INCOME DEEMING IN THE AFDC PROGRAM: USING DUAL TRACK FAMILY LAW TO MAKE POOR WOMEN POORER

AMY E. HIRSCH*

Introduction 713
I. Deeming of Income in the AFDC Program 716
A. Stepparent Deeming 717
B. Grandparent Deeming 718
C. Sibling Deeming 718
II. The Caretaker Option 720
A. Who Used the Caretaker Option 720
B. Child Support 721
C. The Decision-Making Process 722
III. Effects of the Sibling Deeming Amendment 726
A. Loss of Income, Increased Harassment 726
B. Loss of Control, Increased Confusion 727
C. Narrowing the AFDC Program 729
D. Justifications for the Amendment 730
E. Reducing the Harm: Existing Options 732
IV. The Interaction of Welfare and Family Law: Between a Rock and a Hard Place 733
A. The Feminization of Poverty 737
B. The Anti-Feminist Backlash in Family Law 738
Conclusion 739

INTRODUCTION

A series of federal amendments to the Aid to Families With Dependent Children Program (AFDC), in the 1980s, has created a dual track family law system imposing more extensive familial obligations on the poor than on any

* The author is currently a Policy Career Development Fellow sponsored by The Pew Memorial Trust at The RAND/UCLA Center for Health Policy Study, P.O. Box 2138, Santa Monica, CA 90406. She will be returning to her position as a supervising attorney at Community Legal Services, Inc., 5219 Chestnut Street, Philadelphia, PA 19139 in September 1989. The views expressed are solely hers and do not reflect positions taken by either the Rand Corporation or Community Legal Services. The author thanks Paula Roberts, Mark Greenberg, Joel Handler, Lucie White, Peter Jacobson, Richard Weishaupt, and most especially Deborah Harris for suggestions, critiques, and continued conversations about the interaction of welfare and family law. The author also thanks Michael Katz, June Axinn, and the members of the University of Pennsylvania Program for Assessing and Revitalizing the Social Sciences faculty seminar on work and welfare for encouragement and the opportunity to present a draft version of this paper. She is also grateful to her clients who have shared their lives and their struggles with welfare and family law in Florida and Pennsylvania.

other class.[1] AFDC is the major income maintenance program for women and children in the United States with approximately 3.7 million families receiving benefits.[2] Although states have numerous options in administering the program, the broad outlines and many of the specific requirements are set by federal policy as a condition of the state's receiving federal financial participation in the costs of the program. Stepparents, grandparents, and siblings (as well as half-siblings) of indigent children are now presumed financially responsible for those children, as well as any other person in the household who wants to apply for AFDC or who could be required to apply for AFDC by a complicated set of mandatory "grant group composition" rules.[3] Each of these statutory provisions "deems" the income of stepparents, grandparents or siblings to be available to all indigent household members, without regard to whether that income is actually made available to them, and accordingly reduces (or terminates) their AFDC grant dollar for dollar.

Income deeming is a technique used in the AFDC program to make poor women poorer. Rather than a direct benefit decrease, it reduces AFDC benefits by redefining "available" income to include the income of people other than the AFDC recipients. As discussed below, it further mystifies the AFDC program, decreases the ability of poor people to understand how their grants are calculated, and further isolates the extremely poor from the employed poor. Because of the peculiar structure of the welfare system, it has a disparate impact on women and children.[4]

---

1. AFDC is the main needs-based, income maintenance program, in the United States for needy children and their caretaker relatives. 42 U.S.C.A. § 601 (West Supp. 1988). It is the program most people are talking about when they refer to "welfare." It is a cooperative, jointly funded federal-state program, administered by the states in accordance with certain federal requirements. Eligibility is limited to children who are deprived of parental care or support by the death, disability, absence, or (in some states) unemployment of a parent, and certain caretaker relatives. 42 U.S.C.A. §§ 606, 607 (West Supp. 1988). Benefit levels and income limits are set by the states and vary considerably although no state has a benefit level that meets the federal poverty guidelines. In 1987, benefits ranged from thirteen to seventy-nine percent of federal poverty guidelines. Axinn & Stern, *Women and the Postindustrial Welfare State*, 32 SOC. WORK 282, 285 (1987). As of 1987, thirty-five states paid less than fifty percent of the federal poverty line. VanDeVeer, *Adequacy of Current AFDC Need and Payment Standards*, 21 CLEARINGHOUSE REV. 141, 142 (1987).

2. SOC. SECURITY BULL., Jan. 1989, at 61.

3. 42 U.S.C.A. § 602(a)(31), 602(a)(38), 602(a)(39) (West Supp. 1988).

4. Our income maintenance system is highly sex-segregated. Programs which benefit substantial numbers of men (*e.g.*, Social Security, SSI) tend to be federalized and to have much higher benefit levels and much less intrusive and restrictive eligibility conditions than programs which largely benefit women and children (*e.g.*, AFDC). This differential treatment dates back at least to the passage of the Social Security Act of 1935. Pub. L. No. 74-271, 49 Stat. 620 (1935). At that time federal funding for Aid to Dependent Children (ADC) was limited to $6 per month for the first child in a family and $4 per month for each additional child, while federal funding for the elderly or blind was limited to $15 per month per person. *Id.* §§ 403(a), 3(a), 1003(a) (respectively). The federal funding was limited to one-third of the state expenditure for children compared to one-half of the state expenditure for the elderly, plus five percent of the state's administrative expenses for the elderly and blind (but none of the state's administrative expenses for children). *Id.* And, of course, there were no federal funds for the mothers or other caretakers of dependent children until 1950. Social Security Act Amendments of 1950,

In the course of reducing income, it also creates dual track family law — one set of family responsibility requirements for the poor, created through federal welfare law and another, less onerous set of state family law requirements for everyone else. Under the AFDC sibling deeming rules, child support paid for one child in a household is counted as income available to that child's half-siblings. In contrast, under traditional state family law doctrines, child support is based on the unique needs of the child for whom it is paid and is restricted to the use of that child.[5] Siblings are not charged with a general responsibility to support each other. Similarly, grandparents are not generally required to support their grandchildren, and in most states, stepparents are not obligated to support their stepchildren.[6]

While there is a long history of differential family law requirements for poor people,[7] sibling deeming has been a major focus of welfare litigation over the last four years.[8] The amendments discussed in this Article largely reversed the progress made toward a more unitary system of family law during the welfare rights movement of the 1960s and 1970s.[9] Today, as a result of the increasingly separate system of family law for the poor, the ability of AFDC

Pub. L. No. 81-734, § 403(a), 64 Stat. 477, 550. *See* Axinn & Stern, *Age and Dependency: Children and the Aged in American Social Policy*, 63 MILBANK MEMORIAL FUND Q./HEALTH & SOC'Y 648 (1985).

> In 1950, when the amendment to add payments for caretakers of dependent children was being discussed, the maximum possible federal contribution for [Old Age Assistance] and [Aid to the Blind] was $30 of the first $50 a month spent by the state. For ADC the maximum was $16.50 of the first $27 a month spent by the state for the first child in a family, with a similar percentage of a lesser amount for other children.

R. STEVENS & R. STEVENS, WELFARE MEDICINE IN AMERICA: A CASE STUDY OF MEDICAID 22 (1974). These disparities continue. In June 1986, the average AFDC payment per family was $348.83, and the average AFDC payment per individual was $118.86, compared to the federal SSI rate of $336 for a single person living alone and $504 for a couple. CHILDREN'S DEFENSE FUND, A CHILDREN'S DEFENSE BUDGET 98 (1988).

5. *E.g.*, Melzer v. Witsberger, 505 Pa. 462, 480 A.2d 991 (1984); Scott v. Commonwealth, Dep't of Pub. Welfare, 46 Pa. Commw. 403, 406 A.2d 594 (1974); Conway v. Dana, 456 Pa. 536, 318 A.2d 324 (1974); Commonwealth *ex rel.* Byrne v. Byrne, 212 Pa. Super. 566, 569, 243 A.2d 196, 197-98 (1968); Goodyear v. Goodyear, 257 N.C. 374, 379, 126 S.E.2d 113, 117 (1962).

6. There is no common law duty to support a stepchild. A very few states have enacted laws of general applicability requiring stepparents to support their stepchildren. Mahoney, *Support and Custody Aspects of the Stepparent-Child Relationship*, 70 CORNELL L. REV. 38, 43-45 (1984); Note, *AFDC Eligibility and the Federal Step-parent Regulation*, 57 TEX. L. REV. 79, 94-95 (1978).

7. Jacobus tenBroek traced the development of a dual track system of family law back to the English Elizabethan Poor Law of 1601. 43 Eliz. 1, ch.2 (1601). As he documents, we have long had a private law system of family law for the non-poor and a public law system of family law for the poor. tenBroek, *California's Dual System of Family Law: Its Origin, Development and Present Status* (pts. 1, 2 & 3), 16 STAN. L. REV. 257, 900 (1964), 17 STAN. L. REV. 614 (1965).

8. *See, e.g.*, Bowen v. Gilliard, 483 U.S. 587 (1987), and the lower court cases cited therein.

9. *See, e.g.*, Lewis v. Martin, 397 U.S. 552 (1970); King v. Smith, 392 U.S. 309 (1968). *See also* Gilliard v. Craig, 331 F. Supp. 587 (W.D.N.C. 1971) (three-judge court), *aff'd*, 409 U.S. 807 (1972).

mothers to control their family life has been further limited, and their economic plight exacerbated.

This Article discusses the AFDC "sibling deeming" amendment, examining both the effect of the amendment on low-income women and children and the interaction of welfare and family law. This interaction takes several forms, each illustrated by some aspect of the sibling deeming amendment. The first is the development of dual track family law through welfare rules. The second is the impact on welfare law of changes in general family law and the impact on general family law of changes in welfare law. The third is the intertwining of the welfare and family court systems as experienced by low-income women and by welfare and family court staff.[10]

Part I of this Article explains how income deeming works. Part II discusses the options that were available to poor women prior to the sibling deeming amendment, and Part III examines the effects of the amendment. Part IV describes various aspects of the interaction between welfare and family law. My analysis is based on an examination of statutes, regulations and case law; literature on the history of family law and social welfare policy; and personal experience gained as a legal services lawyer in welfare and family law since 1979.

