current position regarding the importance of biological kinship in parenting. Political, economic and ideological reasons better explain this outcome.

**B. Federal policy naively assumes that fathers might stay connected to their children in the absence of a stable connection with the children’s mothers, such as marriage**

Current federal parenting policy tends to gloss over the close relationship between marriage and father involvement. In the words of the head of the National Fatherhood Initiative: “It’s not political, it’s practical. … Fathering is about location, location, location,” and “a man who is not in conflict with the mother of his child, and actually lives in the home with them will have the best chance to be an involved father.”\(^{124}\) The research bears out this common sense observation. Fathers married to the mothers of their


children are the most involved with their children. A variety of factors account for this. Some might be evolutionary, as married fathers are more certain of their paternity, and their ongoing relationship with the mother. Others might related to the phenomenon labeled “gatekeeping,” whereby single mothers control and restrict the fathers’ involvement with the child based upon his behavior, his disposition toward her, and his (more likely) conduct with other women. A 2007 study reported that less than 30% of non-resident, divorced fathers generally have weekly contact with their children. Never-married, nonresidential fathers see their children even less often. Federal policy on fathers should reflect this reality. Presently, fatherhood and marriage programs coexist and are encouraged to work together, but there is a marked emphasis on the educational and economic components of the former. The effects of tying fatherhood and marriage together ought not to be overlooked.

C. The chief federal modus operandi for reducing births to (largely unmarried) adolescents and the poor appears to have produced the opposite results among these very same groups – more nonmarital sex, nonmarital pregnancies and births.

The federal government’s largest, loudest and most expensive approach to “parenting” is to discourage it among the young and the poor via sex education and health care programs involving the distribution of large quantities of (often) free birth control. Over the decades during which these programs have been in full swing, rates of

nonmarital childbearing have soared, particularly among the poorest and least educated Americans. In 1970 the rate of unmarried births per 1000 women of childbearing age was 26; in 1980 it was 29; in 1990 it was 44; in 2005 it was 47; and in 2008, 52.5.\textsuperscript{128}

The Department of Health and Human Services\textsuperscript{2000} summarized the data between 1960 and 2000 as follows: “Nonmarital childbearing increased among women of all age groups between 1960 and 1994 before dropping off modestly in 1995. … However data for 1996 through 1999 show continued increases for women age 15 through 19, 20 through 24, and 25 through 30.” The report continued: “Nonmarital births as a percent of all births have increased among teens of all ages and across all racial and ethnic groups since 1960. … and among women of all ages.” The report showed that nonmarital births as a percentage of all births were 5.3% in 1960, 11% in 1970, 18% in 1980, 28% in 1990, and 33% in 1999.\textsuperscript{130} Today, nonmarital births are at an all time historic high of 41%.\textsuperscript{131} It is important to keep these long term trends in mind given how sensationally the media reports modest declines in, for example, a single year’s rate of teen pregnancy, as compared only with the year or two before. Rates today are still 35% higher than 1980, 75% more than 1970, and 250% more than 1960.\textsuperscript{132}

Yet the federal government’s plans to address teen and other nonmarital childbearing in the future are more of the same, albeit it is banking on multiplying the

\textsuperscript{128}Joyce A. Martin, et al, births: Final Data for 2008, National vital Statistics Reports (Vol. 59, no 1), December 2010
\textsuperscript{129}Babette Gutmann & Jennifer Hamilton (Westat), Trends in the Well-Being of America’s Children and Youth 2000, U.S. Department of Health and Human Services, Office of the Assistant Secretary for Planning and Evaluation (2000)
\textsuperscript{130}Babette Gutmann & Jennifer Hamilton (Westat), Trends in the Well-Being of America’s Children and Youth 2000, U.S. Department of Health and Human Services, Office of the Assistant Secretary for Planning and Evaluation (2000), at Table PF1.7.A.
number of “evidence-based” programs it plans to support.\textsuperscript{133} Most involve birth control, and all of which have shown fairly modest results in reducing sexual involvement or nonmarital pregnancy outcomes temporarily, and only to levels which are still alarming and much higher than prior decades.\textsuperscript{134} At the same time, leading supporters of birth-control-inclusive programs have concluded that birth control availability is virtually universal among women of reproductive age. Already\textsuperscript{135} 89% of sexually active women of reproductive age “at risk” of becoming pregnant use contraception, and 98% have used in their life time. Even among teenagers who are sexually active and do not want to become pregnant, all but 7% use contraception.\textsuperscript{136} In a highly regarded book about poor, single mothers, Promises I Can Keep: Why Poor Women Put Motherhood Before Marriage,\textsuperscript{137} the sociologist-authors wrote that the location of the Planned Parenthoods in poor neighborhoods is so well known that few have to consult the yellow pages to find them.

