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June Carbone

Naomi Cahn

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FAMILY CLASSES: RETHINKING CONTRACEPTIVE CHOICE

*Naomi Cahn & June Carbone**

> I suggest that, apart from the muted story of racism, implications of social class have been neglected in the legal literature on abortion and divorce . . . . In essence, we witness in the United States a raging battle within limited segments of the middle classes on how to regulate the consequences of sexual conduct of everybody else. The American lower classes and large parts of

* Naomi Cahn, John Theodore Fey Research Professor of Law, George Washington University Law School. June Carbone, the Edward A. Smith/Missouri Chair of Law, Constitution and Society, UMKC School of Law. This Article is based on Naomi Cahn's Weyrauch Distinguished Lecture, delivered March 23, 2009, at the University of Florida, Levin College of Law, and Naomi Cahn and June Carbone, Red Families v. Blue Families: Legal Polarization and the Creation of Culture (2010). Our thanks to Nancy Dowd, Shani King, Nancy Levit, and Barbara Woodhouse.

the lower-middle class have no voice or no opinion, and the upper class is unconcerned.[1]

I. INTRODUCTION

Each of us teaches family law, which provides an opportunity to reflect on the differing meanings of families and class. A rich, controversial, and storied literature addresses the intersections of race, gender, class, and family.[2] Anthropology once also devoted considerable attention to working-class life, including differences in family formation. Over the last fifty years, however, explicit attention to family and class has only sporadically appeared in legal and policy discourse. Initially it was overshadowed by discussions of race and family, especially in the wake of the controversial Moynihan Report of the sixties, and the effective disappearance of marriage in poor African-American communities.[3] In the eighties and nineties, it briefly resurfaced as part of the discussion of welfare reform, and Charles Murray's efforts to sound the alarm about "The Coming White Underclass."[4] More recently, however, the moral values discussion and its role in the ideological divisions between the left and right have overshadowed the importance of class in explaining changes in family dynamics.

The political attention paid to moral values—in the context of the high profile fights over abortion, homosexuality, and abstinence education—has developed over the past quarter century in ideological terms as though race and class no longer existed. In fact, the changing understandings that attend family formation reflect a long term shift in the pathways to middle class life creating a new technocratic elite—an elite that invests heavily in both men and women's advanced degrees, and has remade family life to its advantage. The success of the new model, which we call the "blue family paradigm," and the sexual revolution at its core undermines what had once been consensus support

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1. Walter O. Weyrauch, *Family Law Book Review*, 37 AM. J. COMP. L. 832, 836 (1989) (reviewing MARY A. GLENDON, HERMENEUTICS, ABORTION AND DIVORCE, A REVIEW OF ABORTION AND DIVORCE IN WESTERN LAW (1987)).

2. A comprehensive list would be vast. On race, see, for example, ORLANDO PATTERSON, RITUALS OF BLOOD: CONSEQUENCES OF SLAVERY IN TWO AMERICAN CENTURIES (1999); on class, see JOAN WILLIAMS, CLASS ACTS AND GENDER WORKS: RESHAPING THE EVERYDAY AND ELECTORAL POLITICS OF WORK AND FAMILY (forthcoming 2010).

3. *See, e.g.*, PATTERSON, *supra* note 2.

4. Charles Murray, *The Coming White Underclass*, WALL ST. J., Oct. 29, 1993, at A14; *see generally* CHARLES MURRAY, LOSING GROUND: AMERICAN SOCIAL POLICY 1950-1980 (1984).

for traditional values (which we will call "the red family paradigm"), and for the structure of family life following from abstinence to courtship to marriage.[5]

The result of the tensions between these family ideals has been a moral backlash. To be sure, the leaders of the political backlash represent a different elite—one dominated by the more conservative, more business-oriented and more religious Republicans in the South and Midwest. As political scientist Andrew Gelman emphasizes in *Red State, Blue State, Rich State, Poor State*, political differences are greater among people with higher incomes, and religious attendance better predicts political differences of the rich than of the poor.[6] If we consider only high income elites, then the divide on social issues between the well-educated, secular elites who dominate Democratic areas of the country, and the more religious, high income voters who dominate Republican areas of the country is more pronounced than the political differences between poorer voters on the issues underlying the culture wars.[7]

While these political leaders and activists frame the issues (and do so without much reference to race and class), the dispute nonetheless reflects three significant class dimensions, which we will highlight in this Article. First, the communities "on the cusp" of this family transformation are what in another era we might have recognized as the white working class. This group, which has income levels well above the poverty line, but lower levels of education than the more comfortable middle class, sees the foundation of its marriage-based family life under assault. Divorce rates for these communities have plateaued near their historic highs, and nonmarital birth rates have grown, particularly for the 20-24 year-old age group ready to begin family life. Social conservatives are genuinely concerned about what they see as the moral decay of their communities, and resent the celebration of more open and tolerant attitudes toward sexuality that undermine (and sometimes denigrate) their efforts to instill age-old values in their children.

The second overlooked class dimension in these struggles, however, is the opposite of the first. Efforts to stem the "moral decay" in these more traditional communities, which often have taken the form of high profile efforts to promote abstinence in public schools and to harass and obstruct abortion clinics, may make family-based inequality even worse for poorer families. In the poorest communities, marriage has already

5. We set out these paradigms more fully in RED FAMILIES V. BLUE FAMILIES (2010).

6. ANDREW GELMAN ET AL., RED STATE, BLUE STATE, RICH STATE, POOR STATE: WHY AMERICANS VOTE THE WAY THEY DO 92-93 (2008).

7. *Id.*

disappeared for all intents and purposes, and moral suasion alone cannot bring it back. "Moral responses," such as abstinence-only education and lesser access to contraception and abortion, disproportionately affect those without the resources to circumvent the new strictures and produce more unwanted births in the process—exacerbating growing inequality, which determines the circumstances of the next generation.

The third dimension is the change in the distribution of overall fertility. Many American commentators celebrate the fact that overall U.S. fertility remains above the replacement rate and well ahead of fertility in Europe and Japan. The high overall rates, however, which most pundits acknowledge reflect Latino immigration to the United States, also occur because of much higher rates of unintended pregnancy than in most of the rest of the developed world. If we were to acknowledge the unintended pregnancy rate, we might also have to acknowledge that the "blue" regions of the country in fact have fertility levels that approach those of Northern Europe, and that an uncritical embrace of delayed childbearing would produce much higher rates of involuntary childlessness.

In this Article, we highlight the tensions between the two family models, describe the backlash these tensions have produced, and critique the class-based nature of the results. We argue that the politicization of family issues has produced its own "vicious cycle" of moral concern, draconian changes that disproportionately affect the poorest and most vulnerable Americans, and a new round of moral panic justifying further punitive measures, as the initial restrictions (such as closing abortion clinics and slashing family planning funds) make matters worse. We conclude that the "culture wars" are very much about class, and yet they are framed exactly as Professor Weyrauch reported: a fight between two relatively privileged groups, in which class implications of the struggle disappear from sight. This Article argues that only by making these class implications visible—for low income, middle class, and wealthy individuals—can we design more effective interventions that can break the cycle.