I.
DEEMING OF INCOME IN THE AFDC PROGRAM

A series of complicated calculations must be performed to determine whether or not an applicant is eligible for AFDC, and if so, the amount of her grant.[11] Although the details of the calculations have varied over the years, and the grant amounts vary from state to state, the Supreme Court has repeatedly ruled that the Social Security Act prohibits attribution of unavailable income to an applicant or recipient.[12] As recently as 1985, the Court observed that the availability principle has served to prevent states from "imputing financial support from persons who have no obligation to furnish it. . . ."[13] In the 1980s, however, this principle has been honored more often in the breach. Statutory amendments have attributed income from stepparents, grandpar-

10. This Article focuses on what happens to low-income women *as women*. However, matters of race and class are closely interrelated with issues of sex in the experiences of women on AFDC. For many years the AFDC program largely excluded black women and children. *See* F. PIVEN & R. CLOWARD, REGULATING THE POOR (1971) [hereinafter REGULATING THE POOR]; W. BELL, AID TO DEPENDENT CHILDREN (1965). Currently, a majority of the women and children receiving AFDC are black and Hispanic, and the right wing attack on AFDC "inevitably becomes an attack on minorities." Piven & Cloward, *The Contemporary Relief Debate*, in THE MEAN SEASON: THE ATTACK ON THE WELFARE STATE 48 (1987) [hereinafter *Contemporary Relief*]; *see also* A. DAVIS, WOMEN, CULTURE AND POLITICS 57 (1989).

11. 42 U.S.C.A. § 602 (West Supp. 1988); 45 C.F.R. § 233 (1988).

12. 42 U.S.C.A. § 602(a)(7) (West Supp. 1988). *See, e.g.*, Heckler v. Turner, 470 U.S. 184, 200-01 (1985); Van Lare v. Hurley, 421 U.S. 338 (1975); *Lewis*, 397 U.S. at 552; *King*, 392 U.S. at 309.

13. *Heckler*, 470 U.S. at 200.

ents, and siblings even though they have no legal obligation to provide it, and even where it is actually unavailable.

A. Stepparent Deeming

Stepparent deeming consists of the attribution of a stepfather's income to his stepchildren for purposes of determining their eligibility for AFDC and, if eligible, the amount of their grant.[14] It was enacted as part of the first round of the Reagan Administration's welfare cuts in the Omnibus Budget Reconciliation Act of 1981.[15] Stepparent deeming is applied in a series of steps which make certain deductions from the stepparent's income. The remainder is deemed to be available to the stepchild and reduces her welfare grant dollar for dollar.[16]

This provision is directly descended from earlier welfare restrictions which imposed a dependent role on impoverished women. Historically, the welfare system reinforced male dominance by "ensuring that women affiliated with men would rely on the man, rather than the state, for support."[17] Two kinds of rules have been used to justify denial or termination of welfare benefits because of affiliation with a man: "unsuitable home" rules and "man in the house" rules. Unsuitable home policies denied benefits on the basis of the woman's allegedly immoral character. The birth of an illegitimate child was considered proof of an unsuitable home. Man in the house rules treated the presence of any unrelated male in the home as proof that the child was not deprived of care or support by the absence of a father.

Both types of rules were used (often interchangeably) to strictly limit the number of women and children receiving AFDC benefits and, in particular, to deny benefits to black families. These rules also reinforced sexual norms by punishing poor women for non-marital relationships with men.[18] Stepparent deeming is the latest variant of the man in the house rules and effectively denies AFDC to the children of any woman whose husband is employed or has any income other than Supplemental Security Income (SSI) benefits.[19]

---

14. Although stepparent deeming applies to all stepparents, the term "stepfathers" is used here to emphasize the sex/gender arrangements which are being reinforced by the welfare system. *See* Rubin, *The Traffic in Women: Notes on the Political Economy of Sex*, in TOWARD AN ANTHROPOLOGY OF WOMEN (R. Reiter ed. 1975) for a discussion of sex/gender systems. Most AFDC caretakers are women, and most stepparents whose income is at issue are men.

15. Pub. L. No. 97-35, § 2306(a) (codified as amended at 42 U.S.C.A. § 602(a)(31) (West Supp. 1988)).

16. 42 U.S.C.A. § 602(a)(31) (West Supp. 1988); 45 C.F.R. § 233.20(a)(3)(xiv) (1988).

17. Law, *Women, Work, Welfare, and the Preservation of Patriarchy*, 131 U. PA. L. REV. 1249, 1280 (1983).

18. *See* W. BELL, *supra* note 10; REGULATING THE POOR, *supra* note 10; tenBroek, *supra* note 7, 17 STAN. L. REV. at 654-58, for the history and uses of Man in the house, unsuitable home, and stepparent deeming provisions.

19. 42 U.S.C.A. § 602(a)(24) (West Supp. 1988); 45 C.F.R. § 233.20(a)(1)(ii) (1988); 45 C.F.R. § 233.20(a)(3)(vi) (1988). SSI is the federal welfare needs-based program for the aged, blind, and disabled. Congress has specified that the income of individuals who receive SSI is not to be considered in making AFDC determinations for their relatives.

B. Grandparent Deeming

Grandparent deeming, which was enacted as part of the Deficit Reduction Act of 1984, consists of the attribution of grandparents' income to their grandchildren for purposes of determining the grandchildren's eligibility for AFDC and, if eligible, the amount of their grant.[20] Grandparent deeming currently applies only when the parent is under the age of eighteen, is living in the same household as the child and the grandparent, and is the child of the grandparent. In other words, it prevents a teenage mother who is living with her own parent from getting AFDC benefits for her child if the grandparent is employed or has any income other than AFDC or SSI. The budgetary process is the same as for stepparent deeming: after certain deductions, all remaining income of the grandparent is counted, dollar for dollar, against the minor mother and grandchild's welfare grant.[21]

This formula results, of course, in increased stress and tension in the home and reduces the ability of extended families to provide an emotionally or financially supportive environment to teenage mothers and their high-risk children.[22] In spite of such obvious harmful effects, the Family Support Act of 1988 went even further by allowing state agencies to refuse to pay AFDC to teenage mothers who do *not* live with their own parents.[23] This provision, repeatedly sought by the Reagan administration, has the ostensible purpose of reinforcing parental authority over wayward teenagers.[24]

C. Sibling Deeming

Sibling deeming, a 1984 addition along with grandparent deeming, has two parts. First, it requires that siblings (including half-siblings) of a child who applies for AFDC must also apply for AFDC.[25] This requirement ap-

---

20. Deficit Reduction Act of 1984, Pub. L. No. 98-369, § 2640(a) (codified as amended at 42 U.S.C.A. § 602(a)(39) (West Supp. 1988)).

21. 42 U.S.C.A. § 602(a)(39) (West Supp. 1988); 45 C.F.R. § 233.20(a)(3)(xvii) (1988).

22. Morrison v. Heckler, 602 F. Supp. 1485 (D. Minn. 1985), *aff'd*, 787 F. 2d 1285 (8th Cir. 1986); Jimenez v. Cohen, No. 85-5285, slip op. (E.D. Pa. July 17, 1986).

23. Pub. L. No. 100-485, § 403, 102 Stat. 2397 (1988).

24. H.R. CONF. REP. NO. 861, 98th Cong., 2d Sess. 1407-08, *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS 1445, 2095-96; S. REP. NO. 494, 97th Cong., 2nd Sess. 51-52, *reprinted in* 1982 U.S. CODE CONG. & ADMIN. NEWS 781, 827-28.

25. Bowen v. Gilliard, 483 U.S. 587 (1987); 42 U.S.C.A. § 602(a)(38) (West Supp. 1988); 45 C.F.R. § 206.10(a)(vii)(B) (1988). The sibling deeming amendment requires that the state plan for AFDC benefits shall:

> (38) provide that in making the determination under paragraph (7) with respect to a dependent child and applying paragraph (8), the State agency shall (except as otherwise provided in this part) include -
>
> (A) any parent of such child, and
>
> (B) any brother or sister of such child, if such brother or sister meets the conditions described in clauses (1) and (2) of section 606(a) or in section 607(a) of this title (if such section is applicable to the State), if such parent, brother, or sister is living in the same home as the dependent child, and any income of or available for such parent, brother, or sister shall be included in making such determination and applying such paragraph with respect to the family. . . .

plies to all siblings who meet certain criteria[26] and live in the same household as the child who has applied for AFDC, regardless of whether or not the sibling needs public assistance and whether or not the sibling's parents want her to receive welfare. The children's mother is then required to comply with all AFDC regulations with regard to the sibling, including verification of information and cooperation with child support enforcement, as well as with regard to the children for whom she wanted AFDC payments. Second, since the sibling is made a mandatory member of the welfare grant group, any income the sibling may have is considered to be available to the other members of the grant group. Benefits are consequently reduced dollar for dollar or terminated.[27]

Unlike the stepparent and grandparent deeming regulations, which provide for a series of deductions before deeming the remaining income, the sibling deeming rules attribute all of the sibling's income to the AFDC grant group members. The only deductions permitted are those ordinarily available to an AFDC grant group, which are considerably more stringent.[28] Because of this, and because welfare grant levels are extremely low, even small amounts of deemed income have a significant impact.

The major exception to the sibling deeming requirement applies to children who receive Supplemental Security Income (SSI) payments. By definition, this is a relatively small group of severely disabled children.[29] Other exceptions derive from the technical terms of the sibling deeming amendment. The amendment applies only when the sibling meets the categorical requirements for AFDC — thus it does not apply when the sibling is over eighteen (or in some cases over nineteen), is an ineligible non-citizen, or does not have an absent, deceased, unemployed, or disabled parent.[30] These exceptions are confusing, often misunderstood, and rarely applied.

Each of these deeming provisions has discrete harmful effects on poor families; combined they further divide extremely poor people from the working poor by eliminating AFDC benefits for the latter group and further undermine political support for the AFDC program by drastically reducing the universe of eligible people. In addition, the deeming provisions do not create

---

42 U.S.C.A. § 602(a)(38) (West Supp. 1988).

26. Because of the technical language of the amendment, and the bizarre and patchwork nature of AFDC eligibility, siblings who do not meet the statutory criteria for AFDC are exempt. *Id.* § 602(a)(38) (West Supp. 1988). In addition, the sibling deeming amendment provides that deeming will apply "except as otherwise provided" in the AFDC title. *Id.* § 602(a)(38) (West Supp. 1988).