Experts also concede that birth control will always fail a certain percentage of the time. In first 12 most of contraceptive use, 16.4% teens will become pregnant.\textsuperscript{138} 48% of women with unintended pregnancies and 54% of women seeking abortions were using

\begin{thebibliography}{99}
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contraception the month they became pregnant. Contraception expert James Trussell of Princeton University has concluded even that “The Pill is an outdated method because it does not work well enough; it is very difficult for ordinary women to take a pill every single day.”

Pregnancy is so likely from even slightly delayed use of the pill that federal government guidelines on the pill advise women to use “emergency contraception” if they had unprotected intercourse within two days after taking their pill only three hours late. Not surprisingly, given the failures of ordinary birth control, governments are beginning to promote the greater availability of “emergency contraception” (EC), also known as the “morning-after pill.” Yet twenty three studies published between 1998 and 2006, and analyzed by James Trussell and his team at Princeton University, measured the effect of increased EC access. Not a single study among the 23 found a reduction in unintended pregnancies or abortions following increased access to emergency contraception. Rather, many studies have demonstrated “risk compensation” behavior, i.e. a greater willingness to engage in potentially risky behavior when one believes risk has been reduced through technology.

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140 D. Rose, The Pill ‘has had its day as an effective contraceptive,’ The Times (UK), June 26, 2008, at timesonline.co.uk/tol/news/uk/health/article4215441.ece?articleid=4215441.
143 See, e.g. J. Richens et al., Condoms and Seat Belts: the Parallels and the Lessons, 355 The Lancet, 400 (2000); M. Cassell et al., Risk compensation; the Achilles’ heel of innovations in HIV prevention? 332 British Med. J. 605 (2006); J. Dueñas et al, Trends in the Use of Contraceptive Methods and Voluntary Interruption of Pregnancy in the Spanish Population during 1997-2007 82 Contraception 82 (2011) 63% increase in contraceptive use accompanied by 108 percent increase in rate of elective abortions) OTHER; M. Wiggins et al., Health Outcomes of Youth Development Programme in England: Prospective Matched Comparison __ British Med. J. ___ (2009) (sex ed and advice on access to contraception beginning at ages 13-15 over three years at 54 sites; participants more likely than those in control group to report a pregnancy (16% versus 6%) and had early sexual experience (58% versus 33%); D. Paton, The Economics
studies in the U.S. and abroad have reached the same conclusion.144 Economist Peter Arcidiacono and his team at Duke University has proposed that “increasing access to contraception [generally, not just EC] may actually increase long run pregnancy rates even though short run pregnancy rates fall. On the other hand, policies that decrease access to contraception, and hence sexual activity, may lower pregnancy rates in the long run.”145

A tremendous amount of economic and sociological scholarship has been produced indicating that today’s high rates of nonmarital births to parents unlikely to achieve stability or economic self-sufficiency are at least in part the product of the technology funded and distributed by the federal government, and not a satisfactory answer to the phenomenon. According to this substantial body of literature, the widespread availability of birth control and later abortion has led, not to decreased pregnancies, but rather more risky sexual encounters, and a higher number of both pregnancies and abortions. In the words of the comprehensive study of governmental population control strategies, Fatal Misconception, “Contraceptives like the pill, initially developed as a ‘foolproof’ means to reduce fertility, helped spark a sexual revolution that swept the globe.”146

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There is also data indicating that more widespread access to abortion operates similarly. Now famous studies by Nobel Prize winning economist George Ackerlof and his team, and by other economists and sociologists, indicate robustly that more easily available abortion logically leads to more nonmarital sexual encounters, more nonmarital pregnancies and births, more abortions. One economist even links contraception and abortion technology to more divorces.

Yet, there is no response to this data from the current federal executive or legislature. One possible explanation is that it is literally “unthinkable” for them to uncouple their ideas about privacy or freedom in the area of human sexuality, from the notion of easily available birth control (and maybe even abortion), which technology makes possible sexual expression without procreation, and even without any commitment to a longer term union between the sexual partners. Perhaps this represents excessive faith in technology. Certainly this is a possibility. It might also represent an ideology that Harvard economist Lant Pritchett has termed “sexualityism.” This is the position that the “expression of human sexuality is in and of itself a positive good and limitations on that expression are in and of themselves bad.”

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149 Timothy Reichert, Bitter Pill, First Things (May 2010) 25.
Some point to particular federal sex-education programs and messages to claim that the federal government has adopted sexualityism. It is impossible to determine the scope of the role such a message plays in federal sex-education, but there is little doubt that it is at least present in these arenas. One of the most prolific sexual education bodies in the United States, SIECUS (Sexuality Information and Education Council of the United States), a regular recipient of federal funds, writes in its flagship manual for teens that “Sexuality is a part of who you are as an individual,” “At every point in your life, you can choose if and how to express your sexuality.”