II. FAMILY FORMATION IN BLUE AND RED

Family has become a marker of class in American life, exacerbating economic inequality. The children of well-educated parents overwhelmingly grow up in two-parent, two-income families with substantially greater material and emotional resources than those available to the single-parent families that have come to dominate

poorer communities.[8] Within working-class families, the level of education necessary to achieve middle class status is becoming increasingly difficult to obtain, exacerbated by economic difficulties made worse by family instability. As Harvard economists Claudia Goldin and Lawrence Katz point out,

> recent wage structure changes have been associated with a "polarization" of the U.S. labor market with employment shifting into high-and low-wage jobs at the expense of middle-wage positions. . . . [T]he majority of the increase in wage inequality since 1980 has come from rising educational wage differentials, particularly rising returns to post-secondary schooling."[9]

The role of family structure in aggravating economic inequality starts with two overlapping changes in the American economy. First, the returns to higher education, and especially post-graduate degrees, are greater than ever, and those rewards are now available to both men and women. Second, greater global economic competition has driven the high paid manufacturing jobs available to less educated men overseas. As Goldin and Katz observe, the middle in the American market has diminished, leaving relatively low-paying service jobs where pay has stagnated, but increasing the demand for highly educated and skilled workers.[10]

The middle class responded to these changes by investing more in their children, and doing so for both men and women. During the sixties, overall college attendance grew. From 1960 to 1970, the rise in the number of college students "was nothing short of phenomenal," with enrollment more than doubling from 3.8 million to 8.5 million, an increase of over 100%, and increasing by another 41% in the seventies.[11] Women's attendance grew faster than men's, rising from 1.3 million in 1960 to more than 3 million in 1970.[12] By 1980, women

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8. Sara McLanahan, *Diverging Destinies: How Children Fare Under the Second Demographic Transition*, 41 DEMOGRAPHY 607, 608, 614-15 (2004).

9. *See* CLAUDIA GOLDIN & LAWRENCE KATZ, LONG-RUN CHANGES IN THE U.S, WAGE STRUCTURE: NARROWING, WIDENING, POLARIZING 2 (2007), http://www3.brookings.edu/es/commentary/journals/bpea_macro/forum/200709goldin_katz.pdf [hereinafter GOLDIN & KATZ, LONG-RUN CHANGES].

10. *See id.* at 8, 11; *see also* Claudia Goldin & Lawrence F. Katz, *The Power of the Pill: Oral Contraceptives and Women's Career and Marriage Decisions*, 110 J. POL. ECON. 730, 749 [hereinafter Goldin & Katz, *The Power of the Pill*].

11. Russell W. Rumberger, *The Job Market for College Graduates, 1960-1990*, 55 J. HIGHER EDUC. 433, 436 (1984), *available at* http://www.jstor.org/stable/pdfplus/1981442.pdf.

12. *Id.* at 437 tbl.1.

constituted more than half of all undergraduates.[13] In 2003, 30.9% of the women aged 25 to 29 in the United States were college graduates compared to 26% of men.[14]

The rise in women's educational attainment and career ambitions would have been difficult to reconcile with the family formation patterns of the fifties, where the average age of marriage for the country as a whole dropped to twenty, fueled in part by an increase in the number of brides pregnant at the altar. Over the course of the next two decades, as the number of women attending college grew, the "sexual revolution" took hold, transforming the lives of women in their twenties, and changing middle class understandings about the foundation of family life.

In this period, not only did the percentage of college graduates married by age twenty-three drop by 40%, but those married by age 26 fell from more than 70% of those born in the mid-forties (the college graduates of the late sixties) to approximately half of those born in 1960.[15] The increase in the ranks of unmarried young adults occurred simultaneously with an increase in the sexual activity of younger women, a dramatic drop in teen births, and changing expectations about fertility. Economists Goldin and Katz observe that, using a variety of data samples from the era, the percentage of women who report engaging in sex before the age of twenty-one grew from about 40% of those born in 1945 to more than 70% of those born a decade later.[16] The number reporting sexual activity before the age of eighteen grew even more dramatically, from about 15% of those born in 1945 to more than 40% of those born in 1955.[17] In the sixties, half of the women who engaged in premarital sex did so only with their fiancés, yet by the mid-eighties, less than 25% of the women who reported having pre-marital sex did so only with men they expected to marry.[18]

Nonetheless, despite the increase in sexual activity, birth rates dropped. Whereas the teen birthrate crested in 1957 at 97 births per thousand girls between the ages of 15 and 19, by 1983 the rates fell almost in half to 52 births per thousand girls.[19] Adoption rates between

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13. *Id.*

14. NICOLE STOOPS, U.S. CENSUS BUREAU, EDUCATIONAL ATTAINMENT IN THE UNITED STATES: 2003, at 4 (2004), http://www.census.gov/prod/2004pubs/p20-550.pdf.

15. GOLDIN & KATZ, LONG-RUN CHANGES, *supra* note 9; Goldin & Katz, *The Power of the Pill, supra* note 10, at 751.

16. *Id.*

17. *Id.* at 753.

18. KRISTIN LUKER, ABORTION & THE POLITICS OF MOTHERHOOD 87-95 (1984).

19. STEPHANIE COONTZ, THE WAY WE NEVER WERE: AMERICAN FAMILIES AND THE NOSTALGIA TRAP 202-03 (1992); *see also* LUKER, *supra* note 18, at 196 tbl.1 (showing that teenage birthrates were 79.5 births per thousand women aged 15 to 19 in 1950, 91.0 births per

unrelated individuals also changed markedly. They peaked at all time highs in 1970, but dropped in half by 1975.[20] During this same period, expectations about fertility changed. In 1963, 80% of non-Catholic female college students wanted three or more children, and 44% wanted at least four.[21] By 1973, just 29% wanted three or more children (and the cohort had fewer children than even those lower numbers)—an extraordinary shift in a ten-year period.[22]

These changes in the relationship between sex, marriage, and the transition to adulthood created what we have termed the "blue family paradigm." With this new set of family values, emotional maturity and financial independence are the sine qua non of responsible family formation. In order to facilitate the investment in workforce potential of both men and women, it is critical to postpone family formation until education is complete and careers are established. Women's greater financial contributions to family income, in turn, require greater male socialization into more egalitarian and companionate relationships. Because marriage and childbearing are postponed until individuals are in their late twenties and early thirties, fertility control is critical: abstinence is unrealistic because of the long gap between puberty and marriage, contraception is not only permissible, but morally compelled, and abortion is the responsible fallback.

Those who have followed the new blue paradigm have profited handsomely. With later marriage there is less guesswork involved in picking a mate. We have a much better sense by the age of thirty than at twenty regarding who will be successful and who will not, who will outgrow teen partying and who will be an alcoholic, who will pursue career ambitions and who will give up, and who will acknowledge their attraction to same-sex partners. Goldin and Katz report that assortative mating has increased the effect—the well-educated marry the well-educated, and benefit from two higher incomes.[23] Moreover, while the educated hold more liberal attitudes generally, and while the "blue" areas of the country demonstrate more tolerance toward sexuality and a variety of family forms, the well-educated have remade the terms of

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thousand women aged 15 to 19 in 1960, 73.3 births per thousand women aged 15 to 19 in 1965, 69.7 births per thousand women aged 15 to 19 in 1970, and 59.9 births per thousand women aged 15 to 19 in 1990).

20. Penelope L. Maza, *Adoption Trends: 1944-1975*, *in* CHILD WELFARE RESEARCH NOTES #9, at 1-4 (U.S. Children's Bureau 1984), *available at* http://darkwing.uoregon.edu/~adoption/archive/MazaAT.htm.