In the preamble to the interim final regulations implementing the sibling deeming amendment, the Secretary lists five examples of siblings who are not mandatory grant group members as a result of this provision. *See* 49 Fed. Reg. 35586, 35589 (1984).

27. *Bowen*, 483 U.S. at 587; 42 U.S.C.A. § 602(a)(7), 602(a)(38) (West Supp. 1988); 45 C.F.R. § 233.20(a)(3)(ii) (1988).

28. *Compare* 45 C.F.R. § 233.20(a)(3)(xiv) (1988) *with* 45 C.F.R. § 233.20(a)(30)(iv)(F) (1988).

29. 42 U.S.C.A. § 1382 (West 1983 & Supp. 1988).

30. *See supra* note 26. 42 U.S.C.A. § 602(a)(33) (West Supp. 1988).

obligations which may be enforced by the indigent child or woman whose AFDC grant is reduced accordingly. She may not compel the stepparent or grandparent to provide the deemed income. These provisions in no way strengthen the ability of poor women to enforce income-sharing for themselves and their children.

II.
THE CARETAKER OPTION

Prior to the Deficit Reduction Act of 1984,[31] a parent did not have to apply for AFDC benefits for all of her children. She could decide whether or not applying for AFDC for a particular child was in that child's best interests. This was known as the caretaker option.[32] The sibling deeming amendment removed this option by requiring that all siblings be included in the AFDC unit. Understanding how the caretaker option functioned, and the considerations balanced by the women who used it, is critical to understanding the negative impact of the deeming requirements.

A. Who Used the Caretaker Option

Every day, low-income women are faced with the question of how best to care for their children. The decision of how to structure financial arrangements to meet those needs is a fundamental problem for all poor families. Nevertheless, welfare workers rarely advised women of their options concerning grant group composition. Some women consulted welfare rights groups or legal services offices, or learned of their options under the caretaker provisions from friends or neighbors. Of the women who knew of the caretaker option, many chose to exercise it.

Children who received child support and children who received Social Security benefits were the two major groups voluntarily excluded from AFDC by their parents. Children with earned income generally were not affected by the option, partly because the AFDC program disregards the earned income of children who are full-time students, or who are part-time students and who are not full-time employees,[33] and partly because relatively few children earn more than their share of a welfare grant.

Children who benefited from the caretaker option usually lived in families with half-siblings. For example, if a mother received child support for only one of her children, she could apply for AFDC for the remaining children without affecting the first child's right to receive support directly from the father. The option was not relevant to families with only one child since eligibility for AFDC is derived from the child. If the child does not receive

31. Pub. L. No. 98-369, 98 Stat. 494 (1984).

32. The right to the caretaker option was established in Gilliard v. Craig, 331 F. Supp. 587, 593 (W.D.N.C. 1971), *aff'd*, 409 U.S. 807 (1972).

33. 42 U.S.C.A. § 602 (a)(8)(A) (West Supp. 1988); 45 C.F.R. § 233.20(a)(11) (1988).

AFDC, neither can the mother.[34]

B. Child Support

The federal statute requires that the caretaker of a child who applies for AFDC must assign any child support payments to the state welfare department.[35] As a result, the support payments are made to the state, rather than to the mother. Prior to October 1, 1984, the state kept all of the support payments as long as the child continued to receive welfare. If the current support payments exceeded the welfare grant, the excess was to be refunded when the grant was terminated.[36] Even after a child was removed from the welfare grant, the state was entitled to receive arrearage payments (including payments for arrears that accrued before the child received welfare payments) until it had been reimbursed for the full amount of the welfare grant.[37] Once a child was removed from the grant, current support was supposed to again be paid directly to the child's caretaker, rather than to the state.[38] However, long delays often occurred in reassigning support orders back to the mothers.[39]

Since October 1, 1984, AFDC families have been entitled to the first fifty dollars of current child support paid each month.[40] Although fifty dollars per month can be a significant sum to low-income families, the impact of this amendment has been limited by narrow regulatory interpretation. The federal Department of Health and Human Services (HHS) has interpreted the statute to mean that a family can receive only one fifty-dollar "pass-through" each month, even if more than one absent parent is paying support for children in the family.[41] Additionally, HHS has required states to deny pass-through payments for child support which is paid by the absent parent in advance of the month in which it was due and for support paid after the month in which it was due, despite contrary court orders in several jurisdictions.[42]

---

34. If her state or city provides general assistance, the mother might be able to receive benefits for herself alone and receive child support for the child, but no federal funds would be available through the AFDC program. The only situation in which a parent could receive AFDC benefits for herself and not for her child would be if the child were disabled and received SSI. 42 U.S.C.A. §§ 602(a)(24), 606(b) (West Supp. 1988); 45 C.F.R. § 233.10(b)(ii)(b) (1988); 45 C.F.R. § 233.20(a)(1)(ii) (1988); 45 C.F.R. § 233.20(a)(3)(vi) (1988).

35. 42 U.S.C.A. § 602(a)(26)(A) (West Supp. 1988).

36. *Id.* § 657(b)(3)-(4) (West Supp. 1988); 45 C.F.R. §§ 232.20(a)(1), 302.32(b), 302.32(e), 302.51(b)(3), and 302.51(b)(5) (1988).

37. 42 U.S.C. § 657(c) (as amended 1977); 45 C.F.R. § 302.51(f) (1988).

38. Bennett v. White, 671 F. Supp. 343 (E.D. Pa. 1987), *aff'd*, 865 F.2d 1395 (3d Cir.) *cert. denied*, 109 S. Ct. 3247 (1989); 42 U.S.C.A. §§ 602(a)(26), 654(4)-(5) (West Supp. 1988); 45 C.F.R. § 302.51(f) (1988).

39. *Bennett*, 671 F. Supp. 343.

40. *Bennett*, 671 F. Supp. 343.

41. 45 C.F.R. § 302.51(b)(1) (1988).

42. *See* Beasley v. Harris, 671 F. Supp. 911, 919 (D. Conn. 1987) (invalidating 45 C.F.R. § 302.51 to the extent it limits the Title IV-D agency's obligation to pay only one pass-through payment in a month where two or more support payments are collected); Wilcox v. Petit, 649 F. Supp. 685, 687 (D. Me. 1986) (motion for relief from order denied 653 F. Supp. 709, 711) (pass-through payment owed to the recipient for each full month's worth of child support included in

There has also been litigation to determine whether Social Security payments qualify for the pass-through.[43] Although a child's Social Security benefits are intended by the Social Security Act to provide support for the child as a substitute for the parent's lost earning capacity,[44] HHS and the states have refused to consider them child support for purposes of the pass-through.[45]

C. *The Decision-Making Process*

Under the caretaker option, women typically weighed a number of factors in deciding whether or not to exclude a child from the welfare grant:

1. *Would the family's income be maximized through the additional increment of AFDC or through receipt of the child support?*

The additional income gained by adding a child to the AFDC grant has always been quite small. As of January 1986, for example, the monthly increment for adding a third person to an AFDC grant was $60 or less in twenty-five states and $80 or less in thirty-seven states.[46] If the child support exceeded this additional increment, the family's income would be maximized by keeping the child off the AFDC grant.

In 1984, the sibling deeming amendment was enacted simultaneously with the fifty-dollar pass-through for child support payments. In those states in which sibling deeming was not immediately implemented, or was enjoined, there was a period during which the caretaker option and the fifty-dollar pass-through existed simultaneously.[47] In that situation, the calculation was slightly different. The family income would still be maximized by putting a child onto AFDC if the support was less than the additional increment for

---

the payment), *aff'd sub nom.*, Wilcox v. Ives, No. 88-1371 (1st Cir. Dec. 20, 1988), 15 Fam. L. Rep. (BNA) 1130. Previously, child support paid timely by the absent parent, but delayed in transmission, was also included among the payments for which the $50 pass-through was denied. Congress ended this administrative practice with the Family Support Act of 1988, Pub. L. No. 100-485, § 102, 102 Stat. 2343, 2346 (1988).

43. Roberts & Lowry, *Benefiting AFDC Children by Counting Social Security Dependents' Payments Toward Their Absent Parent's Support Obligations*, 21 CLEARINGHOUSE REV. 1526, 1532-36 (1988).

44. The purpose of social security benefits is "to replace the support lost by a child when his father retires, dies or becomes disabled." S. REP. NO. 404, 89th Cong., 1st Sess. 110 (1965).

45. Though it has not issued regulations directly relating to the effect of Social Security benefits, HHS has interpreted 42 U.S.C. § 657(a)(8)(A)(vi) to exclude pass-through payments. This practice was recently enjoined in Stroop v. Bowen, 870 F.2d 969, 973-75 (4th Cir. 1989).

46. CHILDREN'S DEFENSE FUND, *supra* note 4. The Supreme Court upheld Maryland's "maximum grant regulation" which denied *any* AFDC benefit increment for additional children in large families once the maximum grant level had been reached. Dandridge v. Williams, 397 U.S. 471 (1970). At the time, twenty other states had similar policies. Sard, *The Role of the Courts in Welfare Reform*, 22 CLEARINGHOUSE REV. 367, 374 (1988).

47. In many states, litigation successfully delayed implementation of the sibling deeming amendment — sometimes for years. But, ultimately, these challenges were defeated in the Supreme Court. Bowen v. Gilliard, 483 U.S. 587 (1987). For a discussion of the legal theories used in these challenges, see *Gilliard* and the lower court cases cited therein. *See also* Billings, *The Choice Between Living with Family Members and Eligibility for Government Benefits Based on Need: A Constitutional Dilemma*, 1986 UTAH L. REV. 695.

adding a person to the grant. It would also be maximized by adding a child who received support which was more than the additional increment, but was less than the increment plus the fifty-dollar pass-through. For example, if the additional increment for adding the child to the grant was $65, the family's income would be maximized by adding the child to the AFDC grant if the support were less than $115 ($65 plus the $50 pass-through).

2. Could the child's father be relied upon to make regular and timely support payments?

If not, regular AFDC benefits might be preferable even if the grant amount was lower than the support. At the same time, the risk of erroneous loss of welfare benefits and the difficulties of dealing with the welfare department regarding an additional individual had to be compared to the likelihood of non-payment of support.

3. Would the child's ability to get medical care be enhanced through Medicaid benefits?

If the child had medical insurance through her father, Medicaid might not add anything. The child might also be eligible for Medicaid benefits without having to receive AFDC.