Rhetoric in several Supreme Court opinions about women’s reproductive rights and about sodomy, tends to affirm sexualityism. This is true in particular of the Court’s rhetoric in Planned Parenthood v. Casey claiming that all matters associated with sex and procreation, “involve[] the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life.” Note how this language characterizes sexual decisions as strictly individualistic, even when they concern procreating – an event involving at least two persons, and possibly the creation of a third. Also in Casey, the plurality opinion asserted that women as a class have a kind of “reliance interest” in the legal availability of both birth control and abortion in order to “organize [their] intimate relationships,” “define their view of themselves and their places in society,” “and “participate equally in the

153 Ibid. at 851.
economic and social life of the nation.” Sexual expression was also placed at the core of the right of privacy in the Lawrence v. Texas opinion wherein the Court discovered a constitutional interest in sodomy after repeating the above Casey passage above. Justice Ginsburg’s dissent in the partial-birth abortion decision Stenberg v. Gonzalez also reveals the importance she accords to sexual expression, disconnected from childbearing. She writes that the Court’s upholding of the ban on partial-birth abortion is really about depriving them of a means to avoid becoming mothers following upon sexual encounters, concluding: “This way of thinking reflects ancient notions about women’s place in the family and under the Constitution—ideas that have long since been discredited.”

If this is the constitutional definition of freedom where sex is concerned, then children, and their interests in parenting, have no place within it. Then it is unthinkable to suggest that access to, or even government funding for, birth control or even abortion, could be reduced or eliminated without violating an essential freedom. For birth control (in theory if not always in practice) allows a person to express herself sexually, free even of the most intrinsic consequences of sex—procreation, or an ongoing sense of union with the sexual partner. Contraception is the symbol, and sometimes the substance too, of sexual expression without babies. Abortion is its insurance.

There is no doubt that it is extremely difficult to imagine a government willing to respond to nonmarital births among the young and the poor today, without resorting to birth control programs. It is ubiquitous in the public mind and across government programs. It is the internationally preferred way to address population questions.

154 Ibid. at 856.
157 Ibid at 185.
Entrenched public and public-private bureaucracies (e.g. Planned Parenthood, The National Campaign to Prevent Teen and Unplanned Pregnancy) completely depend upon it. But it has failed, not just for a brief period, but for half a century. At the very least, it is time for federal authorities to acknowledge this much, and to explain what it might do to respond to the evidence in the future. Almost no one would begrudge the federal government its interest in promoting family self-sufficiency, but it is wrongheaded to promote this goal using a policy which is not only an expensive failure, but which appears to be entrenching fatherlessness and poverty among women, minorities immigrants, and the less-educated.

Part III Conclusion

I have thus far summarized the major elements of federal policy on parenting and suggested that this policy suffers from serious shortcomings. In this section, I would like to make a few concluding observations. First, I join the growing chorus of those who recognize we have to do better not only for children, but in particular for African Americans and for our newest group of immigrants, Hispanics. Cries for assistance have for too long gone unheeded, as in this column by respected African American commentator Bob Herbert:: “[T]he absence of strong family units with mature parental guidance is at the very root of the chaotic environment that so many black youngsters grow up in.” It requires a “campaign of the scale of the civil rights movement.”158

In the most recent census data, it appears that for the first time in the history of our nation, nonwhite babies form a majority of babies born in a single year; most Hispanics and African Americans. Yet seventy two percent of African American children will be

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born to a single mother, and 54% of Hispanic children. Although many will initially have a cohabiting father, these unions prove far less stable than marriage. Also for the first time in U.S. history, among any race, there are more African American households headed by single parents (mostly women), than African American households with married couples.\textsuperscript{159} Among Hispanics, the rate is 19%, while among Whites and Asians, it is only 9%.

Economists and other social scientists are increasingly convinced that these developments will impair our nation’s economic progress. Commenting on the most recent figures about nonmarital births, the Annie E. Casey Foundation (a leading charitable organization addressing nonmarital pregnancy and births) commented that: “It’s critical that children are able to grow to compete internationally and keep state economies rolling.” Demographer William H. Frey, of Brookings Institution cautioned that “our future labor force is absolutely dependent on our ability to integrate and educate a new diverse child population.”\textsuperscript{160} Neither institution would view themselves as “conservative” on family issues. Both understand the connection between parenting environments and community and national prosperity, particularly for our most vulnerable neighbors.

Second, it appears that women, in particular -- due to the possible combination of their physical and intellectual make-up, including their fertility constraints -- are most disadvantaged by policies which appear to normalize nonmarital sex and identify nonprocreative and uncommitted sex with freedom. When sex becomes a condition for

\textsuperscript{159} Associated Press \textsuperscript{___}, Census Shows Whites are in Minority Among New Births in U.S., June 21, 2011, at \textsuperscript{______}.
\textsuperscript{160} Associated Press \textsuperscript{___}, Census Shows Whites are in Minority Among New Births in U.S., June 21, 2011, at \textsuperscript{______}.
having a nonmarital relationship, it is women more likely to suffer (alone) the range of associated consequences including depression, pregnancy, abortion, and single parenting.