21. Goldin & Katz, *The Power of the Pill*, *supra* note 10, at 752.

22. *Id.*

23. *Id.*

family life to better support two-parent, married families than the rest of the population.[24]

Thus, sociologist Sara McLanahan, drawing on studies by Steve Martin, emphasizes that the best-off quarter of America, defined by women's level of education, has increased the advantages for its children along every measurable outcome.[25] For this group of families, divorce rates have fallen back to the level of the early sixties—before no-fault divorce, nonmarital birth rates are 7%, the same as in the mid-sixties, fathers spend more time with their children while mothers spend no less (the women cut back on housework instead), and family income has increased appreciably while stagnating for everyone else.[26]

The explanation McLanahan offers for these developments is the change in the age of marriage: for the best-educated quartile of American women, mothers' median age rose from 26 in 1970 to 32 in 2000.[27] For mothers in the bottom quartile, it remained relatively flat at 22.[28] For the middle group, it rose slightly from 24 to 26. The age of childbearing is thus a marker of class, and for those who avoid early childbearing, conventional families with two married parents and a high degree of stability follow to a remarkable degree with a minimum of external coercion.[29]

This result has undermined the traditional routes to family life in two overlapping ways. First, for the poorest Americans, it has made marriage that much harder to come by, producing dramatically greater rates of nonmarital births.[30] A lengthy literature debates the reason for the shift, but perhaps the most intriguing explanation involves bargaining theory and the decline of the "shotgun" marriage.

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24. *Id.*

25. McLanahan, *supra* note 8, at 608.

26. *Id.*

27. *Id.* at 609.

28. *Id.* It should be noted, however, that fertility rates have also dropped, especially for teens. *See* Child Trends Data Bank, Percentage of Births to Unmarried Women, www.childtrendsdatabank.org/pdf/75_PDF.pdf (last visited Feb. 1, 2010). Between 1960 and 2000, for example, births to 15- to 19-year-old women fell by more than half. *Id.* The composition of the remaining births nonetheless varies by race and class. *Id.* White women, for example, have higher birth rates in every age group above 25, while African-Americans have higher birth rates in every cohort under 25, even though both races report substantial declines in teen childbearing. *Id.*

29. For a summary of the benefits of later marriage and childbearing, see ELIZABETH GREGORY, READY: WHY WOMEN ARE EMBRACING THE NEW LATER MOTHERHOOD 8-10 (2007) noting that women who give birth at 34 live longer with fewer health issues than women who give birth at any other age, and older women generally have more resources, and happier, more stable, and more egalitarian marriages.

30. George A. Akerlof et al., *An Analysis of Out-of-Wedlock Childbearing in the United States*, 111 Q.J. ECON. 277, 279, 289-90, 291-96 (1996).

Economists Akerlof, Yellin, and Katz observe that for traditionalists "courtship" used to involve an implied promise: if the woman got pregnant, the man married her.[31] As women gained the ability to control their own fertility through use of the pill and access to abortion, the implied promise disappeared.[32] For women who used family planning to avoid childbirth and for those women who did not want or were not ready for children (and, indeed, for those women who wanted sex on the same terms as men), these developments increased their range of choices.[33] Akerlof, Yellin, and Katz emphasize, however, that the women most disadvantaged by these developments were those ready to start childbearing and unable to secure a promise to marry.[34] The groups for whom this may have been most important are the white working class, where courtship was typically sexual, brief, and concentrated in the late teens, and poorer women ready to begin childbearing at younger ages more generally.

Akerlof, Yellin, and Katz conclude that the advent of the birth control pill and abortion produced dramatic declines in the overall number of unintended births, but also produced a higher percentage of nonmarital births—and did so disproportionately for poorer women.[35] Today, 72% of African-American births are nonmarital, and the shotgun marriage, which was never as strong a tradition among African-Americans as among whites, is virtually non-existent.[36] Nonmarital births increased more slowly for whites, but did so most dramatically for poorer whites.[37] Charles Murray's cries of alarm about the "coming white underclass" documented the steep rise in the eighties for this population, rates that have resumed their climb.[38] The states with the highest white teen birth rates vote Republican, and this may be, as Murray documented, a symbol of class anxiety.[39] By 2006, the overall nonmarital birth rate for whites had reached 32%, well above the rate for African-Americans in the sixties that inspired the Moynihan Report.[40] While an increasing number of well-off Americans also choose single parenthood today, those numbers are small in comparison

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31. *See id.*

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.* at 279-82.

36. For a summary of these developments, see DONNA L. FRANKLIN, ENSURING INEQUALITY: THE STRUCTURAL TRANSFORMATION OF THE AFRICAN-AMERICAN FAMILY (1997).

37. *See id.* at 111.

38. *See* Murray, *supra* note 4.

39. *See id.*

40. Joyce A. Martin et al., *Births: Final Data for 2006*, 57(7) NAT'L VITAL STAT. REPS., Jan. 7, 2009, at 1, 11, *available at* http://www.cdc.gov/nchs/data/nvsr/nvsr57/nvsr57_07.pdf.

with the number of poorer, unmarried women giving birth in their early twenties.

The second factor affecting the results has been the increased riskiness of early marriage. Studies have long indicated that marriage before the bride turns twenty produces a dramatically greater risk of divorce.[41] The most comprehensive modern data, by the government's Centers for Disease Control, showed that the greatest gains in marital stability occurred when the women's age at marriage increased from the late teens to the early twenties, while for cohabitants, stability was best achieved when the women began the relationship in her mid-twenties.[42] This data, which examined the likelihood of divorce for different cohorts in 1995, found that the risk of divorce declined from a very high rate of 59% within fifteen years for those marrying before the age of 18, 49% for those marrying at 18 or 19, falling to 36% for those marrying in their early twenties, and 35% for those marrying over 25.

However, a new, more intensive study of marital happiness, using more recent data, shows that the age factor has changed.[43] Instead of looking only at divorce, the researchers examined a series of factors, including marital happiness, interaction, conflict and "divorce

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41. *See, e.g.*, Alan Booth & John N. Edwards, *Age at Marriage and Marital Instability*, 47 J. MARRIAGE & FAM. 67, 68, 71 (1985) (summarizing literature and observing that age at marriage is the single best predictor of divorce). *See generally* Barbara D. Whitehead & David Popenoe, Essay, *The Marrying Kind: Which Men Marry and Why*, *in* THE STATE OF OUR UNIONS 2004: THE SOCIAL HEALTH OF MARRIAGE IN AMERICA 6, 6 (Nat'l Marriage Project ed., 2004), *available at* http://marriage.rutgers.edu/publications/SOOU/SOOU2004.pdf. Efforts to indicate why suggest that greater infidelity at younger ages is a significant factor. Booth & Edwards, *supra*, at 71; Paul R. Amato & Stacy J. Rogers, *A Longitudinal Study of Marital Problems and Subsequent Divorce*, 59 J. MARRIAGE & FAM. 612, 621 (1997). The first comprehensive study by Larry L. Bumpass & James A. Sweet, *Differentials in Marital Instability: 1970*, 37 AM. SOC. REV. 754, 755 (1972), found that the biggest drops in marital instability occurred as the woman's age of marriage increased from the mid-teens to the late teens (a ten-point drop), and that marital stability continued to improve as women's age at marriage increased from the late teens to the early twenties (five-point drop), and from the early to mid-twenties (three-point drop).

42. Matthew D. Bramlett & William D. Mosher, *Cohabitation, Divorce, Marriage and Remarriage in the United States*, 22 VITAL & HEALTH STATS., July 2002, at 1, 55 tbl.21, *available at* http://www.cdc.gov/nchs/data/series/sr_23/sr23_022.pdf. In a parallel study of cohabitation rates, however, the CDC found that the greatest improvements in stability occurred when the woman's age at the start of cohabitation was in the over 25 age group, rather than the 20-24 age group. *Id.* at 49 tbl.15. In contrast with the marriage figures, the CDC found no statistically significant differences between the stability of cohabitation begun in the late teens versus the early twenties. *Id.* The CDC offered no explanation for these results. It is possible that the institutional role of marriage is more critical to relationship success in the early twenties, but the results may also be explained by differences in the populations who cohabit earlier rather than later in life.