Generally, there are two ways to become eligible for Medicaid. The "categorically needy" are those individuals who receive AFDC or SSI; they are generally automatically eligible for Medicaid.[48] States have also had the option of extending a "medically needy" Medicaid program to those individuals who are not eligible for AFDC or SSI, but whose income and resources are below certain limits.[49] States may choose to provide less extensive coverage in their "medically needy" programs than in their "categorically needy" programs.[50] Pennsylvania, for example, does not pay for prescription medications, dental care, vision services, or medical appliances (such as wheelchairs or home oxygen) for persons in the "medically needy" program.[51] So, the individual child's anticipated medical needs also had to be considered in relation to the availability of "medically needy" benefits or private insurance coverage, and compared to "categorically needy" Medicaid benefits, in deciding whether or not to add the child to the AFDC grant.

48. 42 U.S.C.A. § 1396a(10)(A)(i) (West Supp. 1988); 42 C.F.R. §§ 435.110, 435.120 (1987).

49. 42 U.S.C.A. §§ 1396a(10)(C), 1396d(a) (West Supp. 1988); 42 C.F.R. § 435.301 (1987).

50. *Compare* 42 U.S.C.A. § 1396a(10)(A) (West Supp. 1988) *with* 42 U.S.C. § 1396a(10)(C) (West Supp. 1988), and 42 C.F.R. § 440.210 (1987) *with* 42 C.F.R. § 400.220 (1987).

51. 62 PA. CONS. STAT. ANN. § 442.4 (repealed in part by Pub. L. 477, no. 70, as to certain services for the aged) (Purdon 1988); 55 PA. CODE § 1101.32(c) (1989).

4. Would the child's relationship with her father and other paternal relatives be harmed by receiving AFDC?

Contact with the father and his relatives can be an important source of emotional and financial support for the child.[52] Fathers who pay support often object to their children going on welfare. In those cases where support was being paid without a court order, the father might resent being forced to go through a formal administrative or court process which federal law requires in AFDC cases. Women needed to consider whether or not the father or his relatives would resent a decision to apply for AFDC, and if so, whether the resentment would result in decreased visitation or assistance with the child.

The federal statute requires the caretaker of an AFDC child to cooperate in establishing the child's paternity and in pursuing and obtaining child support payments.[53] An exception is available when the caretaker is able to prove good cause for a failure to cooperate. These provisions are narrowly written and provide for only five circumstances under which good cause may be found: rape, incest, a pending adoption or pre-adoption service (for a maximum of three months), or if cooperation "is reasonably anticipated" to result in serious physical or emotional harm to the child or in harm to the caretaker which would prevent her from caring for the child.[54] Although states are required to keep statistics on good cause claims, the data are very limited. It appears that only several thousand findings of good cause for noncooperation are made nationally each year among the approximately three million eligibility determinations.[55] This low volume has been attributed in part to the failure of state officials to inform applicants adequately of their right to make a good cause claim and to the government's failure to follow applicable standards and procedures when assessing claims.[56] Even if a good cause exception is granted, the state may proceed with the support action without the cooperation of the mother if it believes that it can do so without risk of harm to the child or caretaker.[57] So, in almost all cases, the entry of a formal support order would be required.

5. Would the mother and/or the child be endangered?

If there was a history of battering, the mother may have feared violent retaliation for putting the child on AFDC, even if she succeeded in getting a good cause exemption from cooperation in child support enforcement pro-

52. *See* C. STACK, ALL OUR KIN: STRATEGIES FOR SURVIVAL IN A BLACK COMMUNITY (1974).

53. 42 U.S.C.A. § 602(a)(26)(B) (West Supp. 1988); 45 C.F.R. § 232.12 (1988).

54. 42 U.S.C.A. § 602(a)(26)(B) (West Supp. 1988); 45 C.F.R. § 232.42 (1988).

55. Mannix, Freedman & Best, *The Good Cause Exception to the AFDC Child Support Cooperation Requirement*, 21 CLEARINGHOUSE REV. 339 n.7 (1987) (citing HHS QUARTERLY PUBLIC ASSISTANCE STATISTICS, April-June 1985, Tables 16, 22 and 24).

56. *Id.*

57. 45 C.F.R. §§ 232.42, 232.49 (1988).

ceedings. Battering does not end with separation and is often triggered by the batterer's perception that he is losing (or has lost) control over the woman. A decision which he does not approve of could result in violence against the mother and physical or emotional harm to the child.[58]

6. Would the father seek custody of the child in retaliation?

This concern was exacerbated by a fairly common child support enforcement scenario. The AFDC recipient is required to cooperate in child support enforcement actions in which the state is represented by the Title IV-D Child Support Enforcement program.[59] A common tactic used by defendants in support cases is to counterclaim for custody or increased visitation. Since the IV-D attorney does not provide representation in relation to custody or visitation issues, the woman is left to deal with them on her own.[60]

If the father did seek custody, the mother was faced with a significant battle. One of the myths about family law is that women always win custody battles. But recent studies indicate that mothers lose two-thirds of all litigated custody disputes.[61] Receipt of AFDC is often regarded as making the mother a less desirable custodian than an employed father, particularly if the father has remarried.[62] Even if the woman retained custody, the dispute was likely to be very time consuming and stressful for both her and the child.

Under the caretaker option, similar factors had to be considered in deciding whether a child who received Social Security benefits (based on the death, disability, or retirement of a parent) should be included in the AFDC grant.

---

58. *See, e.g.*, L. GORDON, HEROES OF THEIR OWN LIVES 271, n.69 (1988); S. SCHECHTER, WOMEN AND MALE VIOLENCE 219-24 (1982); D. MARTIN, BATTERED WIVES 76-79 (1976); Wilkerson, *Indianan Uses Prison Furlough to Kill Ex-Wife*, N.Y. Times, Mar. 12, 1989, at 14, col. 1 (national ed.).

59. 42 U.S.C.A. §§ 652-659 (West 1983 & Supp. 1989).

60. For a discussion of the conflicts of interest between AFDC recipients and the IV-D program, see Roberts & Allen, *An AFDC Mother's Right to Counsel: Custody Issues in Proceedings Instigated by the IV-D Agency*, 19 CLEARINGHOUSE REV. 278 (1985); Roberts, *Attorney-Client Relationship and the IV-D System: Protection Against Inadvertent Disclosure of Damaging Information*, 19 CLEARINGHOUSE REV. 158 (1985) [hereinafter *Attorney-Client Relationship*]; and Roberts, *In the Frying Pan and in the Fire: AFDC Custodial Parents and the IV-D System*, 18 CLEARINGHOUSE REV. 1407 (1985).

61. Women face a number of barriers in custody cases, including economic discrimination, double standards as to what is required of a good mother and what is required of a good father, and a recent trend in favor of joint custody. National Center on Women and Family Law, *Sex and Economic Discrimination in Child Custody Awards*, 16 CLEARINGHOUSE REV. 1130 (1983). *See also* P. CHESLER, MOTHERS ON TRIAL (1986); L. WEITZMAN, THE DIVORCE REVOLUTION (1985); Polikoff, *Gender and Child Custody Determinations: Exploding the Myths*, in FAMILIES, POLITICS AND PUBLIC POLICY 183 (Diamond ed. 1983).

62. P. CHESLER, *supra* note 61; L. WEITZMAN, *supra* note 61; Polikoff, *supra* note 61; National Center on Women and Family Law, *supra* note 61. An interesting historical twist on this situation occurred under California's "offer of a free home" regulation, in effect until 1963. This regulation prohibited AFDC payments for any child for whom there was an "offer of a free home." The regulation was used by caseworkers and angry men to force women to return to relationships and to transfer custody of their children. Kay & Philips, *Poverty and the Law of Child Custody*, 54 CALIF. L. REV. 717, 727-33 (1966).

Even if the child's father was dead, issues pertaining to the child's relationship with paternal relatives and maximization of family income remained. If the child's father was alive and disabled or (more rarely) retired, the issues were virtually identical to those raised in the child support context.

Low-income women no longer have the option of excluding individual children from the family's AFDC grant since the sibling deeming amendment requires that all siblings (including half-siblings) be included in the welfare grant group. The impact on affected families is direct — increased stress and decreased income.

III.
EFFECTS OF THE SIBLING DEEMING AMENDMENT

A. Loss of Income, Increased Harassment

Predictably, the amendment has resulted in significant loss of income for women and children.[63] Unlike all other families, poor families no longer benefit from child support beyond the fifty-dollar pass-through or Social Security payments. Children who previously were receiving income greater than the AFDC benefit levels have had their income reduced to those levels. The inadequacy of AFDC payments forced many mothers and children to rely on child support or Social Security payments to purchase food, pay the rent, and buy clothes. Other parents used the support or Social Security payments to supplement inadequate public education or to pay for little league or YMCA summer camp. They attempted to provide their children with an enriched environment in the hope of allowing them to escape poverty.[64]

The amendment has also resulted in harassment of women by men who are resentful that their children have been placed on welfare, and angered that their child support payments go to the state rather than their children. We have seen clients who no longer have custody of their children, clients who have been threatened, and clients whose children are no longer visited by their fathers as a result of the amendment. Witnesses in the sibling deeming cases predicted each of these problems, warning they would occur unless sibling deeming were enjoined.[65]

The amendment has also had an effect on child support enforcement. Some hearing officers appear to be setting lower child support orders by limit-

63. The Senate Finance Committee anticipated cost savings resulting from sibling deeming of $455 million during the first three years. Bowen v. Gilliard, 483 U.S. 587 (1987). Since that estimate includes only the federal share of AFDC benefits, approximately fifty-five percent, the benefit loss to recipients would almost double.

64. Findings of Fact, Johnson v. Cohen, No. 84-6227, slip op. at 8-20, 27 (E.D. Pa. Oct. 2, 1985), *rev'd on other grounds*, 836 F.2d 798 (3d Cir. 1987); *See also* Gilliard v. Kirk, 633 F. Supp. 1529, 1536-43 (W.D.N.C. 1986), *rev'd on other grounds sub nom.* Bowen v. Gilliard, 483 U.S. 587 (1987); Plaintiffs' affidavits filed in Showers v. Cohen, 645 F.Supp. 217 (M.D. Pa. 1986); Tracy, *Welfare Rule Splits Up Home*, The Orlando Sentinel, Aug. 26, 1985, at B1, col. 1.