Third, the federal government should not demur from frank conversation about the meaning and consequences of human sexual intimacy and its relationship with parenting on the grounds of privacy or even decorum. Teens and young adults live in a world of 24/7 sexual references. As individuals, they are acutely aware that they live in a sexual marketplace. Qualitative interviews with older adolescents and young adults indicate that sexual intimacy is far from special, sacred, or intimate. In the two leading books exploring premarital sex, largely among 18-23 year olds (many in college) their comments reveal this: A young man: “The fact that I let myself have sex with her, …without having any sort of regard for her. I mean I like her…. But …that could’ve been anybody…” A young women: “Yeah, well, you know you still have to give an occasion blowjob… I avoid the situation at all costs [laughs]. But once it gets to be like, “Come on, please? Okay. Fine.” A young man: “Porn is kind of a way to like, have new girls but not actually cheat on your girlfriend, if that makes sense.” Describing a young man: “In fact, he takes a fairly laissez-faire approach to sex, having hooked up seven or eight times at parties this past year.” One young woman describing another’s relationship: “I don’t know if they like each other that much… Like, he is there in her bed

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162 Mark Regnerus and Jeremy Uecker, Premarital Sex in America: How Young Americans Meet, Mate, and Think About Marrying, supra note __ at 87.
163 Mark Regnerus and Jeremy Uecker, Premarital Sex in America: How Young Americans Meet, Mate, and Think About Marrying, supra note __ at 97.
164 Mark Regnerus and Jeremy Uecker, Premarital Sex in America, supra note __ at 109.
Friday, Saturday night, but he does not come around any other times to hang out with her.¹⁶⁶

It should also be noted that the government is already talking a great deal about sex; it just isn’t talking about it in ways that make the link with future parenting. It is also pursuing campaigns about the private matter of what Americans eat in new and intrusive ways. In an insightful article about public and moral speech about sex, writer Mary Eberstadt asked “Is Food the New Sex?”¹⁶⁷ She asks whether we have become socially and legally more inclined to moralize to others about norms respecting food today, and commensurately less inclined to believe that it is acceptable to offer norms about sex, though in both cases at different times, people were inclined to regard the subject matter as strictly a matter of private choice. Today, federal government is experimenting with a high level of involvement in people’s food choices.¹⁶⁸ Federal agencies are making observations about food of the kind this paper has been making about parenting and sex. They are speaking about its health effects, and about disproportionate harm within the African American and Hispanic communities. They worry aloud about long term consequences.¹⁶⁹ The First Lady is using her sizeable bully pulpit and President is using his executive power to propose a budget and “sweeping” guidelines which, while they are “voluntary” are accompanied by pressure. These guidelines cover “all forms of marketing to kids,” including “product packaging” and the “images” used on products. Federal agents are acknowledging that, in the current

¹⁶⁶ Donna Freitas, Sex & the Soul: Juggling Sexuality, Spirituality, Romance and Religion on America’s College Campuses, 95 (2008).
marketplace, it looks like the odds are against them, but they are pushing ahead all the same.\textsuperscript{170} Programs are targeted to problem areas, and in some cases, new and even intrusive methods are proposed, with the permission of the relevant institutions (schools) and of parents. The U.S. Department of Agriculture just awarded a grant to a Texas school district to install cameras on children’s lunch trays can “read” their food choices.\textsuperscript{171} Significant federal money is flowing to this initiative; 4.5 billion dollars over the next 10 years in order to improve school lunches, for example.\textsuperscript{172} There are plans to move beyond influencing the schools to improving the home environment as well.\textsuperscript{173}

The amount of federal dollars and programs associated with parenting policy is objectively staggering. Some current efforts move in obviously and necessary directions. Others march forward, oblivious to, and in spite of the evidence. There is no reason that the federal government cannot to the parenting enterprise, the same spirit it is currently displaying regarding obesity, a spirit of innovation, urgency, practicality, attention to research, and concern for minority and other vulnerable communities.

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\textsuperscript{170} Ibid. \\
\textsuperscript{171} Mariette Ulrich, School Lunch War Gets Serious , May 17, 2011 at MErcatorNet.com, www.mercatornet.com/family_edge/view 9140 Four . five billion bill to improve qual of students’ meals. \\
\textsuperscript{172} P.L\textsuperscript{________}, Dec. 13, 2010. \\
\textsuperscript{173} Meredith Melnick, Cafeteria Cams Track Students’ Calorie Consumption at School, Time, May 12, 2011, at http://healthland.time.com/2011/05/12/cafeteria-cams-track-students-calorie-consumption-at-school/.
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