43. *Id.* at 55.

proneness."[44] They found, as did the earlier studies, that marriage before the age of 20 strongly correlated with increased divorce risk.[45] Their 1980 data, like the earlier studies, showed a decline in divorce risk after the age of 19, but very little gain as the marriage age increased from 20-24, 25-29, and 30-34 (though it did show substantial gains in marital quality with marriage over the age of 35).[46] Their data from 2000, however, showed a strikingly different pattern. Those who married at age 19 or younger continued to be at a much greater risk of divorce than those who married later.[47] But the 2000 data also showed consistent gains in marital quality with each increase in age, so that the divorce proneness of the group dropped steadily from under the age of 19 to over 20, from 20-24 to 25-29, from 25-29 to 30-34, and again over the age of 35.[48] The authors concluded that the "trend for young adults to complete their education, become economically secure, find more suitable marriage partners, and ensure that they are psychologically ready appears to have benefitted contemporary marital relationships."[49]

Together, the decline of the shotgun marriage, the increased riskiness of younger marital unions, and the changing economy, which has simultaneously increased the rewards for education and eliminated the jobs paying a family wage to less educated young men, have remade the relationship between class and family. The transformation is still underway for whites, and the rate of change varies by region. Consider, for example, the teen birth rate. The lowest overall rates are in the Northeast—the wealthiest part of the country and the region most unequivocally embracing the blue paradigm.[50] The highest rates are in the South or Southwest, particularly Texas, New Mexico, Mississippi, Arizona, and Arkansas.[51] By the end of the nineties, the rate of change had accelerated.[52] In 1988, for example, the lowest teen birth rates were in Minnesota, North Dakota, Massachusetts, Iowa, New Hampshire and Vermont.[53] Since then, rates have dropped more dramatically in New England than the upper Midwest, increasing the regional

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44. PAUL R. AMATO ET AL., ALONE TOGETHER: HOW MARRIAGE IN AMERICA IS CHANGING 79 (2009).

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.*

49. *Id.*

50. GUTTMACHER INST., U.S. TEENAGE PREGNANCY STATISTICS: NATIONAL AND STATE TRENDS AND TRENDS BY RACE AND ETHNICITY 2 (2006).

51. *Id.*

52. *Id.* at 11 tbl.3.3.

53. *Id.*

concentration.[54] The five states with the highest rates in 1988 (Mississippi, New Mexico, Arkansas, Texas, and Arizona), in contrast, did not change significantly.[55]

These patterns partially reflect racial composition.[56] The states with low teen birth rates are much less diverse than the states with higher teen birth rates.[57] Looking at white individuals, the states with the lowest rates were New Jersey, Connecticut, Massachusetts, New York and Rhode Island—still in the Northeast, but concentrated in the wealthy mid-Atlantic states and New England.[58] In contrast, the highest white teen birth rates were concentrated in the very conservative, traditional, and poorer border and Southern states: Arkansas, Kentucky, Mississippi, Oklahoma, and Tennessee.[59] These states also tend to show the greatest commitment to "moral values."[60]

These changing patterns of family formation, which partly reflect differences in wealth and the racial and class composition of different regions of the country, set up an ideological battle. The new blue paradigm, which has been embraced politically in the same states with the highest average ages of marriage (the Northeast and the West Coast) is deeply offensive to those who adhere to more religious and traditional family values. It assumes that sex will occur without marriage. It embraces birth control and abortion. It worries more about poverty than about the nonmarital births that tend to be associated with poverty. And the most visible symbols of the new model—the Hollywood stars flaunting their alternative lifestyles—may be a deep affront to those

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54. *Id.*

55. *Id.*

56. *See generally id.* at 14-16 tbls.3.4-3.6. The pattern for African-Americans is a little harder to gauge than the rate for whites. The states with the lowest African-American teen birth rates are New Hampshire, Utah, New York, and Rhode Island, with California, Massachusetts, and New Mexico tied for fifth. *Id.* at 14 tbl.3.4. New Hampshire (under 1%), New Mexico (under 2%), and Utah (2%) have such small African-American populations as to make analysis difficult. *Id.* at 16 tbl.3.6. The states with the highest rates of African-American births are not concentrated by region, and include Wisconsin, Arkansas, Illinois, Mississippi and Ohio. *Id.* at 14 tbl.3.4, 16 tbl.3.6. Accordingly, the low overall state teen birth rates for the states in the upper part of New England may reflect a lack of diversity, and the high rates in the Southwest may reflect the percentage of Latinos. *See id.* at 14 tbl.3.4. Nonetheless, the teen births for whites alone diverge most between the core Northeastern states and the Southern states. *See id.*

57. For example, Latinos constitute 42% of the population of New Mexico, 32.4% of California, 32% of Texas, and 25% of Arizona. *Id.* at 16 tbl.3.6. Moreover, since the Latino population in these states is substantially younger than the white population, and fertility rates are higher, the effect on the teen birth rate is substantial. Over half of all births in these states are to Latinos. *See id.* tbl.3.6.

58. *Id.*

59. *Id.*

60. *Id.*

who see their communities in danger. The more conservative areas of the country are more culturally diverse—the distinctive cultural patterns of the South and border states are not the same as those of the mountain or plains states. Nonetheless, those with the greatest commitment to traditional religious values, who would like to continue to promote the unity of sex, marriage, and reproduction, face the greatest challenges to continued family stability.

III. BACKLASH: BRINGING BACK BABY AS THE PUNISHMENT FOR FORNICATION

By the end of the seventies, the U.S. Supreme Court had banished the shotgun marriage as official state policy. In *Carey v. Population Services International*,[61] the case that invalidated the New York law restricting distribution of contraceptives to minors, the state asserted that it if unmarried teens had ready access to contraception and could reliably prevent pregnancy, the result would "lead to increased sexual activity among the young."[62] The Court dismissed the suggestion that it is appropriate to deter sexual activity by "increasing the hazards attendant on it" out of hand, observing that "no court or commentator has taken the argument seriously."[63] The Court explained that: "It would be plainly unreasonable to assume that (the State) has prescribed pregnancy and the birth of an unwanted child as . . . punishment for fornication . . . . We remain reluctant to attribute any such 'scheme of values' to the State."[64] With that declaration, the shotgun marriage as official state policy was at an end—at least until the next decade brought it back.

The red paradigm has sought to bring marriage back at the federal and state levels as the only institution specially designed to unite sex and procreation. Thus, the natural law tradition, which has been cited in opposition to same-sex marriage, views the unity that comes from the distinctive nature of heterosexual sex as central to the definition of marriage as an intrinsic good.[65] Political scientist Hadley Arkes, for example, has remarked that "sexuality" refers to that part of our nature

61. 431 U.S. 678 (1977).

62. *Id.* at 694.

63. *Id.* (quotation omitted).

64. *Id.* at 695 (quotation omitted).