65. *See* Findings of Fact, Johnson v. Cohen, No. 84-6227, E.D. Pa., at 22-23; *Gilliard*, 633 F. Supp. at 1536-43; Plaintiffs' Affidavits in *Showers*, 645 F. Supp. at 217.

ing support paid to the child's share of the AFDC grant. Others are concerned by the reduced incentive to pay support since payors know that the support does not benefit their children. The child support enforcement system consequently is made to deal with an increased non-support caseload consisting of people who formerly paid support voluntarily.[66]

B. Loss of Control, Increased Confusion

Receiving welfare is a kafkaesque experience. The recipient is at the mercy of a seemingly arbitrary and chaotic system. Workers regularly demand "verification" (documentary proof) of numerous items of information, whether or not it is within a woman's power to obtain them.[67] For example, an applicant is often asked to supply documentary proof that she is no longer employed, regardless of whether her former employer is willing to provide a written statement. But showing her last pay stub proves only that she was employed when she received it. A recent study found that, nationally, 59.7% of all denials for AFDC or Medicaid were caused by paperwork and document problems, rather than substantive ineligibility, and that denials for procedural reasons increased seventy-five percent from 1980 to 1986.[68]

Similarly, AFDC budget calculations are extremely complex. It is difficult for a recipient to know whether or not she is receiving the correct amount of benefits. If she is receiving the correct amount, it is difficult to understand why her neighbor is receiving more or less than she when the neighbor has the same number of children on welfare and appears to be in similar economic circumstances.

The process of applying for and receiving AFDC is also extremely intrusive. The applicant must provide proof (often in the form of letters from neighbors) that her children are living with her, that she is caring for them, and that their father is not living with her. She must provide information about the identity and location of her child's father and, if she is not married, paternity must be established. In some locations, she will be required to complete a paternity questionnaire detailing her sexual history, dates of intercourse, and names of partners regardless of whether the information is needed

66. Expert witnesses predicted these effects. *See* Findings of Fact, Johnson v. Cohen, No. 84-6227, E.D. Pa., at 20-26; *see also Gilliard*, 633 F. Supp. at 1552-53, 1561.

67. Unlike the federal regulations governing the food stamp program, the AFDC regulations provide little guidance to the states concerning verification requirements. *Compare* 7 C.F.R. 273.2(f) (1988) (detailed listing of items which must be verified) *with* 45 C.F.R. 206.10(a)(10) (1988) (methods used must be consistent with program objectives). As a result, states have relatively wide latitude in imposing verification requirements. Because benefits are not paid pending an appeal from denial of an AFDC application, it is generally in the applicant's best interest to comply with excessive verification requests rather than to contest them. Many AFDC verification problems arise from agency practice rather than regulatory requirements. Conversations with legal services staff in California, Florida, Massachusetts, New York, and Pennsylvania.

68. Tolchin, *Many Rejected for Welfare Aid Over Paperwork*, N.Y. Times, Oct. 29, 1988, at 8, col. 3.

in her case.[69]

Grant group composition under the caretaker option was one of the few areas in which AFDC recipients had any control. To those recipients who chose to exclude a child, for whatever reason, the decision was important. It reflected their choices concerning familial arrangements and expressed their sense of what was best for their children. In some cases, the decision was based on rational economic calculations intended to maximize income; in other cases, the decision was based on concerns about the child's emotional health and sense of self worth. There was a significant loss of control when the right to make this decision was lost.

The amendment also resulted in increased confusion, among workers as well as among recipients, as to the meaning and application of the rules. There are a series of complicated exemptions from sibling deeming, based on the technical language of the rule. Sibling deeming does not apply to siblings who do not meet the categorical requirements for AFDC (based on age, absence of a parent, etc.) or who are otherwise barred from receiving AFDC (e.g., ineligible non-citizens, children whose fathers are absent due to military service).[70] In addition, various contingencies created under the sibling deeming amendment have resulted in further litigation.[71] The grandparent deeming amendment, which was implemented at the same time, also created confusion over which individuals were affected.

Most case workers find the combined complex grant group composition rules incomprehensible. The net result of that confusion is an even greater

69. *See* Johnson & Blong, *The AFDC Child Support Cooperation Requirement*, 20 CLEARINGHOUSE REV. 1389, 1397-99 (1987).

70. The sibling deeming amendment applies if the sibling "meets the conditions described in clauses (1) and (2) of section 606(a) or in section 607(a) of this title . . ." 42 U.S.C.A. § 602(a)(38) (West Supp. 1988). Sections 606(a) and 607(a) list the categorical criteria for AFDC eligibility. Since sibling deeming does not apply to individuals who do not meet these criteria, a sibling who is over the age of eighteen (or in some cases nineteen) is exempt. *Id.* § 606(a)(2) (West Supp. 1988). Similarly, a child who is not deprived of parental care or support need not be included in the AFDC grant. For example, if a child's father resides in the home and is employed, the child is exempt, and the child's mother and half-siblings may continue receiving AFDC without considering the father's income if they are not married. *Id.* §§ 606(a)(1), 607(a) (West Supp. 1988). If they are married, the income is counted through the stepparent deeming process, which is more favorable than the sibling deeming process. *Compare* 42 U.S.C.A. § 602(a)(38) (West Supp. 1988) *with* 42 U.S.C.A. § 602(a)(31) (West Supp. 1988).

In addition, the sibling deeming amendment provides that deeming will apply "except as otherwise provided" in the AFDC title. 42 U.S.C.A. § 602(a)(38) (West Supp. 1988). So children who are prohibited from receiving AFDC by other provisions of the statute are exempted from the sibling deeming requirements. For example, if a child's father is absent due to military service, the child is not a mandatory grant group member, even if the father sends child support. *Id.* § 606(a)(1) (West Supp. 1988). If the child is ineligible for AFDC as a non-citizen, the child is not a mandatory grant group member. *Id.* § 602(a)(33) (West Supp. 1988). Five other examples of siblings who are exempt are provided in the preamble to the interim final regulations implementing the sibling deeming amendment. *See* 49 Fed. Reg. 35586, 35589 (1984).

71. *See, e.g.*, Phipps v. Iowa Dep't of Human Services, 409 N.W.2d 174 (Iowa 1987) (child whose father lives in the home and receives worker's compensation benefits is not a mandatory member of the siblings' AFDC grant group.).

loss of benefits than the rules require. Not only are the deeming rules applied indiscriminately in the AFDC program, but HHS and many states decided to extend them to the Medicaid program without congressional authority.[72] Even in Pennsylvania, which prohibits applying sibling or grandparent deeming to Medicaid, many legal services staff report that welfare workers routinely fail to make any distinction between the rules for Medicaid and the rules for AFDC.[73]

C. *Narrowing the AFDC Program*

The deeming amendments have not only created greater confusion and hardships for those receiving AFDC benefits but have also left many desperately poor families entirely ineligible for the program's assistance.[74] The thrust of the Reagan Administration cutbacks was to narrow the scope of the AFDC program by placing large groups outside of its application. This change undermined political support for the program, and further isolated and stigmatized those who do receive AFDC.

In 1981, the Omnibus Budget Reconciliation Act contained the first round of the welfare cuts.[75] Several of its major provisions were clearly aimed at reducing or terminating benefits for all recipients with any connection to the work force through their own earnings or those of a spouse. These provisions included monthly reporting, retrospective budgeting, the drastic reduction of earned income disregards, and the imposition of stepparent deeming.[76]

Each of these requirements worked in its own way to prevent many poor families from receiving AFDC benefits. States are granted wide discretion, but federal monthly reporting regulations require that, at a minimum, persons with current or recent earned income must file written monthly reports to document continued eligibility.[77] These reports must be turned in within a narrow time period, neither too early nor too late. Most states' computers are programmed to terminate benefits unless a welfare worker records the receipt

72. At least nineteen courts have unanimously rejected the extension of the deeming rules to the Medicaid program. *See e.g.*, Malloy v. Eichler, 860 F.2d 1179, 1182 (3d Cir. 1988); Georgia Dep't of Medical Assistance v. Bowen, 846 F.2d 708, 710 (11th Cir. 1988) (collecting cases); Vance v. Hegstrom, 793 F.2d 1018 (9th Cir. 1986).

73. Conversations with legal services staff in Allentown, Altoona, Harrisburg, Lancaster, Philadelphia, and Pittsburgh, Pennsylvania.

74. Following the trial in the major Pennsylvania case challenging the sibling deeming rule, Johnson v. Cohen, No. 84-6227 (E.D. Pa. Oct. 2, 1985), *rev'd*, 798 F.2d 807 (3d Cir. 1987), one of my tasks was to ensure that the trial transcript was prepared quickly. After prolonged negotiations with the court reporter, and several false alarms, he called to say that the transcript was complete, except for the names of "the eight families." I asked what eight families he was referring to, and he said, "you know, the eight families with dependent children that everyone kept talking about." Throughout the hundreds of pages of trial transcript, he had recorded AFDC as "*Eight* Families with Dependent Children," rather than as "*Aid* to Families with Dependent Children." Our office joked that if we lost the case, it would only be the Seven Families with Dependent Children program.

75. Pub. L. No. 97-35, 95 Stat. 357 (1981).

76. *Id.* §§ 2315, 2301, 2306, 95 Stat. 855, 843, 846 (1981) (respectively).

77. 45 C.F.R. § 233.36(a) (1988).

of a completed, timely form. This results in "churning," a widespread welfare agency practice of terminating welfare benefits for procedural reasons rather than substantive ineligibility. Often women whose cases are churned succeed in getting their benefits reinstated upon reapplication but only after delay, missed checks, and tremendous effort.[78] Even the temporary interruption of benefits can have drastic consequences for an indigent family.

Retrospective budgeting is a system which determines the level of AFDC benefits based on monthly income received one or two months prior to the month in which the benefits are paid. So income received in January would be used to determine the amount of the AFDC grant for March, regardless of whether or not that level of income continues.[79] On the other hand, *eligibility* continues to be determined prospectively, so that income received in January which puts the recipient over the eligibility limit results in immediate termination of benefits.[80]

The sibling deeming amendment, in 1984, continued the process of narrowing the range of those families eligible for AFDC. The state defendants in *Gilliard* estimated that the amendment would result in "termination or reduction of benefits to about 11.3% of AFDC cases in North Carolina. . . ."[81] As discussed above, the two major groups of families affected are those with children receiving child support or Social Security benefits — i.e., families with absent fathers who have a connection to the work force.[82]

As many commentators have observed, benefit programs need to be broad in their coverage in order to command political support.[83] The political vulnerability of means-tested programs reflects their narrow eligibility criteria; people are more likely to consider those programs from which they or their relatives benefit to be legitimate. The more AFDC eligibility is reduced, the more vulnerable the remaining program becomes.