65. *See, e.g.*, John Finnis, *Law, Morality, and Sexual Orientation*, 69 NOTRE DAME L. REV. 1049, 1066 (1994); Robert P. George, Jr., *What's Sex Got to Do With It? Marriage, Morality, and Rationality*, 49 AM. J. JURIS. 63, 71 (2004).

that has as its end the purpose of begetting.[66] In comparison, the other forms of "sexuality" may be taken as minor burlesques or even mockeries of the true thing.[67] The Institute for American Values, which in other respects distances itself from the Christian right, nonetheless reasons in its statement on "Marriage and the Law" that: "The vast majority of human children are created through acts of passion between men and women. Connecting children to their mother and father requires a social and legal institution called 'marriage' with sufficient power, weight, and social support to influence the erotic behavior of young men and women."[68]

The key to this social conservative agenda is not just marriage promotion, which might focus on encouraging childbearing within marriage and discouraging divorce. Indeed, such efforts, if effective and if voluntarily undertaken, might command widespread support. Instead, these efforts emphasize renewing the link between marriage and *control* of sexuality. Doing so requires making sexuality more hazardous. This agenda brings together religious teachings about the relationship between sex and marriage with a political mission to enlist the state in promoting the right values.

This new political agenda has focused most prominently on the high profile issues of same-sex marriage and abortion. Less noted, however, have been the efforts to undercut access to contraception. Contraception, of course, is too popular and widely available to restrict on a wholesale basis. Instead, such efforts have involved the restriction of availability for the most vulnerable, especially teens, the poor, and minority women dependent on government subsidized access. The principle arenas in the fight are abstinence education, parental involvement, restrictions on federal subsidization, and access to new techniques such as Plan B, the morning-after pill.

Dating back to the eighties, for example, have been efforts to undercut Title X, the federal program that attempts to discourage teen pregnancy through systematic provision of contraceptives.[69] Senator Jesse Helms denounced the program, observing that "no one can deny the fact that Title X does indeed subsidize teenage sexual activity. . . . at a minimum, Title X tends to create an atmosphere in which teenage

66. Hadley Arkes, *Questions of Principle, Not Predictions: A Reply to Macedo*, 84 GEO. L.J. 321, 323 (1995).

67. *Id.*

68. *Marriage and the Law: A Statement of Principles*, INST. AM. VALUES, EXECUTIVE SUMMARY TO MARRIAGE AND THE LAW: A STATEMENT OF PRINCIPLES 5 (2006), *available at* http://www.americanvalues.org/pdfs/mlawstmnt_exsumm.pdf.

69. *See, e.g.*, Jeannie I. Rosoff & Asta M. Kenney, *Title X and Its Critics*, 16 FAM. PLAN. PERSP. 111 (1984).

promiscuity is viewed as normal and acceptable conduct."[70] The Reagan administration's efforts to require parental involvement, which would have effectively deterred teens from setting foot in family planning centers, were struck down by the courts,[71] but cuts in federal funding were a factor in the steep rise in teen births in the late eighties and early nineties.[72]

In more recent years, these efforts have focused not just on securing parental involvement in teen contraceptive and abortion access, but in fighting to turn back the clock on sexual permissiveness more generally. In 2008, the Republican Party platform provided that:

> We renew our call for replacing "family planning" programs for teens with increased funding for abstinence education, which teaches abstinence until marriage as the responsible and expected standard of behavior. Abstinence from sexual activity is the only protection that is 100 percent effective against out-of-wedlock pregnancies and sexually transmitted diseases, including HIV/AIDS when transmitted sexually.[73]

Yet, as we have discussed at length elsewhere, abstinence-only education has been ineffective in promoting abstinence until marriage and may make it more likely that teens will not use contraception when they do have intercourse.[74] Indeed, preliminary reports suggest that the popularity of abstinence-only programs may have contributed to the recent rise in teen pregnancy.[75]

In the next section of the Article, we examine the effects of such efforts and their impact in exacerbating the relationship between class, family and the consequences of sex.

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70. *Id.* at 114-15 (reprinting Senator Jesse Helms' testimony before the Labor and Human Resources Subcommittee on Family and Human Services, Apr. 5, 1984).

71. *See, e.g.*, Planned Parenthood Fed'n of Am. v. Heckler, 712 F.2d 650, 665 (D.C. Cir. 1983).

72. *See* Stephanie J. Ventura et al., *Births to Teenagers in the United States, 1940-2000*, 49 NAT'L VITAL STAT. REP., Sept. 25, 2001. After falling sharply from 1960 to 1980, the decline in teen birth leveled off at the beginning of the Reagan administration, and then increased sharply upward from the mid-eighties until the beginning of the Clinton administration. *See id.* They declined again steeply in the nineties. *See id.*

73. OpenEducation.net, 2008 Republican Party Platform Formally Addresses Education, http://www.openeducation.net/2008/09/02/2008-republican-party-platform-formally-addresses-education/ (last visited Oct. 23, 2009).

74. Naomi Cahn & June Carbone, *Deep Purple: Religious Shades of Family Law*, 110 W. VA. L. REV. 459, 460 (2007).

75. *See* Kristin A. Moore, *Teen Births: Examining the Recent Increase*, Research Brief (Child Trends, Washington, D.C.), Mar. 2009, at 4, *available at* http://www.childtrends.org/Files/Child_Trends_2009_03_13_FS_TeenBirthRate.pdf.

A. *Flunking Sex Ed: Education, Class, and Family in the New American Hierarchy*

When we think of the law and fertility, our minds turn to abortion; this reflects how central abortion has become to mobilizing family values voters. In fact, the efforts to resurrect traditional understandings of marriage and family more comprehensively involve abstinence education, contraception, sterilization, and infertility. In each of these instances, we can see class at work, we can see the privileges that class endows, and we can also see how fights over moral values are most likely to affect those who are least likely to vote.[76] Indeed, family structure and poverty affect voter turnout, and family structure has become a major predictor of voting patterns.[77]

Therefore, it is perhaps unsurprising that the measures taken to reinforce the messages conservative parents would like to instill in their children may have the largest impact on the poor and the vulnerable. When it comes to decreases in funding for contraception and abortion, the poor have fewer options.

1. Contraception

Although virtually all American women will use some form of contraception during their lifetimes, there remains enormous variation in contraceptive use and non-use among sexually active men and women. Wealthy and more educated women are more likely to consistently use birth control: 19% of wealthier women (above 250% of the poverty line) did not use contraceptives for some period during a year compared to 29% of women living in poverty; and 15% of college graduates, compared to 36% of those with less than a high school education, did not use contraceptives during the same period.[78] Women who are uninsured are almost twice as likely as privately insured women to go without contraceptives for a period of one year.[79]

Part of the problem is funding. Medicaid is the primary system that funds health care access for poor women, in contrast with the Title X

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76. High income voters are most likely to vote, even controlling for education. *See* Yosef Bonaparte, *Why Do High Income Families Have Higher Voter Turnout?* 13 (JEL, Working Paper Series No. D71 & D72, 2007), *available at* http://ssrn.com/abstract=882565.

77. Nicholas H. Wolfinger & Raymond E. Wolfinger, *Family Structure and Voter Turnout*, 86 SOC. FORCES 1513, 1518-19 (2008).

78. Jennifer J. Frost et al., *Improving Contraceptive Use in the United States*, In Brief (Guttmacher Inst., New York, N.Y.), May 9, 2008, at 3.