D. Justifications for the Amendment

Three justifications are usually advanced in support of the sibling deem-

78. *See, e.g.*, DeHavenon, *Administrative Closings of Public Assistance Cases: The Rise of Hunger and Homelessness in New York City*, 16 N.Y.U. REV. L. & SOC. CHANGE 741 (1987-88).

79. 45 C.F.R. § 233.35 (1988).

80. 45 C.F.R. § 233.31(a) (1988).

81. Gilliard v. Kirk, 633 F. Supp. 1529, 1535 (W.D.N.C. 1986), *rev'd on other grounds sub nom.*, Bowen v. Gilliard, 483 U.S. 587 (1987).

82. *See supra* text accompanying notes 63-66. According to Piven and Cloward, 400,000 working mothers and their families lost their AFDC grants (and another 300,000 had their monthly benefits cut an average of $150-200 per month) as a result of the 1981 cuts. *Contemporary Relief*, *supra* note 10, at 87. The proportion of poor children receiving AFDC declined from 76 out of 100 in 1979 to 57.7 out of 100 in 1985. CHILDREN'S DEFENSE FUND, *supra* note 4, at 98.

83. *E.g.*, INSTITUTE FOR POLICY STUDIES WORKING SEMINAR ON EMPLOYMENT, WELFARE, AND POVERTY; WOMEN, FAMILIES, AND POVERTY: AN ALTERNATIVE POLICY AGENDA FOR THE NINETIES 6, 9 (1987); Greenberg, *A Breakdown of Consensus: Problems in the Welfare State*, DISSENT, Fall 1982, at 468.

ing amendment: first, that it is necessary for budget reduction and serves to allocate scarce dollars to the most needy; second, that it is a reasonable requirement because it more accurately reflects how families function and encourages sharing of income; and, third, that it meets the AFDC statutory objective of encouraging families to "attain . . . self-support and personal independence."[84]

These justifications are specious. The first justification implies that sibling deeming reallocates resources among AFDC recipients, from less to more needy. In fact, the rule in no way enhances the position of even poorer women and children. The monies saved have not been used to increase AFDC grants for the remaining recipients, nor to expand AFDC eligibility in other ways. The real value of AFDC grants has continued to erode, and the savings from sibling deeming have not even been used to stem the tide of the declining purchasing power of AFDC grants.[85]

The limits on resources for AFDC are artificially imposed and reflect political choices rather than budgetary necessity. Balancing the budget on the backs of the poor and the politically powerless may be politically attractive, but it is *not* necessary.[86] The poor, and particularly poor women, have borne far more than their share of the deficit-reduction burden.[87]

As to the second justification, why are only poor families — who are the least able to do so — being forced to "share"? Only poor families lose the benefit of child support payments or Social Security benefits. If we really want to encourage "sharing" then we need to develop truly collective responses to children's needs: we must expand AFDC, rather than cut it.

Third, for poor women, the availability of AFDC increases independence. Welfare benefits make it possible for women to leave abusive relationships and avoid oppressive working conditions.[88] The loss of income caused by the sibling deeming amendment makes it less likely that these families will live in decent housing, have a nutritionally adequate diet, obtain medical care, or receive the education that they need if they are to have any chance of escaping poverty. The primary objective of the AFDC program should be reducing

84. The first two justifications were routinely invoked by the state and federal defendants in deeming litigation. *E.g.*, Bowen v. Gilliard, 483 U.S. 587 (1987). The third justification is cited in Comment, *The Evolution of a Federal Family Law Policy Under Title IV-A of the Social Security Act —The Aid to Families with Dependent Children Program*, 36 CATH. U.L. REV. 197, 198 (1986).

85. VanDeVeer, *supra* note 1.

86. Block, *Rethinking the Political Economy of the Welfare State*, in THE MEAN SEASON: THE ATTACK ON THE WELFARE STATE 135-38 (1987); Edelman & Weill, *Investing in Our Children*, 4 YALE L. & POL'Y REV. 331, 353-58 (1986).

87. Walsh, *Fighting Poverty After Reagan*, 28 THE NATION 336 (1989); Erie, Rein & Wiget, *Women and the Reagan Revolution*, in FAMILIES, POLITICS AND PUBLIC POLICY (Diamond ed. 1983).

88. M. ABRAMOVITZ, REGULATING THE LIVES OF WOMEN: SOCIAL WELFARE POLICY FROM COLONIAL TIMES TO THE PRESENT 314, 352 (1988). *See also* REGULATING THE POOR, *supra* note 10.

poverty, not budget cutting measures that result in poor families becoming poorer.

E. Reducing the Harm: Existing Options

There are a number of steps which could be taken to ameliorate some of the harm caused by the deeming amendments. These steps would require changes in the way that AFDC grants are calculated and in the relationship between grant levels and state "standards of need."

States are required by federal statute to establish an AFDC "standard of need" reflecting the state's determination of the income level needed for a minimally adequate standard of living.[89] States, however, are not required to pay benefits at the standard of need level; most states pay AFDC benefits at levels considerably below the state standard of need.[90] The Family Support Act of 1988 requires each state to re-evaluate its AFDC standard of need and payment levels every three years. The states must report to the public and to HHS how the need standard is determined, its relationship to the payment standard, and any changes in the need or payment standards in the preceding three years. There is no requirement, however, that any changes be made.[91] Although the federal requirements are minimal, there has been some successful litigation concerning the adequacy of standards of need and payment levels based on state law requirements.[92]

Several changes could be made. A federal minimum benefit level could be established, similar to the federal SSI minimum benefit.[93] Alternatively, states could be required to pay benefits equivalent to their standards of need. Or, a change in budgeting methods could be instituted. In most states, any income of an AFDC recipient which is not exempt reduces the AFDC grant dollar for dollar.

An AFDC budgeting option currently available to the states, called "fill the gap," could be made mandatory, and child support explicitly included. In states with "fill the gap" budgeting, non-exempt income may be retained by the recipient to supplement the AFDC grant up to the level of the state standard of need. This would permit AFDC families to retain child support or other income to make up the gap between the state AFDC payment level and the state standard of need.

---

89. 42 U.S.C.A. § 602(a)(23) (West Supp. 1988).

90. In Pennsylvania, for example, the payment levels are approximately fifty-nine percent of the standard of need. *See* Findings of Fact, Johnson v. Cohen, No. 84-6227, slip op. at 4 (E.D. Pa. Oct 2, 1985) *rev'd on other grounds*, 836 F.2d 798 (3d Cir. 1987); Coleman v. O'Bannon, 550 F. Supp. 195 (E.D. Pa.), *aff'd*, 692 F.2d 748 (3d Cir. 1982), *cert. denied*, 460 U.S. 1047 (1983).

91. Pub. L. No. 100-485, § 404, 102 Stat. 2398 (1988).

92. *See, e.g.*, Mass. Coalition for the Homeless v. Secretary of Human Services, 400 Mass. 806, 511 N.E.2d 603 (1987). *See also* Sard, *supra* note 46.

93. The Family Support Act of 1988 also required that the National Academy of Sciences conduct a study and make recommendations to HHS concerning development of a national minimum benefit level. Pub. L. No. 100-485, § 406, 102 Stat. 2399 (1988).

Another possibility, of course, would be to repeal the sibling deeming amendment, thereby restoring a small measure of autonomy to welfare mothers as well as a small but vital portion of their income.

IV.
THE INTERACTION OF WELFARE AND FAMILY LAW: BETWEEN A ROCK AND A HARD PLACE

Low-income women have very little power and very little sense of control over their lives, partly because of the perpetual financial juggling that they must engage in to support their families. A slight loss of income can mean no food, no winter clothes, no electricity. If a welfare check is late, telephone service gets cut off,[94] the baby goes hungry, the landlord threatens eviction. When a family is evicted, the chances of their saving the two or three months rent (first, last, and security deposit) needed to get another apartment is remote, while the likelihood of joining the growing numbers of homeless is strong.[95] When these problems occur, there is a very real danger of having the children removed from the mother's care for neglect.[96]

Given these far-reaching effects, the sibling deeming amendment must be understood in the context of the broader interaction of welfare and family law. It has frequently been noted that welfare and family law are two sides of the

94. Because deregulation has raised the cost of local telephone service, increasing numbers of poor households are without telephones. This has particularly negative implications for dealing with welfare problems. Welfare workers in Philadelphia refuse to see clients without an appointment, which must be made by telephone. Because agency telephone lines are often either busy for hours on end or simply not answered, getting an appointment is difficult for women with telephones, and nearly impossible for those without. Trying to resolve any problem with the welfare department usually requires repeated contacts with the caseworker and may also require calling the supervisor, specialized applications workers, or other staff. These problems require enormous energy under the best of conditions and create a prohibitive barrier when each call requires leaving home, taking children along, finding a friend or neighbor with a working telephone, or feeding quarters into a pay phone on the street.

95. An increasing proportion of the homeless population consists of families. A study of twenty-six cities found over one-third of the homeless population to be families with children. *Hunger, Homelessness Worsen for Families with Children*, YOUTH L. NEWS, Mar.-Apr. 1988, at 22 (citing U.S. CONFERENCE OF MAYORS, GROWTH OF HUNGER, HOMELESSNESS, AND POVERTY IN AMERICA'S CITIES (Dec. 1987)). In another study, "[w]omen and their children were [found to be] at high risk for becoming part of the situationally homeless due to eviction and domestic violence." Hagen, *Gender and Homelessness*, 32 SOCIAL WORK 312, 316 (1987). Hagen also notes that the reliance of women on inadequate public assistance benefits increases their risk of becoming homeless. *Id.* at 313. The Massachusetts Supreme Judicial Court recognized that inadequate AFDC benefit levels cause homelessness in Mass. Coalition for the Homeless v. Secretary of Human Services, 400 Mass. 806, 511 N.E.2d 603 (1987). *See also* Sard, *supra* note 46, at 382-88.