79. *Id.*

family planning program, which provides only about 12% of all funds.[80] However, Medicaid is limited to women who are pregnant or who have children and receive public welfare through Temporary Assistance for Needy Families (TANF).[81] When Medicaid expanded eligibility to a group of women whose Medicaid benefits were due to expire and to some women of higher income (but still relatively low income women), greater contraceptive use produced a 4% decline in the birth rate of teens, and a 2% decline in the birth rate of women over the age of 19.[82]

2. Abortion

Let us turn next to abortion, something we think of in terms of the culture wars, but not necessarily in terms of class. Abortion has, however, always been a class issue. In the time before *Roe v. Wade*, when abortions were illegal in most states, wealthier women were better able to obtain abortions.[83] They could travel to jurisdictions (like New York or England) that had legalized abortion, and they could obtain exceptions from stringent laws.[84] For example, in 1972, the year before the Court decided *Roe*, more than 100,000 women traveled to New York State, where abortion was legal; 50,000 of these women traveled farther than 500 miles.[85]

Today, quite ironically, poor women are more likely to get an abortion than are wealthier women. The role of abortion in determining the life chances of some women is, however, a critical concern for the poor, minorities, those who have less control over their sexuality (a big predictor of divorce as well), and those from abusive and dysfuntional families. When *New York Times* reported in early 2009 that abortion was "safe, legal, and inexpensive," the directors of the *Abortion Access Project and the National Latina Institute for Reproductive Health* wrote in to protest that "An abortion at 10 weeks' gestation costs $523 on

80. *Facts on Publicly Funded Contraceptive Services in the United States*, GUTTMACHER INST. (Guttmacher Institute, Washington, D.C.), Feb. 2009, at 1, *available at* http://www.guttmacher.org/pubs/fb_contraceptive_serv.html.

81. Amy Sullivan, *Behind the Family-Planning Flap*, TIME ONLINE, Jan. 29, 2009, http://www.time.com/time/nation/article/0,8599,1874683,00.html.

82. Melissa S. Kearney & Phillip B. Levine, *Subsidized Contraception, Fertility, and Sexual Behavior*, 91 REV. OF ECON. & STAT. 137, 137 (2009).

83. HEATHER D. BOONSTRA ET AL., ABORTION IN WOMEN'S LIVES 14 (2006), *available at* http://www.guttmacher.org/pubs/2006/05/04/AiWL.pdf [hereinafter BOONSTRA ET AL., ABORTION IN WOMEN'S LIVES].

84. *Id.*

85. *Id.*

average, often out of pocket. To term this "inexpensive," especially in the current economy, is ludicrous."[86]

For poor women, the tradeoffs between access to contraception, abortion, and unintended births are acute. The Guttmacher Institute reports, for example, that at the turn of the century the "unintended pregnancy rate rose 29% among women living below the poverty level and 26% among women living between 100% and 200% of the poverty level, but fell 20% among more affluent women."[87] These increases reflect access and use of contraception. Unintended pregnancy rates also rose for high school dropouts, and women between the ages of nineteen and twenty-four, while declining for adolescents and college graduates.[88] Unintended pregnancy rates influence the incidence of abortion, and abortion rates are predictably higher for those with higher unintended pregnancy rates.[89] Thus, poor women, who constituted 30% of all women of reproductive age in the United States in 2000, obtained 57% of the abortions.[90] Unsurprisingly, these patterns also correlate with race. White women, who had lower pregnancy rates, ended only 18% of conceptions with abortion.[91] African Americans, who had higher pregnancy rates, ended 43% of conceptions with abortion.[92] Hispanics terminated pregnancies 25% of the time.[93]

Even when they are able to obtain abortions, two-thirds of poor women report that they would have liked to have undergone the procedure at an earlier stage of the pregnancy.[94] As a result, access to abortion is more critical to reproductive choice for poorer women and women of color. Rebekah Smith emphasizes that while overall abortion rates were declining in the nineties, the "abortion rate among poor women increased substantially . . . . Increasingly, women obtaining abortions were never-married, low-income, non-white or Hispanic, and usually the parent of at least one child."[95]

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86. Letter to the Editor, *The Abortion Choices of Poor Women*, N.Y. TIMES, Jan. 12, 2009, at A22(L).

87. BOONSTRA ET AL., ABORTION IN WOMEN'S LIVES, *supra* note 83, at 26.

88. Rachel K. Jones et al., *Patterns in the Socioeconomic Characteristics of Women Obtaining Abortions in 2000-2001*, 34 PERSP. ON SEXUAL & REPROD. HEALTH 226 (2002).

89. *Id.* at 231.

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.*

94. Heather D. Boonstra, *The Heart of the Matter, Public Funding of Abortion for Poor Women in the United States*, 10 GUTTMACHER POL'Y REV. 12, 14 (2007), *available at* http://www.guttmacher.org/pubs/gpr/10/1/gpr100112.html.

95. Rebekah J. Smith, *Family Caps in Welfare Reform: Their Coercive Effects and Damaging Consequences*, 29 HARV. J.L. & GENDER 151, 177 (2006).

Medicaid provides no funding for abortion except, according to the 1977 Hyde Amendment, in cases of rape, incest, or life endangerment to the mother.[96] The Supreme Court has repeatedly upheld restrictions on poor women's ability to obtain abortions, first deciding in 1977 that a state need not pay for medically necessary abortions, and then upholding the Hyde Amendment three years later.[97] The consequence is that the 40% of poor women who are covered by Medicaid do not receive federal funding if they need an abortion. Somewhere between one-fifth to one-third of women on Medicaid who wanted an abortion could not afford to obtain one.[98] Some of these women are, however, luckier than others if they live in one of the seventeen states that covers medically necessary abortions with state funds: four of those states—Hawaii, Maryland, New York, and Washington—do so voluntarily, while the rest are under court order to do so.[99]

Abortion is more likely to affect the birth rates of nonwhite women and, because these unintended pregnancies overwhelmingly occur to unmarried women, the nonmarital birth rate. Three economists found that states legalizing abortion experienced a 4% decline in births relative to other states.[100] The decline among teens, women over 35, and nonwhite women was even greater: 13%, 8%, and 12% respectively.[101] Out-of-wedlock births declined by twice as much as births in wedlock.[102]

Nearly half of all pregnancies in the United States are unintended, including 40% of those among white women, 69% among blacks, and 54% among Latinas.[103] The disparities in abortion rates underscore the differential racial and class patterns. For example, "[p]oor women constituted 30% of all women of reproductive age in the United States, yet they obtained 57% of the abortions in 2000."[104]

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96. *See* Hyde Amendment of 1978, Pub. L. No. 94-480, § 210, 92 Stat. 1567, 1586 (1978).

97. *See* Harris v. McRae, 448 U.S. 297 (1980); Maher v. Roe, 432 U.S. 464 (1977).

98. Heather Boonstra & Adam Sonfield, *Rights Without Access: Revisiting Public Funding of Abortion for Poor Women*, 3 GUTTMACHER REP. PUB. POL'Y, Apr. 2000, at 8, *available at* http://www.guttmacher.org/pubs/tgr/03/2/gr030208.pdf.

99. *Id.* at 9.

100. Phillip Levine et al., Roe v. Wade *and American Fertility*, 89 AM. J. PUB. HEALTH 199-200 (1999).

101. *Id.*

102. *Id.*

103. *Facts on Induced Abortion in the United States*, IN BRIEF (Guttmacher Inst., Washington, D.C.) July 2008, *available at* http://www.guttmacher.org/pubs/fb_induced_abortion.pdf

104. Smith, *supra* note 95, at 177.

B. *Cynical Manipulation*

As an example of the attack on controlling reproduction, consider the history of the Food and Drug Administration's approval of Plan B. The Food and Drug Administration's consideration of Plan B, emergency contraception, provides an example of how politics at the national level can affect access to reproductive rights. The Food and Drug Administration (FDA) approved Plan B, or levonorgestrel pills, "the morning-after pill," as a prescription drug in 1999.[105] For maximum effectiveness, the pills must be taken within seventy-two hours of unprotected intercourse because they are designed to interfere to prevent ovulation, and may affect the processes leading up to implantation.[106] According to the manufacturer, they will not affect an existing pregnancy; that is, they will not affect a pregnancy after the embryo has become implanted in the uterine wall.[107] Plan B, which is also called emergency contraception, differs from RU-486 in that the latter can dislodge an existing pregnancy even after implantation, and can be effective within forty-nine days after the beginning of the woman's last period.