96. *See generally* Hansen v. Dep't of Social Services, 193 Cal. App. 3d 283, 293-95, 283 Cal. Rptr. 232, 238-39, *reh'g denied*, 241 Cal. Rptr. 528 (1987); Lynch v. King, 550 F. Supp. 325 (D. Mass. 1982), *aff'd*, 719 F.2d 504 (1st Cir. 1983); ENGLISH, FOSTER CARE REFORM 17-23 (1981); J. GIOVANNONI & R. BECERRA, DEFINING CHILD ABUSE (1979); CHILDREN'S DEFENSE FUND, CHILDREN WITHOUT HOMES (1978); Kay & Philips, *supra* note 62, at 733-37. Ironically, much higher AFDC payments are available to foster parents than to biological parents in most states.

same coin.[97] Both areas of law assume and underscore the economic dependence of women on men and on male power. The relationships established within both areas are largely defined by childbearing and childrearing.[98] Ostensibly, family law controls private domestic social behavior, and welfare law determines the public's financial obligations toward the poor. But, in practice, family law also governs economic arrangements[99] and welfare law also affects domestic social behavior.[100]

The two systems are thoroughly intertwined. Low-income women are physically bounced back and forth between the two systems if they seek financial assistance. Applying for welfare requires cooperation in child support enforcement. In some jurisdictions women are required to physically go to family court to get a form stamped before a welfare application will be processed.[101] Actions are often taken in welfare cases based on information disclosed in family court. If, for example, the defendant in a child support action asserts that he is living with the child's mother as a defense to the support action, the welfare department may terminate the mother's welfare check without any investigation by the welfare department as to the truth of the defendent's assertions.[102] Similarly, if a battered woman seeks a protective order and testifies that the defendant has been staying in her apartment, against her will, she may lose her welfare check.[103] The two systems are so

97. Roberts, *Ameliorating the Feminization of Poverty: Whose Responsibility?*, 17 CLEARINGHOUSE REV. 883 (1984). Johnnie Tillmon, a welfare rights activist, has described life on welfare as a "supersexist marriage."

> The truth is that AFDC is like a super-sexist marriage. You trade in "a" man for "the" man. But you can't divorce him if he treats you bad. He can divorce you, of course, cut you off any time he wants. But in that case, "he" keeps the kids, not you. "The" man runs everything. In ordinary marriage, sex is supposed to be for your husband. On AFDC, you're not supposed to have any sex at all. You give up control of your own body. It's a condition of aid. . . . "The" man, the welfare system, controls your money. He tells you what to buy and what not to buy, where to buy it, and how much things cost. If things — rent, for instance — really cost more than he says they do, it's too bad for you.

Tillmon, *Welfare Is a Women's Issue*, Ms. MAGAZINE, Spring 1972, at 111, *reprinted in part in* M. ABRAMOVITZ, *supra* note 88, at 313-14; Hunter, *Child Support Law and Policy: The Systematic Imposition of Costs on Women*, 6 HARV. WOMEN'S L.J. 1, 16-17, n.92 (1983).

98. One commentator has described welfare and family law as the "public patriarchy" and the "private patriarchy." Brown, *Mothers, Fathers and Children: From Private to Public Patriarchy*, in WOMEN AND REVOLUTION (Sargent ed. 1981).

99. Hunter, *supra* note 97; Brown, *supra* note 98.

100. W. BELL, *supra* note 10; *Contemporary Relief*, *supra* note 10.

101. This practice is being challenged as violating the federal statute and regulations. Coleman v. White, No. 87-1232 (E.D. Pa. filed Mar. 4, 1987).

102. In some jurisdictions, if an AFDC recipient gives information to the state child support enforcement program attorney handling her support case, believing that the attorney is representing her, that information will be used to terminate her welfare payments and to prosecute her for welfare fraud, on the theory that the attorney in fact represents the state, not the woman. *Attorney-Client Relationship*, *supra* note 60.

103. In each of these instances, if the woman appeals the termination and is able to get representation from a local legal services office or welfare rights organization, she has a good chance of winning the appeal. Unfortunately, many AFDC recipients are afraid to exercise

overlapping that low-income women often have trouble distinguishing between them.[104]

A result of this interaction between welfare law and the child support enforcement system is dual track policy for child support enforcement: a mandatory system for welfare recipients and a voluntary system for everyone else. Not only are poor women forced to participate in child support enforcement activities, whether or not they believe it is in the best interests of their children, but the child support enforcement program often functions as an administrative barrier to obtaining AFDC benefits, as the basis for procedural denials of benefits, and as justification for extensive inquiry into intimate matters normally considered private.[105] Attempts to make the child support enforcement system more effective have largely benefited state treasuries rather than low-income women and their children.[106] Most support collected in current and former AFDC cases is retained by the states, sometimes lawfully, sometimes unlawfully.[107]

In addition to institutional interactions, the needs of the welfare system affect general family law, and changes in family law affect substantive welfare eligibility. For example, the increasing use of joint custody has resulted in loss of AFDC eligibility in some states. The AFDC statute generally requires that a child be deprived of support or care because of the "absence" of a parent; some states have questioned whether a parent with joint legal custody is "absent." As a result, a child may be denied AFDC benefits regardless of the actual caretaking arrangements.[108]

Another area in family law that has had an effect on welfare eligibility are changes in the methods and procedures used in paternity determinations. Some women have, in good faith, provided the state agencies with the name of a putative father who was subsequently excluded by HLA testing.[109] Such

---

their appeal rights, do not understand them, or are too exhausted by the daily struggle of caring for their families to deal with the appeal process.

104. In Philadelphia, women seeking increased child support often appeal to the welfare department; women protesting the denial of a child support "pass-through" often file their appeals with the family court. Conversations with Pennsylvania Department of Public Welfare Hearing Officers and Philadelphia Family Court Bureau of Accounts staff.

105. *See* Harris, *Child Support For Welfare Families: Family Policy Caught In Its Own Rhetoric*, 16 N.Y.U. REV. L. & SOC. CHANGE 619 (1987-88); Mannix, Freedman & Best, *supra* note 55; Johnson & Blong, *supra* note 69; *Attorney-Client Relationship*, *supra* note 60.

106. *See* Harris, *supra* note 105.

107. Bennett v. White, 671 F. Supp. 343 (E.D. Pa. 1987), *aff'd*, 865 F.2d 1395 (3d Cir.), *cert. denied*, 109 S. Ct. 3247 (1989); Harris, *supra* note 105.

108. State policies vary widely on this issue, as do individual caseworkers' interpretations of formal policy. One study which relied on mail questionnaires completed by state officials found that "the lack of clarity in most states' policies and practices when both parents continue some involvement with the child is problematic." Hagen & Hoshino, *Joint Custody of Children and AFDC eligibility*, SOC. SCI. REV., Dec. 1985, at 637, 642 (1985). *See also* Roberts, *Representing Low-Income Parents Who Are Seeking a Divorce: Considering the Public Benefits Implications*, 20 CLEARINGHOUSE REV. 540 (1986), for the arguments that AFDC should not be terminated.

109. For a description of the HLA tissue typing test, see Ellman & Kaye, *Probabilities and*

negative blood test results in paternity cases have resulted in increased numbers of women being sanctioned (removed from their children's welfare grants) for "non-cooperation" without consideration of any other evidence concerning actual cooperation.[110]

The needs of the welfare system have also caused changes in general family law. For example, the IV-D Child Support Enforcement Program was created as a mechanism for states to recoup a portion of their welfare costs. One of the few positive developments in recent years was the extension of these mechanisms for enforcing child support obligations to non-welfare cases. This extension occurred as a result of lobbying by women's groups and litigation on behalf of non-welfare women.[111] However, even as the need for greater access to voluntary enforcement mechanisms for non-welfare women was recognized, efforts to reduce the punitive and mandatory aspects of the IV-D system for welfare women failed.

Traditionally, family law has been left to the states.[112] In part this reflects notions of federalism, of "private" versus "public" law, and of the lesser status of domestic issues and women's concerns. In recent years, a growing body of federal family law has developed. Though prompted partly by pressure from women's groups concerning parental kidnapping and child support, these developments seem to have been more strongly motivated by a desire to reduce AFDC expenditures and limit eligibility. As in many other areas, the development of federal family law has been a mixed blessing for women. Unfortunately, the federal courts have been much more willing to enforce federal family law where it benefits state treasuries than where it protects women's rights.[113]

Proof: Can HLA and Blood Group Testing Prove Paternity?, 54 N.Y.U. L. REV. 1131, 1138-41 (1979).

110. Johnson & Blong, *supra* note 69.

111. Carter v. Murrow, 562 F. Supp. 311 (W.D.N.C. 1983); Armstrong v Dep't. of Health and Rehabilitative Services, No. 82-3274 (Fla. Div. of Admin. Hearings 1983); 1984 Child Support Enforcement Amendments, Pub. L. No. 98-378, 98 Stat. 1305.

112. Ours is a "federal system in which regulation of domestic relations has been left with the States and not given to the national authority." Williams v. North Carolina, 325 U.S. 226, 237 (1945). "The whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the states, and not to the laws of the United States." *In re* Burrus, 136 U.S. 586, 593-94 (1890). *See also* McCarty v. McCarty, 453 U.S. 210, 220 (1981); Hisquierdo v. Hisquierdo, 439 U.S. 572, 581 (1979); Ohio *ex rel.* Popovici v. Agler, 280 U.S. 379, 383 (1930); Solomon v. Solomon, 516 F.2d 1018 (3d Cir. 1975); Magaziner v. Montemuro, 468 F.2d 782, 787 (3d Cir. 1972). Because family law matters have traditionally been reserved to the states, Congress may interfere with state domestic relations law only if the congressional enactment meets a stringent two-part standard. First, Congress must have " 'positively required by direct enactment' that state law be preempted." *Hisquierdo*, 439 U.S. at 581 (quoting Wetmore v. Markoe, 196 U.S. 68, 77 (1904)). "A mere conflict in words is not sufficient." *Id.* Second, as the Supreme Court has repeatedly held, where a federal statute conflicts with state family law, the state law will not be overridden unless it does "major damage" to "clear and substantial federal interests." *McCarty*, 453 U.S. at 220; *Hisquierdo*, 439 U.S. at 581; United States v. Yazell, 382 U.S. 341, 352-53 (1966).

113. *E.g.*, *compare* Thompson v. Thompson, 484 U.S. 174 (1988) (Parental Kidnapping

A. The Feminization of Poverty

The relative deterioration in income experienced by women and children in the recent past has been widely observed.[114] While Abramovitz points out that the phrase "feminization of poverty" obscures its historical existence,[115] it is clear that the specific impoverishment of women has accelerated. "Whether as widows, divorcees, or unmarried mothers, women have always experienced more poverty than men. But in the last two decades, families maintained by women alone have increased from thirty-six percent to about fifty percent of all poor families."[116] Two out of every three poor adults are women.[117] It is also clear that minority women and children have been disproportionately affected. In 1981, black, female-headed households had a poverty rate of sixty-six percent compared to forty-two percent for white female-headed households.[118]

How did Congress and the Reagan administration respond to the feminization of poverty? Rather than increasing support and assistance at a time when women and children had become increasingly vulnerable, the administration responded with an unceasing attack on poverty programs in which Congress generally acquiesced.[119] Low-income women and their children have borne the brunt of budget reductions in social programs.[120]

Not only were individual programs slashed and poor people subjected to increasingly coercive "work" programs,[121] poor women have also been increasingly blamed for their poverty and chastised for being a social burden.

Prevention Act does not create a federal cause of action) *with* Bowen v. Gilliard, 483 U.S. 587 (1987) (sibling deeming amendment does not infringe on state family law).

114. *See, e.g.*, Handler, *The Transformation of Aid to Families with Dependent Children: The Family Support Act in an Historical Context*, 16 N.Y.U. REV. L. & SOC. CHANGE 457 (1987-88); Axinn & Stern, *Women and the Postindustrial Welfare State*, 32 SOC. WORK 282, 284 (1987).

115. M. ABRAMOVITZ, *supra* note 88, at 1.

116. Pearce, *Welfare Is Not for Women: Toward a Model of Advocacy to Meet the Needs of Women in Poverty*, 18 CLEARINGHOUSE REV. 412 (1985).

117. Ehrenreich & Piven, *The Feminization of Poverty*, DISSENT, Spring 1984, at 162.

118. Roberts, *supra* note 97, at 884 (citing SUBCOMM. ON OVERSIGHT, PUBLIC ASSISTANCE AND EMPLOYMENT COMPENSATION OF THE HOUSE COMM. ON WAYS AND MEANS, 98TH CONG., 1ST SESS., BACKGROUND MATERIAL ON POVERTY 18 (Comm. Print 1983)). There is a lively debate as to the relative importance of sex, race, and class as determinants of poverty. *See, e.g.*, Gimenez, *The Feminization of Poverty: Myth or Reality*, 19 INT'L J. HEALTH SERVICES 45 (1989) (arguing that class is the most critical factor); Burnham, *Has Poverty Been Feminized in Black America?*, THE BLACK SCHOLAR, Mar./Apr. 1985, at 14 (arguing that race and class are the determining factors). It is clear, however, that women are poorer than men within each racial group and that women are disproportionately represented among the poor.

119. *See* J. AXINN & M. STERN, DEPENDENCY AND POVERTY (1988); M. ABRAMOVITZ, *supra* note 88; F. BLOCK, R. CLOWARD, B. EHRENREICH, & F. PIVEN, THE MEAN SEASON: THE ATTACK ON THE WELFARE STATE (1987); M. KATZ, IN THE SHADOW OF THE POORHOUSE: A SOCIAL HISTORY OF WELFARE IN AMERICA (1986).

120. Erie, Rein & Wiget, *supra* note 87.

121. *See generally* M. Greenberg, Federal Welfare Reform in Light of the California Experience: Early Lessons for State Implementation of the JOBS Program, (1988) (unpublished manuscript on file with the New York University Review of Law & Social Change).

"Blaming the poor for their poverty is nothing new, but the Reagan years saw the disadvantaged stigmatized with innovative cruelty."[122] Political rhetoric about ending poverty was replaced with political rhetoric about ending welfare "dependency." At the same time, the decline in the real dollar value of welfare benefits continued unabated. Between 1970 and 1985, AFDC benefits (adjusted for inflation) declined twenty-five to thirty-five percent in most states, and as much as fifty-eight percent.[123] In forty-one states, AFDC and food stamp benefits combined provide less than three-fourths of the poverty level for a family of three, compared to twenty-one states in 1981.[124]

B. The Anti-Feminist Backlash in Family Law

Along with the "war on welfare," we have seen the development of an anti-feminist backlash in many areas, including family law. Much of the progress that was made in taking violence against women more seriously is being undermined by recent trends towards mandatory mediation and mandatory joint custody.

Mediation is often urged as a cheaper, quicker, more civilized way to settle family law disputes. Although mediation may be appropriate and useful in some situations, it carries significant dangers when the parties enter mediation in positions of unequal power. Since the thrust of mediation is compromise, the party standing in the less powerful position is at considerable risk of a bad outcome, regardless of the applicable law. Women are usually in the disadvantaged position, having less money than men, having been taught that compromise and adaptation are primary virtues, and often being willing to agree to almost anything in order to retain custody of their children. Mandatory mediation, therefore, carries tremendous risks for most women. In general, the party with less power has more protection in a formal court hearing.[125]

The increase in the number of states with joint custody statutes, from five to thirty between 1979 and early 1984,[126] had a similarly negative effect on women. While joint custody may seem like an ideal solution to the problems of child rearing after divorce, it presents serious problems if the parents do not get along. There are particular risks for women when judges are able to mandate joint custody in the absence of agreement. The threat of joint custody becomes a bargaining tool for reducing or avoiding spousal and child support and property division. Joint legal custody rarely imposes additional responsi-

122. Walsh, *supra* note 87, at 338.

123. CHILDREN'S DEFENSE FUND, *supra* note 4, at 96.

124. *Id.* at 98.

125. Bruch, *And How Are the Children? The Effects of Ideology and Mediation on Child Custody Law and Children's Well-Being in the United States*, 2 INT'L J. L. & FAM. 106 (1988); Lerman, *Mediation of Wife Abuse Cases: The Adverse Impact of Informal Dispute Resolution on Women*, 7 HARV. WOMEN'S L.J. 57 (1984); S. SCHECHTER, *supra* note 58, at 161.

126. Bartlett & Stack, *Joint Custody, Feminism and the Dependency Dilemma*, 2 BERKELEY WOMEN'S LAW JOURNAL 9, 13 n.10 (1986).

bilities on the nonresidential parent while at the same time enabling him to exercise effective veto power over decisions of the caretaker.[127] It also forces battered women to have continued contact with abusive spouses, providing opportunities for continued violence.[128] There is also evidence that support orders are substantially lower in joint custody cases, even where the actual child care arrangements are no different from sole custody with visitation.[129]

Nor are women faring well financially in family court. An effect of no-fault divorce has been a drastic reduction in the standard of living for divorced women and their children. One study found that the standard of living for men increased forty-two percent, while that for women and children decreased seventy-three percent in the first year after divorce.[130] Another study found that "two-thirds of the fathers were ordered to pay less for child support payments than they reported spending on monthly car payments."[131]

These trends, combined with economic discrimination in custody decisions, and a double standard for judging good mothers and good fathers, make it more difficult for women to support and retain custody of their children.[132] Although all women are harmed by these trends, low-income women are particularly vulnerable.

CONCLUSION

The sibling deeming amendment has four effects, all of which are negative. It reduces the income of poor mothers and their children, making it more difficult for them to escape poverty. It reduces the options available to poor women concerning familial arrangements, household composition and income maximization. It creates more confusing and illogical rules for administration of the AFDC program. Finally, it further isolates AFDC recipients and reduces the program's constituency. None of these effects can be viewed as accidental, nor were they unpredictable.

The sibling deeming amendment illustrates several truths about the harmful interaction between our social welfare policy and family law:

---

127. Bruch, *supra* note 125; Polikoff, *supra* note 61; Schulman & Pitt, *Second Thoughts on Joint Child Custody: Analysis of Legislation and Its Implications for Women and Children*, 12 GOLDEN GATE U.L. REV. 539 (1982); Levy & Chambers, *The Folly of Joint Custody*, 3 FAMILY ADVOCATE (1981).

128. Polikoff, *supra* note 61; Schulman & Pitt, *supra* note 127.

129. National Center on Women and Family Law, *Annual Review of Family Law*, 21 CLEARINGHOUSE REV. 871, 880 (citing a 1984 study by the Association of Family and Conciliation Courts, Pearson & Thoennes, *Final Report*, Grant No. 18-P-00262-8-01, (Nov. 1985)). *See also Child Support Payments Down*, YOUTH L. NEWS, Mar.-Apr. 1988, at 7 (in 1985, 12.5% of divorced women who were denied child support said it was because they had joint custody or because they had accepted a property settlement in lieu of child support, up from seven percent in 1983) (citing Child Support and Alimony: 1985 (Current Population Reports, Ser. p-23 No. 152, August 1987)).

130. *See* L. WEITZMAN, *supra* note 61.

131. Hunter, *supra* note 97, at 7.

132. *See* P. CHESLER, *supra* note 61; L. WEITZMAN, *supra* note 61; Polikoff, *supra* note 61.

1. There is a two-track system of family law, one track for poor people, particularly AFDC recipients, and another for the non-poor.

2. In recent years, this dual track system has become even more distinct, further limiting the ability of poor women to make choices about their family life and worsening their economic plight.

3. This development is not accidental but is part of a political agenda to narrow the scope of the AFDC program and to undermine public support for the AFDC program.

4. At the same time, an anti-feminist backlash in family law has developed in ways which are particularly harmful to poor women.

5. At every point at which welfare and family law intersect, the policy chosen is the *least* favorable to low-income women and children.

Access to income; decisions about child custody, visitation, household composition, and living arrangements; and responses to physical abuse are all affected in significant ways by the interaction of the welfare and family court systems. The status of poor women and children has significantly worsened in recent years, partly as a result of these changes in the AFDC program. The sibling deeming amendment reflects a punitive and misogynist approach to social welfare policy which reduces the chances that low-income women and children will ever escape poverty. A radically different set of policies is needed if we want a social welfare policy that reduces rather than exacerbates poverty, that improves opportunities and options for poor women and children, that recognizes their ability to identify their own needs,[133] and that assists them in acting upon those needs.

133. *See* Fraser, *Women, Welfare and the Politics of Need Interpretation*, 2 HYPATIA 103 (1987).