In April 2003, the company that manufactured Plan B (now Barr Pharmaceuticals) filed an application to make the drug available without a prescription.[108] Later that year, two FDA advisory committees voted (23-4) to approve the application, without any limitation on the age of the recipient, and relevant FDA staff indicated their support.[109] Nonetheless, the FDA issued a statement of non-approval, explaining that it was concerned about the safety of Plan B for women under the age of 16.[110] Barr filed a second application in July 2004, asking that the drug be approved without a prescription for girls and women age 16 or older.[111] Almost two years later, the FDA finally approved the over-the-counter availability of Plan B, but only for women 18 years or older.[112]

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105. U.S. GOVERNMENT ACCOUNTABILITY OFFICE, FOOD AND DRUG ADMINISTRATION DECISION PROCESS TO DENY INITIAL APPLICATION FOR OVER-THE-COUNTER MARKETING OF EMERGENCY CONTRACEPTION DRUG PLAN B WAS UNUSUAL (2005), *available at* http://www.gao.gov/new.items/d06109.pdf [hereinafter GAO Report].

106. *Id.* at 12.

107. Plan B One-Step, When Should I Take It?, http://www.planbonestep.com/index.aspx?page=6 (last visited Nov. 8, 2009).

108. Sydney Kokjohn, Note, *The Imposition of an Age Restriction on Over-The-Counter Access to Plan B Emergency Contraception: Violating Constitutional Rights to Privacy and Exceeding Statutory Authority*, 9 MINN. J.L. SCI. & TECH. 369, 369 (2008).

109. *Id.*

110. *Id.* at 372-73.

111. *Id.* at 375.

112. *Id.* at 369-70.

Minors need a prescription to obtain the drug.[113] The FDA based this restriction on a lack of adequate data concerning the safety of Plan B for minors—even though numerous medical groups, including the American Academy of Pediatrics, supported its availability.[114]

The background story is far more interesting. During the first phase of the FDA's deliberations, when it was considering the initial application, several employees of the FDA testified in depositions that they were told that rejecting Plan B was a political necessity.[115] *New York Times* reported that

> John Jenkins, director of "the agency's office of new drugs, said in a deposition that his boss, Dr. Steven Galson, told him "that he felt he didn't have a choice" but to reject the application . . . . "And he characterized that in a sense that he wasn't sure that he would be allowed to remain as center director if he didn't agree with the action," Dr. Jenkins said. . . . Dr. Florence Houn, director of the office that evaluated the Plan B application, said that she was told by Dr. Janet Woodcock, a deputy F.D.A. commissioner, that a rejection was necessary "to appease the administration's constituents, and then later this could be approved."[116]

Indeed, an internal memo of the FDA expressed the concern of Janet Woodcock, the deputy operations commissioner, that "we could not anticipate or prevent extreme promiscuous behaviors such as the medication taking on an 'Urban Legend' status that would lead adolescents to form sex-based cults centered around the use of Plan B."[117]

When the Government Accounting Office subsequently investigated the FDA's procedures in considering the drug, it found that the FDA had not followed its usual procedures for approval of new drugs.[118] High-level management at the FDA was much more involved in the Plan B application than in comparable applications concerning over-the-

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113. *Id.*

114. *Id.* at 389-90.

115. Gardiner Harris, *"Morning After" Pill Is Cleared for Wider Sales*, N.Y. TIMES, Aug. 24, 2006, *available at* http://www.nytimes.com/2006/08/24/health/24cnd-pill.html.

116. *Id.*

117. L.L. Wynn & James Trussell, *Images of American Sexuality in Debates over Nonprescription Access to Emergency Contraceptive Pills*, 108 OBSTETRICS & GYNECOLOGY 1272, 1272 (2006) (quotation omitted).

118. Ricardo Alonso-Zaldivar, *FDA Has a Deal for Plan B*, L.A. TIMES, Aug. 1, 2006, at A1.

counter status.[119] Moreover, the rationale for the non-approval—that data on older adolescents could not be applied to younger adolescents and that over-the-counter status of Plan B might have an effect "on the propensity for younger adolescents to engage in unsafe sexual behaviors because of their lack of cognitive maturity"—simply "did not follow FDA's traditional practices."[120] Instead, the FDA had previously relied on data for older adolescents in deciding on a drug's safety for younger adolescents, and the agency had not previously "considered behavioral implications due to differences in cognitive development."[121] Indeed, in a subsequent lawsuit about the FDA's actions, a federal court found that there was "a strong preliminary showing of 'bad faith or improper behavior'" on the part of the FDA.[122]

During the second phase, while the FDA was considering the amended application, Susan Wood, who was the Director of the Office of Women's Health at the FDA, resigned in frustration.[123] She told Ted Koppel on Nightline that she quit because she "felt that science was being overruled at [the] FDA and women's health was being damaged."[124] A few months later, Dr. Frank Davidoff, a former editor-in-chief of the *Annals of Internal Medicine*, resigned as a member of an FDA advisory committee, explaining that he could "no longer associate myself with an organization that is capable of making such an important decision so flagrantly on the basis of political influence."[125] Additionally, in March, 2009, a federal judge found that the FDA had inappropriately appointed people holding anti-abortion views to an expert panel convened to review the drug.[126]

So what was behind all of this political maneuvering? Plan B is controversial for two reasons. First, some maintain that Plan B causes abortions. The drug, which contains a large dose of the same hormones used in the birth control pill, is primarily designed to prevent ovulation, and animal studies indicate that it does not block implantation of a fertilized egg.[127] Nonetheless, the manufacturer cannot rule out the possibility that it will make it less likely that a fertilized egg will

119. GAO Report, *supra* note 105, at 5.

120. *Id.*

121. *Id.* at i.

122. Tummino v. Von Eschenbach, 427 F. Supp. 2d 212, 231-32 (E.D.N.Y. 2006).

123. *Nightline: Birth Control Battle* (ABC television broadcast Sept. 27, 2005).

124. *Id.*

125. *Tummino*, 427 F. Supp. 2d at 228.

126. Natasha Singer, *Contraception Pill Strictures are Eased by a Judge*, N.Y. TIMES, Mar. 24, 2009, at A12.

127. *Emergency Contraception's Mode of Action Clarified*, POP. BRIEFS (Pop. Council, New York, N.Y.) May 2005, at 1, 3, *available at* http://www.popcouncil.org/mediacenter/news releases/ecdisruptsovulation.html.

implant in the uterine wall. Those who believe that life begins at conception therefore maintain that any drug that lessens the likelihood of implantation is abortion-inducing and, one complainant alleged that Plan B caused an abortion.[128] Linking Plan B to abortion, given the intensity of views on the issue, guarantees substantial opposition. Nonetheless, were the only issue presented by Plan B the *possibility* of interfering with implantation, we suspect the drug would not have been so controversial. The second objection, however, was that the greater availability of something that could be taken the "morning after" intercourse would encourage improvident behavior.[129] As one witness testified at hearings held in December 2003 on the drug, "It is self-evident that over-the-counter availability of the morning after pill will lead to increased promiscuity and its attendant physical and psychological damage."[130] The Concerned Women for America alleged that it would result in an "increase in the already too high STD [sexually transmitted diseases] rates by encouraging risky sexual activity, and be given by statutory rapists to adolescents to cover up the continuing abuse."[131] The U.S. Conference of Catholic Bishops alleged that improved access to contraception does not decrease the number of unwanted pregnancies.[132] It was concerned that mandating insurance coverage of contraceptives for minors would subvert parental rights over their children.[133]

Those advocating for the wider availability of Plan B argued that emergency contraception could provide significant help in reducing the

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128. For a discussion of this issue, see, e.g., Claire Smearman, *Drawing The Line: The Legal, Ethical and Public Policy Implications of Refusal Clauses for Pharmacists*, 48 ARIZ. L. REV. 469, 481 (2006); U.S. Food and Drug Admin. Center for Drug Evaluation and Research: Hearing Before Non-Prescription Drugs Advisory Comm. and Advisory Comm. for Reproductive Health Drugs (Dec. 16, 2003), at 191 [hereinafter *FDA, Joint Meeting*] (statement of Dr. Chris Kahlenborn).

129. Harris, *supra* note 115.

130. *FDA, Joint Meeting*, *supra* note 128, at 181 (statement of James Carroll); *see id.* at 193 (statement of Dr. Daniel Hussar) ("I think the availability of Plan B without restrictions would increase or would reduce safe sex precautions which could lead to the increase in consequences, such as STDs.").

131. Letter from Wendy Wright, Senior Policy Director of Concerned Women for America, on reproductive drugs to FDA Advisory Comm. (Dec. 16, 2003), *available at* http://www.cwfa.org/images/content/ww-maptest.pdf.

132. U.S. Conference of Catholic Bishops, Pro-Life Activities—Fact Sheet: Greater Access to Contraception Does Not Reduce Abortions, http://www.usccb.org/prolife/issues/contraception/contrafactsheet0207.shtml (last visited Oct. 28, 2009).

133. U.S. Conference of Catholic Bishops, Pro-Life Activities—Fact Sheet: Contraceptive Mandates, *at* http://www.usccb.org/prolife/issues/abortion/contfac2.shtml (last visited Oct. 28, 2009).

number of unplanned teen pregnancies and abortions.[134] In their testimony supporting the availability of Plan B, the National Partnership for Women and Families pointed out that about one-half of the unplanned pregnancies in the United States each year resulted from contraceptive failure, and that women could be trusted to use Plan B responsibly.[135] While existing testing has not yet established whether widespread use of Plan B will reduce the pregnancy rate, the initial testing suggests that it does not affect the rate of unprotected sex, and ease of access makes women more likely to use it.[136]

FDA regulations, of course, determine the availability of emergency contraception for the entire country. In addition, different states determine how it will be distributed. More than half of all states require that if private insurance policies cover prescription drugs, then they must also cover all FDA-approved contraceptives, including emergency contraception. Most other states provide for general coverage except for certain insurance plans and employers; indeed, only two states (North Carolina and Arkansas) explicitly exclude emergency contraceptives from this mandate.[137] Nonetheless, in other states, Plan B may be excluded from Medicaid coverage. By contrast, in 15 states, emergency rooms are required to provide information about emergency contraceptives, and, in more than 2/3 of these states, emergency rooms can dispense Plan B upon the request of a sexual assault victim.[138] The arguments that Plan B will affect sexual behavior, though not implausible, are not fundamentally different from those about contraception more generally. It is certainly true that the widespread availability of reliable forms of contraception such as the pill have had an impact on sexual practices, and particularly on the acceptability of nonmarital intercourse. Nonetheless, with the change in mores established without the availability of Plan B, the greater availability of emergency contraception is unlikely to have much impact on overall

134. *E.g.*, American College of Obstetricians and Gynecologists, *Statement on the FDA's Approval of OTC Status for Plan B®*, Aug. 24, 2006, http://www.acog.org/from_home/publications/press_releases/nr08-24-06.cfm (last visited Oct. 25, 2009).

135. Nat'l P'ship for Women & Families, Testimony in Support of Over-the-Counter (OTC) Status for Plan B® (2003), *available at* http://www.nationalpartnership.org/site/DocServer/portals_p3_library_ReproHealthMedicalTech_PlanBTestimony.pdf?docID=583.

136. Tina R. Raine et al., *Direct Access to Emergency Contraception Through Pharmacies and Effect on Unintended Pregnancy and STIs: A Randomized Controlled Trial*, 293 JAMA 54, 54-61 (2005).

137. GUTTMACHER INST., STATE POLICIES IN BRIEF: INSURANCE COVERAGE OF CONTRACEPTIVES (2008), *available at* http://www.guttmacher.org/statecenter/spibs/spib_ICC.pdf.

138. GUTTMACHER INST., STATE POLICIES IN BRIEF: EMERGENCY CONTRACEPTION (2009), *available at* http://www.guttmacher.org/statecenter/spibs/spib_EC.pdf.

sexual behavior. Its primary effect is likely to be in preventing pregnancy in cases of contraceptive failure.

IV. CONCLUSION

Policies that protect the availability of contraceptive choice are critical as we move forward;[139] the highest rates of *unwanted* pregnancies and abortions and lowest rates of contraceptive use are correlated with income. We must rebuild the emphasis on contraception, and move away from a focus on abortion as we consider how, in Professor Weyrauch's words, we can pay attention to the "implications of social class . . . on how to regulate the consequences of sexual conduct."[140]

The following three issues will be critical to rethinking contraceptive policies for the nation as a whole:

1. *Comprehensive sex education.* Comprehensive sex education includes arguments for abstinence alongside of medically accurate information about contraception. Abstinence-only efforts: a) have been less effective in reducing pregnancies and sexually transmitted diseases than comprehensive efforts; and, b) increase regional, class, and racial inequalities as the poorest Americans, who are the most likely to lack access to other sources of information, are also the most likely to be enrolled in abstinence only programs, whatever their preferences may be. We emphasize that the issue is not whether the values underlying abstinence should be taught; it is whether they should be taught to the exclusion of other views.

2. *Comprehensive access to contraception.* For adults, contraceptive access is largely a matter of funding and convenience—and choice. The most reliable methods are long-acting ones such as sterilization, IUDs, and hormonal implants. These methods, unlike lower tech devices such as condoms, can be expensive and require access to a doctor and the ability to fill prescriptions. Accordingly, the reliability of contraceptive use corresponds to access to health care.

3. *Adolescent access.* The much more divisive issue with respect to contraception is teen access, particularly without parental consent. Although the Supreme Court decision guaranteeing contraceptive access to teens remains good law, a number of states have taken measures that

139. For a comprehensive analysis of state-by-state efforts, see *Contraception Counts: Ranking State Efforts*, IN BRIEF (Guttmacher Inst., Washington, D.C. 2006), *available at* http://www.guttmacher.org/pubs/2006/02/28/IB2006n1.pdf.

140. Weyrauch, *supra* note 1, at 836.

undercut ready access (e.g., requirements that they must be married, or that a physician must certify the necessity).

The issue of adolescent access is a critical one because teen pregnancy has more negative consequences on mothers and children, and because parental consent requirements overwhelmingly result in less teen contraceptive use. On the other hand, the issue of parental authority touches a responsive chord in many parts of the population. Like other family planning issues, this is controversial, with numerous interests to balance; overall, it seems critical to ensure that all teens, regardless of income, have what they need to prevent unwanted childbirth.

Reproductive autonomy is most readily available for the affluent and the sophisticated, and is increasingly beyond the reach of the most vulnerable. Family planning efforts of all kinds have been the biggest casualty of the cynical manipulation of ideological politics, and are a critical arena for national policy.